'Moonlighting' Revisited: ICJ Judges as Decision Makers in Investment Arbitration

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1. Introduction

In 2017, the International Institute for Sustainable Development (IISD), published a commentary on the involvement of the judges of the International Court of Justice (ICJ) in investor-state dispute settlement (ISDS) as decision makers – arbitrators or members of committees deciding on annulments of awards issued under the ICSID Convention.[1] The IISD is a non-governmental organization concerned with, among others, relations between investment policies and sustainable development and is known for its critical stance towards ISDS.[2] Its report brought to the public attention the practice of working by former and sitting ICJ members (that is, full-time ICJ judges) as arbitrators or annulment committee members despite the prohibition to 'engage in any other occupation of a professional nature' expressly stipulated in the ICJ Statute.[3] The IISD raised several concerns arising from this practice, including significant remuneration of ICJ judges for arbitral work,[4] their workload, independence and impartiality.[5] At the same time, it noted that ICJ members have been involved as decision makers in roughly 10% of all known investment treaty cases,[6] showing the scale of the issue.

The IISD commentary has led to a debate about the professional engagement of the ICJ members outside the Court as the concerns raised have been apparently shared by at least some of the commentators.[7] As a result, in October 2018, in his annual speech before the United Nations General Assembly, the ICJ President has announced the joint decision of the ICJ members not to accept to participate in investment or commercial arbitration, leaving a possibility to act in interstate

[1] Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, 'Is "Moonlighting" a Problem? The Role of ICJ Judges in ISDS' (International Institute for Sustaianable Development 2017) <https://www.iisd.org/sites/default/files/publications/icj-judges-isds-commentary.pdf>.
[2] 'Rethinking Investment Policy to Support Sustainable Development' (*International Institute for Sustainable Development*) <https://www.iisd.org/articles/success-story/rethinking-investment-policy-support-sustainable-development> accessed 6 May 2022.
[3] 'Statute of the International Court of Justice' <https://www.icj-cij.org/en/statute> accessed 6 May 2022, Article 16.
[4] Bernasconi-Osterwalder and Brauch (n 1) 2–4.
[5] ibid 4–5.
[6] ibid 1.
[7] Ashira Vantress, 'A Review of "Moonlighting" ICJ Judges and the International Call for Impartiality in Investor-State Dispute Resolution' (2020) 12 World Arbitration & Mediation Review.

arbitration.[8] While ICSID annulment committees have not been mentioned, the ICJ President himself has resigned from sitting at such a committee upon taking his position in February 2018.[9] At the same time, other ICJ members active at the time have not resigned and continued their work as arbitrators and annulment committee members in more than 10 cases.

Since the 2018 decision, only once a sitting ICJ member has accepted new arbitral appointment just to resign in the wake of controversy around apparent lack of compliance with the previous decision. Thus, while there are still ongoing ISDS cases in which active ICJ members are involved (not to mention many of those where former ICJ judges are working), it is very improbable to see them appointed, in particular as arbitrators, in future investment disputes, at least during their respective terms. There is uncertain fate of prospective ICJ judges appointed during sitting at arbitral tribunal. Historically, there were only few resignations and not a single one was related to appointment to the ICJ. No resignations in the wake of the 2018 decision suggest that in such a situation the arbitral function would be carried on. The practice on that matter is yet to emerge.

In 2020, the ICJ has issued guidelines on external activities of its members. The first section concerns arbitration activity and precises that sitting ICJ members can 'may only participate in inter-State arbitration cases'.[10] While it is still unclear whether that applies to ICSID annulment proceedings as these are not arbitrations, there is a clear exclusion of active ICJ judges from serving as arbitrators in ISDS.

As the involvement of sitting ICJ judges in ISDS as decision makers has been substantially limited, it appears to be a right moment to assess this phenomenon and revisit the data and observations made by the IISD commentary. This paper discusses the role of ICJ judges in deciding investment disputes. Firstly, it presents legal considerations of the role of the ICJ and its judges in international dispute settlement and the explanations for and implications of their involvement in decision making in ISDS (Section 2). Secondly, it presents a quantitative analysis of all appointments of ICJ members (leaving aside ad hoc judges)[11] as arbitrators and annulment committee members in

[8] Abdulquawi A Yusuf, 'Speech by Judge Abdulquawi A. Yusuf, ICJ President' (Seventy-Third Session of the United Nations General Assembly, 25 October 2018) 11–12 <https://www.icj-cij.org/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf> accessed 2 June 2020.

[9] Joel Dahlquist, 'ICJ President Reveals That ICJ Judges Will Not Participate in Investor-State Arbitration in the Future' (*Investment Arbitration Reporter*, 27 October 2018) <http://www.iareporter.com/articles/icj-president-declares-that-judges-will-not-participate-in-international-arbitration-in-the-future/> accessed 29 April 2022.

[10] International Court of Justice, 'Compilation of Decisions Adopted by the Court Concerning the External Activities of Its Members' <https://icj-cij.org/public/files/basic-documents/compilation-of-decisions-en.pdf> accessed 22 May 2022.

[11] At every contentious case decided by the ICJ, each of the parties may appoint an *ad hoc* judge if no judge of the party's nationality is at the bench. While often respected international lawyers, including former or future ICJ members, take *ad hoc* judge position, these are not taken into consideration as they do not benefit from their more permanent ICJ status to get appointments but it is rather the other way around. Nevertheless, among the ICJ judges *ad hoc* one can

known investment disputes (Section 3).[12] Finally, it concludes with the potential implications for limiting the ICJ members involvement in ISDS (Section 4).

2. ICJ and its members in ISDS – potential explanations and implications

The International Court of Justice appears in international investment law and practice in numerous ways. This section will present, first, the ways in which the Court appears in ISDS, second, the explanations for, and third, implications of these appearances.

From all the standing international courts, the ICJ has the broadest scope of jurisdiction. It makes pronouncements on a wide variety of issues, from establishing existence of a customary international legal norm or a general principle of law, through treaty interpretation to using secondary rules on state responsibility. As a result, the Court has made a lot of important pronouncements on general international law which are often cited in international jurisprudence and scholarship. It is the richest source of general principles of law[13] which are indispensable for gap-filling in arbitral law-making.[14]

When solving investment treaty disputes, the arbitrators face various general international law issues, just to mention treaty interpretation, identification and interpretation of other sources of international law, matters of nationality, state succession, attribution of a conduct to a State, remedies for violations or circumstances precluding wrongfulness of State conduct.[15] They often may seek references to these matters in the ICJ jurisprudence.

In addition to its jurisprudence as a source of law, which might go beyond its secondary role provided for in Article 38 of its own Statute (an influential legal source in itself), the ICJ is a source of practices (e.g., in procedure or taking evidence) and, as argued in this paper, adjudicators.

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also find numerous important individuals in the field investment arbitration, just to mention Georges Abi-Saab, Franklin Berman, Charles N. Brower, David Caron, Ahmed Sadek El-Kosheri, Yves Fortier, Marc Lalonde or Donald McRae.

[12] The dataset includes all publicly known investment disputes regardless their legal basis – an investment treaty, an investment contract and/or a domestic law – although most of them are treaty-based. Most of the few contractual disputes belong to the early period of investment disputes (1972-2000). Involvement of ICJ members in ISDS other than directly deciding the case, e.g. appearance as appointing authorities (which has been noted at least 13 times), authority deciding on arbitrator challenges (e.g., decision by Judge Tomka in *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v. India*, PCA Case No. 2013-09, 30 September 2013), counsels or expert witnesses, has not been taken into account.

[13] Damien Charlotin, '"Authorities" in International Dispute Settlement: A Data Analysis' (2020) PhD Dissertation 216–221 <https://www.repository.cam.ac.uk/handle/1810/312324> accessed 10 November 2020.

[14] Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press 2017) 107, 240–247 Cf. The Renco Group Inc. v. Republic of Peru II, PCA Case No. 2019-46, Decision on Expedited Preliminary Objections (30 June 2020), paras 212-214; Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on the Application by Wena Hotels Ltd. for Interpretation of the Arbitral Award (31 October 2005), para. 72.

[15] Damien Charlotin, 'The Place of Investment Awards and WTO Decisions in International Law: A Citation Analysis' (2017) 20 Journal of International Economic Law 279, 288.

Moreover, the ICJ and its judges may play a role in arbitral appointments and challenges. Thus, there are normative, institutional and personal connections between the Court as proxy for general international law and the ISDS tribunals of the investment *lex specialis*.

There is also relevant historical context for the emergence of modern investment law as we know today in which the Court has played its role. Both the Permanent Court of International Justice and the ICJ as its successor have decided several cases which currently fall within the definition of investment disputes.[16] The dissatisfaction with inherent limitations of customary law on diplomatic protection of aliens and foreign property and the challenge against these practice made by the developing countries in the 1970s has led several States to turn to investment treaties providing for international arbitration in which investor have direct standing against host States. Thus, the ICJ had a role in the development of investment treaty regime as a distinct field of practice and research in international law.[17]

Coming back to its legal function, the Court is by far the most popular external source of precedents in investment arbitration.[18] Moreover, empirical evidence shows that the presence of a sitting or former ICJ judge in the bench is correlated with more citations of the ICJ both by the parties and the tribunal.[19] However, law is not the only factor possibly influencing mentioning the ICJ/PCIJ in arbitral decisions. The involvement of the Court, its judges and jurisprudence may play a particular role in strengthening the authority and legitimacy of the tribunal and, in turn, whole investment arbitration. The ways in which investment arbitration uses the Court suggest that it is a multi-purpose tool for legal reasoning and fostering legitimacy of the field. Below, several theoretical explanations for the versatile involvement of the ICJ/PCIJ into investment arbitration are presented.

Historically, arbitration as an informal method of dispute settlement was much less legalized. The authority of the decision of the arbitration tribunal depended heavily on social capital of its members.[20] In medieval times, the arbitrator was often the person of the highest possible authority.[21] This tradition has continued to some degree in modern arbitration, if we recall 20th

[16] E.g., Oscar Chinn (1934) PCIJ (Ser. A/B) No. 63; Barcelona Traction, Light and Power Company, Limited (1970) ICJ Rep. 3; Elettronica Sicula SpA (ELSI) (1989) ICJ Rep. 15. All these cases are often cited in investment arbitration cases, cf. Stone Sweet and Grisel (n 14) 156–157.
[17] Mārtiņš Paparinskis, 'Barcelona Traction: A Friend of Investment Protection Law' (2008) 8 Baltic Yearbook of International Law 105.
[18] Charlotin (n 15).
[19] Charlotin (n 13) 213–214; Fuad Zarbiyev, 'Saying Credibly What the Law Is: On Marks of Authority in International Law' (2018) 9 Journal of International Dispute Settlement 291, 303.
[20] Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996) 18–19, 52–60; Stone Sweet and Grisel (n 14) 72–75.
[21] Cornelis G Roelofsen, 'International Arbitration and Courts' in Bruno Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 154–155.

century inter-state disputes arbitrated by the king of Spain,[22] UN Secretary General,[23] or mediated by the Pope.[24]

After the fading of individual authority of state rulers, authority and social capital were found among legal experts of international renown. When modern international arbitration emerged, the first generation of arbitrators were European international law professors[25] or the experienced and respected international adjudicators. The famous arbitration case concerning *Island of Palmas*[26] was decided by Max Huber, a former President of the PCIJ and one of the most influential international lawyers in the inter-war period. Arguably, his social capital, showed by, to give but one example, his PCIJ judge status, made him a respectable arbitrator.[27] As it will be demonstrated, a continuity can be noted between the PCIJ and the ICJ also in the involvement of their judges in international arbitration.

The decisions of the ICJ (and previously by the PCIJ) are made by one of the most prestigious courts of international law. The Court and its judges are highly esteemed, at least superficially, in international jurisprudence and scholarship.[28] If there is any 'supreme court' equivalent in international adjudication, the ICJ is the closest institution to have that status. Moreover, various proposals on introducing appellate instance in international adjudication concern involvement of the judges.[29] The Court's prestige is one of the answers why its decisions are extensively cited by itself, other courts, and scholars. For the same reason, ICJ judges are involved in other fields of international dispute settlement.

The standing international court character increases the ICJ's appearance as a stable institution. The same concerns the fixed terms of appointment for its judges. The institutional framework of the Court reinforces its prestige as a neutral, diverse, professional and respectable institution. The Statute and the Rules of the Court have ceased to be of internal relevance only, having become

[22] *Arbitral Award Made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua),* Judgment of 18 November 1960, ICJ Rep. 1960, p. 192.
[23] *Case concerning the differences between New Zealand and France arising from the Rainbow Warrior affair* (1986) 19 RIAA 199.
[24] James L Garrett, 'The Beagle Channel Dispute: Confrontation and Negotiation in the Southern Cone' (1985) 27 Journal of Interamerican Studies and World Affairs 81, 93–101.
[25] Dezalay and Garth (n 20) 34–42.
[26] *Island of Palmas Case (Netherlands v US)* (1928) 2 RIAA 839.
[27] Daniel-Erasmus Khan, 'Max Huber as Arbitrator: The Palmas (Miangas) Case and Other Arbitrations' (2007) 18 European Journal of International Law 145; cf. Antoine Vauchez, 'The International Way of Expertise. The First World Court and the Genesis of Transnational Expert Fields' [2014] EUI Working Paper RSCAS 2014/80.
[28] Chester Brown, *A Common Law of International Adjudication* (Oxford University Press 2007) 232; Sara Dezalay and Yves Dezalay, 'Professionals of International Justice: From the Shadow of State Diplomacy to the Pull of the Market for Commercial Arbitration' in Jean dAspremont and others (eds), *International Law as a Profession* (Cambridge University Press 2017) 315–323.
[29] Mohamed Sameh M Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations* (Kluwer Law International 2003) 374–376; Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration' (2005) 73 Fordham Law Review 1521, 1602–1603, 1609–1610.

points of reference for other international adjudication bodies. This concerns not only the indication of the sources of international law in the Article 38 of the Statute but also practical matters.[30]

The ICJ is mindful of its prestige and actively promotes its status. At the annual speeches to the General Assembly, the ICJ Presidents emphasize the need for the Court and peaceful dispute settlement through its works. They also turn attention to consistency and coherence of international decisions, deploring the fact that the Court is not consulted or cited as often as it should.[31] At the same time, the Court is known for being reluctant to employ external citations.[32] The Court was also mindful of the risks of changing hats by its judges and potential issue conflicts arising. In the ICJ Practice Directions, it has been prohibited for judges *ad hoc* to serve at the same time as a counsel in another case before the Court.[33] Also the issue of 'moonlighting' by the ICJ judges themselves has been discussed internally in the UN. After the Advisory Committee on Administrative and Budgetary Questions had questions about the judges being remunerated for, among others, 'acting as arbitrators in inter-State and private international arbitrations', the Court in its report asserted the legality of this practice dating back to the origins of the PCIJ. In addition it emphasized the issue concerned 'a very limited number of judges for very limited periods' and that it had 'no adverse effect on the pace of the work of the Court'.[34] While that might have been the case in the 90's, the matter has resurfaced in with the IISD commentary when both ISDS and involvement of ICJ judges therein was much more active.

The relative popularity of ICJ judges as arbitrators can, on the one hand, be explained by the formal presumption of both moral quality and legal expertise. According to the Statute of the ICJ, its judges shall be "of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law".[35] On the other hand, in practice most of the ICJ judges are indeed previously recognized experts of international law, as the appointment to the ICJ is often considered as an apex of an international legal career. The appointment just formally confirms this

[30] Brown (n 28) 226–234; Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice* (British Institute of International and Comparative Law 2009).
[31] Erik Voeten, 'Borrowing and Nonborrowing among International Courts' (2010) 39 The Journal of Legal Studies 547, 548.
[32] ibid 569.
[33] Philippe Sands, 'Judicialization and Its Challenges' in Andreas Føllesdal and Geir Ulfstein (eds), *The judicialization of international law: a mixed blessing?*, vol 1 (Oxford University Press 2018) 253.
[34] International Court of Justice, 'Report of the International Court of Justice. 1 August 1995 - 31 July 1996' Supplement No. 4 (A/51/4) 43, para 199 <https://www.icj-cij.org/public/files/annual-reports/1995-1996-en.pdf> accessed 22 May 2022.
[35] ICJ Statute, Article 2.

status, adding to the appearance of impartiality.[36] The 'ICJ aura' is not, however, absolute. For example, Judge Bedjaoui, despite his eminence in international arbitration and former ICJ President status, was one of the few arbitrators disqualified while serving in an ICSID dispute.[37]

The tensions between the legal and the social described before are particularly pictured in international arbitration due to its consensual and deformalized nature which, despite the developing legalization, is strongly relying on the social power of particular actors.[38] The dispersed network character of the field without particularly strong center but with several particularly strong personalities has combined the business approach to litigation and high political stakes of state regulatory policy. This 'clash of paradigms'[39] has led to various paradoxes and discontents about the regime. Its hybrid foundations[40] continue to impact the practice of investment arbitration and its perception which in turn shape the authority and legitimacy of the field.

Another potential explanation of the reference to general public international law through the ICJ judges and jurisprudence is strengthening connection between the regimes. The legitimacy crisis of investment arbitration is related to the alleged detachment from the mainstream international law.[41] Thus, one could think that the more 'state-friendly' paradigm is present in investment arbitration, the more it is 're-balanced' towards the interests of the states. Similar reasoning may stand behind the involvement of the ICJ judges in the investment arbitration practice. If 'the enemy of the state'[42] takes more of a 'friend of the state' perspective, the outcome may appear to be more acceptable for the states. In addition, due to the vague wording and numerous gaps in in the applicable law, in particular investment treaties, embedding legal interpretation of these in the general international framework may be perceived as attempting to ensure coherence between the investment *lex specialis*

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[36] Callum Musto, 'New Restrictions on Arbitral Appointments for Sitting ICJ Judges' (5 November 2018) <https://www.ejiltalk.org/new-restrictions-on-arbitral-appointments-for-sitting-icj-judges/> accessed 15 March 2021.

[37] Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 European Journal of International Law 387, 406.

[38] Dezalay and Garth (n 20) 18–19, 52–60; Jan Paulsson, 'Appointment of Arbitrators' in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (Oxford University Press 2020) 107; Stone Sweet and Grisel (n 14) 72–75.

[39] Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 American Journal of International Law 45.

[40] Zachary Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration' (2004) 74 British Yearbook of International Law 151.

[41] Andrea K Bjorklund, 'The Legitimacy of the International Centre for Settlement of Investment Disputes' in Nienke Grossman and others (eds), *Legitimacy and International Courts* (Cambridge University Press 2018) 244–245; Thomas Dietz, Marius Dotzauer and Edward S Cohen, 'The Legitimacy Crisis of Investor-State Arbitration and the New EU Investment Court System' (2019) 26 Review of International Political Economy 749, 756–761; Michael Waibel and others (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Wolters Kluwer Law & Business 2010) 1–4.

[42] José E Alvarez and Gustavo Topalian, 'The Paradoxical Argentina Cases' (2012) 6 World Arbitration & Mediation Review 491, 494.

and the public international *lex generalis*, thus also increasing legitimacy through convincing justification.[43]

Involvement of the ICJ judges may also aim at increasing consistency of investment tribunals' decisions. Although an arbitrator has slightly different function than a judge when it comes to resolving a dispute, the concerns of consistency and coherence are significant also with respect to ISDS.[44] Judges of permanent courts, in comparison to arbitrators appointed *ad hoc* to decide a particular dispute, can be expected to be more mindful of systemic implications of their decision and of consistency with previous decisions, as they do with respect in *jurisprudence constante* of their respective court.[45] The more consistency is considered relevant for annulment proceedings under the ICSID Convention to which reportedly the ICSID Secretariat was appointing from a narrow group of individuals, including several ICJ judges, to ensure consistency in the procedure closest to an appeal in international arbitration. Thus, having a judge as a decision maker may foster the consistency of reasoning, if not of the outcomes, in ISDS.

The implications of the involvement of ICJ judges in ISDS decision making appear from the explanations described before. The status of an ICJ judge seems to be a formal 'seal of approval' of the high standards, legal expertise and thus social capital of the appointee. The ICJ judge appointments in ISDS can be construed as an attempt to influence investment arbitration practice and its outcomes by appointing arbitrators outside of international commercial arbitration, countering investors' efforts.[46] The ICJ judges can be perceived as more deferential to the states because of their public international law background and experience in public service.[47] Thus, their

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

[44] Wolfgang Alschner, 'Ensuring Correctness or Promoting Consistency? Tracking Policy Priorities in Investment Arbitration through Large-Scale Citation Analysis' in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (1st edn, Cambridge University Press 2022) <https://www.cambridge.org/core/product/identifier/9781108946636/type/book> accessed 20 January 2022; Jürgen Kurtz, 'Building Legitimacy Through Interpretation in Investor-State Arbitration: On Consistency, Coherence, and the Identification of Applicable Law' in Zachary Douglas, Joost Pauwelyn and Jorge E Viñuales (eds), *The Foundations of International Investment Law* (Oxford University Press 2014); Andrés Rigo Sureda, *Investment Treaty Arbitration: Judging Under Uncertainty* (Cambridge University Press 2012) 97–141; Thomas Schultz, 'Against Consistency in Investment Arbitration' in Zachary Douglas, Jorge E Viñuales and Joost Pauwelyn (eds), *The foundations of international investment law: bringing theory into practice* (Oxford University Press 2014); Irene M Ten Cate, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration' (2013) 51 Columbia Journal of Transnational Law 418.

[45] Wolfgang Alschner and Damien Charlotin, 'The Growing Complexity of the International Court of Justice's Self-Citation Network' (2018) 29 European Journal of International Law 83, 99–101.

[46] Florian Grisel, 'Marginals and Elites in International Arbitration' in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (Oxford University Press 2020) 265–266.

[47] Freya Baetens, 'The Rule of Law or the Perception of the Beholder? Why Investment Arbitrators Are Under Fire and Trade Adjudicators Are Not: A Response to Joost Pauwelyn' (2015) 109 AJIL Unbound 302, 305; Ernst-Ulrich Petersmann, 'Fragmentation and Judicialization of International Law as Dialectic Strategies for Reforming International Economic Law' (2013) 5 Trade, Law and Development 209, 236.

involvement may be read as more or less deliberate attempt to infuse more of the public international law, 'state-friendly' paradigm into the field subject to, in Anthea Roberts' words, a 'clash of paradigms'.[48] Whether these appointments indeed lead to increased consistency, coherence and legitimacy of investment tribunals' decisions, this is beyond the scope of that paper. However, the implications for the outcomes of the disputes, that is, whether are they more in favor of the state, will be quantitatively inspected.

Finally, involvement of the ICJ judges visibly marks the judicialization of ISDS. Just as other fields of international law and international dispute settlement,[49] even the less formalized methods follow the lead of more permanent judicial institutions and their procedures, with the ICJ experiences on the lead.[50]

To conclude, the involvement of ICJ and its judges in ISDS is visible in numerous ways. They also have several functions. Thus, the appointing ICJ judges as decision makers in ISDS is a purposeful process with significant normative implications. The following part presents the quantitative analysis of this phenomenon.

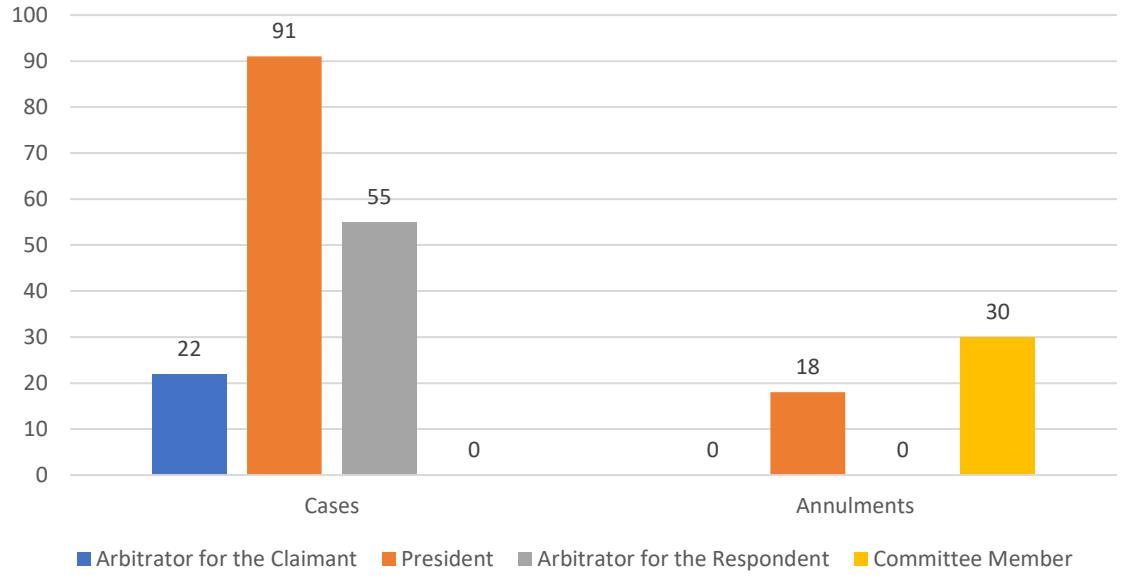
3. ICJ members as decision makers in ISDS – a data analysis

As of 31 July 2017, the IISD identified 7 sitting and 13 former ICJ judges who have been working or worked in overall 90 cases, 78 of them treaty-based, being appointed 92 times during or before their respective terms.[51] I have revisited the available data on investment disputes, using the same databases what the authors of the IISD commentary,[52] looking for all the appointments of all ICJ members before, during and *after* their respective terms. While appointment after ICJ tenure does not raise concerns of 'moonlighting', it is nevertheless relevant for the analysis of the involvement of ICJ judges (sitting or former) in ISDS. As I have argued before, the ICJ judge status appears to be a relevant factor in arbitral appointment and even after the term finishes, the status of a (former) ICJ judge continues to have its effect. In addition, the 2018 decision is likely to put an end to appointing sitting ICJ members and thus to encourage appointing former ICJ members instead.

[48] Roberts (n 39).
[49] Charles Brower and Daniel Litwin, 'Navigating the Judicialization of International Law in Troubled Waters: Some Reflections on a Generation of International Lawyers' <https://lawcat.berkeley.edu/record/1128942> accessed 26 March 2021; Sands (n 33).
[50] Brown (n 28) 232; Stone Sweet and Grisel (n 14) 218–222.
[51] Bernasconi-Osterwalder and Brauch (n 1) 1.
[52] IISD conducted research of public databases of ISDS cases including: Investment Policy Hub, www.italaw.com, International Centre for Settlement of Investment Disputes, Permanent Court of Arbitration Case Repository and Investment Arbitrator Reporter. For this research, I have used the same databases, supplemented at times with the metadata from commercial databases Investor-State Law Guide (ISLG) and Jus Mundi.

As of 1 May 2022, there are 6 sitting and 22 former ICJ judges who are working or worked in 201 cases, 173 of them treaty-based, being appointed 218 times. At the first glance, it might seem that either there were numerous appointments in the last 5 years or the data has been significantly changed otherwise. While the conducted data analysis might have been more extensive with respect to some cases and since the end of 2017 there have been further 29 appointments of sitting and former ICJ members, the key different factor is the inclusion of appointments of the latter. Out of 218 total appointments, 37 took place before the respective ICJ term,[53] 96 during the term and 85 after the term. Thus, a vast majority of ISDS appointments occurred during or after the term of ICJ judges, suggesting that the ICJ status is a relevant factor in the appointing process. ICJ members have been appointed 170 times (in 161 cases) as arbitrators and 48 times (in 40 cases) as ICSID annulment committee members. In 91 arbitrations and 18 annulments respectively, they had the function of the president. 15 times we may find more than one ICJ member, sitting, former or prospective, at a single bench. In 9 arbitrations and 4 annulments there were two ICJ members and further two annulment committees were composed fully from three ICJ judges.[54] Thus, the IISD finding that ICJ members are significantly involved in ISDS decision making is confirmed by the fact that they decided in between 10 and 20% of all known investment arbitrations and in almost 1/3 of all ICSID annulment proceedings (40 out of 133).

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



[53] While in some cases there was an overlap (i.e., an ICJ judge continued to serve as arbitrator or annulment committee member also during ICJ term in a given case), in most cases the case has been concluded before the ICJ term started. Interestingly, 21 out of 37 appointments before the ICJ term concern one person – James Crawford (ICJ judge 2015-2021).

[54] *CMS v. Argentina*, ICSID Case no. ARB/01/8, Annulment (Guillaume, Crawford, Elaraby); *Malaysian Historical Salvors v. Malaysia,* ICSID Case no. ARB/05/10, Annulment (Schwebel, Shahabuddeen, Tomka).

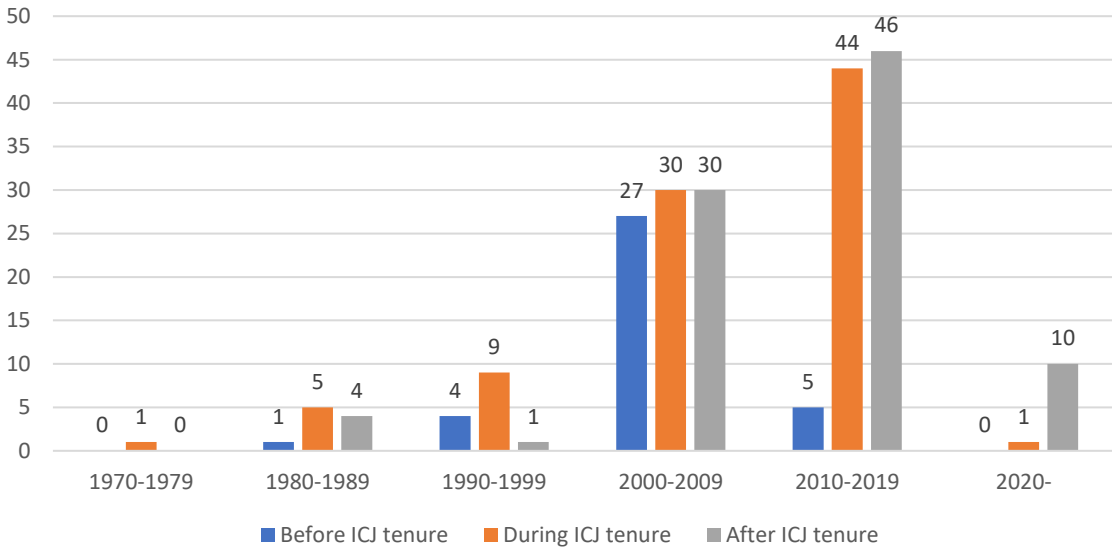
Not only the numbers matter here. The ICJ judges have been involved not only in many investment disputes but also into cases of substantial relevance for the development of investment law and arbitration as a field. An ICJ judge decided, among others, the first ICSID case ever,[55] a second known investment treaty dispute,[56] first annulled ICSID case ever,[57] one of the first NAFTA disputes and reportedly the most often cited investment case,[58] an (in)famous case expanding the scope of the most-favored-nation (MFN) clause to arbitration clause,[59] and one of the two parallel 'Lauder cases' concerning the same investment,[60] just to point out to few.

The historical account of ISDS appointments of ICJ judges is parallel to the general history of ISDS. First investment arbitration proceedings were usually based on a contract or domestic law. Although a vast majority of ISDS appointments of ICJ judges concern treaty-based disputes, in the early years they were involved predominantly in contract-based cases. As noted before, in 1972, a sitting ICJ judge has been appointed to the first ICSID arbitration. That was the only ICJ judge's appointment until the next decade. The 1980s, with the slow increase of investment disputes, have seen 10 appointments, including 3 to some of the first ICSID annulment committees.[61] Further, ICJ members were appointed 4 times as presidents of arbitral tribunals. In the 1990s, the decade which has witnessed an increase of both investment treaties and investment disputes, there were 14 appointments of ICJ judges, 9 of them concerned the active ICJ members at the time. Interestingly, all of these were arbitral appointments, i.e. no ICJ judge has been appointed to sit in ICSID annulment committees in the 1990s. That may be explained by the fact that, until 2000, there were only very few annulments.[62] In the following decades, the number of investment disputes exploded. This is also visible in the huge increase of appointments of ICJ members to 87 in the 2000s and 95 in the 2010s. ICJ judges have been massively appointed as arbitrators, particularly presidents, and members of ICSID annulment committees. While in the 2000s 27 out of 87 appointments occurred before the respective ICJ term, in the 2010s only 5 out of 95 were

[55] *Holiday Inns v. Morocco*, ICSID case no. ARB/72/1, with Sture Petrén as president (ICJ judge 1967-1976).
[56] *American Manufacturing & Trading, Inc. (AMT) v. Zaire (currently the Democratic Republic of the Congo),* ICSID case no. ARB/93/1, with Keba Mbaye as arbitrator for the respondent (ICJ judge 1982-1991).
[57] *Klöckner v. Cameroon*, ICSID case no. ARB/81/2, with Eduardo Jimenez de Arechaga as president (ICJ judge 1970-1979 and ICJ President 1976-1979).
[58] Mondev v. the United States of America, ICSID case no. ARB(AF)/99/2, with James Crawford as arbitrator for the claimant (ICJ judge 2015-2021) and Stephen Schwebel as arbitrator for the respondent (ICJ judge 1981-2000 and ICJ President 1997-2000). Charlotin (n 13) 149.
[59] *Emilio Augustin Maffezini v. Spain*, ICSID case no. ARB/97/7, with Thomas Buergenthal as arbitrator for the claimant (ICJ judge 2000-2010).
[60] *CME v. Czech Republic*, *ad hoc* arbitration conducted at Stockholm in 2000-2001, with Stephen Schwebel as arbitrator for the claimant.
[61] All of the 3 appointments to annulment committees in the 1980s concern Keba Mbaye during his ICJ term (1982-1991). In the 1980s, Judge Mbaye has been also appointed as an arbitrator by respondent in an investment contract dispute, thus collecting almost a half of the appointments of ICJ judges in the decade.
[62] According to the ICSID database, there were only 5 annulment cases prior 2000; ICSID, 'Decisions on Annulment' <https://icsid.worldbank.org/node/81661> accessed 10 May 2022.

such. Thus, a vast majority of ICJ members ISDS appointments concerned sitting or former judges. The current decade would probably mark the decline of appointing ICJ members as decision makers in ISDS, mainly due to the 2018 decision. After that, as mentioned above, only once a sitting ICJ member has been appointed as arbitrator but resigned shortly afterwards. Other 10 appointments post-2018 concerned former ICJ members only. Most probably, this trend will continue in the future.

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



International arbitration professionals constitute a relatively small group which is hardly diversified in terms of gender or geographical background. It is heavily male- and Westerner-dominated group.[63] At the same time, the number of appointments is strongly diversified between the members. While most individuals are appointed only once or few times, there also some central figures with numerous appointments and thus connections within the profession.[64]

Very similar dynamics of the arbitration network are present both in the ICJ itself and in ICJ members appointments. While 4 out of 15 current ICJ members are female, they constitute virtually all the female members in the Court's history (the first and the only former member being Dame Rosalyn Higgins). Accordingly, out of 28 ICJ members involved as decision makers in ISDS, only two are female and were appointed 8 times in total. Both Judge Higgins served and Judge

[63] Puig (n 37) 404–407, 418–419.
[64] ibid 419–422.

Donoghue serves as ICJ presidents. Interestingly, in investment arbitration Judge Higgins has been more often referred to as an authority than appointed as arbitrator.[65]

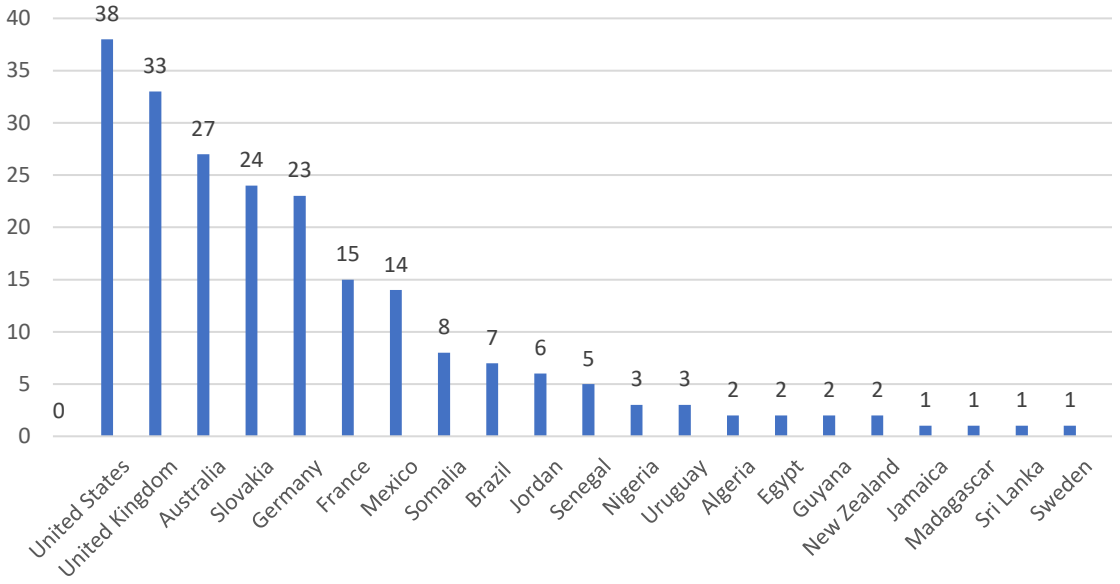
Both female Judges have Anglo-American origin, comprising with other appointed ICJ members from the Anglosphere almost a half of all the appointments of the ICJ members in ISDS. 3 American and 4 British nationals at the ICJ have been appointed in total 38 and 33 times respectively. Adding 6 ICJ members from Australia (27 appointments) and European countries (France – 15 appointments, Germany – 23 appointments, Slovakia – 24 appointments and Sweden – 1 appointment), the Western nations comprise in total 161 of 218 appointments, demonstrating their strong dominance in ISDS decision-making. While such dominance is not necessarily visible in the ICJ at which there can be only one national of a given State at a time and the ICJ members are elected by the UN General Assembly with respect to geographical diversity requirements, it is worthy to note that throughout almost whole history of the Court every permanent member of the Security Council or its predecessor (i.e. China, France, Russian Federation, United Kingdom, United States) had its national at the bench.[66] However, while at least two ICJ judges from France, the United Kingdom or the United States have been involved in ISDS, no Chinese or Russian ICJ judge have been so which aligns with general underrepresentation of some nations among ISDS decision-makers and lesser participation in ISDS in general. The remaining 15 ICJ members from non-Western countries are thus appointed much less often (58 times) and not more than a few times.[67]

[65] Alain Pellet, 'The Case Law of the ICJ in Investment Arbitration' (2013) 28 ICSID Review 223, 237-238. See, e.g., *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, para. 310; *Ambiente Ufficio S.P.A. and others (formerly Giordano Alpi and others) v. Argentine Republic*, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility, 8 February 2013, para. 540.

[66] The 2018 was the first time when a candidate from one of the P5 States – Sir Christopher Greenwood from the UK, an established international arbitrator at the time – has not been elected to the Court.

[67] One could consider Slovakia as historically not a Western country. However, Peter Tomka, the Slovakian ICJ member was appointed the ICJ judge in 2003, a year before Slovakia acceded to the European Union. Judge Tomka has been appointed in ISDS dispute for the first time in 2007. Thus, Slovakia has been taken into account along other European States as 'Western'.

Graph 3: ICJ judges's appointments (divided by nationality, decrasing order)



The number of appointments of individual ICJ members show strong individual differences in involvement in ISDS decision-making, similar to those noticeable generally among international arbitrators. As noted above, less than half of ICJ members, all from Western nations, concentrate almost ¾ of all the appointments. In fact, just 5 individuals have been appointed 127 times, more than a half of the total number. These individuals with large portion of appointments represent certain overlapping types of ICJ judge appointments in ISDS decision-making as well as provide some general insights on the modes of appointment.

A first type to be identified are the ICJ judges who were appointed from one to three times only. They constitute a majority of all the ICJ judge appointees (15 out of 28) while being appointed only 26 times (~12%) in total. As noted above, a significant portion of these 'one time players' (9) are judges from non-Western states. These rare appointees usually have either the role of president (Higgins, Jennings, Keith, Petrén) or the respondent's arbitrator (Cançado Trindade, Ranjeva, Weeramantry). Others have been involved only in the ICSID annulment proceedings (Bola, Robinson, Shahabudeen). Just a look at the names shows that Western 'one time players' appear usually as tribunal presidents[68] while non-Western ICJ judges take up other roles.

The non-Western ICJ judges are also a significant group of another discernible type of ICJ appointments in ISDS. Several ICJ judges acted as arbitrators in disputes where the host State was either a State of their nationality or a State close in the region or otherwise (e.g., due to culture,

[68] The other two Western ICJ judges in this group are Ronny Abraham and Sir Gerald Fitzmaurice, each appointed one time respectively as arbitrator for the respondent and for the claimant.

language, or religion). In the former case, they were always appointed as arbitrators for the respondent, in the latter also at times as presidents. Such an example can be Judge Al-Khasawneh from Jordan who was involved in disputes against Egypt, Iraq, Mauritius, Pakistan, and Turkey; Judge Mbaye from Senegal who was deciding cases against Cameroon, the Democratic Republic of the Congo, Egypt, Guinea, and his own Senegal; or Judge Rezek from Brazil who had cases concerning only Argentina, Chile, and Paraguay. Judge Tomka from Slovakia, while having a broader 'geographical portfolio' of the disputes, have heard 7 (out of 24) cases involving Czech Republic, Estonia, Latvia, Poland, and his own Slovakia adding further 3 involving post-Soviet republics. While Judge Greenwood also has been often appointed to decide on the disputes involving countries form the CEE region (11 out of 28 cases), that may rather just confirm that post-Communist countries have been often found respondents in investment disputes.[69] Strong geographical focus on Latin America and generally Spanish speaking countries can be also ascribed to Judge Sepulveda-Amor from Mexico (Bolivia, Colombia, Cuba, Ecuador, Equatorial Guinea, Spain). At the same time, no geographical focus can be noted in annulment appointments. Also generally these appointments appear to be much more balances geographically when compares to arbitral appointments.

The geographical focus of ICJ judges' appointments, particularly those from non-Western developed countries, suggests a pattern to look for intermediaries between the universal of international law and the local of domestic context. That search is understandable in investment disputes a large part of which involves an investor claimant from Western, developed world and a State respondent from non-Western, developing countries. In their seminal work on the sociology of international arbitration, Dezalay and Garth emphasize that transnational role of international arbitrators.[70] They explicitly indicate 'appointment to the World Court' as a way for local legal notables to be recognized as international lawyers, sufficiently distanced from their domestic setting.[71] The ICJ judge status enables recognition as a 'local universalist', having sufficient international social capital and the aura of neutrality to get arbitral appointments but also perceived by host States as neutral but friendly adjudicator aware of their domestic context. That may explain the trend to appoint ICJ judges mainly as presiding arbitrators, members of annulment committees and arbitrators for the respondent described further.

[69] A similar portion of appointments in disputes concerning post-Communist States is visible in the appointments of Judge Crawford (6 out of 27) and Judge Schwebel (8 out of 24).
[70] Dezalay and Garth (n 20) 3–15.
[71] ibid 297; in a quoted interview, a respondent asked about non-Western arbitrators, pointed out to several ICJ judges, including Jimenez de Arechaga (Uruguay), Mbaye (Senegal) and Bedjaoui (Algeria).

Another type, or rather a general trait of ICJ judges repeatedly involved in ISDS decision-making is an ICJ judge who had a vast majority of appointments during or after the respective ICJ term. As noted before, only few ICJ judges in much fewer cases (37 out of 218) were appointed before obtaining their judge status. Moreover, 21 of these appointments before the ICJ appointment concern James Crawford, being the only person in the dataset who had more than 3 appointments and the majority of these occurred before the respective ICJ term. His respective popularity in the field can be explained both by his status of an eminent international jurist due to his work on the ILC Draft Articles on State Responsibility[72] as well as his work as a counsel in investment disputes.[73] These findings suggest the ICJ appointment provides a 'prestige boost' to an individual and thus is a relevant factor behind appointing that person as an arbitrator.

International arbitration as a profession is usually construed as comprising two main groups: arbitration professionals and international law academics. While it might seem that ICJ judges belong predominantly to the latter, actually several, both from Western and non-Western countries, have been established also in legal and/or arbitration market, domestic or international, even before their respective ICJ term. Among 'legal professionals-turned-judges' we can note Judges Bedjaoui, Bola Ajibola, Crawford, Greenwood, Jimenez de Arechaga and Mbaye.

As noted before, the ICJ judges may be involved in ISDS either as neutral international dispute professionals or as 'local universalists', translating between general international law and particular local context. This function is matched by the role in which typically they are appointed: in arbitration cases as presidents or arbitrators for the respondent and in annulment proceedings, either as presidents or committee members. The data shows strong tendency to have ICJ judges as presidents of their respective benches as exactly half of all appointments are presidential ones (91 in cases and 18 in annulment proceedings). Some individuals, both of few and numerous appointments, have very strong functional focus on that role, just to mention Judges Greenwood (23 out of 28), Guillaume (13 out of 14), Higgins (3 out of 3), Keith (2 out of 2) or Simma (17 out of 23).

As a wing arbitrator, an ICJ judge has been appointed 55 times by respondent and 22 times by claimant. That may suggest the perception of ICJ judges as more 'state-friendly', in particular that 2/3 of the claimant appointments account for one particular individual – Judge Schwebel (14 appointments). Besides 18 presidential appointments to annulment committees, an ICJ judge was

[72] James Crawford, 'ILC Articles on State Responsibility of Internationally Wrongful Acts, with Commentaries' (2001) <https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>.
[73] E.g., *Corn Products International v. Mexico*, ICSID Case no. ARB(AF)/04/1, or *Eureko v. Poland* (ad-hoc). In both cases, Mr. Crawford was a counsel for the respondent.

appointed 30 times as an annulment committee member, in several cases already chaired by another ICJ judge. Reportedly there was a tendency on the part of the ICSID to appoint members of annulment committees from 'a small cohort of individuals', apparently including several ICJ judges, 'in the hopes of some greater continuity and cohesiveness of approach'.[74] Indeed, as noted before, ICJ judges participated in roughly 1/3 of all annulment proceedings (40 out of 133), including the first few as the most recent and pending cases.[75]

A very important role in making appointments is not only on the parties and their arbitral appointees, as it is traditionally in arbitration, but also on arbitral institutions and other appointing authorities, as applicable. It may happen (and indeed often does happen in investment arbitration) that the parties or co-arbitrators cannot come to agreement on the person of the president of the tribunal. It is no surprise in the face of substantial importance of president selection to the course and outcome of the proceedings. At times, due to various reasons, also wing arbitrators have to be nominated by someone else than the party to the dispute. Then, an appointing authority enters as a third party. In such a role there is usually the respective arbitral institution (ICSID, PCA, ICC etc.) or, rarely, an individual respectable in the field, indicated in turn by the underlying instrument of the dispute (treaty or contract) or arbitral rules or by another authority *appointing the* appointing authority. It should be no surprise that often among these individuals appear again ICJ judges, especially presidents and vice-presidents of the Court.[76]

Interestingly, ICJ judges are appointed presidents of arbitral tribunals quite often both by the decision of the parties (28 times) or party-appointed co-arbitrators (20 times) and by arbitral institutions (33 times). Some ICJ judges have strong presidential profiles as well as tendency to be appointed mainly by arbitral institutions instead of the parties or co-arbitrators. For example, Gilbert Guillaume, a former ICJ President, has been appointed president 13 times (out of 14 total appointments), 10 times of which by the ICSID. Similarly the current ICJ President, Joan Donoghue, all of her 4 appointments as president obtained from arbitral institutions. Judge Sepulveda-Amor was appointed president 6 out of 7 times by arbitral institutions. Thus, it can be discerned that some ICJ judges enter the ISDS also or mainly through the party appointment, some

[74] Luke Eric Peterson, 'ICSID Committee Confirms Egypt's Lack of Treaty Breaches in Hotel Dispute, but Takes Issue with Tribunal's Comment on Recourse to Local Courts' (*Investment Arbitration Reporter*, 2 July 2010) <http://www.iareporter.com/articles/icsid-committee-confirms-egypts-lack-of-treaty-breaches-in-hotel-dispute-but-takes-issue-with-tribunals-comment-on-recourse-to-local-courts/> accessed 20 May 2022.

[75] International Centre for Settlement of Investment Disputes, 'The ICSID Caseload Statistics' Issue 2022-1 <https://icsid.worldbank.org/sites/default/files/documents/The_ICSID_Caseload_Statistics.1_Edition_ENG.pdf > accessed 19 May 2022.

[76] While this aspect of ICJ judges as appointing authorities in investment arbitration is outside the scope of this paper, the conducted data search in the IAReporter indicated at least 13 cases in which ICJ judges appeared as appointing authorities.

others are involved mainly through the institutional framework. Arguably, as noted before, a status of ICJ judges serves them as simple evidence of fulfilling requirements for an international arbitrator and guarantee both neutrality as well as sufficient knowledge of international law as required by the ICJ Statute.

A review of the outcomes of the analyzed cases does not confirm the hypothesis of a more 'State-friendly' approach taken by tribunals with an ICJ judge. An overview of concluded cases by the UNCTAD shows that respondent States prevail slightly more often (37%) than investor claimants (28%) while another substantial part of cases is settled or discontinued for other reasons (32%).[77] In its statistics, the ICSID shows the results are even more balanced: respondent States prevail in 34% of cases, investor claimants in 31%, while 35% cases were discontinued or settled.[78] In comparison, the outcomes of both cases and annulment proceedings decided by ICJ judges are even more strikingly balanced. In arbitration proceedings involving ICJ judges as arbitrators, claimants and respondents won exactly the same number of times (46 each – 23 %). Analogously, proceedings have been settled 23 times and discontinued 24 times. Further 31 proceedings (10 cases and 21 annulments – 15 %) are pending. 27 annulment proceedings have been concluded. In the latter, 7 times the annulment has been granted at least in part and 22 times denied. The balance is also seen in these annulments: claimants and respondents succeeded respectively 3 and 4 times and were denied respectively 10 and 12 times.[79] Thus, the outcome balance is not tilted towards respondent States as one could have expected despite the visible skew in the pattern of appointments. If to split the numbers between positions at the bench (party arbitrators and president), the only interesting pattern is that most of pending cases (23) involve ICJ judges as presidents which suggests a trend to move from appointing them as party arbitrators. It should be reiterated here that most probably this would nevertheless apply to former ICJ judges or arbitrators appointed before becoming an ICJ judge only as sitting ICJ judges are excluded from appointments. To conclude, the data does not prove that appointing an ICJ judge has visible or direct influence on the outcome of the proceedings.

To conclude the data analysis, several takeaways can be summed up. First of all, ICJ members appointments in ISDS are substantial both quantitatively and qualitatively – they have been

[77] UNCTAD, International Dispute Settlement Navigator (data as of 31 December 2021), <https://investmentpolicy.unctad.org/investment-dispute-settlement> accessed 19 May 2022. The dataset includes only treaty-based disputes.

[78] International Centre for Settlement of Investment Disputes (n 75).

[79] While 27 annulment proceedings have been concluded, they involve in total 13 annulment applications by claimant and 16 by respondent as in two cases (*Klockner v. Cameroon*, ICSID Case no. ARB2/81/2; *Continental Casualty v. Argentina*, ICSID Case no. ARB/03/9), both parties sought annulment. In both cases, applications of both parties have been dismissed.

involved as decision makers in numerous and important cases. Second, the appointments are not coincidental – vast majority of appointments concern ICJ judges during or after their term, suggesting that ICJ judge status provides a 'prestige boost' in investment arbitration career. Third, the trend of appointing ICJ judges increased along general increase of investment cases and aligns with general demographic of the arbitral profession, being mainly male and Western (with strong dominance of the Anglosphere). Fourth, ICJ judges tend to be appointed in particular roles, mainly as presidents of tribunals and annulment committees, as well as arbitrators for respondent and annulment committee members. Fifth, several types or ICJ judges appointed to arbitration are present, including several repeat players, numerous 'one time players' – particularly from non-Western, developing countries – and 'local universalists with strong geographical focus of appointments. Sixth, at the same time, ICJ judges are not necessarily international legal scholars but already established international dispute professionals, thus bridging two main professional groups in international arbitration profession. Seventh and final, despite significant imbalance in appointment patterns, the outcomes of cases involving ICJ members are strikingly balanced and do not differ substantially from the general population of ISDS decisions. These takeaways invite for some normative considerations in the wake of substantive limitation of involving active ICJ members in ISDS decision making.

4. Implications of excluding active ICJ members from ISDS decision making

As the quantitative analysis demonstrates, most of ICJ judge appointments to ISDS occurred during their respective terms. Most probably, that would lead to a substantial decrease of ICJ appointments in ISDS. That may also apply to former ICJ judges, a similarly significant group, despite they are not prohibited from taking appointments. That is consistent with the observed appointments of former judges in the recent years after the 2018 decision: 4 in 2019, 7 in 2020, 2 in 2021 and 1 as of May 2022. It is also uncertain whether the future ICJ judges who are or will be sitting at arbitral tribunals remain arbitrators after their ICJ appointment. In effect, it is very probable that the available arbitral and annulment committee positions will be filled with individuals from different professional groups associated with international arbitration. Whether there will be more arbitration professionals or public international law scholars, it is yet to be seen. That may have implications for the legitimacy of ISDS. If the former will keep their popularity of appointments, that may foster the private international paradigm and a business perspective on investment disputes. In turn, if the gap is to be filled with the latter, it is hoped that the public international law paradigm is maintained and the coherence between the regimes is fostered. On

the other hand, it has to be emphasized that a quantitative analysis of outcomes of the cases involving ICJ judges does not evidence any skew in favor of states. Whether there is some qualitative difference in reasoning by the tribunals and committees including ICJ judges, it remains to be analyzed further. A preliminary quantitative research on ICJ citations suggests that might be the case.[80] That, in turn, poses relevant normative questions.

The question of legitimacy of ISDS and the implication of limiting the ICJ involvement on the legitimacy concerns remains open. While the 2018 decision solves an arguably minor legitimacy issue for the ICJ, it cuts one of the ways for ISDS to engage with the Court and, through it, with general public international law. Arguably, it might also limit the ways to foster consistency and coherence, both internal and external, of investment decisions. These aspects, however, as outside of the scope of this paper, have to be inspected further.

As argued before, involving a professional judge of a permanent international court might have several functions in a decentralized framework of *ad hoc* arbitral tribunals. The most important function seems to be the broad legal expertise beyond the narrow field of investment law but knowledge of general international law matters which are often indispensable to apply international law applicable to investment disputes. But also other, less legal traits, cannot be ignored. Substantial prestige and respect to the Court and its judges, an effect of substantial social capital, play a role in such highly socially contextualized field as international arbitration. The clout of the ICJ judges adds to the clout of the tribunal and thus the persuasiveness and the legitimacy of its decision. While the same observation may apply to former ICJ judges and judges of other courts and tribunals (also domestic ones), a significant part of these international dispute professionals will be barred from participation in the field at least until their respective term ends. Excluding these judges may also slow down the process of judicialization of international arbitration (however, that process is fueled not only by personal involvement of judges in the field). Paradoxically, while the composition of the ICJ is not representative for the global population, despite the fact that its members are selected by the UN General Assembly in voting, the involvement of ICJ judges was one of the factors for inclusiveness and diversity in international arbitration. Many of the few international arbitrators from non-Western developing world were ICJ judges. Arguably, that status was a significant element of their social capital to make it possible to enter the field. While there are ongoing efforts to ensure gender, racial and ethnic equality in international arbitration profession, particularly in arbitral appointments, there is yet a long way to go.

[80] Charlotin (n 13) 213–214.

To sum up, the multi-faceted involvement of ICJ judges as decision makers in ISDS is, or rather was, quantitively and qualitatively, significant. There several functions of the involvement of an ICJ judge in investment dispute, just to name enhanced perceived legitimacy of the tribunal, its decision and the whole regime. As currently ISDS is facing a backlash as well as being subject to multi-faceted reform debate, that exclusion may in fact add more fuel to legitimacy challenge against it than help mitigate it.