The European Journal of International Law Vol. 29 no. 2

Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010

Gus Van Harten*

Abstract

This article provides an empirical analysis of interpretive discretion in investor–state dispute settlement (ISDS). Since the late 1990s, foreign investors have brought hundreds of investment treaty claims against states, leading to numerous awards in which arbitrators have interpreted investment treaties. Arbitrators may resolve ambiguities in the treaties in expansive or restrictive ways, thereby affecting the compensatory promise of ISDS for foreign investors and corresponding risks for states. Which arbitrators have contributed most to expansive or restrictive approaches? To examine this question, data was analysed on arbitrators' resolutions of contested legal issues, such as the permissibility of parallel or minority shareholder claims and the scope of concepts of investment, fair and equitable treatment, full protection and security and indirect expropriation. The analysis allows for rankings of arbitrators and tentative descriptive findings identifying a small group of individuals as the leading contributors to expansive resolutions and one individual as the leading contributor to restrictive resolutions. The analysis reveals how interpretive discretion impacted relevant legal aspects of ISDS in its first two decades and supplements other research on ISDS arbitrator behaviour.

1 Introduction

Since the 1990s, investment treaties have generated a rising number of foreign investor claims against states, new arguments and justifications for those claims and heightened pressure on governments to reconsider how they regulate to avoid

* Professor, Osgoode Hall Law School, York University, Toronto, Canada. Email: GVanHarten@osgoode.yorku.ca.

EJIL (2018), Vol. 29 No. 2, 507–549 doi:10.1093/ejil/chy024

associated costs.[1] In legal terms, the expansion[2] of investor–state dispute settlement (ISDS) – more precisely, investment treaty arbitration – is connected in part to ISDS arbitrators' choices about whether and how to expand or constrain the treaties' meaning and, by extension, their compensatory promise for foreign investors.[3] To examine this question, the present study draws on theories of adjudicative behaviour that contend that the law's meaning flows not only from its textual content and corresponding reasoning but also from the institutional context and apparent incentives of those who interpret and apply the law.[4] The study is premised on the idea that adjudicative behaviour may reflect preferences that, in Ira Katznelson and Barry Weingast's words, 'are induced by strategic circumstances and human interaction' and that 'specific patterns of relationship and interaction within institutions and or social processes encourage or persuade a given actor to possess a particular type of preference'.[5] From a legal perspective, it is assumed that the interpretative discretion of adjudicators qualifies the formal interpretive tools stipulated in the Vienna Convention on the Law of Treaties and prompts questions about how to employ those tools.[6] Further, interpretive discretion may be channelled into presumptions favouring foreign investors or states in the face of ambiguity in investment treaties.[7] Borrowing from Oliver Wendell Holmes, ISDS decision-making seems more like painting a picture than doing a sum.[8]

From this theoretical perspective, the identity of ISDS arbitrators is expected to be an important factor when identifying tendencies in investment treaty law for at

1 UN Conference on Trade and Development (UNCTAD), 'Investor-State Dispute Settlement: Review of Developments in 2015', IIA Issues Note no. 2, June 2016; Simmons, 'Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment', 66 *World Politics* 2014 12; C. Hamby, 'Secrets of a Global Super Court', *BuzzFeed News Investigation* (28 August 2016), available at www.buzzfeed.com/chrishamby/super-court?utm_term=.hvPWx9NRWo#.mp8Jeg2AJY.

2 I use the 'expansion' to describe a widening of the scope and content of investment treaties based on arbitrators' resolutions of ambiguities in the treaties, as described in this article, not to refer to other aspects of ISDS growth such as the rising number of claims or amounts awarded by tribunals since the first ISDS awards were issued in the 1990s.

3 Simmons, *supra* note 1; Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration', 50 *Osgoode Hall Law Journal* (*OHLJ*) (2012) 211, at 213–214.

4 Cross, 'Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance', 92 *Northwestern University Law Review* (*NWULR*) (1997) 251, at 252–253; J.W. Harris, *Legal Philosophies* (1980), at 93–102.

5 Katznelson and Weingast, 'Intersections between Historical and Rational Choice Institutionalism', in I. Katznelson and B.R. Weingast (eds), *Preferences and Situations* (2007) 1, at 3.

6 Pauwelyn and Elsig, 'The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals', in J.L. Dunoff and M.A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (2013) 445. Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.

7 ICSID, *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines – Decision of the Tribunal on Objections to Jurisdiction*, 29 January 2004, ICSID Case no. ARB/02/6, para. 116 (invoking object and purpose to resolve interpretive uncertainties in favour of the foreign investor); ICSID, *SGS Société Générale de Surveillance v. Pakistan – Decision of the Tribunal on Objections to Jurisdiction*, 6 August 2003, ICSID Case no. ARB/01/13, para. 171 (invoking the principle of *in dubio mitius* to favour the preservation of state sovereignty in the absence of specific treaty language to the contrary).

8 O.W. Holmes, *Speeches* (1913), at 96.

least five reasons.[9] First, investment treaties like other legal sources are often ambiguous on key issues, allowing for multiple credible resolutions of an issue. Second, even if the text is clear, the interpretive process itself is discretionary because arbitrators may choose to prioritize a treaty's object and purpose over its immediately relevant text, for example, and may choose to give more or less weight to supplementary legal sources. Third, adjudicators in any field have varying training, values and so on, and these variations will colour arbitrators' interpretive choices. Fourth, depending on the circumstances of their appointment or re-appointment, ISDS arbitrators appear to have incentives arising from the design of investment treaty arbitration, and these incentives may also influence arbitrators' choices. In each respect, interpretive tendencies in ISDS, and perceptions of those tendencies by the relevant actors, are connected to the arbitrators who adopt expansive or restrictive resolutions of legal issues in specific cases.

The central question in this article is straightforward. Which arbitrators were most responsible for expanding or constraining the compensatory promise of the treaties for claimant investors in the first two decades of ISDS? To examine this question, data was analysed on the individuals who, as frequently appointed arbitrators, appear to have had the most impact on resolving a sample of 14 contested legal issues that were left open in the treaties. In summary, it was found that the resolution of these issues during the relevant period was led by a small group of individuals, most of whom were more associated with expansive approaches than were ISDS arbitrators as a whole. The findings show how repeat presiding arbitrators, often chosen for that role by a default appointing authority, played a leading role in this legal expansiveness. If one were to identify the individuals most credibly described as expansive leaders, using various measures, they would be Gabrielle Kaufmann-Kohler, Andrés Rigo Sureda, Francisco Orrego-Vicuna, Marc Lalonde, Yves Fortier, Stephen Schwebel, Charles Brower and Bernard Hanotiau. On the same basis, one arbitrator, V.V. (Johnny) Veeder, would credibly be described as a restrictive leader.

The data came from a systematic content analysis of ISDS arbitrators' resolutions of 14 contested legal issues from the first ISDS award in 1990 to May 2010 with virtually all of the resolutions emerging in the last 14 years of this 20-year period.[10] The analysis was not intended to evaluate the merits of arbitrators' resolutions of any of the issues but, rather, to assess how arbitrators resolved the contested issues where one or more of the issues was put before them without it being clearly and specifically resolved in the relevant treaty. Compared to a standard doctrinal analysis – which allows for in-depth assessment of the legal reasoning in one or several cases – the method of systematic content analysis entails the review of all of the reasoning and conclusions of adjudicators, in all publicly available materials, on a pre-defined issue

[9] Ginsburg, 'Bounded Discretion in International Judicial Lawmaking', 45 *Virginia Journal of International Law* (*VJIL*) (2004) 631; Waibel, 'Demystifying the Art of Interpretation', 22 *European Journal of International Law* (*EJIL*) (2011) 571, at 573–574; C. Henckels, *Proportionality and Deference in Investor-State Arbitration* (2015), at 7–10.

[10] Hall and Wright, 'Systematic Content Analysis of Judicial Opinions', 96 *California Law Review* (2008) 63. The first investment treaty award – *Asian Agricultural Products v. Sri Lanka*, ICSID Case no. ARB/87/3 – was issued in June 1990; the next award that led to a resolution in the dataset came in 1997.

over a set period. Since it is comprehensive in its coverage, this method avoids the challenge of having to select particular cases as doctrinally representative based on the researcher's discretion or preferences (a selection process that often is not discussed in standard doctrinal analysis). It aims to provide 'a systematic, replicable technique for compressing many words of text into fewer content categories based on explicit rules of coding', which can be used to supplement doctrinal analysis or other forms of inquiry.[11] In the present study, the data, collected over several years of coding, allow for comprehensive analyses of how arbitrators resolved the relevant issues during this phase of ISDS. However, it does not support conclusions beyond May 2010, and it would be questionable to draw conclusions about the post-2010 experience without a further systematic review of post-2010 materials up to another cut-off point. Put differently, the findings are descriptive of the relevant period only, and they should not be extrapolated beyond the cut-off date or used for prediction.

Further, one must be cautious not to form views about the motivations of arbitrators at the individual level. The data for each arbitrator remains limited, sometimes extremely so. The contested issues for which the data was gathered were chosen with a view to capturing a range of issues of general applicability under the treaties and affecting the treaties' compensatory promise for foreign investors, but the issues are only a sample and do not capture all of the arbitrators' interpretative choices. The coding of other issues, such as at the damages stages of a tribunal's reasoning, could yield different or contradictory results. Since the analysis focused on ambiguous and contested issues to isolate the exercise of arbitrator discretion in legal interpretation – on the assumption that the arbitrators' interpretations play a role in signalling the meaning of investment treaties – the analysis did not seek to capture other forms of arbitrator discretion such as the determination of relevant facts, the application of law to facts or the balancing of other considerations in the investor–state relationship. In this respect, the analysis does not capture another expectation, reflected in realist views of adjudication, that arbitrators are driven primarily by the facts and not the law.[12] Considering these limitations, the article tentatively assists in identifying the arbitrators who appear most associated with expansive or constraining tendencies in the interpretation of investment treaties, although the findings remain approximate and descriptive of the relevant period only.

2 Background

Academic models of judicial behaviour point to various factors that can influence judicial decision-making, including doctrinal, attitudinal, economic, strategic and institutional factors.[13] The models have been extended to international arbitration in

[11] Stemler, 'An Overview of Content Analysis', 7(17) *Practical Assessment, Research and Evaluation* (2001) (electronic journal), para. 1, available at http://pareonline.net/getvn.asp?v=7&n=17.

[12] Leiter, 'Positivism, Formalism, Realism', 99 *Columbia Law Review* (1999) 1138, at 1148.

[13] E.g., Choi and Gulati, 'Trading Votes for Reasoning: Covering in Judicial Opinions', 81 *Southern California Law Review* (2008) 735, at 736–737; Voeten, 'The Impartiality of International Judges: Evidence from

studies of, for example, the apparent incentives of arbitrators in the marketplace for private adjudicative services, distinct from public judges;[14] the gender, racial and national diversity among arbitrators[15] and the doctrinal signals of arbitrators' perceptions of their roles.[16] Yet there are many institutional contexts for arbitration, and differences between ISDS and other adjudicative forums could alter arbitrator behaviour in important ways.[17] Empirical research on ISDS arbitrators is at a fledgling stage, although useful work has been done on the prevalence of private law backgrounds among arbitrators;[18] the tendency for many to be appointed predominantly on either the investor-side or the state-side of tribunals;[19] the frequency of arbitrators serving as counsel in other ISDS cases;[20] the lack of gender and cultural diversity;[21] the citation-based connections across arbitration awards[22] and the disproportionate impacts of repeat arbitrators.[23] Most relevant for the present study, researchers have also sought to map the social networks of ISDS arbitrators based mainly on appointment histories and other ISDS roles.[24] The present study offers new information about active ISDS arbitrators by identifying their associations with expansive or restrictive interpretive tendencies on particular issues over an extensive historical period.

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the European Court of Human Rights', 102 *American Political Science Review* (2008) 417; Tiller and Cross, 'What Is Legal Doctrine?', 100 *NWULR* (2006) 517; Fischman and Law, 'What Is Judicial Ideology, and How Should We Measure It?', 29 *Washington University Journal of Law and Policy* (2009) 133; Posner, 'Judicial Behavior and Performance: An Economic Approach', 32 *Florida State University Law Review* (2005) 1259; Fiscus, 'Of Constitutions and Constitutional Interpretation', 24 *Polity* (1991) 313.

14 Ginsburg, 'The Culture of Arbitration', 26 *Vanderbilt Journal of Transnational Law* (*VJTL*) 1337; Y. Dezalay and B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1998); Colvin, 'An Empirical Study of Employment Arbitration: Case Outcomes and Processes', 8 *Journal of Empirical Legal Studies* (2011) 1, at 12; Cooter, 'The Objectives of Private and Public Judges', 41 *Public Choice* (1983) 107.

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

16 Michaels, 'Roles and Role Perceptions of International Arbitrators', in W. Mattli and T. Dietz (eds), *International Arbitration and Global Governance* (2014) 47.

17 Bloom, 'Empirical Models of Arbitrator Behavior under Conventional Arbitration', 68 *Review of Economics and Statistics* (1986) 578.

18 Costa, 'Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields', 1 *Oñati Socio-Legal Series* (2011) 1, at 14.

19 Pauwelyn, 'The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators Are from Venus', 109 *American Journal of International Law* (*AJIL*) (2015) 761, at 781–782.

20 D. Gaukrodger and K. Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Paper on International Investment no. 2012/13 (2012), at 95.

21 Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration', 86 *North Carolina Law Review* (2007) 1; W.L. Kidane, *The Culture of International Arbitration* (2017).

22 E.g., Jeff Commission, 'Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence', 24 *Journal of International Arbitration* (2007) 129; A. Stone Sweet and F. Grisel, *The Evolution of International Arbitration* (2017), at 151–157.

23 Costa, *supra* note 18, at 11; Pauwelyn, *supra* note 19, at 774–775; P. Eberhardt and C. Olivet, *Profiting from Injustice* (2012), at 38.

24 Puig, 'Social Capital in the Arbitration Market', 25 *EJIL* (2014) 387; Langford, Behn and Lie, 'The Revolving Door in International Investment Arbitration', 20 *Journal of International Economic Law* (2017) 301.

In previous research, it was found that ISDS arbitrators generally have tended to resolve the contested legal issues discussed here in expansive ways that favoured claimant investors.[25] This research was based on systematic content analyses of how the arbitrators, in all public ISDS cases to May 2010, resolved 14 issues of interpretation that were left ambiguous in the relevant treaty and that had led to conflicting views among ISDS tribunals or in secondary legal literature.[26] It was found that the arbitrators had tended to permit foreign investor claims to go ahead where, for example, the 'investment' was a paper transfer of assets involving no new capital for the host economy; the investment was a domestic company in which the claimant owned a minority share but sought damages on behalf of the company as a whole; the investor's nationality extended through a multi-state chain of ownership; the claim ran parallel to another forum that was open to, or had been agreed to by, the foreign investor; the claim was based on a most-favoured-nation (MFN) clause that was argued to provide access to the dispute settlement terms of another treaty; the foreign investor relied on conceptions of 'fair and equitable treatment' and 'full protection and security' that were not specified in the treaty or customary international law; the investor, to establish an 'indirect' expropriation, argued for relatively low thresholds of impact on its assets by the state or the investor invoked a treaty's umbrella clause to challenge commercial as well as sovereign conduct of the state. These tendencies in the resolution of ambiguous issues had the effect, in legal terms, of expanding the compensatory promise of ISDS for foreign investors; the contrasting restrictive interpretations, usually associated with a minority of arbitrators, tended to constraint it.

The present article uses this dataset to connect individual arbitrators to expansive or restrictive interpretive tendencies, thus shedding light on who among them was most active in expanding or constraining the coded aspects of ISDS leading up to May 2010. It is not claimed that choices of arbitrators in these respects are necessarily explained by any of the factors discussed in the literature on judicial behaviour, including those that informed the design of the present study. Rather, it is suggested that aspects of the evolution of ISDS in the relevant period emerged from micro-level choices by arbitrators, especially the most active ones, who in adjudicating claims were in the position to resolve legal ambiguities in investment treaties. The data are presented using simplified lists to identify apparent leaders of expansive or restrictive tendencies. The identification of these leaders was based mainly on the frequency of their appointments and issue resolutions, their total expansive or restrictive resolutions and the proportion of their resolutions that were expansive or restrictive. The analyses offer approximate measures of who exercised power in ISDS, and how, in the doctrinal evolution and signalling of the treaties' scope and content. The lists were inspired by descriptive statistics in sports with a view to presenting the data in an accessible but informative way.[27]

[25] Van Harten, *supra* note 3.

[26] The coded issues and descriptions of expansive and restrictive resolutions for each issue are included in Appendix 1.

[27] T.R. Black, *Doing Quantitative Research in the Social Sciences: An Integrated Approach to Research Design, Measurement and Statistics* (1999), ch. 12; J. Thorn and P. Palmer, *The Hidden Game of Baseball* (1984), at 9–12; J. Albert, J. Bennett and J.J. Cochran (eds), *Anthology of Statistics in Sports*, ASA-SIAM Series on Statistics and Applied Probability (2005).

There are important limitations to the analyses. They provide descriptive information about arbitrator behaviour for the relevant period only and do not support predictions. The data were not tested for statistical significance (to assess the risk of random variation), and the methods of data collection involved significant coder discretion, although this discretion was bounded by pre-set coding instructions and the use of multiple coders. Where an issue appeared to have been resolved clearly by the terms of the treaty, it was not coded as expansive or restrictive on the rationale that its resolution did not involve sufficient arbitrator discretion. In the coding, each arbitrator's expansive or restrictive resolution of each issue was treated as an equal contribution to the corpus of investment treaty law, regardless of the apparent degrees of expansiveness or restrictiveness or the extent to which the resolution varied from tendencies in other ISDS awards. Overall, the analyses provide new information – gathered after an extensive, albeit discretionary and limited, coding process – about ISDS arbitrators' interpretive choices in the relevant period.

3 Coded Issues and Dataset

The coding covered all known and publicly available awards (that is, decisions) in investment treaty arbitration from the beginning of ISDS awards claims in the early 1990s until May 2010 when the multi-year coding process began.[28] Thus, all of the arbitrators' known resolutions of the coded issues were captured for the first two decades of ISDS awards. Coding was limited to the arbitrators' resolutions of the 14 issues identified below and in Appendix 1; these issues were selected in advance of the coding, in consultation with other specialists,[29] on the basis that they were significant, generally applicable and had been subject to divergent interpretations by arbitrators

[28] The data was collected as part of a project in which arbitrators' resolutions of contested issues in investment treaty law were coded systematically to test hypotheses arising from the unique incentives of ISDS arbitrators as compared to other adjudicators. The findings on these hypotheses are reported elsewhere. Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part 2): An Examination of Hypotheses of Bias in Investment Treaty Arbitration', 53 *OHLJ* (2016) 540; Van Harten, *supra* note 3. The present article reports additional findings based on this earlier coding of arbitrators' decisions.

[29] The consultation took place as follows. A draft coding template was sent in June 2009 to 12 colleagues with diverse perspectives in the field including four ISDS practitioners, four academics working in international investment law, three such academics who also practised in ISDS and one non-lawyer who was an experienced trade and investment law researcher at a non-governmental policy organization. Each colleague was asked to comment on (i) whether the proposed issues, intended to reflect a range of general issues arising under investment treaties, should be adjusted by removing or adding issues and (ii) the characterization of expansive and (as proposed in the original template) 'prudential' approaches to each issue with reference to arbitration awards or secondary literature that had provided a basis for identifying the issues as contested at the time. All 12 colleagues replied to the request for comment and nine were able to make time to review the draft template and give comments. Based on the comments, changes were made to the template including the choice of issues and the characterization of issue resolutions. Other aspects of the template were also changed; e.g., the term 'prudential' was replaced with 'restrictive' to describe the non-expansive issue resolutions after some colleagues commented that 'prudential' was too judgmental (colleagues differed on whether this judgmental quality worked in favour of or against the corresponding legitimacy of 'expansive').

or in secondary literature. The purpose was not to evaluate whether the resolution of an issue was correct but, rather, to examine whether the arbitrators adopted an expansive or restrictive approach to the coded issues and to compare the arbitrators' interpretive choices to their appointments records. The issues dealt with foreign investor access to ISDS (jurisdictional/ admissibility issues) and the content of foreign investor protections (substantive issues).[30]

A *Issues of Foreign Investor Access to ISDS*

1 Claims by Corporate 'Foreign Investors'

The coding of this issue asked whether ISDS arbitrators addressed the question of whether an ISDS claim should be allowed if ownership of the investment ran through a chain of companies, via one or more third states, from the host state to the nominal home state under the relevant treaty.[31] That is, what if a 'foreign investor' under a treaty between State A and State B could also be said to have been a foreign investor from State C, D or E? An expansive approach to this issue permitted the claim to proceed regardless of the point at which the investor claimed foreign nationality in a multi-state chain of ownership. A restrictive approach put limitations on such claims.

Viewing this issue in a wider context, an expansive approach would tend to facilitate legal planning by companies or individuals to organize their affairs in ways that make it more difficult to regulate them in any state because of the obscurity of who owns what and where. An expansive approach could also facilitate companies and individuals choosing from among different nationalities in their strategies to avoid regulation or pursue litigation against states. Loosely, the issue might be called a 'Panama Papers' concern in ISDS.[32] As summarized further in Table 1, the coding arbitrators were found to have resolved this issue expansively or restrictively on 72 occasions in ISDS awards, tending heavily towards expansive approaches.

2 Claims by Natural Person 'Foreign Investors'

This issue arose from ambiguity in the treaties about how the nationality of some natural persons – as distinct from the companies and other legal persons in the first issue above – should be determined. The issue arose in situations where natural persons sought to bring ISDS claims against their own state in their own name, instead of through a holding company or other vehicle. Would arbitrators allow such claims or bar them on the grounds that the investor was not sufficiently foreign? More specifically, would they allow the claim when the investor was a natural person who was a national of the host state?

An expansive approach answered yes to this question; a restrictive approach answered no. As it turned out, virtually no cases raised this issue and so almost no

[30] For a comprehensive description, see Appendix 1.

[31] Voon, Mitchell and Munro, 'Legal Responses to Corporate Manoeuvring in International Investment Arbitration', 5 *Journal of International Dispute Settlement* (*JIDS*) (2014) 41.

[32] Stack et al., 'What Are the Panama Papers?', *New York Times* (4 April 2016).

Table 1: Resolutions per coded issue

Issue	Number of issue resolutions	Resolution of issue	
		Expansive (%)	Restrictive (%)
Corporate person investor	72	85	15
Natural person investor	6	0	100
Concept of investment	119	70	30
Minority shareholder interest	75	92	8
Permissibility of investment	27	67	33
Parallel claims	162	84	16
MFN treatment	60	50	50
National treatment	60	35	65
Fair and equitable treatment (autonomous standard)	56	73	27
Fair and equitable treatment (content)	137	83	17
Full protection and security	51	57	43
Indirect expropriation	120	72.5	27.5
Umbrella clause	32	91	9
National security exception	24	75	25
Cumulative	**1,001**	**73.5**	**26.5**

data – six resolutions, which were all restrictive – were generated. ISDS claims in which an investor appeared to be suing his or her own state typically were not brought in the name of a natural person but, instead, through holding companies used by (very wealthy) individuals to obtain ostensibly foreign nationality.[33]

3 Concept of 'Investment'

Some may think of investment as the activity of buying assets to seek profit, assume risk and contribute indirectly to a state's economy, but the term has a broader meaning in ISDS.[34] To illustrate, it may be interpreted to include a paper transfer of assets that involve no new capital for an economy. The issue examined in this context was whether 'investment' should be limited to situations in which certain indicators – commitment of capital for a certain period, expectation of gain, assumption of risk and contribution to the host economy – are present. These indicators are called the *Fedax* or *Salini* criteria in ISDS after they were adopted by early tribunals to guide the assessment, for example, of short-term or non-risky activity when applying the

[33] E.g., Van Harten and Malysheuski, 'Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants', Osgoode Hall Law School Legal Studies Research Paper no. 14 (2016), at 5–7.

[34] Malik, 'Definition of Investment in International Investment Agreements', *International Institute for Sustainable Development Bulletin* (2009).

concept of investment.[35] Arbitrators who applied the *Fedax*/*Salini* criteria were taken to have adopted a restrictive approach on this issue; those who did not, an expansive approach. The issue was found to have been resolved by ISDS arbitrators on 119 occasions, and they tended towards expansiveness.

4 Claims by Minority Shareholders

What should happen in ISDS if the foreign owner of a domestic company – the shares of which are themselves the foreign investor's 'investment' – owns only a small part of that company?[36] One might expect that the foreign investor, as a minority shareholder of the company, should be able to seek compensation in ISDS for the part of the company that the investor actually owns and not for the whole company. Yet some arbitrators have allowed foreign minority shareholders to bring claims on behalf of the whole company that they partly own, effectively expanding ISDS arbitrators' authority to award public compensation to foreign investors. For this issue, a restrictive approach limited minority shareholder claims to the minority interest; an expansive approach allowed such claims on behalf of the whole company. The issue was found to have been resolved by arbitrators on 75 occasions, and they tended heavily towards the expansive approach.

5 Claims Involving Questionable Investments

In some ISDS cases, there are doubts about the legitimacy of the investment that led to the dispute with the host state. For example, it may be alleged that the investment was secured by corrupt dealings or that it did not comply with the domestic rules of entry for foreign investments.[37] The coded issue, where the ISDS claim related to an investment made in allegedly suspect circumstances, was whether the foreign investor or the respondent state should have the onus of establishing that the ISDS claim should be allowed or prohibited. An expansive approach put the onus on the state; a restrictive approach put it on the investor. As it turned out, the issue did not arise much. It was resolved on 27 occasions, and the resolutions tended towards expansiveness.

6 Claims That Run Parallel to Another Forum

This issue related to a complicated but important aspect of the foreign investor protection system. It raised the question of whether ISDS can displace other forums for dispute resolution, such as the domestic state courts or forums agreed upon by foreign investors in their contracts with state entities. Faced with another forum, domestic and international courts often show restraint by requiring litigants to use the forum

[35] ICSID, *Fedax N.V. v. Venezuela – Decision of the Tribunal on Objections to Jurisdiction*, 11 July 1997, ICSID Case no. ARB/96/3; ICSID, *Salini Construttori S.p.A. and Italstrade S.p.A. v. Morocco – Decision on Jurisdiction*, 31 July 2001, ICSID Case no. ARB/00/4.

[36] D. Gaukrodger, 'Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law', OECD Working Papers on International Investment 2014/02 (2014).

[37] Yackee, 'Investment Treaties and Investor Corruption: An Emerging Defence for Host States?', 52 *VJIL* (2012) 723.

most connected to the dispute. Many ISDS tribunals, in contrast, have favoured allowing parallel ISDS proceedings, thus expanding the compensatory promise of the treaties for foreign investors.[38]

This issue was coded by asking whether a parallel ISDS claim should be allowed in circumstances where the investor had agreed under a contract to use another forum, where the investor is required by the treaty to use domestic courts or where the investor has brought a claim for compensation in another international forum. An expansive approach allowed the ISDS claim to proceed in such circumstances, whereas a restrictive approach did not. The issue was found to have been resolved more often than any other coded issue – on 162 occasions – and the resolutions tended heavily towards expansive approaches.

7 Claims Based on MFN Treatment

Many investment treaties give foreign investors a broad right to treatment from the state that is at least as favourable as the treatment received by foreign investors from other states. The MFN clause raises complex issues of interpretation. For example, should MFN treatment be limited to the substantive treatment of foreign investors or should it extend to procedural and institutional questions, such as the ability to bring an ISDS claim under another treaty where the host state's treaty with the foreign investor's home state does not allow ISDS?[39]

In the coding, an expansive approach to this question extended MFN treatment to encompass more favourable dispute settlement provisions in other treaties; a restrictive approach declined to do so. The issue was found to have been resolved on 60 occasions with an even split between expansive and restrictive approaches. Incidentally, the issue straddles the line between the topic of foreign investor access to ISDS and that of the content of foreign investor protections.

B *Issues Involving the Content of Foreign Investor Protections*

1 Scope of 'National Treatment' Rights

Through MFN treatment, foreign investors are protected from discrimination – more precisely, from less favourable treatment – in comparison to foreign investors from other states. With the right of national treatment, they are protected from less favourable treatment in comparison to domestic investors. Although it may sound straightforward, national treatment also raises complex issues in the analysis of how investors are compared.[40] For present purposes, the coded issue was whether national treatment should be interpreted in any of a number of flexible ways that would favour foreign investors' claims. For example, can foreign investors compare themselves to domestic

[38] Shany, 'Contract Claims vs Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims', 99 *AJIL* (2005) 835.

[39] Faya Rodriguez, 'The Most-Favored-Nation Clause in International Investment Agreements: A Tool for Treaty Shopping?', 25 *Journal of International Arbitration* (2008) 89.

[40] Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and Its Discontents', 20 *EJIL* (2009) 749.

investors even if they are not 'in like circumstances' in their businesses? An expansive approach took a flexible approach to this aspect of national treatment and others; a restrictive approach did not. Overall, the issue was found to have been resolved on 60 occasions, and the resolutions tended towards restrictiveness.

2 Tethering of 'Fair and Equitable Treatment' to Customary International Law

ISDS arbitrators, when finding states in violation of an investment treaty, have relied on the concept of 'fair and equitable treatment' more often than any other foreign investor protection.[41] The concept has also been controversial because of how it has been interpreted.[42] For example, in many cases, governments have argued that the concept was limited to characterizations of the 'minimum standard of treatment' for foreign nationals in customary international law. Yet investment treaties did not state this limiting condition in clear and express terms, leaving space for ISDS arbitrators to decide whether the term should be tethered in this way to custom.[43]

An expansive approach to the issue treated fair and equitable treatment as a protection that was autonomous from customary international law. A restrictive approach limited the concept to the customary minimum standard. Arbitrators were found to have resolved the issue on 56 occasions and to have tended towards an expansive approach.

3 Scope of 'FET'

Another question about fair and equitable treatment is how broadly the arbitrators interpreted its content, regardless of whether they approached it as being autonomous from customary international law. Broadly, this question involved whether arbitrators chose to characterize the vaguely worded protection as a source of broad-ranging rights for foreign investors and corresponding powers of review for the arbitrators or, alternatively, as a last resort protection against egregious abuse not covered by other foreign investor protections in the treaties.

In the coding, various terms drawn from customary sources – such as 'outrage', 'bad faith', 'wilful disregard of due process of law' and 'wilful neglect of duty' – were used as markers of a restrictive approach to fair and equitable treatment.[44] An expansive approach went beyond these markers, using more far-reaching terms to review states' decisions, including more open-ended criteria such as 'idiosyncratic', 'unreasonable', 'legitimate expectations', 'stability of the legal or business framework' and 'affirmative transparency'. This issue was the second most frequently resolved issue by arbitrators, with 137 resolutions, and they tended heavily towards expansiveness.

41 UNCTAD, *Fair and Equitable Treatment* (2012), at 10–15.

42 Kläger, 'Fair and Equitable Treatment: A Look at the Theoretical Underpinnings of Legitimacy and Fairness', 11 *Journal of World Investment and Trade* (2010) 435; R. Kläger, *'Fair and Equitable Treatment' in International Investment Law* (2011).

43 Porterfield, 'A Distinction without a Difference? The Interpretation of Fair and Equitable Treatment under Customary International Law by Investment Tribunals', *Investment Treaty News Quarterly* (March 2013).

44 *L.F.H. Neer and Pauline Neer (United States) v. United Mexican States*, 15 October 1926, reprinted in (1926) 4 UNRIAA 60; *Elettronica Sicula SpA (United States v. Italy)*, Judgment, 20 July 1989, ICJ Reports (1989) 14.

4 Scope of 'Full Protection and Security'

Another ambiguous foreign investor protection is full protection and security.[45] Although not to the same extent as fair and equitable treatment, this protection has also lent itself to expansive interpretations.[46] The hinge for expansion has been to swing the standard beyond the physical security of investors and their assets to broader notions of economic or legal security. Indeed, some treaties that were concluded after the beginning of the rapid growth of ISDS claims in the late 1990s have been clarified specifically to limit the standard to physical security.[47] Under those treaties, the arbitrators' resolutions on this point were not counted in the coding because the issue would be judged to have been resolved clearly and specifically in the treaty.

In coding ISDS decisions under those treaties that left the issue open, interpretations that limited full protection and security to physical security were treated as restrictive; those that extended it to economic or legal security were coded as expansive. Arbitrators were found to have resolved the issue on 51 occasions, and the resolutions modestly favoured the expansive approach.

5 Scope of 'Indirect' Expropriation

Investment treaties give foreign investors protection against expropriation. This protection goes beyond direct expropriations to incorporate situations of indirect expropriation that leave the foreign investor's formal ownership intact.[48] Indirect expropriation is an uncertain concept, open to the interpretation that public compensation must be paid to foreign investors even for incidental economic costs of general, non-discriminatory laws and regulations that serve a public purpose.[49] Broad approaches to indirect expropriation are controversial because of how they provide benefits for foreign investors not available to other actors and because of how they may deter states from passing laws and regulations.[50]

A restrictive approach to this issue arose where, for example, arbitrators decided that a law or regulation, if it did not transfer ownership of the relevant assets, would have to amount to a 'near-complete' taking of the assets' value before compensation was owed. An expansive approach required compensation when the law or regulation had merely a 'significant' or 'substantial' effect on the assets' value. Arbitrators

[45] Cordero Moss, 'Full Protection and Security', in A. Reinisch (ed.), *Standards of Investment Protection* (2008) 131.

[46] M. Malik, 'The Full Protection and Security Standard Comes of Age: Yet Another Challenge for States in Investment Treaty Arbitration?', *International Institute for Sustainable Development*, November 2011.

[47] E.g., EU–Canada Comprehensive Economic and Trade Agreement (signed 30 October 2016, not yet in force), available at http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf, Art. 8.10(5); Roy, 'Unveiled: Indian Model BIT', *Kluwer Arbitration Blog* (18 January 2016), available at http://kluwerarbitrationblog.com/2016/01/18/unveiled-indian-model-bit/.

[48] Hoffman, 'Indirect Expropriation', in A. Reinisch (ed.), *Standards of Investment Protection* (2008) 151.

[49] Porterfield, 'International Expropriation Rules and Federalism', 23 *Stanford Environmental Law Journal* (2004) 3.

[50] D. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (2008).

resolved issues of indirect expropriation fairly often, on 120 occasions, and the resolutions tended to be expansive.

6 Scope of Umbrella Clause Protections

Some treaties include a provision that protects foreign investors not just under the treaty's protections but also in other legal relationships with a state.[51] In the extreme, these 'umbrella clauses' could transform all of a state's domestic legal obligations to foreign investors to the status of an international obligation and make them enforceable in ISDS.[52] Expansive interpretations of other foreign investor protections, such as fair and equitable treatment, can have a similar effect, but the presence of an umbrella clause makes it easier for ISDS to be characterized as a substitute for other forums for resolving disputes.

In coding this issue, a restrictive approach would limit the impact of umbrella clauses to situations in which a state, in its treatment of foreign investors, was involved in sovereign or regulatory conduct as opposed to private or commercial conduct. An expansive approach would apply the umbrella clauses without that constraint. The issue was uncommon, being resolved in only 32 occasions, and the resolutions tended overwhelmingly towards expansiveness.

7 Availability of National Security Exception

In some ISDS cases, the sued state argued that its actions, having caused economic loss to a foreign investor, were justified by a national emergency arising from a severe economic or political crisis.[53] This argument was based on essential security exceptions in the treaties.[54] An expansive approach refused to extend this essential security defence to circumstances of economic and financial emergency; a restrictive approach allowed it to be extended that way, at least to some degree. The issue was found to have been resolved on only 24 occasions, and the resolutions tended towards expansiveness.

4 Coding Process and Dataset

All publicly available ISDS awards were reviewed by three coders, one acting as a tie-breaker, to identify whether each issue arose and, if so, whether its resolution appeared to qualify as expansive or restrictive. Sometimes, resolutions were coded as

[51] Crawford, 'Treaty and Contract in Investment Arbitration', 24 *Arbitration International* (2008) 351.

[52] Wong, 'Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide between Developing and Developed Countries in Foreign Investment Disputes', 14 *George Mason Law Review* (2006) 137.

[53] Organisation for Economic Co-operation and Development, 'Essential Security Interests under International Investment Law', in *International Investment Perspectives: Freedom of Investment in a Changing World* (2007), at 93–105; Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System', 3 *Asian Journal of WTO and International Health Law and Policy* (2008) 199.

[54] E.g., United States–Argentina Bilateral Investment Treaty (entered into force 20 October 1994), Art. XI.

non-classifiable, such as where the arbitrators declined to rule on an issue that had been put before them or where the resolution appeared to fit both an expansive and a restrictive approach. Resolutions were assigned to each individual arbitrator who endorsed the tribunal award containing the resolution.[55]

All awards were coded for all known cases to the beginning of the coding on 10 May 2010. As of that date, 261 cases were found to have been decided, including 174 that had generated an award raising one or more of the coded issues. In 21 of these cases, an award was not publicly available, and, in another eight, an award was not available in English. Another three cases were consolidated by the ISDS tribunal with another case and coded under that other case. This left 142 cases under bilateral investment treaties (78 per cent of the cases), the North American Free Trade Agreement (14 per cent), the Energy Charter Treaty (6 per cent), and the Association of Southeast Asian Nations' Agreement for the Promotion and Protection of Investments (1 per cent).[56] In 12 of the 142 cases, none of the coded issues was found to have arisen, leaving 130 in which one or more issues arose. Of these, at least one issue was found to have been resolved expansively or restrictively in 123 cases. Across the 123 cases, an issue was found to have been resolved by an arbitrator in 1,001 instances. Overall, 736 of the resolutions were expansive, and 265 were restrictive. In 143 instances, an issue was found to have arisen, but its resolution did not appear to fit an expansive or a restrictive classification. The findings for each coded issue are outlined in Table 1. The coding process and results are discussed in more detail elsewhere.[57]

For present purposes, the coding generated a record of each arbitrator's decisions on relevant legal aspects of the treaties. In the remainder of this article, the data is analysed to assess the behaviour of those arbitrators found to have been relatively active in resolving the coded issues. Various measures are applied to rank the arbitrators.

5 Most Active Arbitrators and the Role of Appointing Authorities

In the institutional context of ISDS, where choices about appointments are made by claimant investors and respondent states and by organizations with default appointing authority, who emerged as the most active arbitrators among the 206 in the dataset? This question was examined by tallying the number of appointments (that is, cases in which they served on a tribunal) for each arbitrator; by examining the role, if any, played by the default appointing authority in relevant appointments and by identifying the arbitrators who resolved the most issues with an indication of the arbitrators'

[55] Van Harten, *supra* note 3, at 229–233; Van Harten, *supra* note 28, at 549–554.

[56] North American Free Trade Agreement 1992, 32 ILM 289, 605 (1993); Energy Charter Treaty 1994, 2080 UNTS 95; Agreement among the Government of Brunei Darussalam, Republic of Indonesia, Malaysia, Republic of the Philippines, Republic of Singapore and Kingdom of Thailand for the Promotion and Protection of Investments 1987, 27 ILM 612 (1988).

[57] Van Harten, *supra* note 3; Van Harten, *supra* note 28.

share of all of the resolutions. The first and third measures, concerning frequency of appointments and issue resolutions, indicated who among the arbitrators led the resolution of the coded issues. The second indicator, on investor-side, state-side and presiding appointments, provided background on how arbitrators came to their positions on tribunals.

A *Arbitrator Activity based on Frequency of Appointments*

In the dataset, 19 arbitrators were appointed in at least four ISDS cases (Table 2).[58] The 10 most frequently appointed arbitrators, each with six or more appointments, emerged as leading figures in the relevant period of ISDS. They were Fortier, Orrego-Vicuna, Bernardo Cremades, Kaufmann-Kohler, Albert Jan van den Berg, Lalonde, Jan Paulsson, Karl-Heinz Bockstiegel, Schwebel and Brower.[59]

Table 2: Most active arbitrators, by number of appointments

Arbitrator	Appointments	Investor-side	State-side	Presiding	Unclear from award
Yves Fortier	14	4	1	9	0
Francisco Orrego-Vicuna	13	1	1	11	0
Bernardo Cremades	11	4	3	3	1
Gabrielle Kaufmann-Kohler	11	4	1	6	0
Albert Jan van den Berg	11	4	5	2	0
Marc Lalonde	9	7	2	0	0
Jan Paulsson	8	3	0	5	0
Karl-Heinz Bockstiegel	7	2	0	5	0
Stephen Schwebel	7	3	4	0	0
Charles Brower	6	5	0	0	1
Piero Bernardini	5	3	1	1	0
James Crawford	5	2	1	2	0
Brigitte Stern	5	0	4	1	0
Henri Alvarez	4	4	0	0	0
Franklin Berman	4	0	3	1	0
Pedro Nikken	4	0	4	0	0
Rodrigo Oreamuno	4	0	1	3	0
Francisco Rezek	4	0	3	1	0
Andres Rigo Sureda	4	0	0	4	0
Total	**136**	**46**	**34**	**54**	**2**

[58] The list does not capture all appointments by each listed arbitrator because some appointments would not have been available in public documentation when coding began in May 2010.

[59] All have been identified elsewhere as active ISDS arbitrators: e.g., Eberhardt and Olivet, *supra* note 23; Puig, *supra* note 24; Stone Sweet and Grisel, *supra* note 22, at 52, 71–72.

Among these 19 arbitrators, different appointment histories emerged. Some, such as Lalonde and Brower, were primarily or entirely appointed by investors; others, like Brigitte Stern and Pedro Nikken, were mostly state-side. Some, such as Orrego-Vicuna and Bockstiegel, served mostly in a presiding role.[60] Notably, the most active arbitrators were more often appointed by investors than states. Also, those who were usually appointed as presiding arbitrators[61] were in other cases (that is, when not presiding) appointed more often as investor-side than as state-side arbitrators. Thus, for the seven predominantly presiding arbitrators among the 19 with four or more appointments, there were 43 presiding appointments alongside 14 investor-side, and only four state-side, appointments. Four of the seven had more investor-side, than state-side, appointments; one had the opposite. This finding about predominantly presiding arbitrators offers an initial possible explanation for the arbitrators' overall tendency towards expansive resolutions and leads to the question of how individuals are appointed repeatedly as ISDS arbitrators.[62]

B *Role of Default Appointing Authorities*

The present study goes beyond other research identifying active arbitrators based on the frequency of their participation on ISDS tribunals.[63] It connects the records of appointment of the most active arbitrators to their record of decision-making on the coded legal issues. With respect to appointments, investor-side and state-side arbitrators are usually chosen by the relevant party based on advice from its lawyers, while presiding arbitrators are chosen by negotiation and agreement between the parties or, in the absence of agreement, by a default appointing authority designated under the treaty. The parties' negotiations are presumably premised on the appointing authority's role and, even if the parties agree on who to appoint, an appointing authority could influence the negotiations by proposing names who it would be inclined to appoint. For example, the most prominent appointing authority is the World Bank,[64] acting through its president or the secretary-general of the International Centre for Settlement of Investment Disputes (ICSID), and ICSID, where it is requested by a party to make an appointment, follows a 'ballot procedure' by which names of potential appointees are supplied by ICSID to the parties.[65] Shaping the parties' negotiation

[60] Sole arbitrators were counted as presiding arbitrators.

[61] I.e., whose appointments as presiding arbitrator on the tribunal exceeded their appointments as investor-side or state-side members.

[62] For a critical exposé, see Eberhardt and Olivet, *supra* note 23.

[63] Rankings by Puig (*supra* note 24) and by Langford *et al.* (*supra* note 24) of arbitrators' centrality in ISDS networks are compared to the present study's rankings in notes 82 and 83 below.

[64] Measured by the frequency with which the International Centre for the Settlement of Investment Disputes (ICSID) is in a position to appoint ISDS arbitrators in publicly available cases. For a discussion of other institutional contexts for ISDS appointment, see, e.g., Stone Sweet and Grisel, *supra* note 22, at 45–51.

[65] ICSID describes the ballot procedure as follows: when a party makes a request for appointment of a sole arbitrator or president of the tribunal, ICSID first conducts a ballot procedure by which ICSID gives each party a ballot containing the names of several candidates and each party has a short time in which to return its completed ballot, indicating whether it accepts or rejects each candidate. If the parties agree on a candidate, then ICSID selects one of them. If the parties do not agree on any of the candidates,

of presiding arbitrators, the World Bank and other appointing authorities can influence who becomes a repeat player in ISDS, even if the appointing authority does not appoint directly. Thus, the default role of such authorities in allocating the power to interpret investment treaties, after a claim has been filed, appears to be an important part of the context for ISDS's legal evolution.

In the case of the frequently appointed 19 arbitrators mentioned above, appointing authorities played a significant role in choosing the presiding arbitrators (Table 3). Of the 54 presiding appointments among these 19 arbitrators, the appointing authority selected the presiding arbitrator in 22 cases (41 per cent) and appeared to play a partial role in this selection in another four cases (7 per cent).[66] The leading beneficiaries of

Table 3: Most active arbitrators, role of default appointing authority

Arbitrator	Appointments as presiding	Selected by default authority	Selected in part by default authority	Selected by parties
Francisco Orrego-Vicuna	11	5	1	5
Yves Fortier	9	3	1	5
Gabrielle Kaufmann-Kohler	6	0	0	6
Karl-Heinz Bocksteigel	5	1	0	4
Jan Paulsson	5	2	0	3
Andres Rigo Sureda	4	2	0	2
Bernardo Cremades	3	1	1	1
Rodrigo Oreamuno	3	3	0	0
James Crawford	2	1	0	1
Albert Jan van den Berg	2	2	0	0
Franklin Berman	1	0	0	1
Piero Bernardini	1	0	1	0
Francisco Rezek	1	1	0	0
Brigitte Stern	1	1	0	0
Total	**54**	**22**	**4**	**28**

then ICSID appoints the sole arbitrator or president of the tribunal. ICSID, 'Selection and Appointment of Tribunal Members – ICSID Convention Arbitration', available at https://icsid.worldbank.org/en/Pages/process/Selection-and-Appointment-of-Tribunal-Members-Convention-Arbitration.aspx. I acknowledge the comment of an anonymous reviewer that the ICSID ballot procedure 'does not come into play every time the parties are to agree to appoint the president' of a tribunal but rather only 'if ICSID is to appoint the presiding arbitrator', which 'presupposes that the parties cannot agree on his or her appointment'.

[66] This information is approximate and, if anything, perhaps understates the role of appointing authorities in arbitrator selection because ISDS awards are not always specific and complete in the description of the role

these presiding appointments were Orrego-Vicuna (with five of 11 presiding appointments by the appointing authority), Rodrigo Oreamuno (three of three), Fortier (three of nine), van den Berg (two of two), Rigo Sureda (two of four), and Paulsson (two of five). It seems reasonable to assume that the appointing authorities' selection of these individuals boosted their prospects for investor-side, or state-side, appointments and for party-agreed presiding appointments.[67] In this way, appointing authorities can play a role in shaping ISDS authority at an individual level, highlighting the question of whether they may select certain individuals based on an awareness of their decision-making records and a preference to steer ISDS in a particular legal direction.

C *Arbitrator Activity Based on Total Issue Resolutions*

Tallying appointments offers an impression of the impact of individual arbitrators. Yet an individual may have been appointed to a case without having resolved significant legal issues in the case. For the interpretive tendencies identified here, a more precise measure of impact is the frequency of each arbitrator's resolutions of the coded issues. This measure links arbitrator appointments to interpretive choices, especially for active arbitrators. The data is laid out in Table 4, which identifies the 53 most active individuals, each of whom generated at least five resolutions as expansive or restrictive.[68] The table also tallies each arbitrator's share of all resolutions. This measure reveals that resolutions were highly concentrated among the 53 most active arbitrators, who represented about 25 per cent of arbitrators in the dataset but accounted for about two-thirds of all resolutions. Nine of them, making up less than 5 per cent of all arbitrators, accounted for over 30 per cent of all resolutions: Orrego Vicuna, Fortier, van den Berg, Lalonde, Kaufmann-Kohler, Schwebel, Brower, Rigo Sureda and Cremades. In the relevant period of ISDS awards, these arbitrators had an exceptional impact on the relevant legal aspects of ISDS and, in turn, on signalling the scope and content of the treaties for foreign investors and states. What signals appear to have been sent?

6 Interpretive Tendencies among the Most Active Arbitrators

On the whole, ISDS arbitrators tended towards expansive interpretations of the coded issues in the relevant period, adopting an expansive resolution in 73.5

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of the appointing authority. In particular, the category of 'selected in part' by the appointing authority covers uncertain situations in which an award reports that the tribunal's presiding arbitrator was appointed by agreement of the parties 'in consultation with' the appointing authority or similar language. These references were taken to mean that the appointing authority played a role in indicating who it thought would be suitable as the presiding arbitrator in the context of the parties' negotiations. Finally, for the arbitrators included in the list in Table 3, the appointing authority apparently played a further role by selecting an investor-side arbitrator in one case (Crawford) and by partially selecting a state-side arbitrator in one case (van den Berg).

67 Puig, *supra* note 24, at 422.

68 Like other thresholds in the study, the 'over-five' threshold was arrived at as the data was organized into lists and adopted because it reflected a natural break – that is, the top 50 individuals coincided closely with the cut-off of more than five resolutions.

Table 4: Most active arbitrators, by total issue resolutions

Arbitrator	Issue resolutions as expansive or restrictive	Issue resolutions including non-classifiable	Percentage of all resolutions (as expansive or restrictive) (%)	Concentration of resolutions among most active (%)
Francisco Orrego-Vicuna	53	57	5.3	5.3
Yves Fortier	44	46	4.4	9.7
Albert Jan van den Berg	43	46	4.3	14.0
Marc Lalonde	38	39	3.8	17.8
Gabrielle Kaufmann-Kohler	34	40	3.4	21.2
Stephen Schwebel	25	27	2.5	23.7
Charles Brower	24	26	2.4	26.1
Andres Rigo Sureda	22	22	2.2	28.3
Bernardo Cremades	20	26	2.0	30.3
Francisco Rezek	16	18	1.6	31.9
Karl-Heinz Bockstiegel	16	17	1.6	33.5
V.V. Veeder	16	16	1.6	35.1
Sandra Morelli Rico	13	13	1.3	36.4
Bernard Hanotiau	13	13	1.3	37.7
Jan Paulsson	13	18	1.3	39.0
Alejandro Garro	12	13	1.2	40.2
Charles Poncet	12	12	1.2	41.4
Benjamin Greenberg	11	11	1.1	42.5
William Rowley	11	12	1.1	43.6
Pedro Nikken	11	13	1.1	44.7
Piero Bernardini	10	10	1.0	45.7
Jeswald Salacuse	9	11	0.9	46.6
Carlos Bernal Verea	9	9	0.9	47.5
Toby Landau	9	11	0.9	48.4
Henri Alvarez	8	9	0.8	49.2
Pierre-Yves Tschanz	8	8	0.8	50.0
Giorgio Sacerdoti	8	8	0.8	50.8

Table 4: *Continued*

Arbitrator	Issue resolutions as expansive or restrictive	Issue resolutions including non-classifiable	Percentage of all resolutions (as expansive or restrictive) (%)	Concentration of resolutions among most active (%)
Domingo Bello Janeiro	8	8	0.8	51.6
Franklin Berman	8	10	0.8	52.4
Michael Reisman	8	8	0.8	53.2
Guillermo Aguilar Alvarez	8	9	0.8	54.0
Michael Mustill	7	8	0.7	54.7
James Crawford	7	10	0.7	55.4
Tatiana de Maekelt	7	8	0.7	56.1
Robert Briner	7	9	0.7	56.8
Daniel Martins	7	7	0.7	57.5
Stewart Boyd	7	7	0.7	58.2
Arthur Watts	7	8	0.7	58.9
Raul Vinuesa	6	6	0.6	59.5
Peter Behrens	6	6	0.6	60.1
Brigitte Stern	6	8	0.6	60.7
Gary Born	6	6	0.6	61.3
Hans Danelius	6	10	0.6	61.9
Martin Hunter	6	6	0.6	62.5
Christer Soderlund	6	7	0.6	63.1
Per Runeland	6	6	0.6	63.7
Pierre-Marie Dupuy	6	6	0.6	64.3
Michell Nader	6	6	0.6	64.9
Patrick Barrera Sweeney	6	6	0.6	65.5
Jaime Irarrazabal	6	6	0.6	66.1
Carl Salans	6	6	0.6	66.7
Neil Kaplan	6	7	0.6	67.3
Wolfgang Kuhn	6	7	0.6	67.9

per cent of instances where an issue was resolved expansively or restrictively. Who is associated most clearly with one or the other tendency? In examining this question, one must be cautious because the number of resolutions per individual was usually limited and the data does not give a basis for predicting future decisions.[69]

Four measures were used to identify arbitrators as leaders in expansive or restrictive approaches. The discussion looks first at expansive leaders by pinpointing the arbitrators who generated the most expansive resolutions in total (Table 5) and by identifying those who tended most heavily towards expansive resolutions (Tables 6 and 7). The discussion proceeds with similar analyses of the relatively few arbitrators who tended towards restrictive approaches (Tables 8 and 9). Finally, an adjusted measure is used to account tentatively for the role of presiding arbitrators (Table 10).[70]

Table 5: Top 20 arbitrators, by total expansive resolutions

Arbitrator	Expansive resolutions	Percentage of all expansive resolutions (%)	Concentration of expansive resolutions among most active (%)
Francisco Orrego-Vicuna	44	6.0	6.0
Marc Lalonde	34	4.6	10.6
Yves Fortier	33	4.5	15.1
Albert Jan van den Berg	32	4.4	19.5
Gabrielle Kaufmann-Kohler	31	4.2	23.7
Stephen Schwebel	24	3.3	27.0
Charles Brower	22	3.0	30.0
Andres Rigo Sureda	21	2.9	32.9
Bernardo Cremades	14	1.9	34.8
Charles Poncet	12	1.6	36.4
Francisco Rezek	12	1.6	38.0
Sandra Morelli Rico	12	1.6	39.6
Bernard Hanotiau	12	1.6	41.2
Pedro Nikken	11	1.5	42.7
Alejandro Garro	11	1.5	44.2
Karl-Heinz Bockstiegel	11	1.5	45.7
Jeswald Salacuse	9	1.2	46.9
Jan Paulsson	9	1.2	48.1
Benjamin Greenberg	8	1.1	49.2
Pierre-Yves Tschanz	8	1.1	50.3
Piero Bernardini	8	1.1	51.4
Henri Alvarez	8	1.1	52.5

[69] Sisk and Heise, 'Judges and Ideology: Public and Academic Debates about Statistical Measures', 99 *NWULR* (2005) 743, at 792; Bloom, *supra* note 17, at 578.

[70] de Fina, 'The Party Appointed Arbitrator in International Arbitrations – Role and Selection', 15 *Arbitration International* (1999) 381.

Table 6: Top 20 arbitrators, by share of resolutions that were expansive

Arbitrator	Total resolutions (as expansive or restrictive)	Resolutions that were expansive (%)
Charles Poncet	12	100
Pedro Nikken	11	100
Jeswald Salacuse	9	100
Henri Alvarez	8	100
Pierre-Yves Tschanz	8	100
Daniel Martins	7	100
Gary Born	6	100
Neil Kaplan	6	100
Wolfgang Kuhn	6	100
Stephen Schwebel	25	96
Andres Rigo Sureda	22	96
Charles Brower	24	92
Bernard Hanotiau	13	92
Sandra Morelli Rico	13	92
Alejandro Garro	12	92
Gabrielle Kaufmann-Kohler	34	91
Marc Lalonde	38	90
Domingo Bello Janeiro	8	88
Guillermo Aguilar Alvarez	8	88
Stewart Boyd	7	86

A *Expansive Leaders Based on Total Expansive Resolutions*

There were 22 arbitrators, each with eight or more expansive resolutions (Table 5). They were led by Orrego-Vicuna, Lalonde, Fortier, van den Berg and Kaufmann-Kohler. All five were among the most frequently appointed arbitrators and three – Orrego-Vicuna, Fortier and Kaufmann-Kohler – were the most frequently appointed presiding arbitrators. The analysis thus revealed a high concentration of expansive resolutions. The five leaders – fewer than 3 per cent of all arbitrators – accounted for about 25 per cent of all expansive resolutions. Also, the 22 arbitrators mentioned above, who were fewer than 11 per cent of all arbitrators, accounted for nearly 53 per cent of all expansive resolutions. This concentration was greater than the concentration for total resolutions, indicating again that a small number of individuals had a relatively huge impact on ISDS legal expansion in the relevant period.

B *Expansive Leaders Based on Share of Resolutions That Were Expansive*

Another measure of expansiveness was the share of each arbitrator's resolutions that were expansive instead of restrictive, using a threshold of over five resolutions per arbitrator (Table 6). By this measure, some arbitrators tended heavily towards expansiveness. Nikken and Charles Poncet had unbroken records of 10 or more expansive resolutions and various others, led by Schwebel, Rigo Sureda, Brower,

Kaufmann-Kohler and Lalonde, adopted an expansive approach for at least 90 percent of their resolutions.

Of the 53 most active arbitrators (by total resolutions), 45 (85 per cent) adopted more expansive resolutions compared to restrictive resolutions, with only three (6 per cent) adopting more restrictive than expansive resolutions. Of those who had more expansive than restrictive resolutions, 24 (45 per cent) exceeded the average share of expansive resolutions for all arbitrators by at least 10 per cent of the mean. Table 7 identifies the 53 most active arbitrators in these respects.

These findings indicate further how the most active arbitrators tended to lead other arbitrators in adopting expansive resolutions. There were 10 arbitrators who resolved 10 or more issues with at least 90 per cent of the resolutions being expansive: Lalonde, Kaufmann-Kohler, Schwebel, Brower, Rigo Sureda, Sandra Morelli Rico, Hanotiau, Alejandro Garro, Poncet and Nikken. Together, these 10 individuals accounted for 190 of all expansive resolutions (26 per cent).[71]

By comparison, some of the 53 most active arbitrators, including Fortier, van den Berg, Cremades, Francisco Rezek, Bockstiegel, Paulsson and Benjamin Greenberg, had a share of expansive resolutions falling within 10 per cent of the mean for all arbitrators. Only ten of the 53 had a share of expansive resolutions that fell below the mean by 10 per cent or more: Veeder, William Rowley, Michael Reisman, Michael Mustill, James Crawford, Raul Vinuesa, Hans Danelius, Pierre-Marie Dupuy, Jaime Irarrázabal and Carl Salans. Most of these individuals were relatively inactive; only Veeder and Rowley generated more than 10 expansive or restrictive resolutions in total.

C *Restrictive Leaders Based on Total Restrictive Resolutions (Adjusted)*

Who were the restrictive leaders in the dataset? This question was more difficult to answer because there were far fewer restrictive than expansive resolutions overall. Some limited findings are outlined here on measures similar to those used for expansive leaders. Like the other findings, the rankings of restrictive leaders shed light on what happened in the relevant period, but they should be approached with caution and do not support predictions. The first measure was used to identify arbitrators based on their total restrictive resolutions (Table 8). It was challenging to implement this measure because, for the most active arbitrators, expansive resolutions usually exceeded restrictive ones by a substantial margin. As a result, the arbitrators with the most restrictive resolutions were usually the same as those with the most expansive resolutions, but with far fewer restrictive resolutions for each individual. For a more focused test of restrictiveness, therefore, total restrictive resolutions were tallied in Table 8 for all arbitrators who accounted for more than two restrictive resolutions and who did not otherwise qualify for one of the lists of expansive leaders in Tables 5 and 6.[72] Put differently, the list of restrictive leaders was filtered to exclude individuals who led the field in expansive

[71] For the 22 most active arbitrators (by total expansive resolutions, including several arbitrators tied for twentieth), about 10% of the arbitrators accounted for 52% (386) of the expansive resolutions.

[72] The record of total restrictive resolutions by the most active arbitrators not included in Table 8 is provided in Table 7.

Table 7: Most-active arbitrators, report of expansive and restrictive resolutions

Arbitrator	Total resolutions (expansive or restrictive)	Expansive resolutions	Restrictive resolutions	Share of resolutions that were expansive (%)	Exceeds mean (73.5%) share of resolutions that were expansive?
Francisco Orrego-Vicuna	53	44	9	83	Yes*
Yves Fortier	44	33	11	75	Yes
Albert Jan van den Berg	43	32	11	74	Yes
Marc Lalonde	38	34	4	90	Yes*
Gabrielle Kaufmann-Kohler	34	31	3	91	Yes*
Stephen Schwebel	25	24	1	96	Yes*
Charles Brower	24	22	2	92	Yes*
Andres Rigo Sureda	22	21	1	96	Yes*
Bernardo Cremades	20	14	6	70	No
Francisco Rezek	16	12	4	75	Yes
Karl-Heinz Bockstiegel	16	11	5	69	No
V.V. Veeder	16	7	9	44	No*
Sandra Morelli Rico	13	12	1	92	Yes*
Bernard Hanotiau	13	12	1	92	Yes*
Jan Paulsson	13	9	4	69	No
Alejandro Garro	12	11	1	92	Yes*
Charles Poncet	12	12	0	100	Yes*
Benjamin Greenberg	11	8	3	73	No
William Rowley	11	6	5	55	No*
Pedro Nikken	11	11	0	100	Yes*

Table 7: *Continued*

Arbitrator	Total resolutions (expansive or restrictive)	Expansive resolutions	Restrictive resolutions	Share of resolutions that were expansive (%)	Exceeds mean (73.5%) share of resolutions that were expansive?
Piero Bernardini	10	8	2	80	Yes
Jeswald Salacuse	9	9	0	100	Yes*
Carlos Bernal Verea	9	7	2	78	Yes
Toby Landau	9	7	2	78	Yes
Henri Alvarez	8	8	0	100	Yes*
Pierre-Yves Tschanz	8	8	0	100	Yes*
Giorgio Sacerdoti	8	6	2	75	Yes
Domingo Bello Janeiro	8	7	1	88	Yes*
Franklin Berman	8	6	2	75	Yes
Michael Reisman	8	3	5	38	No*
Guillermo Aguilar Alvarez	8	7	1	88	Yes*
Michael Mustill	7	1	6	14	No*
James Crawford	7	4	3	57	No*
Tatiana de Maekelt	7	5	2	71	No
Robert Briner	7	5	2	71	No
Daniel Martins	7	7	0	100	Yes*
Stewart Boyd	7	6	1	86	Yes*
Arthur Watts	7	5	2	71	No
Raul Vinuesa	6	3	3	50	No*
Peter Behrens	6	4	2	67	No
Brigitte Stern	6	4	2	67	No

Table 7: *Continued*

Arbitrator	Total resolutions (expansive or restrictive)	Expansive resolutions	Restrictive resolutions	Share of resolutions that were expansive (%)	Exceeds mean (73.5%) share of resolutions that were expansive?
Gary Born	6	6	0	100	Yes*
Hans Danelius	6	3	3	50	No*
Martin Hunter	6	4	2	67	No
Christer Soderlund	6	5	1	83	Yes*
Per Runeland	6	5	1	83	Yes*
Pierre-Marie Dupuy	6	3	3	50	No*
Michell Nader	6	4	2	67	No
Patrick Barrera Sweeney	6	5	1	83	Yes*
Jaime Irarrazabal	6	3	3	50	No*
Carl Salans	6	3	3	50	No*
Neil Kaplan	6	6	0	100	Yes*
Wolfgang Kuhn	6	6	0	100	Yes*

Notes: * means by at least 10% of mean.

Table 8: Top 20 arbitrators, by total restrictive resolutions

Arbitrator	Restrictive resolutions
V.V. Veeder	9
Michael Mustill	6
Anthony Mason	5
Abner Mikva	5
Michael Reisman	5
William Rowley	5
Francisco Rezek	4
Hans Danelius	3
Pierre-Marie Dupuy	3
Jaime Irarrazabal	3
James Crawford	3
Florentino Feliciano	3
Juan Fernandez-Armesto	3
Gilbert Guillaume	3
Meir Heth	3
Jeremy Lever	3
Fali Nariman	3
Carl Salans	3
Raul Vinuesa	3

resolutions or in their share of expansive resolutions. The filter left 19 arbitrators, each with three or more restrictive resolutions. Another 29 arbitrators accounted for two restrictive resolutions each and are not included in Table 8.

By this measure, a few arbitrators, led by Veeder, emerged as restrictive leaders. These arbitrators' interpretations constrained the treaties' compensatory promise for claimant investors relatively often. In each case, they had much less impact on overall interpretive tendencies than did the expansive leaders. Yet their presence shows that ISDS is not monolithic and suggests that the scope and content of foreign investor protection would have evolved differently if tribunals had a different make-up.[73]

D *Restrictive Leaders Based on Share of Resolutions That Were Restrictive*

Applying the same measure as for expansive leaders, Table 9 identifies the restrictive leaders based on the share of their resolutions that were restrictive. The same threshold (over five resolutions in total) was applied. Compared to the expansive leaders in Table 6, this measure revealed again that the most active arbitrators generated much fewer restrictive resolutions compared to expansive resolutions. Just one arbitrator (Veeder) generated over 10 resolutions, with more being restrictive than expansive. Most other arbitrators who accounted for a relatively high number of restrictive resolutions, especially Rowley, Bockstiegel, Paulsson and Cremades, had more expansive

[73] G. Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (2013), at 159–161.

Table 9: Top 20 arbitrators, by share of resolutions that were restrictive

Arbitrator	Total issue resolutions (expansive or restrictive)	Resolutions that were restrictive (%)
Michael Mustill	7	86
Michael Reisman	8	62
V.V. Veeder	16	56
Hans Danelius	6	50
Pierre-Marie Dupuy	6	50
Jaime Irarrázabal	6	50
Carl Salans	6	50
Raul Vinuesa	6	50
William Rowley	11	45
James Crawford	7	43
Peter Behrens	6	33
Martin Hunter	6	33
Michell Nader	6	33
Brigitte Stern	6	33
Karl-Heinz Bockstiegel	16	31
Jan Paulsson	13	31
Bernardo Cremades	20	30
Robert Briner	7	29
Tatiana de Maekelt	7	29
Arthur Watts	7	29

than restrictive resolutions. Except for Rowley, the share of their resolutions that was expansive was close to the mean (average) for all arbitrators.

Just three individuals, Mustill, Michael Reisman and Veeder, had over five resolutions, with more restrictive than expansive resolutions. For these restrictive leaders, the findings were driven by two cases in which each arbitrator decided a claim against the USA. Five of Mustill's six restrictive resolutions were in the *Loewen* case.[74] Three of Reisman's five restrictive resolutions and four of Veeder's nine, as well as four of Rowley's five, were in the *Methanex* case.[75] These findings illustrate the limited evidence of restrictiveness for frequently appointed arbitrators in the relevant period.

E *Adjustment for Presiding Arbitrators*

In the usual context of three-member ISDS tribunals, presiding arbitrators appear to play a more central role in tribunal decision-making, especially where called upon to

[74] ICSID, *Loewen Group Ltd. and Raymond L. Loewen v. United States – Decision on Hearing of Respondent's Objection to Competence and Jurisdiction*, 5 January 2001, ICSID Case no. ARB(AF)/98/3; ICSID, *Loewen Group Ltd. and Raymond L. Loewen v. United States – Award*, 26 June 2003, ICSID Case no. ARB(AF)/98/3.

[75] ICSID, *Methanex Corporation v. United States – Partial Award (Preliminary Award on Jurisdiction and Admissibility)*, UNCITRAL, 7 August 2002; ICSID, *Methanex Corporation v. United States – Final Award of the Tribunal on Jurisdiction and Merits*, UNCITRAL, 3 August 2005.

resolve differences between the party-side arbitrators.[76] To illustrate, there were 42 issue resolutions in the dataset that came in a separate opinion by a tribunal member who disagreed with the others' approach.[77] Just two (5 per cent) of these 42 resolutions came in a separate opinion by the presiding arbitrator (both in Prosper Weil's dissent in the *Tokios* decision).[78] One way to account for the centrality of the presiding arbitrators is to double count their resolutions.[79] The logic of double counting follows from the stylized observation that a presiding arbitrator can lose in a tribunal's decision-making only if he or she is outvoted by the party-side arbitrators, whereas a party-side arbitrator must convince the presiding arbitrator of his or her position if the other party-side arbitrator disagrees. Based on this assumption, the weight of presiding arbitrators' views in deliberations is, in principle, equal to that of the two other arbitrators combined and the presiding arbitrator's resolutions are in turn twice as important as each of the other arbitrators' resolutions. Clearly, double counting is only one simplified way to measure presiding arbitrators' impact, albeit with benefits of accessibility and transparency.

Presiding arbitrators' resolutions were double counted (Table 10) for the 20 most active arbitrators by total resolutions (as listed in Table 4). For each individual, the table reports a plus/minus count, calculated by subtracting the arbitrators' restrictive resolutions from his or her expansive ones. The higher a plus count, the more the expansive resolutions exceeded the restrictive; a minus count indicated more restrictive than expansive resolutions. To account for the presiding arbitrators' role, the counts were adjusted by double counting an arbitrator's expansive and restrictive resolutions while presiding.

For 10 of the arbitrators, many, and sometimes all, of their resolutions were in a presiding role. The adjustment was starkest for Orrego Vicuna, Fortier, Rigo Sureda and Hanotiau, each of whom doubled or nearly doubled his plus score, reaching +20 or more. To a lesser extent, the adjustment increased the expansive impact for Kaufmann-Kohler, Cremades and Rowley. For other arbitrators, the adjustment changed little or nothing. Where the adjustment had a notable impact, in all cases but one (Veeder), it accentuated the arbitrator's expansive tendency. For Veeder, the adjustment modestly increased his minus score.

7 Summary of Findings

Nine findings emerged from the study. First, the most active ISDS arbitrators tended to have a background as investor-side, not state-side, appointees, especially when

[76] Tucker, 'Inside the Black Box: Collegial Patterns on Investment Tribunals', 7 *JIDS* (2016) 183.

[77] Including expansive and restrictive resolutions. The proportion of separate opinions that came from presiding arbitrators declines (from 5% of 42 resolutions) to 3% of 63 resolutions if non-classifiable resolutions are included.

[78] ICSID, *Tokios Tokelés v. Ukraine – Decision on Jurisdiction*, 29 April 2004, ICSID Case no. ARB/02/18.

[79] Langford *et al.*, *supra* note 24, at 311, adopted an alternative weighting of one for presiding arbitrators and 0.75 for each party-side arbitrator.

Table 10: Expansive and restrictive resolutions, adjusted for presiding arbitrator

Arbitrator	Expansive resolutions	Expansive resolutions as presiding arbitrator	Restrictive resolutions	Restrictive resolutions as presiding arbitrator	+/–	Adjusted +/–
Francisco Orrego-Vicuna	44	43	9	9	+35	+69
Yves Fortier	33	20	11	5	+22	+37
Albert Jan van den Berg	32	2	11	2	+21	+21
Marc Lalonde	34	0	4	0	+30	+30
Gabrielle Kaufmann-Kohler	31	10	3	2	+28	+36
Stephen Schwebel	24	0	1	0	+23	+23
Charles Brower	22	0	2	0	+20	+20
Andres Rigo Sureda	21	21	1	1	+20	+40
Bernardo Cremades	14	8	6	1	+8	+15
Francisco Rezek	12	0	4	1	+8	+7
Karl-Heinz Bockstiegel	11	6	5	4	+6	+8
V.V. Veeder	7	0	9	4	-2	-6
Sandra Morelli Rico	12	0	1	0	+11	+11
Bernard Hanotiau	12	12	1	1	+11	+22
Jan Paulsson	9	6	4	4	+5	+7
Alejandro Garro	11	0	1	0	+10	+10
Charles Poncet	12	0	0	0	+12	+12
Benjamin Greenberg	8	0	3	0	+5	+5
William Rowley	6	6	5	0	+1	+7
Pedro Nikken	11	0	0	0	+11	+11

serving as the presiding arbitrator. The most frequently appointed ISDS arbitrators were more often appointed by foreign investors than states, and those who were usually appointed to the presiding role were in other instances appointed more often as investor-side than state-side arbitrators.

Second, default appointing authorities, such as the World Bank and ICSID, had an important impact on the allocation of adjudicative power in ISDS.[80] They played a significant role in choosing the most active repeat presiding arbitrators and seem likely to have enhanced some of the key individuals' prospects for other appointments.

Third, ISDS decision-making power was very concentrated. The 50 most active arbitrators, among 206 in the dataset, accounted for about two-thirds of the resolutions of coded issues in the relevant period. Five arbitrators accounted for about 20 per cent of all resolutions. These and other frequently appointed arbitrators had a disproportionate impact on the relevant legal aspects of ISDS.

Fourth, the concentration of ISDS decision-making was even greater in the case of expansive resolutions of the coded issues (those favouring the likelihood of success by claimant investors[81]). The five arbitrators who generated the most expansive resolutions accounted for nearly 25 per cent of all expansive resolutions. By the same measure, the top 22 arbitrators accounted for about 50 per cent of all expansive resolutions. In either case, a small group of individuals appeared to drive ISDS expansion on the coded issues in the relevant period.

Fifth, many of the most active arbitrators were overwhelmingly expansive in their resolutions, taking an expansive, rather than a restrictive, approach in at least 90 per cent of the resolutions. Some arbitrators had an unbroken record of expansive resolutions over at least 10 resolutions.

Sixth, among the 53 most active arbitrators, 45 tended towards an expansive approach. Of these, 24 exceeded by at least 10 per cent the average (mean) share of total resolutions that were expansive among all arbitrators. The expansive leaders included 10 individuals who were found to have resolved at least 10 issues and to have adopted an expansive approach for at least 90 per cent of their resolutions. Consisting of about 5 per cent of the arbitrators, they generated 26 per cent of all expansive resolutions. About 10 per cent of arbitrators generated 52 per cent of expansive resolutions.

Seventh, despite having less data for this question, it was possible to identify four arbitrators who tended towards restrictiveness in their resolutions of the coded issues. There were not many, and they did not have nearly as much impact as arbitrators tending towards expansiveness. Other than one individual, the restrictive resolutions of these arbitrators came mostly (75 per cent of 16 resolutions for the other three arbitrators) in two cases against the USA.

[80] Other ISDS appointing authorities included the Permanent Court of Arbitration (which ordinarily chooses another organization or individual to be the appointing authority in each case), the Stockholm Chamber of Commerce, and the International Chamber of Commerce.

[81] It is imprecise to describe expansive resolutions as 'pro-investor' and restrictive ones as 'pro-state'. For example, an expansive resolution may tend to favour a capital-exporting state in its relations with other states and a restrictive resolution may favour foreign investors in general if the resolution helps to maintain states' support for investment treaty arbitration.

Eighth, one can rank in various ways the arbitrators who appear to have contributed most to expanding investment treaties' scope and content in these ways during the relevant period. The rankings are descriptive, approximate and tentative. In the author's judgment, the best use of the present analyses for this purpose is to combine the measures of (i) total expansive resolutions (where the arbitrator exceeded the mean share of all arbitrators' resolutions that were expansive); (ii) share of resolutions that were expansive and (iii) plus/minus score as adjusted by double-counting resolutions in a presiding role. This cumulative approach identifies the following arbitrators as expansive leaders in the first two decades of ISDS awards:

- Orrego-Vicuna, Lalonde, Fortier, van den Berg, Kaufmann-Kohler, Schwebel, Brower and Rigo Sureda (each of whom accounted for more than 20 expansive resolutions and who together generated a third of all expansive resolutions);
- Nikken, Poncet, Schwebel, Rigo Sureda, Brower, Hanotiau, Morelli Rico, Garro, Kaufmann-Kohler and Lalonde (each of whose resolutions were at least 90 per cent expansive after generating over 10 resolutions in total) and
- Orrego-Vicuna, Fortier and Rigo Sureda, followed by Kaufmann-Kohler, Cremades, Hanotiau and Rowley (each of whom had a greater expansive impact after double-counting their resolutions while in a presiding role).

Two arbitrators – Kaufmann-Kohler and Rigo Sureda – appear on all three lists, and six arbitrators – Orrego-Vicuna, Lalonde, Fortier, Schwebel, Brower, and Hanotiau – appear on two of them. These eight arbitrators seem the most credibly described as expansive leaders in the relevant period, subject to the various limitations discussed in this article.[82]

Ninth, on the same basis, one arbitrator seems credibly described as a restrictive leader: Veeder.[83] This arbitrator generated a relatively high number of restrictive resolutions (nine) and more restrictive than expansive resolutions (56 per cent restrictive). Unlike other restrictive leaders, his restrictive resolutions did not come primarily in a single case against the USA.

These findings offer detailed, individualized information on interpretive discretion in ISDS from the first ISDS award in 1990 until May 2010. They reveal how ISDS legal expansion in this period was connected to concentrated decision-making of a small group of individuals who were appointed repeatedly, often as the presiding arbitrator and by an appointing authority rather than the disputing parties.

[82] Of these eight arbitrators, six appear in Puig's rankings (Puig, *supra* note 24, at 415) of the centrality of individual arbitrators. Rigo Sureda and Schwebel were the exceptions. Notably, Puig's study was based on appointments to tribunals, not on resolutions of legal issues, and his data included contract-based and legislation-based, as well as treaty-based, ICSID arbitrations (but not non-ICSID treaty-based investment arbitrations) and extended to a cut-off of February 2014. In Langford and *et al*., *supra* note 24, at Table 6, all but one (Rigo Sureda) of the eight arbitrators listed here appear in the authors' cumulative ranking of top power brokers based on a dataset that included non-ICSID, as well as ICSID, treaty-based investment arbitrations and extended to May 2016. Langford and colleagues did not examine resolutions of legal issues but went beyond Puig by reviewing appointments as counsel, experts and tribunal secretaries in addition to arbitrators.

[83] Veeder appears on both Puig's and Langford *et al*.'s rankings, both *supra* note 24.

8 Commentary

The comments in this section are more reflective of the author's inferences than the findings reported above. The study assessed the exercise of interpretive discretion by ISDS arbitrators over an extensive period, attempting to illuminate the role of individuals in dynamics of legal evolution. The findings offer tentative support for expectations that institutional and economic factors play a role in this type of adjudicative behaviour. I comment on two factors that helped in the design of the overall coding project. I then discuss other possible explanations for the findings and the relevance of the study to other themes in ISDS research.

The role of institutional factors in the present project arose primarily from the power of the appointing authorities to decide who will be an arbitrator and, in turn, who will have the power to resolve ambiguities in investment treaties. This role of the appointing authorities shapes the context for disputing parties' decision-making on who to appoint based on an evaluation of who the appointing authority might otherwise appoint. Thus, the appointing authorities' appointment record – alongside the arbitrators' decision-making records – can influence the legal evolution of ISDS. Here, arbitrators who were chosen more frequently by the appointing authorities, especially in a presiding role, were found to have tended towards expansiveness in their resolutions of coded issues. Expansive tendencies presumably become self-reinforcing where they provide signals to other arbitrators and disputing parties about the acceptable boundaries of legal reasoning and argument.[84] Further research could use citation analysis to compare how arbitrators and disputing parties responded to early examples of expansive or restrictive interpretations or to identify important milestones in the legal evolution of ISDS and link those milestones to individual arbitrators.

The role of economic factors in the project arose primarily from assumptions about the business interests of the arbitrators. Assuming that many ISDS arbitrators have a financial incentive to seek re-appointment, aspects of the arbitration business become relevant to evaluations of arbitrator behaviour.[85] To illustrate, in ISDS, only one type of disputing party – foreign investors – can bring the original claims that trigger arbitrators' appointments (and the related work for ISDS lawyers and experts, many of whom are also arbitrators).[86] Based on this asymmetrical structure, ISDS arbitrators have an apparent interest to interpret the treaties in ways that create favourable conditions for foreign investors to bring claims. These claims are the genesis of the ISDS legal industry. More acutely, arbitrators whose appointments are mostly on the investor-side have an apparent interest to appeal to the investor-side market for appointments, creating a further reason to expect them to favour expansiveness.[87] These

[84] Katznelson and Weingast, *supra* note 5, at 8.

[85] Dezalay and Garth, *supra* note 14, at 9.

[86] Langford *et al.*, *supra* note 24.

[87] Strezhnev, 'Detecting Bias in International Investment Arbitration', Draft paper presented at the 57th Annual Convention of the International Studies Association, 12 March 2016, at 8–9; Puig and Strezhnev, 'Affiliation Bias in Arbitration: An Experimental Approach', Arizona Legal Studies Discussion Paper no. 16–31 (2016).

economic considerations are not the full story of arbitrator behaviour, of course; they exist alongside other potential factors, such as an arbitrator's commitment to fair and well-reasoned decision-making or to the role of adjudication in resolving international conflict. Even assuming they are not predominant, however, economic interests of arbitrators and the associated legal industry are part of the 'institutional situations' that 'shape and help constitute and induce preferences' of actors in ISDS.[88] The present study was not meant to test the role of economic factors specifically, especially not for individual arbitrators. Yet the findings that arbitrators tended towards expansiveness in their resolution of the coded issues, led by a small group of frequently appointed individuals (typically having more appointments as investor-side arbitrators rather than as state-side arbitrators), appears to support the role of economic factors in relevant aspects of the evolution of investment treaty law.

It should be stressed that empirical findings on adjudicative behaviour are always open to a variety of possible explanations.[89] For instance, the tendency of active arbitrators, or of investor-side arbitrators, towards expansive resolutions may be linked to greater knowledge or experience in the relevant areas of law or adjudication. The legal expansion of ISDS in general may be connected to growing awareness among potential claimants of the availability of ISDS and the opportunities to make novel arguments (although this explanation may be difficult to disentangle from the signalling effect of arbitrators' own interpretations). Such expansion may also relate to how lawyers presented investment treaties to disputing parties and to whether the lawyers' representations reflected arbitrators' actual interpretations. In the case of appointment decisions, it may be that appointing authorities – when they put individuals on tribunals or on ballots for the parties to consider – were not at all influenced by the individuals' past record of legal determinations. The present study did not explore these and other possible explanations for the interpretive tendencies observed here, and its findings do not emerge from any specific hypotheses related to any particular factors. At their core, the findings reveal simply that individual arbitrators played varying roles in the coded aspects of the legal evolution of ISDS during the relevant period.

On the question of ISDS arbitrator behaviour, ideally a range of methods and data sources would be used in complementary ways to elaborate on expectations.[90] That said, empirical research can never provide definitive proof of any arbitrator's mindset in any particular case,[91] and researchers must take care to avoid unsupported claims about individual preferences. By the same token, empirical methods should not be used to give unwarranted assurances about ISDS where its institutional context raises unique issues about the role of institutional or economic factors in decision-making.

88 Katznelson and Weingast, *supra* note 5, at 1.

89 Sisk, Heise and Morriss, 'Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning', 73 *New York University Law Review* (1998) 1377, at 1380–1382.

90 For an innovative study using experimental methods to test for ISDS arbitrator bias, see Puig and Strezhnev, *supra* note 87.

91 Sisk and Heise, 'Judges and Ideology: Public and Academic Debates about Statistical Measures', 99 *NWULR* (2005) 743, at 746, 794.

The present study is connected tangentially to other ISDS research themes. For example, Stephan Schill has argued that the proliferation of investment treaties, and their allowances for forum shopping and broad MFN treatment, has created a de facto multilateral system.[92] ISDS tribunals play an important role in multilateralization because, according to Schill, they 'generate, with some exceptions, largely coherent decisions even across different investment treaties, above all as regards the interpretation of the substantive principles of investment protection' and because '[f]requent reappointments of the same individuals … ensures a certain continuity in arbitral jurisprudence'.[93] The findings here suggest that there is significant commonality in arbitrators' handling of legal issues across investment treaties and that this indicator of multilateralization has been supported especially by a group of repeat arbitrators.[94] The findings reveal further that, to the extent that frequently appointed arbitrators have advanced coherence, they have tended towards expansive approaches of various jurisdictional and substantive issues left open by the treaties. Also, such coherence can be understood as a potential product not only of legal reasoning by a core group of arbitrators but also of institutional and economic features of ISDS.

Second, the present findings are tangentially relevant to questions of gender and cultural diversity in ISDS.[95] They reveal that two of the most active arbitrators who are in under-represented gender or nationality groups – Kaufmann-Kohler and Orrego Vicuna – contributed more than almost any other arbitrator to expansiveness in their resolutions of the coded issues, particularly in a presiding role on tribunals. Leaving aside other reasons to encourage diversity, this observation highlights the issue of whether more gender or nationality diversity in ISDS would affect arbitrators' interpretive choices overall, especially if the most active arbitrators are part of a close-knit professional community.[96]

Third, the findings appear relevant to doctrinal research on detailed legal reasoning to support or refute different approaches to investment treaty law. Doctrinal research might benefit from taking a wider perspective on how legal issues relate to each other – for example, what is the significance of an expansive interpretation on an issue of parallel claims if it is followed by a restrictive view of the available remedy or of a restrictive interpretation of indirect expropriation alongside an expansive approach to full protection and security? What signals does one or another resolution send as part of the overall doctrine elaborated by tribunals?

9 Conclusion

The purpose of this study was to shed light on how arbitrators resolved contested legal issues that were not dealt with clearly and specifically in an investment treaty. The

92 S. Schill, *The Multilateralization of International Investment Law* (2009).

93 Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking', in A. von Bogdandy and I. Venzke (eds), *International Judicial Lawmaking* (2012) 133, at 155–156.

94 See also Stone Sweet and Grisel, *supra* note 22, at 75–76, 169

95 Kidane, *supra* note 21.

96 Ginsburg, 'The Culture of Arbitration', 36 *VJTL* (2003) 1335; Puig, *supra* note 24.

purpose was not to evaluate the merits of differing resolutions. Compared to standard doctrinal analysis, content analysis allows for a more comprehensive review of ISDS legal evolution over the relevant period. The study does not support conclusions beyond May 2010; its findings are descriptive of the relevant period and should not be extrapolated beyond the cut-off or used for prediction. While the coded issues were chosen with a view to capturing a range of generally applicable issues, they do not capture all of the arbitrators' interpretative choices. Coding of other issues could yield different or contradictory results.[97] The analysis also did not seek to capture other forms of arbitrator discretion such as the determinations of relevant facts. Considering these and other limitations, the article tentatively identifies arbitrators who appear to be most responsible for expansive or restrictive resolutions of the coded issues in the relevant period.

The study contributes evidence to help in understanding how ISDS has evolved legally and which individuals were active in that evolution. The findings show that a dozen or so arbitrators, in the first two decades of ISDS awards, had an outsized impact on shaping various legal aspects of investment treaties. These arbitrators were at the centre of ISDS based not only on the frequency of their appointments but also on the degree of their participation in the accumulation of resolutions of doctrinal contests over the scope and content of the treaties. Their resolutions of the coded issues tended to enhance the treaties' compensatory promise for foreign investors, with correspondingly heightened risks for states. Had interpretive discretion been exercised by other individuals, apparently including some who were appointed infrequently in the same period, then more constrained signals may have been sent and ISDS may have unfolded differently.

[97] E.g., arbitrators may have adjusted their approach to preserve ISDS legitimacy, as argued in Schneiderman, 'Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?' 2 *JIDS* (2011) 471.

Appendix 1: Investment treaty arbitration coding project – issues classification template, June 2009

Issue 1: 'corporate person investor' – expansive approach	**Issue 1: 'corporate person investor' – restrictive approach**
• prioritization of corporate form over control of the investment vehicle or rejection of an implied origin-of-capital test; • allowance of a claim by a foreign company that is owned and likely controlled by nationals of the host state; or • allowance of a claim by a shareholder whose investment in the host state is owned by an intermediary company of a third state.	• flexible use of veil-piercing or of an indirect control test or of a substantial connection text in order to preclude jurisdiction/ admissibility; • refusal of a claim by a foreign company that is owned and likely controlled by nationals of the host state; or • refusal of a claim by a shareholder whose investment in the host state is owned by an intermediary company of a third state.
Issue 2: 'natural person investor' – expansive approach	**Issue 2: 'natural person investor' – restrictive approach**
• allowance of a claim against the only state of which the claimant is a citizen; • allowance of a claim against a state of which the claimant is a citizen without conformation that the citizenship upon which the claim is based is dominant and effective; or • allowance of a claim based on a flexible application of the requirement for foreign nationality as customarily applied to natural persons.	• refusal of a claim against the only state of which the claimant is a citizen; • refusal of a claim against a state of which the claimant is a citizen following confirmation that the citizenship upon which the claim is based is not dominant and effective; or • refusal of a claim based on a strict application of the requirement for foreign nationality as customarily applied to natural persons.
Issue 3: 'concept of investment' – expansive approach	**Issue 3: 'concept of investment' – restrictive approach**
• where a claim is under the ICSID Convention, non-application of the *Fedax* criteria, including by focusing primarily on the definition of investment in the bilateral investment treaty or other investment treaty (also known as subjective theory of investment under ICSID); • where the claim is under the ICSID Convention, liberal application of the *Fedax* criteria to include as 'investment' any activities that are stand-alone and that go beyond conventional FDI project activities, in line with 'the liberal movement, favourable to an extension of the jurisdiction of ICSID tribunals to every kind of economic rights';[98]	• where a claim is under the ICSID Convention, strict application of the *Fedax* criteria (that is, rejection of subjective theory focusing primarily on the definition of investment in the BIT or other investment treaty) to limit 'investment' to conventional foreign direct investment (FDI) project activities or otherwise to deny claim; • whether or not the claim is under the ICSID Convention, adoption of a requirement for an actual transfer of capital into the respondent state as a feature of investment; or

[98] Yala, 'The Notion of "Investment" in ICSID Case Law: A Drifting Jurisdictional Requirement?', (2005) 22 *Journal of International Arbitration* 105, at 108.

Appendix 1: *Continued*

Issue 3: 'concept of investment' – expansive approach	**Issue 3: 'concept of investment' – restrictive approach**
• whether or not the claim is under the ICSID Convention, rejection of the requirement for an actual transfer of capital into the respondent state as a feature of investment (unless there are extenuating circumstances such as corrupt practices that block an investor from doing so); or • whether or not the claim is under the ICSID Convention, inclusion of non-traditional categories of ownership within the concept of 'investment' – for example, ownership of a sales office, market share, or corporate governance rights in a contract, where the asset is not part of conventional FDI project activities.	• whether or not the claim is under the ICSID convention, exclusion of non-traditional categories of ownership where not linked directly to conventional FDI project activities.
Issue 4: 'minority shareholder interest' – expansive approach	**Issue 4: 'minority shareholder interest' – restrictive approach**
• allowance of a claim by a minority shareholder without limiting the claim to the shareholder's interest in the value and disposition of the shares (as opposed to interests of the domestic firm as a whole); or • allowance of a claim by a minority shareholder where the treaty does not clearly and specifically allow it.	• limitation of such a claim to the extent of the claimant's minority shareholder interest in the value and disposition of the shares; or • preclusion of a claim by minority shareholder due to lack of control over the investment (in circumstances where, for example, the treaty does not define investment to include ownership of stock or shares in a domestic company).
Issue 5: 'permissibility of investment' – expansive approach	**Issue 5: 'permissibility of investment' – restrictive approach**
• evident onus on state to show that investment was not affirmatively approved or was based on corrupt practices.	• evident onus on investor to show that investment was affirmatively approved or was not based on corrupt practices.

Appendix 1: *Continued*

Issue 6: 'parallel claims' – expansive approach	**Issue 6: 'parallel claims' – restrictive approach**
• allowance of treaty claim in face of: o a treaty-based duty to exhaust (or other claim-related condition such as a time-limited duty to pursue) local remedies which has clearly not been satisfied by the claimant, whether or not the claim relates to a contract; o a contractually agreed dispute settlement clause that was consented to by the claimant or a closely related company, where the claim appears to relate to a contractual dispute but regardless of whether any claim has been brought in the contractually agreed forum and regardless of whether the treaty claim is based on an umbrella clause; o a fork-in-road clause, where the claimant or a closely related company ('closely related' meaning a company owned and likely controlled by the investor) has brought a parallel claim via the relevant 'path' of the fork-in-road (that is, in a domestic court or a domestic or international tribunal, according to the relevant path of the fork-in-road) and the claim arises from the same underlying factual dispute; or o an actual claim pursuant to another treaty, arising from the same factual dispute.	• refusal or delay (in order to permit resolution of aspects of the dispute in another forum) of a treaty claim in face of: o a duty to exhaust (or other claim-related condition such as a time-limited duty to pursue) local remedies which has clearly not been satisfied by the claimant, whether or not the claim relates to a contract; o a contractually agreed dispute settlement clause, where the claim appears to relate to the contract but regardless of whether or not any claim has been brought in the contractually agreed forum and regardless of whether the treaty claim is based on an umbrella clause; o a fork-in-road clause, where the claimant or a closely related company has brought a parallel claim via the relevant path of the fork-in-road and the claim arises from the same underlying factual dispute; or o an actual claim pursuant to another treaty, arising from the same factual dispute.

Appendix 1: *Continued*

Issue 7: 'scope of MFN treatment' – expansive approach	**Issue 7: 'scope of MFN treatment' – restrictive approach**
• extension of MFN to non-substantive/ treatment-oriented provisions of other treaties (for example, so as to include dispute settlement provisions of other treaties).	• refusal to extend MFN to substantive/ treatment-oriented provisions of other treaties (for example, so as to include dispute settlement provisions of other treaties).
Issue 8: 'national treatment' – expansive approach	**Issue 8: 'national treatment' – restrictive approach**
• non-application of requirement for 'like circumstances' or 'similarly situated' investors/ investments; • broad approach to 'like circumstances', including where based on approach that is at least as broad as a competition-based reading (that is, one that focuses simply on the competitive relationship between the compared investors/ investments and that does not account for differences based on policy considerations such as health or environmental risks arising from the economic activity); • low evidentiary threshold (for example, less than a balance of probabilities or its approximate equivalent; no requirement for systemic discrimination beyond individual comparator(s)) for claimant to establish de facto discrimination; or • low evidentiary threshold to establish protectionist intent as sole basis for breach (for example, ambiguous statements by public officer potentially justified by other policy objectives that provide a non-economic rationale for favouring domestic competitors).	• strict approach to 'like circumstances' or 'similarly situated'; • declining to find like circumstances based solely on a competition-based reading; • rigorous evidentiary threshold (for example, a balance of probabilities or its approximate equivalent, or higher; requirement for evidence of systemic discrimination beyond individual comparator(s)) for claimant to establish de facto discrimination; or • requirement of protectionist intent as a condition of breach.

Appendix 1: *Continued*

Issue 9: 'fair and equitable treatment – relationship to customary standard' – expansive approach • establishment as an autonomous standard beyond customary standard.	**Issue 9: 'fair and equitable treatment – relationship to customary standard' – restrictive approach** • limitation to customary standard.
Issue 10: 'fair & equitable treatment – content' – expansive approach • where limited to customary standard, non-application of requirement to establish state practice and *opinio juris* as basis for novel aspects of customary standard; or • whether or not limited to customary standard, introduction of novel concepts that clearly expand the tribunal's authority to review substantive state decisions and that go beyond *Neer* or *ELSI* terminology.	**Issue 10: 'fair & equitable treatment – content' – restrictive approach** • where limited to customary standard, application of requirement to establish state practice and *opinio juris* as basis for novel aspects of customary standard; or • whether or not limited to customary standard, limitation of the standard to the *Neer* or *ELSI* terminology and/ or rejection or serious containment of novel concepts (for example, by incorporation of rigorous duty on claimant to know and evaluate law of host state and prospect of legal reform or by the adoption of a deferential position where host state has an objective basis for the decision).
Issue 11: 'full protection and security' – expansive approach • expansion beyond issues of physical security of the investor and investment to include concepts of legal security and stability of the investment climate; or • assignment of full responsibility to host state for physical harm suffered by investor or investment without discussion of severe longstanding conflict in a country that provides context for the physical harm suffered.	**Issue 11: 'full protection and security' – restrictive approach** • limitation to issues of physical security; or • alleviation of host state's responsibility for physical harm suffered by investor or investment based on severe longstanding conflict in a country that provides context for the physical harm suffered.

Appendix 1: *Continued*

Issue 12: 'indirect/ regulatory expropriation' – expansive approach	**Issue 12: 'indirect/ regulatory expropriation' – restrictive approach**
• use of test for indirect expropriation that focuses exclusively or primarily on the effect of the measure on the investor and that ignores or seriously downplays other potentially relevant factors, such as the regulatory purpose of measure (even where the measure is non-discriminatory) or a requirement for enrichment of the host state; • extension of effects-based analysis of indirect expropriation to situations in which the effect on the investor/ investment is 'significant' or 'substantial', or otherwise less than a 'nearly complete taking' of the investment; or • allowance of expropriation claim based on severance of the property right or economic interest into segments which are then subjected to a distinctive analysis for expropriation.	• use of a test for indirect expropriation that excludes all measures that are adopted for a legitimate public purpose or that applies stringent limiting factors beyond the effect on the investor/ investment, such as a requirement for enrichment by the host state; • limitation of effects-based analysis of indirect expropriation to situations in which the effect on the investor/ investment is a 'nearly complete taking' (or equivalent); or • refusal to allow expropriation claim on basis that it represented an attempt to sever the property right or economic interest into segments which would then be subjected to a distinctive analysis for expropriation.
Issue 13: 'scope of umbrella clause' – expansive approach	**Issue 13: 'scope of umbrella clause' – restrictive approach**
• interpretation that the umbrella clause can be violated by private or commercial acts of the host state (that is, any breach of contract).	• limitation of the umbrella clause to cases of sovereign interference or denial of justice or equivalent 'public' acts of the host state, without extending to private or commercial acts of the state.
Issue 14: 'essential/ national security' – expansive approach	**Issue 14: 'essential/ national security' – restrictive approach**
• exclusion, from the scope of the exception, of emergency measures to address a domestic financial and economic crisis.	• inclusion, within the scope of the exception, of emergency measures to address a domestic financial and economic crisis.