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Introduction: The Legitimacy Crisis and the Empirical Turn

DANIEL BEHN*, OLE KRISTIAN FAUCHALD** AND MALCOLM LANGFORD***

1.1 Introduction

The development of the modern investment treaty regime represents one of the most remarkable and swift expansions of international law in the post-war period. In just 30 years, the regime has developed from a small subsect of international law to one of its most prominent, with over 3,500 signed treaties[1] and over 1,100 investor-state arbitrations registered.[2] The significance of the regime is attributable to the largely bilateral treaty network, and to the tremendous growth in the use of the investor–state dispute settlement (ISDS) mechanisms embedded in the vast majority of all international investment agreements (IIA) currently in force.[3]

* Associate Professor (Senior Lecturer) in International Law, Queen Mary University of London; Associate Research Professor, PluriCourts, University of Oslo. This book and this chapter was supported by the Research Council of Norway through its Centres of Excellence Funding Scheme, project number 223274: PluriCourts: Centre for the Study on the Legitimate Roles of the Judiciary in the Global Order. The editors would also like to recognize and thank Maxim Usynin for his assistance with this volume, but also more generally for his hard work, dedication and loyalty to numerous projects over the years.

** Professor of Law and PluriCourts Coordinator (2012), Department of Public and International Law, University of Oslo; Research Professor, Fridtjof Nansen Institute.

*** Professor of Public Law and Director of CELL, Department of Public and International Law, University of Oslo; Co-Director, Centre on Law and Social Transformation, University of Bergen and CMI.

1 UNCTAD IIA Navigator <investmentpolicy.unctad.org/international-investment-agreements> data through 1 January 2020.

2 PITAD database <pitad.org> data to 1 January 2020.

3 UNCTAD IIA Navigator (n. 1). See ch. 2 for our updated mapping of ISDS clauses in IIAs. See also Joachim Pohl, Kekeletso Mashigo and Alexis Nohen, 'Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey' *OECD Working Papers on International Investment 2012/02* (96% of the 1,660 BITs surveyed contained ISDS language).

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The ISDS[4] system – the focus of this volume – provides ad hoc, one-off international arbitration for prospective disputes that can be initiated by an individual or corporate foreign investor against the state hosting its investment. Starting with the first treaty-based ISDS case in 1987,[5] it has grown from a few cases into a sprawling network of international adjudication, which we analyse closely in the following chapter. As Figure 1.1 indicates, we have seen an upwards growth trajectory over the past two decades with the past five years flattening off at about 80–100 new treaty-based ISDS cases being registered annually. Given that treaty-based ISDS cases take an average of 3.74 years from registration to final award[6] and that about a third of all cases are settled or discontinued,[7] approximately 40–50 final awards are currently being rendered each year,[8] and 400 treaty-based ISDS cases are pending at any given time.[9]

Putting this evolution in comparative perspective, it is difficult to find other areas of international legal practice that have generated such a caseload in both quantity and case complexity in a relatively short period of time.[10] For example, the World Trade Organization (WTO) and its state-to-state Dispute Settlement Understanding (DSU) generated a comparable caseload to the investment treaty regime in the late 1990s and 2000s, but by 2012 new ISDS cases were outpacing WTO cases three to

[4] The term ISDS can be used to label the provisions in an IIA that permit foreign investors to initiate claims against states hosting their investments for alleged breaches of the investment protections standards provided in the relevant IIA. ISDS can also refer to individual arbitrations brought according to an ISDS provision in an investment treaty (and ISDS can be even broader, including contract or foreign direct investment law (FDI) law-based arbitrations against states or state entities; or even non-arbitral processes between investors and states such as mediation or conciliation). For the purpose of this chapter, we will use ISDS to refer primarily to the individual arbitration cases that arise directly out of an investment treaty. In addition to ISDS, such cases are also variously interchangeably called investment treaty arbitration, investor–state arbitration, international arbitration, investment arbitration, or international investment arbitration.

[5] *Asian Agricultural Products* v. *Sri Lanka* (ICSID Case No. ARB/87/3), Award, 27 June 1990, based on the United Kingdom–Sri Lanka BIT (1980).

[6] Daniel Behn, Tarald Berge, Malcolm Langford and Maxim Usynin, 'What Causes Delays in Investment Arbitration' (2019) *PluriCourts Working Paper*.

[7] PITAD (n. 2).

[8] Ibid.

[9] Ibid.

[10] As of 1 January 2020, a total of 751 cases were concluded with 373 cases pending (1,126 ISDS cases registered). Cases are listed by the year registered and whether the case has concluded (a final award rendered or case settled or discontinued). Post-award proceedings are not considered.

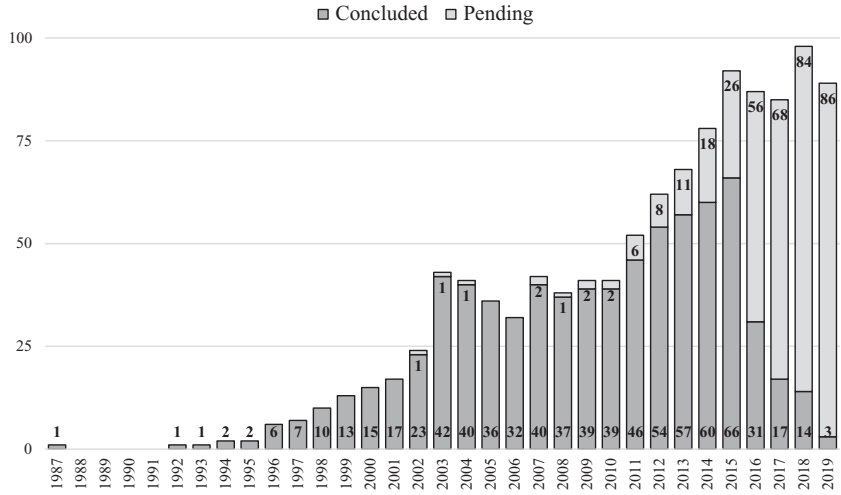

Figure 1.1 Growth in the ISDS caseload: pending versus concluded cases (1987–2020)[1]

[1] PITAD database <pitad.org> data to 1 January 2020.

one.[11] With many supporters,[12] it remains one of the most actively litigated areas of international law today. Moreover, as the caseload grew – over the past few decades – a considerable amount of jurisprudence through arbitral awards has emerged as well as an entirely new industry of investment arbitration experts, practitioners, government officials, and academics.[13]

[11] As of 1 January 2020, ISDS cases almost double those of the WTO. The WTO records 593 disputes compared with 1,126 ISDS cases registered. For WTO cases see WTO DSU <wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>.

[12] See Sadie Blanchard and Charles N. Brower, 'From "Dealing in Virtue" to "Profiting from Injustice:" The Case against "Re-statification" of Investment Dispute Settlement' (2014) 55 *Harvard Int'l L. J. Online*; EFILA, 'A Response to the Criticism against ISDS' <efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the-criticism_of_ISDS_ final_ dft. pdf>.

[13] Malcolm Langford, Daniel Behn and Runar Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20(2) *JIEL* 301; Andrea Bianchi, 'Epistemic Communities in International Arbitration', in Federico Ortino and Thomas Schultz (eds.), *Oxford Handbook of International Arbitration* (Oxford University Press, 2020); Emmanuel Gaillard, 'Sociology of International Arbitration' (2015) 31(1) *Arbitration International* 1; Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25(2) *EJIL* 387; Moshe Hirsch, 'The Sociology of International Investment Law', in Douglas et al. (eds.), *The Foundations of*

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This growth, however, has not come without a cost. ISDS cases are and have been controversial. As a decentralized system of one-off dispute settlement decided by party-appointed arbitrators who are typically tasked with balancing the private interests of a foreign investor from the global North against the public interests of a state in the global South, it is little wonder that the ISDS system has been embroiled in a legitimacy crisis for nearly 20 years now with virtually every aspect of the system being challenged and critiqued.[14] Less critical responses to the legitimacy crisis tend to focus on the desirability of specific targeted reforms from inside the system, making claims about the evolutionary nature of international legal practice and how the system can and does become more legitimate over time.[15] Stronger critiques of the system tend to target

International Investment Law: Bringing Theory into Practice (Cambridge University Press, 2014).

[14] Charles N. Brower, Charles H. Brower and Jeremy Sharpe may be the have been the first to write an article on the topic with 'The Coming Crisis in the Global Adjudication System' (2003) 19(4) *Arbitration International* 415. That piece is followed by three articles specific to NAFTA: Charles H. Brower, 'Structure, Legitimacy and NAFTA's Investment Chapter' (2003) 36 *Vanderbilt Journal of Transnational Litigation*. 37; Ari Afilalo, 'Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels Should Solve Their Legitimacy Crisis' (2004) 17 *Georgetown International Environmental Law Review* 51; Ari Afilalo, 'Meaning, Ambiguity, and Legitimacy: Judicial (Re-)construction of NAFTA Chapter 11' (2005) 25 *Northwestern Journal of International Law and Business* 279. Susan D. Franck puts the legitimacy crisis squarely in the title: 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521, and Gus Van Harten's book, *Investment Treaty Arbitration and Public Law* (Oxford University Press, 2007) is the first book-length critique of arbitration as a legitimate means for resolving public law disputes. Then come the regime critics: M. Sornarajah, 'A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration', in Karl P. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes* (Oxford University Press, 2008); and regime supporters, Charles N. Brower and Stephan W. Schill, 'Is Arbitration a Threat or a Boom to the Legitimacy of International Investment Law' (2008–9) 9 *Chicago Journal of International Law*. 471; and in 2010, Michael Waibel and colleagues published *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer, 2010).

[15] Chester Brown and Kate Miles (eds.), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011); Andrea Bjorklund, 'The Role of Counterclaims in Rebalancing Investment Law' (2013) 17(2) *Lewis and Clark Law Review* 461; Alec Stone Sweet and Florian Grisel, 'The Evolution of International Arbitration: Delegation, Judicialization, Governance', in Mattli and Dietz (eds.), *International Arbitration and Global Governance: Contending Theories and Evidence* (Cambridge University Press, 2014); Daniel Behn 'Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-The-Art' (2015) 46 (2) *Georgetown Journal of International Law* 363; Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press, 2017).

broader, more systemic issues that are less likely to be reformed from within over time. This type of critical perspectives about the regime is often characterized by systemic claims, for example that ISDS is afflicted by varying degrees of bias,[16] is excessively costly and lengthy,[17] with

[16] Susan D. Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law' (2007) 19(2) *Pac. McGeorge Global Bus. & Dev. L. J.* 337; David Branson, 'Sympathetic Party-Appointed Arbitrators: Sophisticated Strangers and Governments Demand Them' (2010) 25(2) *ICSID Rev.* 367; Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50(1) *Osgoode Hall L. J.* 211; Stavros Brekoulakis, 'Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making' (2013) 4(3) *JIDS* 553; Gus van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press, 2013); Nathan Freeman, 'Domestic Institutions, Capacity Limitations, and Compliance Costs: Host Country Determinants of Investment Treaty Arbitrations 1987–2007' (2013) 39(1) *International Interactions* 54; Susan D. Franck, 'Conflating Politics and Development: Examining Investment Treaty Outcomes' (2014) 55 *VJIL* 13; Cédric Dupont and Thomas Schultz, 'Do Hard Economic Times Lead to International Legal Disputes? The Case of Investment Arbitration' (2014) 19(2) *Swiss Political Science Review* 564; Daniel Behn (ibid.); Thomas Schultz and Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Study' (2015) 25(4) *EJIL* 14; Susan D. Franck and Lindsey Wylie, 'Predicting Outcomes in Investment Treaty Arbitration' (2015) 65 *Duke L. J.* 459; Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration' (2016) 53(2) *Osgoode Hall L. J.* 540; Cédric Dupont, Thomas Schultz and Merih Angin, 'Political Risk and Investment Arbitration: An Empirical Study' (2016) 7(1) *JIDS* 136; Alec Stone Sweet et al., 'Arbitral Lawmaking and State Power: An Empirical Analysis of Investor-State Arbitration' (2017) 8(4) *JIDS* 579; Daniel Behn and Malcolm Langford, 'Trumping the Environment? An Empirical Perspective on the Legitimacy of Investment Treaty Arbitration' (2017) 18(1) *JWIT* 14; Julian Donaubauer, Eric Neumayer and Peter Nunnenkamp, 'Winning or Losing in Investor-to-State Dispute Resolution: The Role of Arbitrator Bias and Experience' (2017) *Kiel Working Paper No. 2074;* Krzysztof Pelc, 'What Explains the Low Success Rate of Investor-State Disputes?' (2017) 71(3) *International Organization* 559; Daniel Behn, Tarald Laudal Berge, and Malcolm Langford, 'Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration' (2018) 38(3) *Northwestern Journal of International Law and Business* 333; Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Hart, 2018); Silvia Steininger, 'What's Human Rights Got to Do with It? An Empirical Analysis of Human Rights References in Investment Arbitration' (2018) 31(1) *Leiden J. Int'l L.* 33; Gus Van Harten, 'Leaders in the Expansive and Restrictive Interpretation of Investment Treaties: A Descriptive Study of ISDS Awards to 2010' (2018) 29(3) *EJIL* 504.

[17] Susan D. Franck, 'Rationalizing Costs in Investment Treaty Arbitration' (2011) 88(4) *U. Wash L. Rev.* 769; Albert Jan van den Berg, 'Time and Costs: Issues and Initiatives from an Arbitrator's Perspective' (2013) 28(1) *ICSID Rev.* 218; Adam Raviv, 'Achieving a Faster ICSID', in Jean Kalicki and Anna Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Resolution System: Journeys for the 21st Century* (Brill, 2015), 653; Susan D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (Oxford University Press, 2019); Sergio Puig, 'Contextualizing Cost-Shifting: A Multi-Method Approach' (2019) 58(2) *VJIL* 261; Daniel Behn and Ana Maria Daza, 'The Defense Burden in Investment Arbitration?' (2019) *PluriCourts Working Paper*.

conflicting and inconsistent jurisprudence,[18] a lack transparency and diversity in decision-making,[19] a system that rewards private over public interests;[20] and that all told, these aspects among others demonstrate that

[18] Ole Kristian Fauchald, 'The Legal Reasoning of ICSID Tribunals: An Empirical Analysis' (2007) 19(2) *EJIL* 301; Jeffrey Commission, 'Precedent in Investment Treaty Arbitration: A Citation Analysis of Developing Jurisprudence' (2007) 24(2) *J. Int'l Arb.* 129; Gabrielle Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse' (2007) 23 *Arb. Int'l* 357; Yas Banifatemi, 'Consistency in the Interpretation of Substantive Investment Rules: Is It Achievable?' in Roberto Echandi and Pierre Sauvé (eds.), *Prospects in International Investment Law and Policy: World Trade Forum* (Cambridge University Press, 2013); Thomas Schultz, 'Against Consistency in Investment Arbitration', in Zachary Douglas, Joost Pauwelyn and Jorge Viñuales (eds.), *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014); Katharina Diel-Gligor, *Towards Consistency in International Investment Jurisprudence: A Preliminary Ruling System for ICSID Arbitration* (Brill, 2017); Damien Charlotin, 'The Place of Investment Awards and WTO Decisions in International Law: A Citations Analysis' (2017) 20(2) *JIEL* 279; Mark Feldman, 'Investment Arbitration Appellate Mechanism Options: Consistency, Accuracy, and Balance of Power' (2017) 32(3) *ICSID Rev.* 528; José E. Alvarez, *Boundaries of Investment Arbitration: The Use of Trade and European Human Rights Law and Investor-State Disputes* (Juris, 2018); Niccolò Ridi, 'The Shape and Structure of the "Usable Past": An Empirical Analysis of the Use of Precedent in International Adjudication' (2019) 10(2) *JIDS* 200.

[19] Eugenia Levine, 'Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 29(1) *Berkeley J. Int'l L.* 200; Sergio Puig (n. 13); Susan D. Franck et al., 'The Diversity Challenge: Exploring the "Invisible College" of International Arbitration' (2015) 53 *Col. J Transnt'l L.* 429; Emilie M. Hafner-Burton and David G. Victor, 'Secrecy in International Investment Arbitration: An Empirical Analysis' (2016) 7(1) *JIDS* 61; Langford, Behn and Lie (n. 13); Lucy Greenwood, 'Tipping the Balance: Diversity and Inclusion in International Arbitration' (2017) 33(1) *Arb. Int'l* 99; Michael Waibel and Yanhui Wu, 'Are Arbitrators Political: Evidence from International Investment Arbitration' (2017) *Working Paper*; Jansen Calamita and Elsa Sardinha, 'The Bifurcation of Jurisdictional and Admissibility Objections in Investor-State Arbitration' (2017) 16(1) *LPICT* 44; Luke Nottage and Ana Ubilava, 'Costs, Outcomes and Transparency in ISDS Arbitrations: Evidence for an Investment Treaty Parliamentary Inquiry' (2018) 21(4) *Int. Arb. L. Rev.* 111; James Crawford, 'The Ideal Arbitrators: Does One Size Fit All?' (2018) 32(5) *Am. U. Int'l L. Rev.* 100; Taylor St. John et al., 'Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration' (2018) *PluriCourts Working Paper*; James Devaney, 'An Independent Panel for the Scrutiny of Investment Arbitrators: An Idea Whose Time has Come?' (2019) 18(3) *LPICT* 366; Malcolm Langford, Daniel Behn and Runar Lie, 'Computational Stylometry: Predicting the Authorship of Investment Arbitration Awards', in R. Whalen (ed.), *Computational Legal Studies: The Promise and Challenge of Data-Driven Research* (Edward Elgar, 2020), 53–76; Thomas Schultz and Niccolò Ridi, 'Arbitration Literature', in Schultz and Ortino (eds.), *Oxford Handbook of International Arbitration* (Oxford University Press, 2020), ch. 1.

[20] Jose E. Alvarez, 'The Return of the State' (2011) 20 *Minnesota Journal of International Law* 223; Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science', in Chester Brown and Kate Miles (eds.), *Evolution in Investment Treaty*

the game is rigged against poorer states, stifling economic development, not promoting it.[21]

From the early 2000s onwards, this mountain of critical scholarship and civil society reports[22]on the legitimacy crisis could be placed in two broad categories: critiques of the investment treaties and their substantive rules; and critiques of the process of resolving investment disputes, that is, ISDS.[23] By the mid-2010s, both sets of critiques reached a degree of maturity, as the debate on the legitimacy of ISDS moved clearly into the public sphere, and a diverse group of states – from South Africa, India and Venezuela to the United States (US) and the Czech Republic – initiated unilateral and bilateral reforms to substantive and procedural provisions of their IIAs. This policy reform movement turned multilateral in the late 2010s with UNCTAD's initiation of an Investment Policy Framework for Sustainable Development in 2015,[24] the Proposals for Amendment of the ICSID Rules,[25] and the emergence of UNCITRAL Working Group III (WG III) on ISDS Reform in 2017.[26] The systemic and multilateral reform projects that had seemed so politically

Law and Arbitration (Cambridge University Press, 2011); Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice: How Law Firms, Arbitrators, and Financiers are Fueling an Investment Arbitration Boom* (Transnational Institute, 2012).

[21] Lauge N. Skovgaard Poulsen and Emma Aisbett, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65 *World Politics*. 273; M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015); Lauge N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press, 2015); Peter Nunnenkamp, 'Biased Arbitrators and Tribunal Decisions against Developing Countries: Stylized Facts on Investor-State Dispute Settlement' (2017) 19 *J. Int'l Dev.* 851.

[22] See Stephan W. Schill, 'W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law' (2011) 22(3) *EJIL* 875; Thomas Schultz and Niccolò Ridi, 'Arbitration Literature', in Thomas Schultz and Federico Ortino (eds.), *Oxford Handbook of International Arbitration* (Oxford University Press, 2020), ch. 1.

[23] We analyse this literature closely in Chapter 2.

[24] Launched at the Financing for Development Conference in Addis Ababa, 2015 <investmentpolicy.unctad.org/investment-policy-framework>.

[25] See ICSID, *Volume 3: Proposals for Amendment of the ICSID Rules – Working Paper*, August 2018, paras. 302–5.

[26] For a brief history, see Malcolm Langford, Gabrielle Kaufmann-Kohler, Michele Potestà and Daniel Behn, 'UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions – An Introduction' (2020) 21(2–3) Journal of World Investment and Trade 167. The United Nations Commission on International Trade Law (UNCITRAL) Working Group III can, according to its mandate, work on all issues relating to the settlement of investment disputes, but not on the substantive rules provided in existing IIAs. UNCITRAL, 'Report of Working Group III (Investor–State Dispute Settlement

infeasible[27] became a possibility once again.[28] Regardless of what is achieved, at a minimum, the mandate of WG III provides a signal that a transition from a crisis period to a multilateral reform period could be occurring.[29]

While most critique of ISDS has been normative and doctrinal in nature, empirical research has been central in identifying and measuring the significance of certain concerns. Assisted by the empirical turn in international legal scholarship about a decade ago,[30] there is now a critical mass of empirical legal scholars and social scientists focusing

Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017)', UN Doc. No. A/CN.9/930/Rev.1 (19 December 2017). The ISDS reform process emerged gradually in 2015, when the UNCITRAL Secretariat commissioned a study to the Geneva Center for International Dispute Settlement (CIDS) to review whether the *Mauritius Convention on Transparency* could provide a useful model for possible reforms in the field of ISDS. See Gabrielle Kaufmann-Kohler and Michele Potestà, *Can the Mauritius Convention Serve as a Model for the Reform of Investor-State Arbitration in Connection with the Introduction of a permanent investment tribunal or an Appeal Mechanism? Analysis and Roadmap* (CIDS, 2016) <uncitral.org/pdf/english/CIDS_Research_Paper_Mauritius.pdf>. In 2017, the UNCITRAL Secretariat commissioned a further study from CIDS: see Gabrielle Kaufmann-Kohler and Michele Potestà, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards* (CIDS, 2017) <uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf>.

[27] Many previous post-Second World War attempts to multilaterize the international investment law did not produce binding treaties, including: the Havana Charter (1948); the Abs-Shawcross Draft Convention on Investments Abroad (1959); Louis B. Sohn and Richard R. Baxter, 'Draft Convention on the International Responsibility of States for Injuries to Aliens' (1961) 55(3) *AJIL* 548; the OECD Draft Convention on the Protection of Foreign Property (1967); the OECD Draft Multilateral Agreement on Investment (1998).

[28] In addition, there are at least two other major initiatives: the ICSID Rule Amendment Project <icsid.worldbank.org/en/amendments>; and the Energy Charter Treaty Modernization Project <energychartertreaty.org/modernisation-of-the-treaty>.

[29] Feldman (n. 18); Stephan W. Schill, 'Reforming Investor–State Dispute Settlement: A (Comparative and International) Constitutional Law Framework' (2017) 20(3) *JIEL* 649; Stone Sweet and Grisel (n. 15); Sergio Puig and Gregory Shaffer, 'Imperfect Alternatives: Institutional Choice and the Reform of Investment Law' (2018) 112(3) *AJIL* 361.

[30] See Susan D. Franck, 'Empirical Modalities: Lessons for the Future of International Investment' (2010) 104 *ASIL Proceedings* 33; Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106(1) *AJIL* 1; Sergio Puig, 'Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda' (2013) 36(2) *Fordham International Law Journal* 465; Christopher Drahozal, 'Empirical Findings on International Arbitration: An Overview', in Thomas Schultz and Federico Ortino (n. 16), ch. 27; Wolfgang Alschner, Joost Pauwelyn and Sergio Puig, 'The Data-Driven Future of International Economic Law' (2017) 20(2) *JIEL* 217.

specifically on investor-state arbitration: a substantial increase over a virtually non-existent field of study as late as 2004,[31] when almost all empirical research on the regime was still focused on measuring the effects of investment treaties,[32] and the few early empirical pieces on ISDS that did emerge were hampered by small sample size. Today, this critical mass of empirical legal scholars and social scientists[33] focusing on

[31] Before 2010, there were only a few scholars empirically assessing ISDS, Franck (n. 14); Susan D. Franck, 'The Nature and Enforcement of Investor Rights under Investment Treaties: Do Investment Treaties Have a Bright Future?' (2005) 12 *University of California Davis Journal of International Law and Politics* 47; Van Harten (n. 14); Commission (n. 18); Fauchald (n. 18); Susan D. Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50(2) *Harvard Int'l L. J.* 436; José Alvarez and Kathryn Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime', in Karl Sauvant (ed.), *Yearbook on International Investment Law and Policy 2008/2009* (Oxford University Press, 2009); Kathleen S. McArthur and Pablo A. Ormachea, 'International Investor-State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction' (2009) 28(3) *The Review of Litigation* 559; David Schneiderman, 'Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes' (2010) 30 *Northwestern Journal of International Law and Business* 383.

[32] Early studies on the investment treaty regime were researched primarily by political scientists focused on flows of FDI and their relation to IIAs. In fact, it appears to have been so focused on those aspects that it was not until 2014 when that first ISDS-related study took place: Beth Simmons, 'Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment' (2014) 66(1) *World Pol.* 12. Pre-2010 empirical studies on investment treaties tended to focus on how treaties would bring more capital to the Global South: Mary Hallward-Driemeier, *Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit . . . and They Could Bite* (World Bank, 2003); Peter Egger and Michael Pfaffermayer, 'The Impact of Bilateral Investment Treaties on Foreign Direct Investment' (2004) 32(4) *Journal of Comp. Econ.* 787; Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing States?' (2005) 33(10) *World Dev.* 1567; Tom Ginsburg, 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' (2005) 25(1) *Int'l Rev. L. Econ.* 107; Jeswald W. Salacuse and Nicholas P. Sullivan, 'Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 *Harvard Int'l L. J.* 67; Zachary Elkins, Andrew T. Guzman and Beth Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000' (2006) 60(4) *Int'l Org.* 811; Jason Yackee, 'Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?' (2008) 42(4) *Law & Soc. Rev.* 805; UNCTAD, 'The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing States' (2009) *UNCTAD Series on International Investment Policies for Development*; Jennifer Tobin and Susan Rose-Ackerman, 'When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties' (2010) 6 *Rev. Int'l Orgs.* 1.

[33] Examples include the use of empirics to support a theoretical claim (by political scientists): Poulsen and Aisbett (n. 21), and the use of empirics to test changes in treaty design

ISDS reflects the emergence of a burgeoning field: scholars have already used a range of methods and approaches – quantitative,[34] qualitative,[35] longitudinal,[36] surveys,[37] interviews,[38] archival,[39] network[40] and computational[41] – to analyse the ISDS system, probe its origins, its functioning and effects, and to address doctrinal questions.

The effects of this empirical turn are clear in a number of the debates on ISDS. For example, quantitative and economic research assessing potential pro-investor bias,[42] excessive damages awards,[43] correctness

(by legal scholars): Wolfgang Alschner, 'The Impact of Investment Arbitration on Investment Treaty Design: Myth versus Reality' (2017) 42(1) *Yale J. Int'l L.* 1.

[34] See above (nn. 16–20).

[35] Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford University Press, 2013); Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press, 2014); Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge University Press, 2015); David Collins, 'Loss Aversion Bias or Fear of Missing Out: A Behavioural Economics Analysis of Compensation in Investor–State Dispute Settlement' (2016) 8(3) *JIDS* 460.

[36] Malcolm Langford and Daniel Behn, 'Managing Backlash: The Evolving Investment Arbitrator?' (2018) 29(2) *EJIL* 551; Schultz and Dupont, Promoting the Rule of Law (n. 16).

[37] Franck et al. (n. 19); see also Maria Laura Marceddu, 'What's Wrong with Investment Arbitration?' Reforming International Investment Arbitration, ISDS Academic Forum, PluriCourts Centre for Excellence (LEGINVEST) and the Forum for Law and Social Science, University of Oslo, 1–2 February 2019.

[38] Stavros Brekoulakis et al., 'Impartiality and Personal Values in Arbitral Decision-Making', research project at Centre for Commercial Law Studies, Queen Mary University of London, 2019–2023; Todd Tucker, 'Inside the Black Box: Collegial Patterns on Investment Tribunals' (2016) 7(1) *JIDS* 183.

[39] Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (Oxford University Press, 2018).

[40] Puig (n. 13); Langford, Behn and Lie (n. 13).

[41] Wolfgang Alschner, 'Correctness of Investment Awards: Why Wrong Decisions Don't Die' (2019) *LPICT* 345; Malcolm Langford, Runar Lie and Daniel Behn, 'Computational Stylometry: Predicting the Authorship of Investment Arbitration Awards', in Ryan Whalen (ed.), *Computational Legal Studies: The Promise and Challenge of Data-Driven Research* (Edward Elgar, 2020), 53; Wolfgang Alschner and Dmitriy Skougarevskiy, 'Can Robots Write Treaties? Using Recurrent Neural Networks to Draft International Investment Agreements', in Bex (ed.), *Legal Knowledge and Information Systems: JURIX 2016* (IOS Press, 2016), p. 119.

[42] Franck et al. (n. 19).

[43] Daniel Behn, 'Performance of Investment Treaty Arbitration', in Squatrito et al. (eds.), *The Performance of International Courts and Tribunals* (Cambridge University Press, 2018); Jonathan Bonnitcha and Sarah Brewin, *Compensation under Investment Treaties: Best Practices* (IISD, 2019); see also Diane Desierto, 'ICESCR Minimum Core Obligations

of decisions[44] and double hatting by arbitrators as legal counsel have been foregrounded.[45] The centrality of empirical perspectives has only accelerated in light of the problem-centric mandates of UNCTAD's Investment Policy Framework for Sustainable Development and UNCITRAL WG III. In assessing the desirability in addressing concerns surrounding excessive costs and duration, correctness and consistency of awards, and arbitral diversity and independence – and reforms to address them – the process in UNCITRAL WG III has relied increasingly on empirical research and called for new studies.[46]

The primary aim of this volume therefore is to interrogate empirically this legitimacy crisis and attempts by the regime to legitimate itself. Across a range of issues, the authors contribute new empirical findings, test old ones, experiment with new methods, cover new themes, and analyse the implications for debates and reform efforts.

The book also serves three other purposes. First, we seek to provide a theoretical justification for the use of empirical data and methods to test normative claims. Empirical (and doctrinal) analyses of legitimacy are rarely framed and inflected by the dominant theories of legitimacy within political and legal philosophy. We therefore seek to contribute to the broader literature on the legitimacy of international courts and tribunals by organizing the contents around prominently used categories of legitimacy.[47] Framing the research agenda in this way allows us also to assess more

and Investment: Recasting the Non-expropriation Compensation Model during Financial Crises' (2012) 44(3) *GW Int'l L. Rev.* 473.

[44] Alschner (n. 41).

[45] Malcolm Langford, Daniel Behn and Runar Lie, 'The Ethics and Empirics of Double Hatting', *ESIL Reflection* (2018).

[46] Beginning with the establishment of an Academic Forum on ISDS to work alongside WG III, a Concept Paper project original led by Gabrielle Kaufmann-Kohler, Michele Potestà and George Bermann, and later with Daniel Behn and Malcolm Langford, has so far produced fourteen reports, all drawing on empirical data. The reports are available at <jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers>. See the empirical survey report: Daniel Behn, Malcolm Langford and Laura Létourneau-Tremblay, 'Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?' *Academic Forum on ISDS Concept Paper* (2020). Additional subject-matter specific reports include, *inter alia*: Stavros Brekoulakis and Catherine Rogers, 'Third-Party Financing in ISDS: A Framework for Understanding Practice and Policy', *Academic Forum on ISDS Concept Paper* (2019); Malcolm Langford, Daniel Behn and Maria Chiara Malaguti, 'The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement', *Academic Forum on ISDS Concept Paper* (2019).

[47] For an overview, see Andreas Føllesdal, 'Survey Article: The Legitimacy of International Courts' (2020) *Journal of Political Philosophy* <onlinelibrary.wiley.com/doi/pdf/10.1111/jopp.12213>.

rigorously our current empirical understanding of different legitimacy issues and where the need for future research lies. Thus, while the book can contribute to the current public policy debate over reform of the international investment regime,[48] it also provides an alternative template for the design of future empirical studies that investigate normative critique.

Second, we bring together a leading group of empirical legal scholars working on ISDS today to consolidate the empirical scholarship. Drawing on a range of social science theories, the authors theorize, conceptualize and interrogate the regime, deploy new and diverse methods and analytics, and advance a future research agenda. Importantly, given the rapid expansion and proliferation in arbitrations and accompanying actors, the ability of scholars to analyse broader patterns and develop generalizable findings, regardless of method, has been considerably enhanced.

Finally, many of the volume's chapters use a new and comprehensive data source for empirical research. As a somewhat diffuse, decentralized and often non-transparent system of international adjudication, the empirical study of ISDS has always been plagued by access to information and data. In order to overcome some of these limitations, a significant number of chapter authors in this volume have taken advantage of a newly developed comprehensive database on IIAs and ISDS created as part of a long-term research project at the PluriCourts Centre for Excellence: the PluriCourts Investment Treaty and Arbitration Database (PITAD).[49]

The remainder of the chapter proceeds as follows. Section 1.2 introduces the different types of legitimacy (normative, sociological, legitimation) and discusses how and to what extent empirical research can contribute to legitimacy claims in the context of historical and contemporary debate. Section 1.3 introduces the different chapters of the book, which is structured largely according to legitimacy categories. We conclude with some reflections on the overall themes and ways forward for empirical research.

1.2 Assessing Legitimacy Claims Empirically

One of the fundamental problems with the use of vague or broad normative conceptions, such as justice, fairness, and legitimacy, is that

[48] One of the features of many studies in the book is their nuanced conclusions: for example, studies using data on particular phenomena to find that some legitimacy claims are more relevant than others, or finding that the incidence of certain problematic aspects in ISDS is variable.

[49] PITAD (n. 2).

they – by their very nature – defy precise meaning. A further complication is that the breadth of these concepts permits their mobilization in popular discourse to advance general and sweeping claims. The result is that, in evaluating legitimacy critiques that arise out of the discourse on ISDS, the term legitimacy is often used as marker symbolizing dissatisfaction with a particular regime or legal order rather than articulating a particular normative conception of legitimacy. It risks therefore being either an 'empty signifier'[50] or ideational short-hand; glossing over the 'bewildering thicket of legitimacy challenges'.[51] Thus, when one says that ISDS is in a 'legitimacy crisis', the first question to ask is whether the term is being used to identify particular normative dilemmas in regard to its claims to authority, articulate a comprehensive moral critique of ISDS, or express a general dissatisfaction with the regime because it has been perceived as unfair or unjust by a certain set of actors.

For our purposes, we wish to move away from the use of legitimacy as a general term and instead focus on particular aspects of legitimacy (and legitimation) as they are expressed in the discourse and structured in theory. To give some depth to what we are talking about when evaluating specific legitimacy claims in the context of ISDS, we take a brief tour through the jungle of legitimacy definitions. We distinguish between normative (including legal) and sociological legitimacy; and between legitimacy and legitimation. Yet, ontology is not enough. In this volume, we seek to connect empirical inquiry with the various legitimacy claims lodged for and against the regime.

1.2.1 *Normative and Sociological Legitimacy*

There is no authoritative or generally accepted definition of legitimacy. However, one typology is common. Legitimacy is conceptualized as either normative (including legal legitimacy) or sociological. *Normative legitimacy* concerns the rightness of an institution's exertion of power. In the context of global governance institutions, Buchanan and Keohane define it as:

> the right to rule, understood to mean both that institutional agents are morally justified in making rules and attempting to secure compliance with them and that people subject to those rules have moral, content-independent reasons to follow them and/or to not interfere with others' compliances with them.[52]

[50] Claus Offe, 'Governance: An "Empty Signifier?"' (2009) 16(4) *Constellations* 550.
[51] Føllesdal (n. 47), 16.
[52] Alan Buchanan and Robert Keohane, 'The Legitimacy of Global Governance Institutions', in Rudolf Wolfrum and Volker Röben (eds.), *Legitimacy in International Law* (Springer, 2008), p. 25.

Legitimacy is thus a set of moral standards by which an institution or regime is judged or justified.

In the context of law and legal institutions, normative legitimacy may also carry claims about legal authority. In this respect *legal legitimacy* may be defined as a 'property of an action, rule, actor or system which signifies a legal obligation to submit to or support that action, rule, actor or system'.[53] While there may be discussions over the 'legal validity' of such a rule, the point for this species of normative legitimacy is that a discussion of legitimacy begins with legal obligation.[54]

Some go further and claim that the concept of normative legitimacy should be chiselled down to legal legitimacy when discussing law and its institutions, worrying that a broad normative approach is too demanding or even too permissive. The latter notion is clear in Abi-Saab's attack on the use of normative legitimacy assessments: 'I would discard from the discourse of legitimacy any attempt to use it as a means to dodge or get around the law; as a passé-droit, a licence trumping legality or a "justification" of its violation.'[55]

However, assessing the broader normative legitimacy of an institution represents a long tradition in political thought and practice, often forming the basis for policy and legal proposals or calls for adjudicative deferentialism or activism in the case of courts, and captures certainly the broad range of critiques directed at the ISDS regime – which are moral, legal or both. Moreover, normative legitimacy provides an important external assessment of an institution's ability to impose its legal (interpretive and coercive) authority. In any case, positive law remains consistently and highly relevant to two constituent elements of normative legitimacy: the fundamental role of consent in international law and process constraints on jurisdiction and legal reasoning. Any application of normative legitimacy needs to take seriously the existence of legal mandates and jurisdictional constraints. In the field of ISDS, part of the debate is precisely concerned with the scope of both the legal mandate and procedure. This underscores a more general point about the need to

[53] Christopher Thomas, 'Uses and Abuses of Legitimacy in International Law' (2014) 34(4) *Oxford J. Legal Studies* 729, 735.

[54] Ibid., 735–8.

[55] Georges Abi-Saab, 'The Security Council as Legislator and as Executive in Its Fight against Terrorism and against Proliferation of Weapons of Mass Destruction: The Question of Legitimacy', in Wolfrum and Röben (n. 52), 116.

separate out the different elements of legitimacy and the object and subject of legitimacy to which we return below.

Sociological legitimacy, as distinct from normative legitimacy, is a conception of legitimacy that is behavioural or descriptive. It asks whether 'the governed' believe and accept that an institution has, or maintains, the power to rule over them. In this Weberian sense, one asks whether individuals affirm 'a system of authority' and lend it 'prestige', such that obedience may follow.[56] This type of legitimacy is descriptive in the sense that its purpose is to empirically catalogue belief systems of those subject to a particular legal system, set of rules or institution. It does not claim to evaluate whether those beliefs are normatively justified. For sociological legitimacy, it may be important to identify which actors or audiences are the targets of a particular institution's legitimacy – which can include 'both state and societal actors, from government elites to ordinary citizens', representing different 'constituencies'.[57] Moreover, sociological legitimacy may relate to general or specific aspects of adjudication (e.g. ISDS generally or a particular decision or aspect of ISDS related rules of procedure); whether beliefs are stable or not; and whether there are particular background conditions for the formation of beliefs.[58]

In the field of law, sociological legitimacy is often unavoidable.[59] As Buchanan and Keohane state, 'The perception of legitimacy matters, because, in a democratic era, multilateral institutions will only thrive if they are viewed as legitimate by democratic publics.'[60] A modest body of literature has engaged with the sociological legitimacy of various national and international courts.[61] Efforts to measure it in the decentralized field of international investment law and arbitration have struggled, although some surveys and experiments,[62] and media and document content

[56] Max Weber, *The Theory of Social and Economic Organization* (Free Press, 1964), p. 382.
[57] Jonas Tallberg and Michael Zürn, 'The Legitimacy and Legitimation of International Organizations: Introduction and Framework' (2019) 14(4) *Rev. Int'l Orgs.* 581.
[58] James Gibson, Gregory Caldeira and Vanessa Baird, 'On the Legitimacy of National High Courts' (1998) 92(2) *Am. Pol. Sci. Rev.* 343, 351; and updated results in James Gibson, 'The Legitimacy of the U.S. Supreme Court in a Polarized Polity' (2007) 4(3) *J. Emp. Legal Studies* 507.
[59] Tallberg and Zürn (n. 57).
[60] Alan Buchanan and Robert Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20(4) *Ethics and International Affairs* 405, 406.
[61] On international courts, see the overview in Erik Voeten, 'Public Opinion and the Legitimacy of International Courts' (2013) 14(2) *Theor. Inq. Law* 411. On domestic courts, see e.g. Gibson, Caldeira and Baird (n. 58) and Gibson (n. 58).
[62] Marceddu (n. 37).

analysis, have sought to provide a quantitative character to evidence on beliefs about ISDS.[63]

International lawyers and international relations scholars sometimes conflate normative and sociological conceptions. It could be argued that the two go together in practice and that the former is a proxy for the latter (e.g. if an institution is normatively legitimate it is likely to be accepted as legitimate in a sociological sense). However, this approach is questionable: actor beliefs may diverge significantly from the results of a principle-based analysis. This divergence is often apparent, if not acute, for judges and arbitrators. In their decisions or reasoning, the need to build sociological legitimacy (e.g. through greater deference to a state) may come at the cost of normative legitimacy (e.g. ensure consistency in deference towards states), and vice versa.

Nonetheless, following Habermas and others, it is important to underline that sociological perspectives can sharpen normative claims.[64] If, contrary to normative expectations, an institution or regime is unable to maintain legitimacy in practice, those very expectations may require reconsideration. A sociological perspective can therefore heighten awareness of the real as opposed to imagined powers of institutions and 'inform judgments about alternative pathways to legitimate rule'.[65] Legitimacy beliefs may also produce indirect moral effects. As Føllesdal notes, an enhanced sociological legitimacy for an international court or tribunal can improve compliance, which 'may affect its actual *normative* legitimacy, enabling states to prevent free riding on agreed rules'.[66] Likewise, sociological legitimacy is not entirely free from normative notions. The framing of sociological legitimacy is dependent or 'conceptually parasitic' on some a priori conception of normative legitimacy.[67]

With that said, the main focus of this volume will be to respond to normative legitimacy claims – in other words, is the critique of ISDS justified? Yet, a secondary focus is sociological, and this dimension of

[63] Langford and Behn (n. 36).
[64] Jurgen Habermas, *Communication and the Evolution of Society* (Beacon Press, 1979), p. 205.
[65] Bruce Gilley, *The Right to Rule: How States Win and Lose Legitimacy* (Columbia University Press, 2009), p. xiii.
[66] Føllesdal (n. 47), 6.
[67] Daniel Bodansky, 'Legitimacy in International Law and International Relations', in Dunoff and Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press, 2013), p. 327.

legitimacy is covered in three respects. First, many chapters take a departure point in beliefs. Second, some of the normative chapters explore how beliefs might shift with greater normative awareness. Third, the final part of the book is devoted to how sociological legitimacy might be enhanced – in others words through legitimation, to which we now turn.

1.2.2 *Legitimacy and Legitimation*

The terms legitimacy and legitimation are obviously interrelated but they require slightly different starting points. *Legitimacy* is a moral perspective or sociological belief but *legitimation* refers explicitly to the process by which actors 'come to believe in the normative legitimacy of an object'.[68] In some cases, this process is a result of an explicit legitimation strategy; while in other cases, it is neither deliberate nor controllable, for example an institution gains or loses legitimacy 'as the product of the unconscious replication of pervasive legitimacy narratives'.[69] A significant body of social science literature is thus concerned with identifying legitimacy beliefs (e.g. based on self-interest, normative approval, and comprehensibility), studying strategies for 'gaining, maintaining, and repairing legitimacy'[70] and parsing their dimensions such as 'intensity (strength), tone (direction), and narratives (content)'.[71]

Legitimation is inherently a dynamic concept. Legitimacy assessments, whether normative or sociological, often contain a relatively static version of the object at hand: the legitimacy of a regime or institution is viewed at one point in time. Legitimation, however, generally refers to a diachronic process, typically as a strategic response to identified legitimacy deficits. Legitimation studies are often concerned with processes and interventions that increase or decrease institutional legitimacy across time, using methods ranging from process tracing to qualitative interviews and surveys and quantitative and computational analysis. For example, scholars have scrutinized whether investment arbitrators have sought to maintain the legitimacy of the regime by collectively producing decisions that are more favourable to state respondents, such

[68] Thomas (n. 53), 742.
[69] Ibid.
[70] Mark C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' (1995) 20(3) *Academy of Management Review* 571, 572.
[71] Tallberg and Zürn (n. 57), 589.

as reducing the number of claims won, mitigating damages, or exercising caution in high-profile ISDS cases.[72]

While the modes of assessment between legitimacy and legitimation are distinct, it is not unusual for there to be overlap between evaluations of the legitimacy of an institution and the legitimation processes it engages in. To assess the legitimation processes of a regime requires that one evaluates these processes in terms of its 'targets' (who or what is the target of efforts to increase or decrease the legitimacy of a particular institution?), 'purposes' (for what purpose does the institution seek to enhance its legitimacy?) and 'audiences' (which actors hold relevant beliefs?). Once the target, purposes and audience for legitimation has been identified, it becomes easier to determine the factors that contribute to or detract from an institution's legitimacy in a particular context and what strategies might be more effective.

Given the focus of this volume, it is the various institutions and procedures constituting elements of ISDS that are the *targets* of legitimacy. Within ISDS, there are a number of ways that the focus can be disaggregated. This includes arbitrators, arbitration institutions, substantive provisions of treaties, and rules of procedure.

The *purpose* of legitimation may be diverse. We may take as a starting point that the core purpose that legitimacy may serve for ISDS is to influence disputing parties to voluntarily comply with decisions. To many, the purpose could extend further. It can include the willingness of third parties affected by the outcomes of ISDS (e.g. local populations, employees and the investors' home states) to accept and respect the conclusions of an ISDS tribunal; acceptance by relevant actors (e.g. national or international courts, tribunals and enforcement institutions) of the analytical approaches, interpretations and conclusions of ISDS as authoritative and controlling; and saving the entire system from systemic backlash.

In the case of ISDS, the *audiences* are many and diverse. There are multiple actors who are either required to comply with their rules and rulings or possess particular interests in their design and functioning. While core actors are those who should directly comply with the ruling of a tribunal – that is, the specific host state and investor in a particular ISDS dispute – there may be a variety of other relevant actors that are not direct parties to a particular dispute. These might include, *inter alia*,

[72] Langford and Behn (n. 36).

other states hosting foreign investments, the home states of investors, specific institutions and entities within home states and host states, transnational actors such as specific groups of investors, legal experts, quantum experts, intergovernmental political and adjudicative institutions, NGOs, and entities that advise states and investors.

While the main focus of this volume is in responding to normative legitimacy claims within a broader sociological setting, the final part of this volume contains three chapters assessing legitimation of different aspects of the system for different purposes (see section 1.3). Moreover, some of the specific legitimacy chapters (e.g. chapters 7 and 10) also address legitimation strategies.

1.2.3 Empirical Assessments: Approaches, Possibilities and Limitations

It is one thing to categorize legitimacy concepts; it is another to measure them empirically. This applies to both normative and sociological approaches. The empirical challenges are fourfold: construct validity, data collection, choice of theory and method, and interpretation of results.

The first challenge is *construct validity*, which concerns concretizing and operationalising the abstract moral notion or hidden social phenomenon of legitimacy. For normative forms of legitimacy, this requires reducing complex and contestable concepts in legitimacy debates such as 'independence', 'transparency', 'diversity' or 'interpretive activism' into something measurable.

In this volume, authors spend considerable time in trying to operationalize and justify methods for identifying 'bias' (chapter 3), 'rule of law' (chapter 8) and 'conflict of interest' (chapter 13). Even simpler concepts require difficult choices. For example, do we treat as similar developing countries facing an ISDS claim if they range from low income to upper middle income countries according to the World Bank Income Groups (see chapter 2)? Or in determining the effect of the 'nationality' of arbitrators on decision-making, should a 'non-Western' national with long-term residence in the 'West' be categorized as Western or not (see chapter 10)? Likewise, when is a foreign investor small, medium, large or extra-large given all have multi-million-dollar revenue streams (chapter 13)?

The same challenge applies in measuring sociological legitimacy, where Tallberg and Zürn note that '[a]s a product of internal processes of cognition and recognition, legitimacy is less readily observable than

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many other phenomena in world politics, such as wars and treaties.'[73] In this volume, we are faced with operationalizing concepts like 'backlash', 'strategy' and 'outcome'. Nonetheless, we know that these subjective belief systems can be identified and measured in a similar manner to the objective data points on wars and treaties, albeit the effort to collect such data is daunting and time consuming. In the field of international relations, the most common forms of seeking to identify beliefs are through surveys and survey experiments, political communication and political behaviour – as Armstrong and Nottage draw on in their mixed methods appraisal of support for ISDS (Chapter 11).[74]

The second challenge relates to data collection. All forms of empirical research on ISDS have historically been hampered by the international investment regime's default positions on confidentiality and decentralization. This difficult terrain has meant that data collection has been built on physical and digital sleuthing as much as traditional methods of collection and systemization of legal decisions and orders. In the last few years, however, ISDS databases can claim to include almost all treaty-based cases, even if not all awards and other arbitration-related documents are available.[75] We estimate, for example, that PITAD[76] – based on comments we have received from three arbitral institutions (see chapter 2) – currently only fails to account for a small universe of approximately fifty to sixty 'known unknown' treaty-based ISDS cases. There are also 'unknown unknown' cases that may range from ten to thirty.[77]

One important challenge is the lack of data on non-ICSID contract – and FDI law-based ISDS cases. Access to information regarding such cases is essential when exploring many legitimacy-related issues, in particular since countries that provide consent to ISDS through FDI laws

[73] Tallberg and Zürn (n. 57), 596.

[74] See above (n. 61–63).

[75] ITAlaw <italaw.com> is the main text-based database for treaty-based arbitration. The ICSID Cases Database <icsid.worldbank.org/en> includes a broader range of cases based on FDI laws and contracts, but does only cover those administered by ICSID. International Arbitration Database <arbitration.org> seems to include all kinds of ISDS cases, but its specific coverage remains somewhat unclear. More numerically oriented databases include PITAD (n. 2) and UNCTAD ISDS Navigator <investmentpolicy.unctad.org/investment-dispute-settlement>. This brief and selective overview does not include commercial or project-specific databases.

[76] PITAD (n. 2).

[77] In the early days of the practice of the system, the universe of completely below-the-radar cases was considered to be significantly higher than today.

tend to have low numbers of IIAs (see chapter 2) and since investors frequently have the option of basing ISDS claims on FDI laws or contracts rather than on IIAs. Difficulties in identifying contract and FDI law ISDS cases and their underlying awards has resulted in a 'spotty' cluster of known cases. There are also serious selection bias issues at play: the awards in such cases will almost exclusively enter the public domain through set-aside petitions in the courts of the seat or through enforcement actions in the courts of third states. These cases, all concerning post-award litigation, thus represent not only a small subset of the overall caseload, but a very particular one: that is, those typically with flaws and compliance problems.[78] These scattered and often buried awards thus continue to present challenges for the quality and expansion of ISDS databases.

Many empirical questions require access to other types of materials – which might include background or contextual factors for a tribunal decision (typically fact-based inquiries), motivations and characteristics of the various stakeholders and actors (arbitrators, foreign investors, law firms, valuation experts, industry experts, and the arbitral institutions themselves), or the effects of ISDS awards on either the system as a whole or on a particular respondent state facing enforcement actions against it in a third state (typically looking at questions of compliance and impact). Some data of this nature has been collected, for example the characteristics of arbitrators – their gender, nationality, education and professional background. Some research projects are also using ambitious experimental methods to identify the operation of cognitive biases in decision-making (chapter 3), while others seek to map the breadth and diversity of personal values among ISDS decision-makers using value surveys, interviews, and psychometric testing.[79]

However, even as the methods advance and data improves, challenges remain when researching legitimacy issues associated with ISDS. These include the problems that arise when basic information regarding the caseload of a global regime requires state-specific collection of

[78] Luke Eric Peterson at IAReporter <iareporter.com> has constructed a new dataset that has a large collection of non-ICSID FDI law and contract cases.

[79] Stavros Brekoulakis et al. (n. 38). This project develops a new theoretical understanding for the assessment of impartiality among different types of party-appointed adjudicators. Empirical methods, psychometric testing, interviews, textual content analysis and surveys are used to create new variables and measures that, when combined with more traditional socio-demographic data, can help us better understand how panel dynamics, personal value diversity, cognitive biases and various other institutional biases influence decision-making processes and outcomes in ISDS.

information, requiring the use of localized qualitative and quantitative methods and process tracing across all states. No other international judicial regime requires such intensive research, which explains why empirical scholarship on both the pre-litigation and the post-litigation phases in ISDS cases still lags behind significant studies elsewhere.[80]

The third challenge is choice of *method*. Much research on the ISDS regime has been of the doctrinal variety[81] although it is diversifying. Social science methods are employed increasingly, with greater attention being paid to issues of case selection and research design.[82] To be sure, doctrinal or traditional methods carry certain advantages in answering claims about the legitimacy crisis. Scholars are able to obtain a relatively fine-grained understanding of the actual development of the jurisprudence. For example, jurisprudential scholarship suggests a small but discernible capability of ISDS tribunals to respond reflexively to certain aspects of critique against the system: such as in the areas of environmental protection and broader issues of sustainable development;[83] in relation to indirect expropriation;[84] fair and equitable treatment;[85] full protection and

[80] See Laurence Helfer and Erik Voeten, 'International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe' (2014) 68(1) *Int'l Org.* 77; Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge University Press, 2014); Hyeran Jo and Beth A. Simmons, 'Can the International Criminal Court Deter Atrocity?' (2016) 70(3) *Int'l Org.* 443; Øyvind Stiansen, 'Directing Compliance? Remedial Approach and Compliance with European Court of Human Rights Judgments' (2019) *Br. J. Political Sci.* <doi.org/10.1017/S0007123419000921-9>.

[81] For a good example of a doctrinal survey of the jurisprudence in ISDS, see Rudolf Dolzer, 'Fair and Equitable Treatment: Today's Contours' (2014) 12(1) *Santa Clara J. Int'l L.* 7.

[82] See e.g. Jorge Viñuales, 'Foreign Investment and the Environment in International Law: Current Trends', in Kate Miles (ed.), *Research Handbook on Environment and Investment Law* (Edward Elgar, 2019), p. 12; Wolfgang Alschner and Kun Hui, 'Missing in Action: General Public Policy Exceptions in Investment Treaties', in Lisa Sachs, Lise Johnson and Jesse Coleman (eds.), *Yearbook on International Investment Law and Policy 2018* (Oxford University Press, 2019), ch. 21.

[83] Marie-Claire Condonier Segger, Markus W. Gehring and Andrew Newcombe (eds.), *Sustainable Development in World Investment Law* (Kluwer, 2011); Behn and Langford (n. 13); Viñuales (ibid.).

[84] Caroline Henckels, 'Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration' (2012) 15(1) *JIEL* 223.

[85] Dolzer (n. 81).

security;[86] most-favoured-nation treatment;[87] or on the definition of an investment;[88] but also in studies showing how certain ISDS tribunals have ignored advances in seeming preference for maintaining the status quo.[89] These studies all demonstrate the potential for the use of more medium-N doctrinal research on the development of the jurisprudence in ISDS and how those doctrinal advances (or lack thereof) are modifying any trends away on legitimacy questions is also significant.[90]

Nonetheless, doctrinal methods suffer from various disadvantages. Their breadth is limited – in terms of description, generalization and information; as is their depth in terms of explanatory and predictive power. Moreover, even when legal texts provide seeming answers to legitimacy questions, a doctrinal approach can be misleading. For example, the legal discourse in awards may have no material consequences on actual decision-making.[91] Thus, a multimethod approach that harnesses the power of different methods is to be preferred.

In this volume, the trio of quantitative, qualitative and computational methods are deployed and sometimes together in a single chapter. *Quantitative* approaches permit broader description, identification of patterns, and testing for correlation through probabilistic logic.[92] With the use of controls and theory-driven testing, insight can also be gained on causation. The types of quantitative methods vary. They can range from simple descriptive statistics and binary correlations (chapters 5 and 6) to multivariate regression analysis on awards datasets and experimental surveys (chapters 3 and 11). However, quantitative methods have their clear limitations, especially their reliance on a numeric

[86] Stanimir A. Alexandrov, 'The Evolution of the Full Protection and Security Standard', in Meg Kinnear et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer, 2016), p. 319.

[87] Julie A. Maupin, 'MFN-Based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach' (2011) 14(1) *JIEL* 157.

[88] Van Harten (n. 14), 251.

[89] Jeffrey Waincymer, 'Balancing Property Rights and Human Rights in Expropriation', in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersman (eds.), *Human Rights in International Investment Law and Arbitratio*n (Oxford University Press, 2009), p. 275; Henckels (n. 84), 237.

[90] Thomas Keck, 'Medium-N Methods' in David Law and Malcolm Langford (eds.), *Research Methods in Constitutional Law: A Handbook* (Edward Elgar, 2020).

[91] Shai Danziger et al., 'Extraneous Factors in Judicial Decisions' (2011) 108(17) *Proceedings of the National Academy of Sciences of the United States of America* 6889.

[92] James Mahoney and Gary Goertz, 'A Tale of Two Cultures: Contrasting Quantitative and Qualitative Research' (2006) 14(3) *Pol. Anal.* 227.

simplification of complex phenomena and the challenge of controlling for multiple causal influences.

Focusing on a smaller number of cases, actors or objects, *qualitative* methods permit a deeper analysis of the context and explanation for different legal phenomena – whether case background, complexity of adjudicative reasoning and cultures. While a significant body of qualitative research is deductive and theory-driven,[93] much is inductive and operates with a different logic – seeking to find necessary and sufficient conditions rather than probabilistic relationships. The result is that qualitative approaches often contribute to theory and hypothesis development. In practice, qualitative methods are difficult to categorise but range from participant observation and interviews (chapter 11), to small to medium-N surveys, document content analysis (chapter 16), process tracing, and broader use of qualitative data to support theoretical propositions or hypotheses. Such qualitative studies might suffer from weaknesses from limited generalizability to risks of bias in case selection.

Computational methods are the new kid on the block and have rapidly made their presence felt in international economic law.[94] These methods represent a fusion of quantitative and qualitative methods – treating text as complex numerical patterns. They offer new techniques in prediction, text and network analysis, and computational power enables quicker analysis of a greater range of material and data. Existing data-driven research on ISDS and investment treaties has sought to map networks of citations,[95] arbitrators and counsel,[96] predict the authorship of arbitral awards[97] and the outcome of treaty negotiations between states.[98] In this volume, chapter 4 uses computational methods to map and probe the

[93] Langford, Behn and Lie (n. 13); Siri Gloppen, 'Courts and Social Transformation: An Analytical Framework', in Roberto Gargarella, Pilar Domingo and Theunis Roux (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate, 2006), ch. 2.

[94] Alschner, Pauwelyn and Puig (n. 30).

[95] Niccolo Ridi, 'Approaches to External Precedent: The Invocation of International Jurisprudence in Investment Arbitration and WTO Dispute Settlement', in Szilard Gáspár-Szilágyi , Daniel Behn and Malcolm Langford, *Adjudicating Trade and Investment Disputes: Convergence or Divergence?* (Cambridge University Press, 2020), p. 121.

[96] Langford, Behn and Lie (n. 13).

[97] Langford, Lie and Behn, 'Computational Stylometry' (n. 19).

[98] Wolfgang Alschner and Dmitriy Skougarevskiy, 'Can Robots Write Treaties? Using Recurrent Neural Networks to Draft International Investment Agreements', in Floris Bex and Serena Villata (ed.), *Legal Knowledge and Information Systems: JURIX 2016* (IOS Press, 2016), p. 119.

relationship between arbitrators and law firms. However, these methods also face their challenges – especially in discerning meaning rather than pattern in text, and explaining rather than predicting.

Finally, some methodological approaches seek to combine different methods, so-called mixed methods.[99] Methods can be combined *sequentially* (e.g. a regression analysis followed by case studies to test causality) or *concurrently* (e.g. a survey instrument with quantitative and qualitative questions). There are of course limitations in commensurability – ensuring that the methods can speak to each other and reveal convergence or divergence in data collection, results or findings. However, from a pragmatic perspective, mixed methods often provide a more sophisticated understanding of complex phenomena (chapters 4, 11 and 14).

The final challenge is interpretation of results. Caution should be exercised in discerning and communicating any empirical result, and each study should be judged on its own assumptions, strengths and limitations. More importantly, it should be viewed as part of a longer 'academic conversation'.

A quick example might help illustrate this point. There has been a perception (belief) that ISDS is illegitimate because there is a structural bias in favour of foreign investors winning a disproportionate number of claims against less developed states. To test this empirically, we would be interested in evaluating whether, in fact, foreign investors do win a disproportionate number of such cases against less developed states (higher win ratio than against developed states), and if there are any legitimate reasons (e.g. poor levels of governance or fact-specific circumstances) that can explain such differences. The trajectory of existing research on potential structural bias against developing states can take Franck's study from 2009 as a starting point. Using data up to 2007, she found that the development status of the respondent state did not have a statistically significant relationship with the final outcome of a case on the merits,[100] and in 2014, with more data, she argued that the result continued to hold when controlling for the level of democracy within a particular respondent state.[101]

[99] Abbas Tashakkori and John Creswell, 'Exploring the Nature of Research Questions in Mixed Methods Research' (2007) 1(3) *J. Mixed Methods Research* 207, 211.

[100] Franck, 'Development and Outcomes' (n. 31) but see also Gus Van Harten, 'Fairness and Independence in Investment Arbitration: A Critique of Susan Franck's Development and Outcomes of Investment Treaty Arbitration' (2011) *Osgoode Hall Law School of York University Research Paper*.

[101] Franck, 'Conflating Politics and Development' (n. 16).

However, examining a much larger dataset covering all cases up through 2017 and with a focus on the role of democratic governance, Behn, Berge and Langford found the reverse. They identified a strong statistically significant correlation between foreign investor wins and the development status of a particular respondent state (whether as a continuous or categorical variable);[102] and that the pattern generally persists when controlling for almost all types of democratic governance indicators, except one.[103] These findings are reinforced by Sattorova's qualitative case studies on ISDS which show that 'there is a significant current within the international arbitration community that favours the vision of investors as victims of corrupt governments and thus downplays their role in normalizing and entrenching weak governance in developing states.'[104]

Yet, and alternatively, Strezhnev advances and tests a different theory for why poorer states may lose more frequently than wealthier states. He finds evidence that poorer states settle 'weaker' cases more frequently than wealthier states thus skewing the statistics on foreign investor success rates upwards in poorer states.[105] Thus, the conclusion to be drawn here is that any empirical analysis of a legitimacy critique in ISDS will likely be no simple endeavour and will require multiple studies across time that employ synthetic theories and use different methods; and even then the results will likely be very nuanced.

1.3 Forms of Legitimacy and Overview of the Book

We now turn from legitimacy theory and empirical approaches to how both are applied in this book. Legitimacy assessments can be framed and disaggregated in multiple ways within and across different disciplines and traditions.[106]

[102] Behn, Berge and Langford (n. 14). The interesting nuance uncovered by this study is that it appears that the correlation between foreign investor success and respondent state development status is driven by foreign investors having very low success rates in cases against respondent states with a high development status rather than foreign investors having very high success rates against respondent states with a low development status.

[103] Ibid. Controlling for a property protection strength variable wiped out most of the effect of a state's economic development status.

[104] Sattorova (n. 16), 138–40, 165.

[105] Anton Strezhnev, 'Why Rich Countries Win Investment Disputes: Taking Selection Seriously' (2017) *Working Paper*. The argument is that the system is anti-developing state, which is different than stating that the system is pro-investor as argued above. One additional consideration is that the empirical classification of 'strong' and 'weak' cases is very hard to establish in an 'objective' manner.

[106] For different perspectives on disaggregating normative legitimacy, see Føllesdal (n. 47); Mark Thatcher and Alec Stone Sweet 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002) 25(1) *West European Politics* 1; Daniel Bodansky,

However, it is not particularly controversial to disaggregate normative legitimacy into three elements: consent, process and output.

Consent legitimacy primarily focuses on issues of the original basis and authority of an institution or regime. We propose that this form of legitimacy refers to the constitutive process for establishing and maintaining institutions or regimes. In contemporary international law, this type of legitimacy might refer to the establishing of a treaty regime covering a specific area of governance. A treaty, such as an IIA, might lack consent legitimacy if certain states were coerced into signing it or if the treaty authorizes actions that its parties never envisioned.[107] Equally, there may be consent legitimacy issues arising out of the scope of the delegation of authority that a state gives to third party adjudicators, such as ISDS arbitrators.

Process legitimacy generally refers to assessments of the process(es) by which rules, decisions and actions are made, applied, or interpreted. In the context of ISDS, arbitral tribunals may be, or be viewed as, legitimate if they fulfil certain criteria such as independence, impartiality, transparency, accountability, judicial restraint and due process or contribute to more effective participation (commonly referred to as standards of procedural justice or fairness) or to standards of decision-making and legal reasoning.[108] However, issues relating to efficiency or the lack thereof may also raise issues of legitimacy. For example, are arbitrator challenge procedures legitimate if they are disproportionately disruptive to the progress of the case? Are there any legitimacy concerns with the costs of arbitral tribunals? What about the evidentiary standards and assurances of equality of arms between the parties?

Output legitimacy generally refers to the instrumental or substantive justifications (purposes) for an institution or regime; and how outcomes from decision-making processes are to be evaluated. Different aspects of output may be relevant, ranging from the negative (e.g. the avoidance of 'extreme injustice')[109] to the positive (e.g. the fulfilment of a moderate range of public goods),[110] through to optimal and just outcomes.[111] For our purposes, output legitimacy in the context of ISDS will generally require evaluation of whether the resolution of cases produces just effects

'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93(3) *AJIL* 596.

[107] See discussion of economic coercion in Elkins, Guzman, Simmons (n. 32).

[108] Bodansky (n. 103).

[109] Buchanan and Keohane (n. 60), 44.

[110] Gilley (n. 65).

[111] Fabienne Peter, 'Political Legitimacy', *Stanford Encyclopedia of Philosophy* (2010, revised 2017) <plato.stanford.edu/entries/legitimacy/>.

for both the system of adjudication and the parties to particular disputes. Are the results in terms of allocation of costs and benefits normatively legitimate? Are particular outcomes or effects legitimate? Output legitimacy can also refer to general effects of ISDS on the justifications for entering into IIAs in the first place: for example, the extent to which it provides protections for investments in exchange for increased flows of FDI.

To be sure, there is some overlap across the three elements. Moreover, there is a question as to how these various elements of legitimacy might be balanced against each other through the application of legitimation strategies. For example, if there are legitimacy deficits identifiable with aspects of ISDS, can improvements in process legitimacy be used to cure aspects relating to a decision's lack of grounding in state consent? Likewise, might deficits in ISDS's process legitimacy be balanced against outputs or outcomes that are normatively sound in terms of their legitimacy? This question is at the heart of the debate over the mandate for the UNCITRAL WG III process: which seeks explicitly to bolster the system's legitimacy through procedural reforms. However, critics claim this mandate is insufficient to address both normative and sociological legitimacy concerns.[112]

While consent, process and output are the common theoretical categories, the contributions to this volume generally fall into the latter two; although many have implications relating to consent legitimacy. The layout of this book is therefore structured around three main themes: process legitimacy, outcome legitimacy, and legitimation strategies. These three parts of the book follow an empirical overview of the state of affairs with ISDS and the legitimacy crisis in chapter 2, which provides an empirical departure point for the book with a quantitative and qualitative analysis of: (1) states' exposure to ISDS through consent in treaties and investment legislation; (2) the operation of the ISDS regime in practice and (3) the academic discourse regarding the legitimacy of ISDS.

1.3.1 Process Legitimacy: Independence and Impartiality

In this volume, we split process legitimacy into two major themes: legitimacy concerns relating to concepts of *independence and impartiality* of adjudicative bodies; and legitimacy concerns relating to *legal*

[112] See Gus Van Harten, Jane Kelsey and David Schneiderman, 'Phase 2 of the UNCITRAL ISDS Review: Why "Other Matters" Really Matter' (2019) *Osgoode Hall Legal Studies Research Paper* 2; and discussion of debate in Langford, Kaufmann-Kohler, Potestà and Behn (n. 26).

reasoning. In the first part on independence and impartiality, the four studies address: (1) possible cognitive biases in arbitral decision-making; (2) the role that law firms play in repeat arbitral appointments; (3) challenges to arbitrators and the accompanying procedural rules and (4) how incidents of dissent relate to claims of independence.

Even if arbitrators are subject to intensified scrutiny, significant concerns remain regarding their impartiality. In 'Testing Cognitive Bias: Experimental Approaches and Investment Arbitration' Puig and Strezhnev provide an account of ways that experimental methods can be used to uncover and identify decision-making biases. Investment arbitration tribunals derive their legitimacy from different normative, sociological and political processes than standing courts. In great part, these tribunals rely on tacit norms of behaviour among arbitration professionals. Understanding what factors affect how arbitrators make decisions in these kinds of adjudicative settings is essential in assessing critiques concerning the quality or correctness of their decisions and especially their independence and impartiality. This chapter describes a promising alternative empirical strategy that utilizes survey experiments conducted on arbitration professionals to test bias claims. It discusses also how researchers can design experimental vignettes to mimic specific aspects of the arbitration process that are difficult to observe or manipulate in the real world context.

Legitimacy concerns are an essential element in the selection of the arbitral tribunal. In 'The Influence of Law Firms in Investment Arbitration' Lie starts with Dezalay and Garth's pioneering study that applied Bourdieu's concept of social capital to the arbitration market, revealing how certain groups established and maintained their status within the market. His study asks the following: What are the actual relationships between the most influential arbitrators and the most influential law firms in the system and how might these relationships create real or perceived conflicts of interest issues for the ISDS system? This chapter answers these research questions with mixed methods: using integrated network, statistical and doctrinal analyses. By utilizing this combination of doctrinal and data-driven approaches, Lie provides insights into how the law firms have gained a central position in the ISDS network by establishing strong relationships with leading arbitrators. He points out that the top law firms have positioned themselves as 'gatekeepers' to the ISDS system, in particular in terms of distribution of cases among potential arbitrators and the acceptance of new arbitrators, and discusses possible impacts on the perceived independence and legitimacy of the ISDS system.

Parties' dissatisfaction with the tribunals' composition increasingly results in formal challenges to individual arbitrators. In 'Arbitrator Challenges in International Investment Tribunals' Giorgetti tells us that, once rare in proceedings of international tribunals, challenges to investment arbitrators are increasingly common. Using data from different arbitral institutions up through 2019, she finds a remarkable upsurge in the number of arbitrator challenges from 2010 to the present. On the one hand, many challenges may be of a purely tactical character, designed by the parties – typically the respondent state – to delay proceedings or pressure a party to settle or withdraw a complaint. On the other hand, many arbitrators may be legitimately vulnerable to challenges; and the increase in number may suggest that the system is or should take more seriously concerns around repeat appointments by the same party, double hatting, and issue conflicts. This chapter argues that arbitrator challenges may in fact contribute to the legitimacy of the adjudicative process by ensuring in practice that independence and impartiality is maintained; and signalling to prospective arbitrators and their appointers the risks of non-disclosure or certain types of appointments.

Arbitrators might voice their sympathy for the perspectives of one of the parties to the dispute by formulating dissenting opinions. In 'Dissents in Investment Treaty Arbitration: On Collegiality and Individualism' Kapeliuk starts with one of the more enduring criticisms of international arbitration and its legitimacy: that parties can appoint 'their' arbitrator unilaterally. The striking lack of dissents and their asymmetry when they occur – usually by the losing party appointed arbitrator – raises questions over whether arbitrators act independently and impartially in relation to the party that appointed them; and the very concept of party-appointed arbitrators is by itself contrary to traditional notions of judicial impartiality. This chapter investigates whether a background in civil law, as opposed to common law where dissent is a more familiar phenomenon, could explain the absence of arbitral dissents. Using PITAD data on both dissents and arbitrator background, the chapter explores this potential causal factor. Her findings, that differences in background seem unrelated to frequency of dissents, lends some support to the view that the relationship between an arbitrator and the appointing party is a main driver of dissenting opinions.

1.3.2 Process Legitimacy: Legal Reasoning

The book's second part on process legitimacy focuses on due process and legal reasoning. We provide three studies on: (1) the often hidden and

unexpected role of domestic courts in investment disputes before they reach an international arbitration tribunal; (2) the effect of informal citation networks on the consistency of arbitral decisions and (3) the stabilizing effect of a system of informal precedent on the fair and equitable treatment (FET) standard.

In general, we assume that there have been extensive discussions and formal procedures between investors and public authorities prior to the materialization of an ISDS case. This context is arguably essential for fully understanding the legal arguments of the parties, the reasoning of the tribunal, and ultimately the legitimacy of the system. In 'Foreign Investors, Domestic Courts and Investment Treaty Arbitration' Gáspár-Szilágyi notes that supporters of ISDS put forward several major justifications for its continued existence, including in particular that disputes are *denationalized*, thus keeping foreign investors out of domestic courts that lack *independence*, are less *efficient*, or are *biased* against foreigners. The justification that ISDS obviates a role for the host state's domestic courts strengthens a perception that foreign investors proceed directly to the international sphere. This chapter asks why investors do resort to the courts of the host state *prior* to an ISDS case. Looking at two states with transitional judiciaries and two states with well-functioning judiciaries, the author uncovers rich data on the impressive scope of claims brought by foreign investors in the host states where they are investing; and Gáspár-Szilágyi concludes with some reflections on the role of domestic litigation in legitimation of ISDS.

It can be argued that within a largely bilateral and contractual treaty regime – which to some extent characterizes international investment law – tribunals should focus on resolving the conflict that triggered the ISDS case, paying more attention to ensuring correctness and less to consistency and predictability. In 'Ensuring Correctness or Promoting Consistency: Tracking Policy Priorities in Investment Arbitration through Large-Scale Citation Analysis' Alschner identifies concerns about investment arbitration tribunals treating like cases differently – consistency problems – and different cases the same – correctness problems. Using empirical citation analysis, he looks at an *observable* selection of what a tribunal considers to be 'relevant' precedent to reveal that tribunals are more concerned with consistency than correctness. However, this is contrary to what states consider the policy priority in ISDS reform debates. As a result, he finds an apparent mismatch between the hierarchy of policy preferences voiced by states in the ISDS reform process and what tribunals do. States can resolve that mismatch

by hard-coding their policy preferences into institutional design. He argues that as part of the ISDS reform, states should thus make the ordering between correctness and consistency considerations explicit when delegating adjudicatory authority to future ISDS institutions.

Tribunals face significant challenges when seeking consistency in their interpretations of IIAs, in particular where states have provided limited guidance in the treaty text. In 'Fair and Equitable Treatment: Ordering Chaos through Precedent?' *Grisel* provides an empirical account of doctrine in investment arbitration by tracing the effect that a small number of seminal cases have on maintaining a certain level of consistency in the interpretation of the FET standard. The FET standard and its interpretation by arbitral tribunals has been blamed for giving foreign investors carte blanche to sanction governments over broad swathes of policy. It is said to be lacking any common definition and that it is a vague and ambiguous catch-all term. This chapter provides a rigorous qualitative and quantitative empirical assessment of citations and their role in the development of the FET standard consistently by tribunals across time. Based on the in-depth exploration of FET case law the author find that three landmark cases have a de facto *stare decisis* effect of reconciling competing interpretations and ultimately providing a relatively consistent standard.

1.3.3 Output Legitimacy

The third part on output legitimacy provides five chapters that empirically assess various aspects of the consequences of states' consent to ISDS: (1) how geographic diversity among arbitrators in ISDS cases remains a problem from the perspective of perceived legitimacy but less so normative legitimacy; (2) whether and how ISDS provisions have (not) contributed to improved foreign investment and the costs to host states of consent to ISDS; (3) how some states may have to endure a double sanction when investment arbitration is used as a remedy in a time of crisis; (4) how large-scale foreign investors have prevailed disproportionately well over small-scale foreign investors in ISDS cases across time and (5) to what extent the Chinese approach to ISDS provides investors with adequate and effective remedies for resolving investment disputes, and whether it might contribute to combat corruption.

In responding to criticisms such as those discussed in chapters 3 and 4, significant efforts have been taken, in particular by arbitration institutions, to increase the diversity of arbitrators. In 'The West and the Rest:

Geographic Diversity and the Role of Arbitrator Nationality in Investment Arbitration' Langford, Behn and Usynin start with the critique that ISDS is not geographically diverse, a common refrain in the legitimacy crisis discourse. In this chapter, the authors look to determine: (1) if dominant place of residence and not nationality may be a better indicator of geographic difference; (2) whether there is a lack of geographical diversity in ISDS cases and why it matters and (3) whether more geographically representative tribunals would affect outcome in ISDS cases? On the issue of dominant residence versus nationality, the overall number of non-Western arbitrators in the system drops from 35% to 25% due to a sizable number of non-Western arbitrators living in the West. On issues of perceived legitimacy, 74% of those adjudicating ISDS cases are from Western states and this is problematic for the perceived legitimacy of the system because 80% of ISDS cases are against non-Western respondent states. However, the issue becomes more complicated when examining the effect on outcomes. The authors find that the absence of geographic representativeness can favour Western home and host states, especially when the chaiman of the tribunal is from the West. However, possibly due to a high degree of institutionalization and socialization of arbitrators in the system, it does not appear at present that arbitrator nationality has a significant effect on outcomes.

The voluminous literature on the benefits of IIAs in terms of increasing flows and stocks of investment indicates that there is no 'one size fits all' in terms of treaty design and effects. In 'Mixing Methodologies in Empirically Investigating Investment Arbitration and Inbound Foreign Investment' Armstrong and Nottage provide a key response to legitimacy concerns over investment arbitration by pointing to whether or not it produces material benefits. Through a mixed methods approach, the authors revisit the vexed question of whether offering treaty-based ISDS protections leads to significant increases in inbound FDI. The chapter examines the synergies and tensions involved with: (1) econometric research of the impact of ISDS provisions on inbound FDI; (2) qualitative research on investor and host state practices and attitudes and (3) framing and presenting research questions and findings, especially in light of social psychological research on cultural risk cognition. They conclude that whatever the results that emerge from empirical research findings, the form of presentation will determine whether they will be accepted by the public or fall victim to growing polarisation in perceptions and positions.

In recent years, ISDS has increasingly been employed by investors in the aftermath of a variety of crises, ranging from economic meltdown to inter-state war. In 'Double Jeopardy? The Use of Investment Arbitration in Times of Crisis' Shultz and Dupont focus on investment arbitration as a means of last resort that occurs as a response to the realization of two types of shock towards foreign investors – one from severely dysfunctional governance at the national level and the other from an economic crisis. Using an original dataset that includes investment claims filed under the rules of all arbitration institutions as well as ad hoc arbitrations, the authors test links between governance, economic crises and investment arbitration; and they find that poor governance, understood as corruption and lack of rule of law, has a statistically significant relation with investment arbitration claims, but economic crises do not when considered separately. Yet, bad governance and economic crises considered together are a good predictor of when countries will get hit by investment arbitration claims. Their findings are of great significance to important questions regarding outcome legitimacy, in particular whether ISDS produces legitimate outcomes if used to redress or mitigate severe governance deficiencies, and whether its use in the context of economic crises hurts countries in great difficulty and thereby undermines efforts to ensure mutually beneficial economic recovery.

Even if ISDS is resource demanding and time consuming, a relatively diverse group of investors has initiated ISDS cases and thereby indicated a strong belief that they might benefit from the regime. In 'Who has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants' Van Harten and Malysheuski make the observation that the legitimacy of ISDS appears to depend in part on an expectation that it benefits smaller businesses, not just large multinationals and the super-wealthy. This chapter collects data on size and wealth of the foreign investors that have brought claims and received monetary awards due to ISDS. Categories for the size and wealth of foreign investors are compared to the size of damage awards, which helps determine that the primary beneficiaries in ISDS cases have been companies with annual revenue exceeding USD one billion and individuals with net wealth in excess of USD 100 million. The main finding is that the beneficiaries of ISDS-ordered financial transfers, in the aggregate, have overwhelmingly been wealthy individual investors and large companies – and especially extra-large companies. They also note that the awards gained by small companies are not so different from their legal costs.

The distribution of benefits from ISDS is not only related to the decisions of tribunals, but also to the interaction between investors and public authorities prior to the arbitration. In 'Explaining China's Relative Absence from Investment Treaty Arbitration' Lindmark, Behn and Fauchald explore whether the absence of ISDS cases against China means that investors are deprived of adequate and effective remedies for resolving investment disputes. While ISDS might be an effective tool for foreign investors against less powerful states, it is a less potent means for securing investors' interests against powerful countries, such as China. Based on a unique dataset of all Chinese IIAs, the authors find that the low number of ISDS cases against China up until 2007 can be better explained by jurisdictional limitations. In more recent years, the continued reluctance among foreign investors to bring cases can be explained only partially by the unequal power relationship between foreign investors and Chinese authorities. The authors find that the administrative review procedures required under Chinese IIAs prior to the establishment of arbitral tribunals promote dispute resolution that accommodate the joint interests of investors and public officials directly involved with the establishment and operation of the investment. Such non-transparent procedures allow parties to keep corrupt practices away from public scrutiny. In view of the high level of corruption in domestic courts, the authors argue that ISDS will be more easily available and is likely to prevent corruption if the administrative review requirement is removed.

1.3.4 Legitimation Strategies

The fourth and final part of the book includes three chapters looking empirically at strategies employed to enhance the legitimacy of ISDS. The chapters focus on: (1) how investment arbitration can promote the development of local legal institutions; (2) how states learn and develop capacity in the field of international investment law and arbitration and (3) how such capabilities are used to renegotiate the ISDS provisions in their BITs.

Since one of the main purposes of ISDS is to substitute for dysfunctional domestic judiciaries, one should expect the impact of ISDS on domestic judiciaries to be positive when assessing the legitimacy of the former. Indeed, the positive effects on domestic rule of law is one of the major output legitimacy claims of ISDS supporters. In 'Does International Arbitration Enfeeble or Enhance Local Legal Institutions?'

Rogers and Drahozal examine the critique that investment arbitration instead undermines or hampers the development of national legal institutions. By providing a forum for foreign investors separate and distinct from local courts, critics argue, ISDS removes any incentive for foreign investors to promote the development of local legal institutions. This chapter sets out an account of how investment arbitration might affect development of local legal institutions, in particular international commercial arbitration and, perhaps, domestic arbitration. The authors find that while both the number of investment agreements and investment arbitration proceedings to which a state is a party is negatively related to the rule of law in the state, the presence of an indicator for support for international commercial arbitration – adoption of the UNCITRAL Model Law on International Commercial Arbitration – essentially offsets that negative relationship.

As exemplified by the OECD negotiations of the Multilateral Agreement on Investment, developing countries have for a long time been regarded as 'rule-takers' rather than 'rule-makers', and they are still perceived as such despite multiple efforts at enhancing their performance. In 'Learning from Investment Treaty Law and Arbitration: Developing States and Power Inequalities' Sattorova and Vytiaganets show how the interaction of developing states with investment treaty law and arbitration constitutes an important, albeit often less visible, part of the ongoing debate about the legitimacy of the investment treaty regime and its ISDS provisions. Even a cursory overview of the literature on legitimacy of international investment law reveals that developing states and their concerns are frequently lumped together under the broader rubric of investment treaty law as a threat to national sovereignty and a constraint on state capacity to regulate in the public interest. By focusing on the formal equality between contracting state parties and the reciprocal nature of international investment agreements (IIAs), they argue that such narratives tend to mask the presence of power disparities, which considerably shape the involvement of developing states in the creation, diffusion, and internalization of investment treaty law. The authors seek to counter these narratives by drawing on new empirical data to expose a range of structural, normative and institutional power inequalities that currently shape the various stages of developing states' participation in the international investment regime. By using the optics of power and focusing on how developing states learn from and internalize investment treaty law, the chapter peers behind the formal structures of investment treaties and ISDS to identify the underlying processes and

actors and to question the legitimacy of the prevailing norms and institutional arrangements. Their principal argument is that a meaningful reform of ISDS is impossible without addressing power inequalities in negotiating the norms constituting a global investment treaty regime.

Finally, traditionally essential strategies when renegotiating IIAs has been to provide (broader) consent to ISDS and negotiate more precise substantive provisions. In 'Legitimation through Modification: Do States Seek More Regulatory Space in Their Investment Agreements?' Broude, Haftel and Thompson claim that states unhappy with BITs and with the arbitration mechanisms under them should make efforts to insert, renegotiate or remove ISDS provisions. This chapter is based on a dataset on renegotiated and terminated BITs. The initial evidence indicates that states have not made a systematic effort over the years to recalibrate their BITs for the purpose of preserving more regulatory space. In fact, most renegotiations either leave ISDS provisions unchanged or render them more investor-friendly. Nevertheless, they find that this is beginning to change, as recent renegotiations are more likely to circumscribe ISDS in ways that preserve more state regulatory space.

1.4 Concluding Thoughts

The international investment arbitration regime emerged in the late 1990s as a leading symbol of economic globalization.[113] Its trajectory since then has followed many of the ups and downs of the neo-liberal economic order. Some claim that it strengthens economic growth, rule of law and peaceful interstate relations; others that it favours global financial elites, enhances power asymmetries between the Global North and South, and is built on a non-transparent and obtuse transnational legal order of powerful arbitrators.

The individual chapters presented in this volume sought to address empirically many of the critiques advanced against ISDS using a wide range of social scientific and data-driven tools. The answer to the question of legitimacy is mixed, whether on process or output legitimacy. Some chapters demonstrate clear legitimacy problems, others the opposite, while many provide a nuanced picture of the critiques and the need for a critical understanding of how we interpret findings. The final chapters point to some ways forward for the regime's legitimation.

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

We hope that the framing of the contributions within a centuries old political and legal discourse on legitimacy contributes to contextualizing and enhancing our understanding of how we research, analyse and interpret legitimacy in the context of international investment law in general and ISDS in particular. We hope also that the broad range of approaches to empirical research presented in this volume will inspire cooperation among social scientists (including legal scholars), and contribute to improving the quality of empirical research on the functions and roles of international courts and tribunals.

This volume seeks also to provide a comprehensive starting point for the empirical study of ISDS in the years to come. The chapters of this book demonstrate how the empirical study of legitimacy can advance our understanding of how ISDS works and how empirical evidence about the functioning of ISDS can assist in responding to many of the normative claims lodged for and against the use of ISDS in its past 25 years.