

## THE POLITICS OF INTERNATIONAL INVESTMENT ARBITRATORS

Catherine A. Rogers<sup>†</sup>

Arbitrators have become the lightning rod for some of investment arbitration's most contentious political debates. The specific reasons are tied to the nature of investment arbitration itself. It was originally conceived as a means to depoliticize international investment law by removing disputes from national courts and gunboat diplomacy. Investment arbitration was supposed to ensure those disputes would instead be decided by a neutral law-bound process.<sup>1</sup> According to its critics, investment arbitration did not accomplish that aim. Its outcomes, critics contend, are the product of a host of extra-legal factors,<sup>2</sup> including investment arbitrators' policy preferences or, worse, their own personal self-interest. For every hypothesis about what extra-legal factors affect investment arbitrators' decisions, there seems to be an equal and opposite hypothesis.

Some critics hypothesize that investment arbitrators favor their appointing party in order to increase the likelihood of future appointments;<sup>3</sup> defenders counter that arbitrator appointments are based on reputations for impartiality so that partisan decisionmaking would be counterproductive.<sup>4</sup> Some commentators hypothesize that arbitrators are inclined to render compromise awards so that neither party is dissatisfied (again in an effort to maximize chance of future appointments);<sup>5</sup> others hypothesize that balancing and notions of proportionality are

---

<sup>†</sup> Professor of Law and International Affairs, Paul & Marjorie Price Faculty Scholar, Penn State Law. I would like to thank...

<sup>1</sup> See Andrea K. Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor-state Arbitral Awards: The Re-politicization of International Investment Disputes*, 21 AM. REV. INT'L ARB. 211, \_\_\_\_\_ (2010) (purpose of investment arbitration is to depoliticize investment disputes); Ibrahim Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, in THE WORLD BANK IN A CHANGING WORLD 102-03 (Franziska Tschofen & Antonio R. Parra eds., 1st ed. 1991) (same).

<sup>2</sup> In this article, I use "extra-legal" to refer to a host of factors that are apart from legal texts, precedents and procedures. These include "ideology, judicial background, strategic reaction to other institutions, the nature of litigants, or the makeup of [tribunals]." Gregory C. Sisk, *The Quantitative Moment and the Qualitative Opportunity: Legal Studies of Judicial Decision Making*, 93 CORNELL L. REV. 873, 877 (2008). M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SINGAPORE YB INT'L L. 19, 30-31 nn. 40-43 (2006) (referring to an "arbitration fraternity" that promotes its own interests at the expense of legitimate state interests). In addition to scholarly commentary, several advocacy groups have advanced this position. See, e.g., Corporate Europe Observatory, *Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, available at <http://corporateeurope.org/publications/profitting-from-injustice>.

<sup>3</sup> The propriety and potential effects of such "favoritism" is taken up *infra* notes \_\_\_-\_\_\_, and accompanying text.

<sup>4</sup> Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 492 (2009);.

<sup>5</sup> Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUBLIC CHOICE 107 (1983) (arguing that "income-maximizing private judges make decisions which are Pareto efficient with respect to the litigants" and that the competition between private judges compels them to consider the effects of their decisions upon the litigants); Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 34 (2008) (arguing that since "arbitrators are commonly chosen (directly or indirectly) and paid by the parties, giving the arbitrators an interest in rendering decisions that will maximize the chances that they will be chosen again in

“perhaps something quite different than arbitrators traditionally conceived.”<sup>6</sup> Some commentators argue that arbitration rules that prohibit arbitrators from sharing nationality with either party are problematic because they preclude States from appointing arbitrators who would best understand the context of State decisionmaking,<sup>7</sup> while others have characterized the same prohibitions as a “step in the right direction.”<sup>8</sup> Still other commentators hypothesize that investment arbitrators systematically value investor interests over State interests either to increase chances of reappointment<sup>9</sup> or because of their background in commercial arbitration.<sup>10</sup> In apparent answer to some of these critiques, other commentators argue that partisan decisionmaking would be counterproductive<sup>11</sup> if not “suicidal”<sup>12</sup> for arbitrators.

Each hypothesis and counter-hypothesis is predicated on certain empirical assumptions, and most are tied to proposals to reform investment arbitration. These empirical assumptions and proposed reforms can often be traced to anecdotal accounts of the system or more general dissatisfaction with or support for the substantive policy outcomes of particular cases. This combination of anecdote and political positioning has made investment arbitration an irresistible trove for empirical research. Focused, sustained empirical research could, after all, provide definitive “proof” of which among the myriad hypotheses is correct. Even better, in a system as ideologically divided and rapidly evolving as investment arbitration, empirical proof of specific polemics would seem able to move certain proposals to the front of the long line of reforms being advocated.

---

future disputes. The result is an incentive to render compromised judgments that do not badly offend either party.”) (cited in Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns Of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 49 n.4 (2010)).

<sup>6</sup> Stone Sweet, Alec, *Arbitration and Judicialization* at 75 (January 20, 2012). Oñati Socio-Legal Series, Vol. 1, No. 9, 2011. Available at SSRN: <http://ssrn.com/abstract=1988923>.

<sup>7</sup> William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 Va. J. Int’l L. 307m, \_\_\_ (2007) (identifying as a weakness in investment arbitration tribunals the inability under ICSID rules of States to appoint their own nationals to ensure that arbitrators have sufficient understanding and sympathy for the context of States’ decisionmaking).

<sup>8</sup> Paulsson at 8 (arguing that rules that preclude appointing of an arbitrator who shares the nationality of one party as “a step in the right direction”).

<sup>9</sup> Cf. Andrew Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, 49 DUKE L.J. 1279, 1282 (2000) (hypothesizing that in domestic arbitration, by ignoring applicable mandatory rules, arbitrators can “develop a reputation as a desirable arbitrator” and thus increase their chances at future selection).

<sup>10</sup> This concern is echoed by many scholars. See, e.g., Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, AM. J. INT’L L. 179 (2010) (noting that many investment arbitrators “have a background primarily in international commercial arbitration rather than public international law” and that background “may make [them] less familiar with or concerned about public international law interpretive approaches”); M. Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in *Appeals Mechanism in Investment Disputes* 39, 41-42 (Karl P. Sauvant ed., 2008) (arguing that the fact that because most arbitrators come from commercial arbitration backgrounds, they may not be as sensitive to the public nature of the interests involved); David Schneiderman, *Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes*, \_\_ NW. J. INT’L L. & BUS. \_\_ (2010) (same).

<sup>11</sup> Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT’L L. 471, 492 (2009);

<sup>12</sup> Stone Sweet at 75 (“[I]t seems suicidal for arbitrators to proceed . . . with a heavy thumb pressed permanently down on the investors’ side in cases with very high political stakes”).

Two of the most radical reform proposals are Jan Paulsson’s call for elimination of party-appointed arbitrators,<sup>13</sup> and Gus Van Harten’s proposal to replace investment arbitration with a permanent investment arbitration court.<sup>14</sup> The proposals come from opposite sides of the political divide in investment arbitration—Paulsson is one of world’s leading arbitration specialists and Van Harten is one of investment arbitration’s most ardent critics. Perhaps ironically, their proposals converge in some important respects. Both proposals rely, at least in part, on empirical research and they both take direct aim at international arbitrators.

Empirical research about investment arbitrators is a relatively new endeavor. It draws inspiration from and follows some of the larger trends established by similar research about judicial decisionmaking in national and international courts. As a result, it is helpful to understand its antecedents in studies of judicial decisionmaking, in particular some of the methodological limitations that have been explored in that strain of empirical research. Part I of this paper begins with a brief sketch of some of the most significant methodological challenges raised by this genre of empirical research, including how some of those challenges affect empirical research in investment arbitration. The assessment of empirical research in investment arbitration provides a backdrop to the analysis of substantive issues in the remainder of the paper.

Part II offers an evaluation of selected reforms that have been proposed for investment arbitration based, in part, on some findings in empirical research. In Section A, I examine research regarding dissenting opinions, seeking to clarify how to read and interpret empirical findings about the rates at which party-appointed arbitrators dissent in favor of their appointing party. Section B takes up proposed reforms to eliminate the practice of party-appointed arbitrators, which is predicated on some of the same skepticism expressed based on empirical findings in Section A. Rather than simply countering proposed reforms, this Section makes an affirmative case for the value that party-appointed arbitrators bring to tribunal decisionmaking. Section C examines the proposal for a permanent International Investment Court and concludes that it would not necessarily accomplish some of the policy and procedural aims that inspire the proposed reform.

After concluding that structural overhaul of investment arbitration system is not feasible or desirable in the short or perhaps even medium term, if ever, Part III proposes specific reforms to improve critical aspects of the current system for arbitrator selection. These reforms are capable of being implemented within the existing framework, but could nevertheless redress some of the critiques of investment arbitration that prompted the more structural reform proposals.

## I. Empirical Research Regarding Investment Arbitrators

---

<sup>13</sup> Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REV.: F. INVESTMENT L.J. 339 (2010).

<sup>14</sup> Gus Van Harten, *Investment Treaty Arbitration and Public Law 180-84* (2008); Gus Van Harten, *A Case for an International Investment Court* (June 30, 2008). Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper. Available at SSRN: <http://ssrn.com/abstract=1153424> or <http://dx.doi.org/10.2139/ssrn.1153424>.

Empirical research on legal decisionmaking, both judges and arbitrators, has become a genre of its own.<sup>15</sup> The generalized goal of most of these pursuits is to identify extra-legal factors that affect, determine, or alter the outcomes of legal decisionmaking. Empirical research regarding investment arbitrators derives both inspiration and methodological approaches from empirical research into judicial decisionmaking. But there are also important differences, however, both terms of specific goals and in the impact of its conclusions from empirical research regarding investment arbitration. This section surveys empirical research regarding U.S. courts, including some of its methodological limitations and critiques.

### A. Goals of Empirical Research

In the context of national judicial decisionmaking, two schools of thought have inspired the growing body of empirical research. The first is the anti-formalist critique of legal decisionmaking.<sup>16</sup> The conventional, formalist view of legal decisionmaking is that outcomes depend on an almost mechanical application of law to the facts of the case. This view still has significant purchase in certain circles, particularly in civil law systems.<sup>17</sup> In other places, legal realists, and later critical legal scholars, have challenged this view of judicial decisionmaking. They posit that other factors, most notably personal policy preferences of judges, determine outcomes. Scholars have pursued empirical research to prove that the realists had the better view and that formalism was an obsolete model for understanding legal decisionmaking.

A second beacon for empiricists, which follows from the first, relates to systemic bias. If factors other than neutral application of law to facts affect case outcomes, systems of justice that are presumed to be law-bound and impartial could, instead, be systematically biased in favor of certain parties or outcomes. The urge to identify the factors that contribute to that systemic bias, and measure the extent of that bias affects outcomes, has lured even more empiricists to pursue research in this field. Together these two postulates have generated an extensive body of research. The ostensibly neutral yardstick of empirics seems like a perfect tool to evaluate the supposed bias of adjudicatory decisionmakers.

Empirical research is relatively new to investment arbitration, in part because the emergence of a significant body of publicly available data is relatively new.<sup>18</sup> Some of the same interests that inspire research into judicial decisionmaking also inspire empirical research in investment arbitrators' decisionmaking, but there are also some important differences. In contrast to a more generalized anti-formalism critique in the judicial context, much empirical research in the area of investment arbitration is a response to anecdotal critiques of the

---

<sup>15</sup> This is evident not only from the sheer volume of published papers, but the fact that there are now even entire symposia dedicated to the topic. See, e.g., Steven G. Gey & Jim Rossi, *Empirical Measures of Judicial Performance: An Introduction to the Symposium*, 32 FLA. ST. U. L. REV. 1001 (2005).

<sup>16</sup> See Harry T. Edwards and Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L. J. 1895, 1924 (2009).

<sup>17</sup> Micheal Waibel & Yanhui Wu, *Are Arbitrators Political?*, (forthcoming) (working draft—cited with permission).

<sup>18</sup> Information about international commercial arbitration generally much less available. In response to critics and political pressure, investment arbitration has made significant steps to become more transparent. As a result, the body of publicly available information about investment arbitration has grown exponentially in recent years. See Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 KANSAS L. REV. 1301 (2006).

investment arbitration regime—the competing hypotheses and counter-hypotheses described in the introduction. The research very deliberately sets out to test assumptions and allegations of bias in decisionmaking by investment arbitrators. The ability to identify potential influence of extra-legal factors in judicial decisions raises interesting questions about how judges make decisions. When similar questions are raised about investment arbitration, interpretations of data may too readily gravitate to conclusions about the integrity or “bias” of investment arbitrators or blanket refutation of underlying concerns about real possibility of systemic bias.<sup>19</sup>

Whereas research into judicial outcomes contributes to a generalized discussion about the nature of legal decisionmaking, similar empirical research regarding investment arbitrators is often inspired by and necessarily feeds into a much more particularized and riven debate about the legitimacy of investment arbitration.<sup>20</sup> In this vein, empirical research in investment arbitration seeks to, and has the potential to, impact the debate over various proposals for reforms. In some respects, empirical research in investment arbitration is a welcome relief to anecdote and impressions that have fueled the debate. But the highly politicized also creates some risks. But it also raises “a danger that policy makers will take up a study for purposes that the research does not support.”<sup>21</sup>

There is a risk that the allure of the ostensible neutrality of empirical research will overtake critical assessments of its research in light of the limitations of both of particular empirical studies and of empirical research as a methodology for measuring phenomenon as complex as legal decisionmaking. As valuable and important as empirical research can be, it must be read, interpreted, and relied on only with a full understanding of its limitations.

## B. Methodological Challenges

Critiques of empirical research into judicial behavior are by now almost as extensive as the original empirical research itself. Systematic reflection has also led to some sober assessment about the methodological limits of such research as well as the limitations on its outcomes. At a more structural level, scholars acknowledge that definitively proving or disproving systemic bias in a system of adjudication is, quite simply, impossible. That impossibility is inherent in empirical methodology, and in the peculiarities of legal decisionmaking.

This Part briefly reviews of some of the most significant limitations with regard to empirical study of judicial and arbitrator decisionmaking. A systematic survey of empirical methodology is beyond the scope of this Article, but brief perusal of some of the most significant

---

<sup>19</sup> Van Harten, *Fairness and independence in investment arbitration: A critique of Susan Franck’s “Development and Outcomes of Investment Treaty Arbitration*, *supra* note \_\_\_, at 1 (challenging empirical findings in another study as “inappropriate” in its conclusions that investment arbitration “as a whole, functions fairly” and is not in need of eradication or radical overhaul”).

<sup>20</sup> A similar divide exists in domestic US arbitration, where advocates for consumer and employee rights in particular regard what has been dubbed “mandatory arbitration” as depriving those claimants of important procedural rights they would have in U.S. courts. This divide has produced a vibrant political debate, and some substantial proposals for structural reform. Empirical research is now playing an increasingly important role in sorting out the nature and true extent of perceived problems with existing practices. [cite to Rutledge]

<sup>21</sup> Van Harten, *Fairness and independence in investment arbitration: A critique of Susan Franck’s “Development and Outcomes of Investment Treaty Arbitration*, *supra* note \_\_\_, at 9 (objecting to the use of empirical research in support of policy positions regarding the U.S. Model BIT).

limitations is helpful as a primer for understanding the growing body of empirical research in the area of investment arbitration and its relationship to proposed reforms. The point of this analysis is not to discourage empirical research, or to discount the contributions it can make to our understanding of this emerging field. It is instead an effort to rein potentially exaggerated importance that may be attributed to specific findings, which at best only provide partial and provisional insights into the phenomenon they study.

### 1. The Elusive Control for the Most Essential Variable

One of the most fundamental difficulties with empirical research regarding legal decisionmaking is that it seeks to measure whether and to what extent extra-legal factors have affected the outcome of adjudicatory decisions. It cannot, however, isolate what legal outcome would otherwise have resulted in the absence of any hypothesized influences. In other words, it is impossible to control for the most essential variable (implicitly or explicitly) being tested—the correct legal outcome in a particular case. Absent control for the correct outcome, or at least the relative strength of a particular party’s case, the extent and even existence of deviations from it cannot be known for certain. Some methodological work-arounds have been developed in an attempt to control for the strength of case and the proper outcome.<sup>22</sup> These work-arounds provide proxies for the correct substantive outcome, which has helped sharpened empirical research.

One example of a work-around is in Gus Van Harten’s recent work, which uses a content-based analysis to compare outcomes regarding jurisdiction as either more “restrictive” or “expansive.”<sup>23</sup> To avoid comparison with the “correct outcome” he engages in a relative comparative analysis as between outcomes. He finds that arbitrators tend more often to adopt expansive interpretations on issues of jurisdiction, and reasons that such expansive findings tend to favor claimants because they “expand[] the authority of investment treaty tribunals and ... allow[] more claims to proceed.”<sup>24</sup> Although Van Harten demonstrates a statistically significant propensity of investment arbitrators to adopt expansive interpretations, all we know is that these decisions are “more expansive” than other alternatives.

These outcomes appear to be more expansive than those preferred by individuals whose policy preference is for narrower investment arbitration jurisdiction. They do not, however, represent a finding that investment arbitrators’ “expansive” jurisdictional findings are somehow an improper deviation from the “correct” legal outcome. Van Harten is careful not to characterize these findings as deviating from a “correct” legal outcome,<sup>25</sup> but he does offer a hypothesis about a possible motivation for the expansive jurisdictional findings—that “a strong tendency toward expansive resolutions [on jurisdictional issues] enhanced the compensatory promise of the system for claimants[.]”<sup>26</sup> Despite the “strong tendency” in his data and how well

---

<sup>22</sup> [cites]

<sup>23</sup> Van Harten, *supra* note \_\_\_\_, at \_\_\_\_

<sup>24</sup> Van Harten, *supra* note \_\_\_\_, at \_\_\_\_

<sup>25</sup> For example, he states “If states expected the relevant issues to be resolved restrictively, this has clearly not been the case in practice.” Van Harten, *supra* note \_\_\_\_, at 35. Of course, interpretations that differ from what states expected is not the same thing as an improper interpretation of “ambiguous language in investment treaties.” *See id.* at 5.

<sup>26</sup> Van Harten, *supra* note \_\_\_\_, at 3.

it fits with existing narratives about arbitrator bias, Van Harten acknowledges that other hypotheses might explain the result. At least one possible alternative hypothesis is explored in more detail below.<sup>27</sup>

## 2. Correlation and Causation

In addition to an inability to control for correct outcomes, another important challenge for empirical research regarding adjudicatory decisionmaking is that researchers are hypothesizing about causal relationships, but empirical data can only prove correlation. Specifically, researchers design studies to test for the influence of particular extra-legal factors on legal decisionmaking and hypothesize which variables might be responsible for that influence. In analyzing the data, researchers often find a correlation between the variables that they have designed to test for. The problem is that observed correlations do not prove causation. Some examples will help illustrate.

In one well-publicized study outside the field of adjudication, researchers found a strong correlation between childhood myopia and infants who slept with the light on.<sup>28</sup> The correlation was—reasonably, but wrongly—reported as proof that sleeping with the light on as an infant *caused* myopia. A later study found no correlation between lighting and myopia, but a strong correlation between parental myopia and the development of child myopia. Researchers in the second study made a related inference (to provide an alternative hypothesis for the correlation identified in the earlier study) that myopic parents were more likely to leave a light on in their children’s bedroom.<sup>29</sup> Myopia, it seems, also interfered with the first researchers’ ability to distinguish correlation from causation.

Closer to the topic at hand, in the U.S. domestic arbitration context, some striking correlations have led commentators to hypothesize about the existence of causal relationships. For example, some scholars have observed that business claimants have exceptionally high win rates (in excess of over ninety percent!) in consumer debt arbitrations.<sup>30</sup> Based on the observed correlation in this data, scholars, policymakers and commentators concluded that consumer debt arbitration was biased or “heavily slanted” in favor of business parties.<sup>31</sup> As it turns out, however, creditors had “even higher win rates (ranging from 98.4 percent to 100 percent)” in debt

---

<sup>27</sup> See *infra* notes \_\_\_\_, - \_\_\_\_, and accompanying text.

<sup>28</sup> Quinn GE, Shin CH, Maguire MG, Stone RA (May 1999). "Myopia and ambient lighting at night". *Nature* 399 (6732): 113–4.

<sup>29</sup> Holly Wagner, *Night Lights Don't Lead To Nearsightedness, Study Suggests*, (Jan. 21, 2013 06:27 P.M.), <http://researchnews.osu.edu/archive/nitelite.htm>.

<sup>30</sup> Drahozal at 78-79 & n. 11 (Letter from Professors of Consumer Law and Banking Law to Senators Dodd and Shelby and Congressmen Frank and Bachus, Statement in Support of Legislation Creating a Consumer Financial Protection Agency 6 (Sept. 29, 2009), available at <http://law.hofstra.edu/pdf/Media/consumer-law%209-28-09.pdf> (“Studies have found the arbitrators find for companies against consumers

to 96% of the time, suggesting that arbitration providers are responding to the incentive to find for those who select them: the companies that insert their names in their form contracts.”) (cited in

*Christopher R. Drahozal\* and Samantha Zyontz, Credit Claims in Arbitration and in Court*, 7 *Hastings Bus. L.* 777, 779 n.10 (2010).

<sup>31</sup> Drahozal at 79 & n.11, citing *Federal Arbitration Act: Is the Credit Card Industry Using It to Quash Legal Claims?: Hearing Before the H. Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 148 (2009) (testimony of David Arkush stating that in success rates and award amounts, AAA arbitrations appear to be heavily slanted in favor of businesses).

collection cases in national courts.<sup>32</sup> Bias in the arbitration process, in other words, does not appear to have been the cause of high win rates for companies, or at least the strong correlation does not in itself prove that it was.

Another criticism of consumer debt collection arbitration, which echoes some complaints about investment arbitration, is that repeat-players enjoy beneficial treatment by arbitrators who are anxious to be reappointed and therefore seek to render outcomes favorable to those most likely to reappoint them. This hypothesis seemed compelling both because its inherent logic<sup>33</sup> and its support from anecdotal evidence. It also seemed consistent with observed statistics indicating an exceptionally high correlation between corporate parties and favorable outcomes.

Here, empirical research did find a modest statistical correlation between repeat-players and win rates (though no correlation with respect to percentage of recovery).<sup>34</sup> This correlation was consistent with the hypothesis of arbitrator bias. Researchers also found, however, that repeat businesses are more likely to settle or otherwise dispose of unmeritorious cases before an award than non-repeat businesses.<sup>35</sup> Screening out of cases would increase win rates and, the study concluded, was more likely to have produced a repeat-player effect than improper bias among arbitrators.

The lesson of these studies is that correlation can provide support for a researcher's hypothesis about causation;<sup>36</sup> it does not prove it. For any reasonably complex phenomenon, such as legal decisionmaking, a range of possible hypotheses can explain observed correlations in data.<sup>37</sup> This is a cornerstone of scientific methodology. Nevertheless, in discussing their findings many studies, including studies in investment arbitration, elide discussion of their hypotheses about causation and the empirical correlations observed.<sup>38</sup>

---

<sup>32</sup> Drahozal, Christopher R., *Arbitration Innumeracy* (May 26, 2012). *Yearbook on Arbitration and Mediation*, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=2101371>, at 6.

<sup>33</sup> Numerous commentators have written presuming that, as rational actors, arbitrators necessarily decide cases with an eye to earning future appointments. Although this presumed influence of self-interest is often stated as a matter of fact, it is, in reality, only a hypothesis.

<sup>34</sup> Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitration*, 25 OHIO ST. J. ON DISP. RESOL. 843, 913 (2010).

<sup>35</sup> *See id.*

<sup>36</sup> FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* 4 (2007) (“A reader [of empirical studies] should not place undue importance on a finding of statistical significance, because such a finding shows a correlation between variables but by itself does not prove the substantive significance of that correlation.”).

<sup>37</sup> *See* Edwards & Livermore, *supra* note \_\_\_, at \_\_\_ (“Statistical analysis simply cannot capture the full dimension of that unique and important human enterprise known as judging.”)

<sup>38</sup> For example, even if generally careful, Van Harten implies that a higher than expected rate of rulings in favor of investors suggests systemic bias: “If the system is meant to provide an impartial and independent adjudicative process based on principles of rationality, fairness, and neutrality, then the interpretation and application of the law should reflect a degree of evenness between claimants and respondent states in the resolution of contentious legal issues arising from ambiguous treaty texts[.]” Van Harten, *supra* note \_\_\_, at 6. Waibel and Wu, meanwhile, include in their stated hypothesis not only the testable aspects of their theories, but a causal explanation, hypothesizing that “Arbitrators from developing countries are less likely to hold the host country liable *because they are more familiar with the economic and social conditions in developing countries and host countries the more likely source of future arbitral appointments.*” Waibel & Wu, *supra* note \_\_\_, 23 (emphasis added). Several other possible hypotheses could explain an observed correlation. *See also* Waibel & Wu, (stating that they are inquiring into whether “the fact that many arbitrators wear another hat as advocates in concurrent ICSID cases for the investor or the host state *colors* their decisionmaking” not simply whether there is a correlation between identified factors);



### 3. Ideology and Policy Preferences

Another common problem with empirical research into adjudicatory decisionmaking is that it seeks to test the effect of decisionmakers’ political ideologies or policy preferences. Such ideologies and preferences are nearly impossible to measure directly. Instead, researchers use characterizations and proxies for decisionmakers’ actual policy preferences. In research regarding the U.S. judiciary, common proxies are the political party of the appointing president,<sup>39</sup> social background and experience, newspaper evaluations of judges, and prior judicial decisions.<sup>40</sup> More recently, scholars have questioned whether reliance on ideology (even assuming that proxy measures were accurate gauges of ideology) adequately “distinguish[es] between values as a self-conscious motive for decisionmaking and values as a subconscious influence on cognition.”<sup>41</sup> This is an important distinction because self-conscious imposition of policy preferences teeters close to bias or professional misconduct, whereas subconscious influence is simply part of what it means to be human.

This methodological hurdle has important implications for research in investment arbitration. Critiques of investment arbitration often speak in terms of an over-simplified dichotomy between a “pro-investor” or a “pro-state” orientation.<sup>42</sup> This dichotomy is more problematic than liberal/conservative ideologies that have been used in judicial contexts because the stated ideological preference aligns not simply with ideological preferences, but it links the presumed ideological preference with particular parties. While self-consciously allowing political ideology to influence legal decisionmaking may raise questions close to the line of professional propriety, expressly preferencing one party over another falls way on the wrong side of that line. For these reasons, characterizations of ideology in empirical studies of investment arbitrators raise not only the methodological problems that arise in studies of judicial decisionmaking, but seem to improperly impugn arbitrators when proof of such hypothesized bias would be impossible to prove or disprove.

### 4. Over-Simplification of Outcomes

Empirical analysis of inputs and outcomes of an adjudicatory process must be translated into mathematical terms. There are several ways to translate outcomes into dependent variables, though the most common types are binary win-loss outcomes. This approach has been criticized in the context of appellate cases because there are more than two possible dispositions, including

---

*see id.* at 39 (“Our empirical analysis *shows* that arbitrators appear to be influenced, in some cases, by their policy views and do not simply apply the law as it stands when deciding investment cases.”) (emphasis added).

<sup>39</sup> CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).

<sup>40</sup> Chris Guthrie & Tracey E. George, The Futility of Appeal: Disciplinary Insights into the “Affirmance Effect” on the United States Courts of Appeals, 32 Fla. St. U. L. Rev. 357, 366 (2005).

<sup>41</sup> Dan M. Kahan, “Ideology in” vs. “Cultural Cognition of” Law: What Difference Does it Make? 1 (Harvard Law Sch. Program on Risk Regulation, Research Paper No. 08-22, 2008), available at <http://ssrn.com/abstract=1111865>.

<sup>42</sup> *See* Waibel & Wu, *supra* note \_\_, at 21 (using “pro-investor” to refer to a “worldview” that “attach[es] overriding importance to the protection of investment (“property rights”), over and above other societal goals.”). Despite using this terminology, Waibel and Wu acknowledge that “even if an arbitrator is seen as being pro-investor or pro-state, these predispositions do not necessarily correspond to a coherent political philosophy.” *Id.* at 36. Relatedly, they acknowledge that policy preferences are not “directly observable,” *see id.* at 22, and hence they use as a proxy repeat appointments by one category of parties or another.

affirmed in part and remanded, affirmed in part and reversed in part, etc.<sup>43</sup> The complexity of how legal disputes are resolved can lead to coding errors make reduction of dispositions to binary outcomes.

A related, and “perhaps the most troubling,” critique regarding research in the U.S. court system is that researchers investigate only the outcomes of decisions, not their content. Thus, a disposition on procedural grounds is treated the same as a decision on the merits.<sup>44</sup> In addition, this approach is unable to take account of differences between “[o]pinions that reach broad conclusions of law and include significant dicta” versus “opinions that decide cases narrowly on only the arguments presented” and opinions that “hew closely to precedent” or decide cases “on first principles.”<sup>45</sup> Scholars have been developing methodologies for engaging in systematic content-based analysis of legal decisions. Particularly in a field as new as investment arbitration, for which the legal texts are inherently ambiguous, and even legal methodologies are very much debated, it may well be that the content of decisions, rather than the outcomes, have more to tell us about how the field is evolving.

## G. Conclusion

Despite the challenges and critiques of empirical methodology and quantitative analysis of legal decisionmaking, it continues at a seemingly ever-increasing pace.<sup>46</sup> For all this effort, and for all the attention and rhetoric it garners, its conclusions should not be over-stated. As a leading commentator has noted in the judicial context, “[e]mpirical study has yet to demonstrate that any extralegal factor—ideology, judicial background, strategic reaction to other institutions, the nature of litigants, or the makeup of appellate panels—explains more than a very small part of the variation in outcomes (when exploring large numbers of judicial decisions in diverse subject-matter areas).”<sup>47</sup> In light of the limited explanatory power of quantitative models, even scholars who value continued efforts at empirical research are urging a refocus on qualitative forms of legal scholarship, meaning both theoretical and doctrinal analysis of legal issues.

Empirical studies of investment arbitration face all the same challenges described above that affect similar research regarding national judicial decisionmaking, as well as some additional challenges.<sup>48</sup> One important difference, however, is that investment arbitration is still in its “adolescence.”<sup>49</sup> It operates in a volatile and politically charged environment, in which policy makers, arbitrators, practitioners and scholars regularly interact. Even in more stable settings, empirical claims “can bamboozle not enlighten, terrorize not guide, and all too easily

---

<sup>43</sup> Harry T. Edwards and Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L. J. 1895, 1924 (2009).

<sup>44</sup> Edwards & Livermore, *supra*, note \_\_\_\_, at 1926-27.

<sup>45</sup> *Id.*

<sup>46</sup> Sisk at 876 (“we are experiencing what I will call a “Quantitative Moment” in the legal academy” in which “greater value [is] attached” and more resources committed “to empirical study of the law in the leading law schools”).

<sup>47</sup> Sisk at 877

<sup>48</sup> Jason Webb Yackee, Controlling the International Investment Law Agency, 53, Harv. Int’l L. J., 392, 403 (Summer 2012) (“[E]mpirically studying epistemic communities [like the international investment law community] poses certain difficulties”).

<sup>49</sup> Anthea Roberts, Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System, 107 Am. J. Int’l L. \_\_\_\_, at 37 (forthcoming 2013).

end up abused and distrusted.”<sup>50</sup> In investment arbitration, empirical claims to prove or disprove controversial contentions can have an outsized impact.<sup>51</sup> While a welcome contribution to the important debates of the day, they should be evaluated against the backdrop of a clear understanding of methodological limitations and without an expectation that any empirical data, no matter how titillating, can definitively resolve the critical questions facing the investment arbitration regime.

## II. Reform Proposals Regarding Investment Arbitrators

Often relying on empirical evidence, there have been a series of reform proposals for investment arbitration, some emanating from the most esteemed ranks of investment arbitrators and others from its most ardent critics. This Part assesses some of the proposed reforms that aim specifically at investment arbitrators. Section A begins with proposals to eliminate, or at least greatly restrict, dissenting opinions, while Section B takes up a proposal to eliminate party-appointed arbitrators. Section C, then, takes up the most radical reform proposal of all—elimination of investment arbitration altogether in favor of an International Investment Court.

### A. Dissents by Party-Appointed Arbitrators

In a highly-publicized study, leading international arbitrator and scholar Albert van den Berg presented the “astonishing fact” that nearly all dissents written by party-appointed arbitrators are written in favor of the appointing party who appointed them.<sup>52</sup> This is a number that captures attention and, perhaps predictably, has been a springboard for proposed reforms by Jan Paulson, another leading practitioner, discussed in the following section, that party-appointed arbitrators be abolished altogether. In assessing the importance of van den Berg’s findings, and their potential implications for reform proposals, it is essential first to locate it in a larger framework.<sup>53</sup>

As a starting point, it is helpful first to look at how frequently dissents are being issued by party-appointed arbitrators. Van den Berg identifies 34 dissenting opinions by party-appointed arbitrators out of a total of 150 decisions studied, meaning that party-appointed arbitrators only dissent in 22% of all cases studied.<sup>54</sup> Although we can easily calculate that those numbers

---

<sup>50</sup> BLASTLAND & DILNOT, at x-xi (quoted in Drahozal, *Arbitration Innumeracy*, at 2).

<sup>51</sup> Van Harten, *supra* note \_\_\_, at \_\_\_ (“[I]t is important to present empirical research with care and accuracy in order not to mislead policy-makers and academic commentators alike.”).

<sup>52</sup> Van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, in Arsanjani et al., *LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN* 824 (2010).

<sup>53</sup> I do not in this paper undertake either to update van den Berg’s research, which examined awards only through December 31, 2008, or to independently reassess his classification of particular separate opinions as dissenting (as opposed to concurring).

<sup>54</sup> In addition, although van den Berg limits his analysis to dissents authored by party-appointed arbitrators, his discussion sometimes may give the reader the misimpression that *only* party-appointed arbitrators draft dissenting opinions. In fact, van den Berg acknowledges that a small but statistically significant number of dissents are authored by arbitrators who are not appointed by a party. Although van den Berg does not undertake to identify the total number of dissents, he incidentally references to at least [7] dissenting opinions authored by arbitrators who were not appointed by a party. Given the small sample size, and the attempt to discern arbitrator incentives for authoring dissents, it is difficult to see how these other dissents can be considered statistically insignificant, at least in understanding overall rates of dissent in investment arbitration. Even if the [seven] additional dissents not by

translate into a 22% rate of occurrence of such dissents, that calculation does not tell us much. What we need to know is: Is 22% a “big” number?<sup>55</sup> To answer that question, we need to ask further: “Big” compared to what?<sup>56</sup>

Van den Berg appears to suggest that the appropriate baseline for comparison should be nearly zero. He argues against various justifications for dissenting opinions, and concludes that they are only appropriate in extraordinary circumstances, such as if “[s]omething went fundamentally wrong in the arbitral process” or the “arbitrator has been threatened” with physical danger.<sup>57</sup> This perspective about dissenting opinions is likely tied to van den Berg’s own legal background in the civil law tradition, which historically disfavors (or prohibits) dissenting opinions.<sup>58</sup> If the appropriate baseline for the number of dissents were near zero, the 22% level might be high.

Importantly, however, a zero or near-zero baseline would be appropriate in some domestic contexts, particularly those that prohibit dissenting opinions or do not have an existing practice of them. A zero baseline is not appropriate in the investment arbitration, however, because the ICSID Convention expressly authorizes dissenting opinions.<sup>59</sup> Moreover, the existing practice in investment arbitration is consistent with prevailing practices among a range of other international tribunals that incorporate both civil law and common law participants and procedures.<sup>60</sup> Data is not available on the spectrum of dissent rates among international tribunals, but the one available example is helpful. According to one study, the European Court of Human Rights (ECHR) included at least one dissenting opinion in 900 out of 6,749 judgments.<sup>61</sup> While this yields just over a 13% rate of dissents, the study found that in cases that were not routine, meaning cases that made “a significant contribution to the development, clarification or modification of its caselaw,” the rate of dissenting opinions was approximately 42%.<sup>62</sup> Investment arbitration seems still to be encountering a range of novel issues, which may well mean that this 42% is a helpful baseline for understanding what might be a reasonable rate of dissenting opinions.

---

party-appointed arbitrators are a full accounting of that category of dissents, that would change the overall rate of dissents to 27% and mean that in van den Berg’s sample the rate of overall dissents that are written in favor of appointing parties is significantly lower than the near 100% that van den Berg cites.

<sup>55</sup> See Drahozal, *Arbitration Innumeracy*, at 4 (quoting Blastland & Dilnot)

<sup>56</sup> Drahozal, *Arbitration Innumeracy*, at 5

<sup>57</sup> Van den Berg, *supra* note \_\_\_, at 831.

<sup>58</sup> Van den Berg himself makes this point, quoting French Scholar and delegate to the 1899 Hague Peace Conference Chevillier Descamps, who reasoned that dissenting opinions improperly create “the appearance of there being two judgments.” [Van den Berg, *supra* note \_\_\_, at 828.]

<sup>59</sup> ICSID Convention, *supra* note \_\_\_, at art. 48(4).

<sup>60</sup> See Charles N. Brower & Charles B. Rosenberg, *The Death of The Two-Headed Nightingale: Why The Paulsson-Van Den Berg Presumption That Party-Appointed Arbitrators Are Untrustworthy is Wrongheaded*, 25-26 (forthcoming). (identifying a range of international tribunals that expressly permit dissenting opinions, including the Iran–United States Claims Tribunal, the International Court of Justice, the International Tribunal for the Law of the Sea, the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Special Tribunal for Lebanon, the Extraordinary Chambers in the Courts of Cambodia, the Inter-American Court of Human Rights, and the European Court of Human Rights).

<sup>61</sup> Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 Int’l Org. 669, 685 (2007) (citing statistics from 1960 through June 30, 2006). [panel size?]

<sup>62</sup> See *id.* (noting that many unanimous decisions by the ECHR are very routine, such as the 1,377 judgments considering Italian violations of protections against excessive delays in court proceedings).

Judge Charles Brower and Charles Rosenberg, in an extensive review and critique of van den Berg’s findings, have argued that rates of dissent among Supreme Courts in several other countries, which range from a relatively unusual low of 25% through a high of 62% for the U.S. Supreme Court, are an appropriate baseline.<sup>63</sup> Against this baseline, the 22% rate of dissents among party-appointed arbitrators in investment arbitration seems quite appropriate if not even strikingly low. Statistics from national Supreme Courts are interesting touchstones, but may not be appropriate as a baseline for comparison since each of these courts is composed of more than three members, making unanimity more difficult and the potential for dissents more likely than with 3-person tribunals.<sup>64</sup>

If aiming for comparison with 3-person tribunals, another potential baseline might be decisions by the 3-judge panels on U.S. appellate courts. There, the percentage of dissenting opinions is only 10% for published decisions.<sup>65</sup> Although considerably lower than the 22% in van den Berg’s study, this difference might be expected given that appellate decisions involve a narrower range of issues and are made within a framework of bounded discretion and assumed facts. Moreover, national legal systems have well-developed bodies of precedent that guide judicial decisionmaking.<sup>66</sup> While interpreting and applying that those sources may produce some disagreement, investment arbitration frequently involves novel legal questions, ambiguous treaty language, facts interpreted through cross-cultural and multi-national filters, and (if assumptions are correct) a deep ideological divide among parties and arbitrators. Previous awards are often cited, and arguably represent a form of soft-precedent. But unlike in a system with formal stare decisis, the existence of a previous award directly on point does not necessarily provide an answer on the same issue for a later panel.

Against the backdrop of these considerations, a 22% dissent rate may suggest that party-appointed arbitrators are exercising a commendable degree of restraint in the frequency with which they issue dissents. At a minimum, even in absolute terms, the level of unanimous awards (in at least 78% of cases, party-appointed arbitrators do not dissent in favor of the party who appointed them) means that the vast majority of cases are decided by a unanimous tribunal. This 78% unanimity rate would, at the very least, undermine van den Berg’s hypotheses about the emergence of “mandatory” dissents<sup>67</sup> (in which case we might expect dissents in all or almost all cases) or more general concerns that “politics and partisan ideological gamesmanship rule[] the day” for party-appointed arbitrators.<sup>68</sup>

Brower and Rosenberg also suggest that the actual percentage of party-appointed arbitrator dissents favoring an appointing party is lower than the total 22% because van den Berg counts as dissents some opinions that are more properly understood as concurrences or do not

---

<sup>63</sup> Brower and Rosenberg (citing rate of 62% dissents for the U.S. Supreme Court, 25% and 37% for the Canadian Supreme Court, and 36% for the Australian High Court).

<sup>64</sup> Unlike investment arbitral tribunals, supreme courts are also appellate courts, not courts of first instance. This point is discussed in more detail in the pages that follow.

<sup>65</sup> Edwards & Livermore, *supra*, note \_\_\_\_, at 1944.

<sup>66</sup> Edwards & Livermore, *supra*, note \_\_\_\_, at 1944. Some empirical research aims directly at investigating the extent to which precedent operates as a constraining force on judicial decisionmaking. [Cites]

<sup>67</sup> Van den Berg at 830.

<sup>68</sup> *Cf.* Edwards & Livermore, *supra*, note \_\_\_\_, at 1944 (discussing high level of consensus in published U.S. appellate court decisions).

actually favor appointing parties.<sup>69</sup> According to Brower and Rosenberg, at least five opinions that van den Berg classifies as dissents in favor of an appointing party should be instead correctly classified either as concurrences or as not “favoring” the appointing party. Given the small sample size (only 34 dissents overall) reassignments of these five cases along the lines suggested by Brower and Rosenberg would have a statistically significant effect both on the overall number of dissents authored by party-appointed arbitrators and on the assertion that nearly 100% of such dissents were “in favor” of the appointing party.<sup>70</sup>

Putting aside issues of the overall rate of dissents, it is still significant that, when they do dissent, party-appointed arbitrators usually (according to Brower and Rosenberg) or almost always (according to van den Berg) dissent in favor of the party who appointed them. They dissent at a much higher rate in favor of their appointing party than can be explained by chance. The correlation, however, does not in itself suggest misconduct by individual party-appointed arbitrators or systemic disregard of party-appointed arbitrators’ professional obligations, including the duty of impartiality.<sup>71</sup> The high correlation could be a result of the fact that party-appointed arbitrators are carefully selected by parties so that their sincere evaluations strongly correlate with their appointing parties’ interests, particularly on those issues when their disagreements with other members of the tribunal are significant enough to prompt a dissenting opinion.

This alternative hypothesis seems difficult to accept as consistent with prevailing notions of “impartiality” and “independence” that are required of all arbitrators. Most national and international sources describe party-appointed arbitrators’ obligations as identical to those of arbitral chairpersons, using the same terms “neutrality” and “impartiality.”<sup>72</sup> Using the same terminology to describe the professional obligations of both party-appointed arbitrators and arbitral chairpersons, for reasons explained below, inappropriately blurs the distinct functions that the two different types of arbitrators perform on tribunals.

The ICC Arbitration Rules follow the long-held premise in international adjudication generally that “each State in the litigation should be permitted to have a judge of its own nationality on the bench,” arbitral rules generally permit party-appointed arbitrators to share the nationality of their appointing party.<sup>73</sup> These same rules generally prohibit chairpersons from sharing the nationality of either party. Thus, under the ICC rules, for party-appointed arbitrators, shared nationality with a party is not considered an impediment to their impartiality (and is instead considered an important right), but for an arbitral chairperson, nationality would be an improper sign of partiality.

The ICSID Convention departs from this tradition, permitting shared nationality of any arbitrator with either party only on agreement of both parties.<sup>74</sup> Nevertheless, the ICSID

---

<sup>69</sup> Brower & Rosenberg, *supra* note \_\_\_\_, at 27-30. I do not explore the implications of such reclassifications here, however, because the data is incomplete.

<sup>70</sup> I do not explore here the potential implications of such reclassifications might be because the data relating to possible reclassification is neither systematic nor complete.

<sup>71</sup> If party appointed arbitrators were “now expected to dissent if the party that appointed him or her has lost the case entirely or in part,” we would expect that the rate of party-appointed arbitrators dissenting to be much higher than 22%.

<sup>72</sup> [cites to Born treatise]

<sup>73</sup> Il Ro Suh, *Voting Behavior of National Judges in International Courts*, 63 AM. J. INT’L L. 224, 224 (1969) (cited in Adam Smith, *Tex. Int. LJ.*...).

<sup>74</sup> ICSID Convention, art. 39 (“The majority of the arbitrators shall be nationals of States other

Convention and arbitrator selection procedures in investment arbitration adhere to prevailing structural and procedural differences in the appointment of party-appointed arbitrators versus arbitral chairpersons. Subject to challenge standards,<sup>75</sup> party-appointed arbitrators are unilaterally appointed by each party, meaning that they are a “pure” expression of party preference. Arbitral chairpersons, meanwhile, in addition to satisfying challenge standards, must be jointly agreed upon by the parties. Pure party preferences about chairpersons, therefore, are limited by their ability to secure agreement by the opposing party. In this respect, challenge standards provide a minimum floor for both party-appointed arbitrators and chairpersons, but only chairpersons are cabined in by the ceiling of mutual consent.

Prevailing practices and ethical standards applicable to appointment procedures confirm and reinforce these differences with respect to party-appointed arbitrators and arbitral chairpersons. As described in greater detail below,<sup>76</sup> parties engage in extensive research before selecting party-appointed arbitrators. In addition, the prevailing view is that they are permitted to interview potential party-appointed arbitrators.<sup>77</sup> Research may also be done for arbitral chairpersons, but any contact between parties and chairpersons is generally prohibited.<sup>78</sup> The additional constraints on appointment of chairpersons imposed by the consent requirement and the restrictions on communication indicate that they have a different function than party-appointed arbitrators and a different relationship to the parties’ pure preferences. Thus, although the same terminology in challenge and ethical standards are used to describe both categories of arbitrators, what is actually expected in terms of conduct and function is, in fact, distinct.

Going back to dissenting opinions, against the backdrop of the above-described practices and procedures, it would be surprising if we observed many (any?) dissenting opinions authored by party-appointed arbitrators in favor of the opposing party. Certainly, we would not expect them to issue dissenting opinions for their appointing party at the same level as chance, as van den Berg suggests. Party-appointed arbitrators are not randomly selected. They represent one party’s pure preference for a decisionmaker and are selected based on a careful assessment of their ability to fully appreciate appointing parties’ interests and view of the case. If party-appointed arbitrators were, with any degree of regularity, writing dissenting opinions in favor of an opposing party, it would mean that parties were doing an exceptionally poor job of identifying party-appointed arbitrators.

Jan Paulsson implicitly acknowledges that party expectations about and obligations of party-appointed arbitrators are necessarily different than those for arbitral chairpersons, and that

---

than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.”); ICSID Arbitration Rules, rule 3 (arbitrations “shall not have the same nationality as nor be a national of either party”).

<sup>75</sup> The ICSID Convention and Rules speak rather obliquely in terms of “independence” and an “reliability for independent judgment.” See ICSID Arbitration Rules, rule 6. As a practical matter, when arbitrators consider their obligation to disclose information or parties assess whether to raise a challenge under these standards, they inevitably look at prevailing standards for disclosure and disqualification articulated in various sources, most notably the IBA Guidelines on Conflicts of Interest in International Commercial Arbitration.

<sup>76</sup> See *infra* notes \_\_\_-\_\_\_, and accompanying text.

<sup>77</sup> GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION Vol. 1, 1496, (2009).

<sup>78</sup> [Cite to Born treatise]

those differences derive from the appointment process. In fact, these observed differences are precisely the basis for his proposal to eliminate party-appointed arbitrators altogether.<sup>79</sup>

## **B. An Affirmative Case for Party-Appointed Arbitrators**

Paulsson prefaces his proposal to eliminate party-appointed arbitrators by characterizing the practice of allowing parties to appoint arbitrators as “ill-conceived”,<sup>80</sup> an “unprincipled tradition,” and one that creates a “moral hazard.” Several commentators have already offered rebuttals to Paulsson’s various arguments in favor of this reform and I will not repeat those arguments here.<sup>81</sup> My goal is not to rebut the Paulsson’s proposed elimination of party-appointed arbitrators, but instead make an affirmative case for their existence.

As described above, extra-legal factors in legal decisionmaking are inevitable and in many respects healthy by-product of human decisionmaking more generally. Even if inevitable, however, tolerance for them is obviously limited, both with regard to the nature and extent of such influences. Various features in system design aim to limit the effect of these extra-legal influences, even if (and perhaps especially because) they cannot necessarily be precisely confirmed or measured.

In national legal systems, judges are most often randomly assigned cases to reduce or at least randomize the systemic influence of extra-legal factors. In a system with random case assignment, a party may by chance benefit from or be disadvantaged by the extra-legal factors that may come into play as a result of assignment of a particular judge or judges to their case. They will not, however, be subject to the potentially compounded effect of extra-legal influences being an express and intentional consideration when the judge or a third-party intentionally selects case assignments. It is the difference between a random factor or event that could happen in a fair game, and the results of a skewed game in which adverse changes are intentionally imposed.

Paulsson speculates that the primary obstacle to weaning parties away from the practice is that confidence in “decent institutions” is undermined a “constant stream” of new, unreliable arbitral institutions.<sup>82</sup> He reasons that the institutions are suspected of either poor judgment, cronyism, or corruption. It may, instead, be that parties are reluctant to trust any third party’s assessment of which extra-legal factors should be brought to bear on their case.

Van Harten has expressed similar skepticism about extra-legal considerations affecting intentional case assignment by appointing authorities in investment arbitration. Van Harten questions whether the ICC, which is designated by some investment treaties as an appointing authority, is particularly well-suited to perform that function in a neutral manner. As Van Harten notes, the ICC postures itself as “the world business organization,” “the voice of world

---

<sup>79</sup> Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REV.: F. INVESTMENT L.J. 339 (2010).

<sup>80</sup> Paulsson, *supra* note \_\_\_\_, at 9.

<sup>81</sup> Michael E. Schneider, *President’s Message: Forbidding unilateral appointments of arbitrators – a case of vicarious hypochondria?*, 29(2) ASA BULL. 273, 273 (2011) (“The basic paradigm in arbitration as we know it is for each party to appoint its arbitrator and for the two then to appoint a chairperson. The model has worked seemingly well for decades if not centuries . . .”);

<sup>82</sup> Paulsson *supra* note \_\_\_\_, at 13-14.



business,” and an organization that “speaks for world business whenever governments make decisions that crucially affect corporate strategies and the bottom line.”<sup>83</sup> Under Van Harten’s reasoning, the ICC will be more inclined to regard investor-friendly arbitrators as appropriate for selection, and therefore increase the likelihood that certain, in his view, undesirable extra-legal considerations would play a role in a tribunal’s decisionmaking.<sup>84</sup>

Arbitrator selection directly by the parties can resolve the problem of intentional selection by a third party and, if each party maximizes their ability to influence tribunal composition, even Van Harten’s expressed concern. In any dispute, the opposing parties will have distinct views about which features in arbitrators will be most advantageous for their respective case strategies, meaning which extra-legal features might affect their decisionmaking in ways that are advantageous to that party’s case. In selecting party-appointed arbitrators, parties can maximize those preferences; as described above, party-appointed arbitrators are selected based on parties’ pure preferences, subject only to challenge and disqualification standards.<sup>85</sup> With regard to chairpersons, parties can (either directly or by proxy through party-appointed arbitrators) negotiate what they regard are optimal tradeoffs with the opposing party for traits in the chairperson.<sup>86</sup>

As a pure expression of a party’s preferences for which extra-legal factors might be brought to bear on its particular case, party-appointed arbitrators can perform an essential function. They ensure that those considerations the appointing party thinks are important are represented on and assessed by the tribunal. They can act as a counterbalance against other considerations brought to bear by other tribunal members. At a more structural level, they can act as an important check against a majority decision that goes against the interests of their appointing party.

Investment arbitration tribunals, like any decisional body, are subject to certain limitations that can produce errors in decisionmaking. The first limitation for individuals on a tribunal is what is commonly known as “bounded rationality.” A now well-established body of research by psychologists, behavioral economists and others demonstrates that all individuals, including judges and arbitrators, operate in a realm of “bounded rationality.” Like all other humans, arbitrators “have inherently limited memories, computational skills, and other mental tools.”<sup>87</sup>

The existence of heuristic biases and their effect on decisionmaking are well documented through experimental studies.<sup>88</sup> While the details of these studies need not be revisited, the

---

<sup>83</sup> VanHarten, *supra* note \_\_, at \_\_\_\_.

<sup>84</sup> Van Harten, *supra* note \_\_\_\_ at \_\_\_\_ (“[T]he entity that has the ultimate power to appoint in each case, after a claim has been filed, has much greater ability to influence the adjudicative process than if it only appointed the adjudicator once and for a set term.”).

<sup>85</sup> See *supra*, notes \_\_\_\_-\_\_\_\_, and accompanying text.

<sup>86</sup> This analysis necessarily underscores the importance of fair opportunity for each party to maximize its ability to shape the tribunal. As discussed in greater detail below, there is reason to believe that this threshold requirement is not fully satisfied under current practices. See *infra* notes \_\_\_\_-\_\_\_\_, and accompanying text.

<sup>87</sup> Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 20 (2002).

<sup>88</sup> Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (reporting the results of a study that supports hypothesis that trial judges use mental shortcuts, or heuristics, to make judicial decisions).

general outlines are useful. Some of these heuristics may be tied to personal backgrounds and cultural cognitions of individual decisionmakers.<sup>89</sup> Other heuristics tend to occur to some degree across all decisionmakers, as well as parties and their counsel. These types include, for example, anchoring,<sup>90</sup> hindsight bias,<sup>91</sup> and egocentric bias, framing, and representativeness heuristic.<sup>92</sup>

One specific heuristic identified in social scientific research that has particular relevance in decisionmaking by a board or panel of individuals, and therefore may be more acute on arbitral tribunals, is the phenomenon called “groupthink.” Groupthink occurs when thought processes and decision-making capabilities become affected by subtle peer pressure, which can lead a board or panel to prioritize unanimity over independent judgment and expertise.<sup>93</sup> This behavior, observed in groups in numerous experimental studies, is most prone to develop among small, tight-knit groups who share an intellectual orientation and a common goal. Paulsson himself seems to describe the existence of this precondition in international arbitration when he notes that leading arbitrators “deliberate within an intellectual zone of shared confidence.”<sup>94</sup>

Many arbitrators reading the description of heuristic biases and groupthink have an inner voice that is probably now protesting: “Certainly not me!” But the evidence from experimental settings suggests that such protests are futile. Trained judges, and by extension skilled arbitrators, may be less subject to some of these heuristic biases or “blindness” than ordinary citizens.<sup>95</sup> Professional commitments to impartiality may dampen their effect, but these psychological phenomena are not generally a matter of choice. Studies indicate that we are all, to some degree, subject these various shortcomings and shortcuts to decisionmaking.

The most effective ways to reduce the cumulative effect of these cognitive blinders or heuristic biases, and prevent groupthink, according to Janis, the researcher who identified and named the phenomenon, is to “formalize the role of the devil’s advocate and rotate this position among group members at each meeting.”<sup>96</sup> In other words, insert into a tightknit group certain individuals whose assigned function is to challenge the consensus of that group.

---

<sup>89</sup> Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 137 (2007).

<sup>90</sup> Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside The Judicial Mind*, 86 CORNELL L. REV. 777, 784, 2001.

<sup>91</sup> *See id.*

<sup>92</sup> *See also* Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420 (2007).

<sup>93</sup> IRVING L. JANIS, VICTIMS OF GROUPTHINK 9 (1972); *see also* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 85-86 (2000); Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 32 (2002); Marleen A. O’Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1239 (2003).

<sup>94</sup> Paulsson, *supra* note \_\_\_, at \_\_; *see also* Yackee, *supra* note \_\_\_, at 407 (the “small, relatively closed” investment arbitration “community is more likely to be relatively ideologically cohesive and better able to coordinate its policymaking efforts”).

<sup>95</sup> Guthrie, *Misjudging*, *supra* note \_\_\_, at 458 n.216.

<sup>96</sup> O’Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, n.30 (2003). The incidence of groupthink on corporate boards of directors has been the subject of extensive scholarly commentary. James D. Cox & Harry L. Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 J.L. & CONTEMP. PROBS. 82, 99 (1985). One particularly cynical view expressed the concern this way: “It’s always been interesting to me that you take these intelligent, accomplished, honorable people, and somehow you put them around a boardroom table and their IQ points drop 50 percent and their spines fly out the room.” *All Things Considered*, Nell Minow Discusses How Companies Can Restore Investor Confidence

Janis' prescribed remedy for groupthink, it turns out, bears an uncanny resemblance to the actual practice of party-appointed arbitrators.<sup>97</sup> On a tribunal, party-appointed arbitrators' assigned role causes them to look skeptically and question decisions that may have negative consequences for the party who appointed them.

Additional details of Janis' suggestion read almost like a guide on how to be an effective party-appointed arbitrator. Janis suggests this "unambiguous assignment" as devil's advocate be fulfilled by "present[ing] arguments as cleverly and convincingly as [the person] can, like a good lawyer, challenging the testimony of those advocating the majority position."<sup>98</sup> The devil's advocate, according to Janis, should ask tough questions and encourage suggestions in a low-key style, all while withholding his or her own opinion to avoid being too confrontational.<sup>99</sup> This prescription sounds much like Martin Hunter's famous explanation of the optimal party-nominated arbitrator as "someone with the maximum predisposition towards my client, but with the minimum appearance of bias."<sup>100</sup>

Anecdotal information suggests that party-appointed arbitrators in fact function similar to Janis' devil's advocate. They can and do improve the process of deliberation by challenging decisions of other arbitrators, both within the tribunal deliberations and in the process of drafting of the award or, in 22% of cases, actually publishing a dissent. Under this view, party-appointed arbitrators are not a necessary evil that must be accepted because alternatives are not viable. They are, instead, an important structural feature of international arbitral tribunals. The threat and reality of publishing a dissent is part of this process of challenge and accountability.

This last point brings us back to van den Berg's study. Dissenting opinions have a role to play in connection with to party-appointed arbitrators' function. Van den Berg rejects the notion that separate opinions can enhance party confidence in the process.<sup>101</sup> Although van den Berg is concerned that dissenting opinions can undermine the authoritativeness of an award, and hence parties' willingness to comply, in some instances they can instead enhance losing parties' acceptance of an awards. Take for example one of the separate opinions that van den Berg characterizes as a dissent in favor of an appointing party and Brower and Rosenberg characterize as either a concurrence or as not overtly favorable.

---

(NPR radio broadcast, July 2, 2002) (cited in O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. Cin. L. Rev. 1233, n.30 (2003)).

<sup>97</sup> It also finds an analog in shareholder-nominated directors, who it is argued could break through groupthink because they would have different interests and alliances than the other corporate officers on the board. Lucian Arye Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 Bus. Law. 43, 63 (2003).

<sup>98</sup> Janis, *supra* note \_\_\_\_, at 267-68.

<sup>99</sup> *See id.*

<sup>100</sup> Martin Hunter, *Ethics of the International Arbitrator*, 53 ARB. 219, 223 (1987).

<sup>101</sup> Van den Berg also rejects the notion that dissenting opinions can contribute to the development of law. In support of this position, he argues that ICSID dissents are not cited by subsequent tribunals, except in one "curious exception." Van den Bert at 831. Brower and Rosenberg provide a compelling response, examining how dissenting opinions can and have contributed to the development of law. Brower & Roseberg at 36. They also note that ICSID tribunals have cited dissenting opinions on several occasions, not only the one cited by van den Berg. Interestingly, ICSID tribunals have also on several occasions cited dissenting opinions from the International Court of Justice. Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EUR. J. INT'L L. 301, \_\_ (2008).

In *Wena v. Egypt*, the arbitrator appointed by Egypt issued a two sentence statement that he “concur[s] in the Tribunal’s entire award,” including the award or compound interest, but was “not persuaded” that interest should be compounded quarterly.”<sup>102</sup> The separate opinion on a narrow, and seemingly insignificant issue, arguably underscores the arbitrator’s substantive agreement with the rest of the tribunal on the balance of the issues.<sup>103</sup> In the absence of the separate opinion, the appointing party would not know that the arbitrator affirmatively agreed with the tribunal’s decision, and may well assume the award was effectively a 2-1 decision with acquiescence, but not affirmative agreement, by its party-appointed arbitrator.

Several commentators have offered anecdotal explanations of how party-appointed arbitrators contribute to deliberative functions on the tribunal. Most such explanations, however, are often offered by way of apology for historical practices or justification for party’s preferences.<sup>104</sup> These accounts provide important real-world verification of the value of deliberations in which party-appointed arbitrators press against resort to a groupthink gravitation to the path of least resistance.

This affirmative case for the party-appointed arbitrator would not be complete without a few final comments. First, although party-appointed arbitrators perform a function similar to Janis’ devil’s advocate, there are important differences. The devil’s advocate is appointed to question and offer skepticism about any position being considered by the board. A party-appointed arbitrator, on the other hand, is selected only to challenge particular positions that may be contemplated by the tribunal—those positions that are harmful to the appointing party’s position. The fact that party-appointed arbitrators are selected by different procedures, and consequently that parties have different expectations about their conduct, begs the question about professional standards for both party-appointed and chairperson arbitrators use the same terminology (“impartiality” or “independent judgment”). The alignment of impartiality standards appears to have been originally an effort to explicitly reject an earlier (and now nearly extinct) form of intentionally highly-partisan party-appointed arbitrator that was prevalent in U.S. domestic arbitration practice and had caused considerable disruption in international arbitration. In rejecting the historical U.S. model of highly-partisan party-appointed arbitrators, the rules and standards elided the differences described above that exist between party-appointed arbitrators and arbitral chairpersons. Although these differences necessarily affect arbitrators’ impartiality obligations, no commentators, courts or existing rules or standards have done an adequate job of explaining these differences. .

---

<sup>102</sup> See *Wena Hotels Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Statement of Professor Don Wallace, Jr. (Dec. 8, 2000).

<sup>103</sup> Notably, because it is a relatively small sample, if this and the other cases Brower and Rosenberg argue should not be treated as dissents were subtracted from van den Berg’s sample, the overall rate of dissents would be less than 20% and the percentage of dissents favoring an appointing party would be closer to 85% not 100%. This latter number still represents a strong correlation between party-appointed arbitrators and dissents favoring the appointing party. As explained below, however, this correlation may well be the result of factors other than rank partisanship.

<sup>104</sup> See, e.g., Michael E. Schneider, *President’s Message: Forbidding unilateral appointments of arbitrators – a case of vicarious hypochondria?*, 29(2) ASA BULL. 273, 273 (2011) (“The basic paradigm in arbitration as we know it is for each party to appoint its arbitrator and for the two then to appoint a chairperson. The model has worked seemingly well for decades if not centuries . . . .”); William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 644 (2009) (noting that party-appointed arbitrators “promote confidence in the international arbitral process” and “party input into the selection of arbitrators has long been common practice”).

Van den Berg essentially concedes these differences, but he refers to them as a “few exceptions” to party-appointed arbitrators’ obligations of impartiality.<sup>105</sup> As I explore elsewhere, properly understood, they are not “exceptions” to impartiality obligations, but distinctions that signal a differentiated role for party-appointed arbitrator. For party-appointed arbitrators to be regarded as legitimately functioning as devil’s advocates on behalf of the appointing party, the contours and content of their impartiality obligations must reflect that role. I argue elsewhere that, contrary to existing standards but consistent with apparent practices, disqualification standards for party-appointed arbitrators should be different and more flexible than those that apply to arbitral chairpersons. I also argue that, while disqualification standards can and should be more flexible, disclosure standards should remain as exacting as those for chairpersons.<sup>106</sup>

A related observation about differences between Janis’ devil’s advocate and party-appointed arbitrators is that it is not an individual party-appointed arbitrator who acts as Janis’ devil’s advocate, but rather *both* party-appointed arbitrators together. This observation raises important issues about equality in the appointment process. For this design feature to work similar to Janis’ devil’s advocate, it is necessary to ensure that the processes for selecting party-appointed arbitrators are fair and afford the parties equal opportunities to maximize their preferences. As explored in greater detail in the final Part, there is reason to believe that this precondition of equal opportunity is not firmly assured under current standards and practices.<sup>107</sup> Moreover, having party-appointed arbitrators serving as devil’s advocates puts new stress and premium on selection of the arbitral chairperson.

Finally, allowing party-appointed arbitrators as a practice creates the risk of hyper-partisan party-appointed arbitrators, the boogeyman that animate much of van den Berg’s and Paulsson’s analysis. Hyper-partisan arbitrators have certainly made a few appearances over the years, including in some very high-profile cases, as surveyed by Paulsson.<sup>108</sup> They can undoubtedly be disruptive and even disturbing. This type of party-appointed arbitrator, however, is a self-correcting problem, both within individual cases and over time.

On specific tribunals, hyper-partisan party-appointed arbitrators end up alienating other members of the tribunals and, as a result, undermine their own ability to be effective on the tribunal.<sup>109</sup> More systematically, as parties become more sophisticated in their selection methods and more aware of the potential hazards of an overly partisan party-appointed arbitrator, they are increasingly reluctant to appoint self-defeating hyper-partisan arbitrators. A self-correcting problem does not require radical reforms, especially at the expense of the value that party-appointed arbitrators can bring to tribunal decisionmaking. Increased transparency and

---

<sup>105</sup> Van den Berg, *supra* note \_\_\_\_, at 42.

<sup>106</sup> See CATHERINE A. ROGERS, *ETHICS IN INTERNATIONAL ARBITRATION* (forthcoming).

<sup>107</sup> See *infra* notes \_\_-\_\_, and accompanying text.

<sup>108</sup> Paulsson at 347-48.

<sup>109</sup> See LAURIE CRAIG, *ET AL.*, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* 196 (2000) (“There is little advantage to having *one* guaranteed vote on a three-person tribunal.”). Jennifer Kirby, *With Arbitrators, Less can be More: Why the Conventional Wisdom on the Benefits of having Three Arbitrators may be Overrated*, 26(3) J. INT’L ARB. 337, 350 (2009) (“[A] party’s decision to nominate a cat’s-paw may call into question that party’s integrity and good faith in the eyes of the chairman, and lead the chairman to be more sceptical about the party itself and its case than he might otherwise have been.”).

formal feedback about arbitrators, as proposed in the final Part, can help deter these practices and enable parties to avoid knowingly appointing such arbitrators.<sup>110</sup>

### C. Proposals for an International Investment Court

If, under Paulsson’s proposal, the pool of investment arbitrators were limited to only a select few of the most worthy individuals and they were appointed to cases by a third party, the practice in investment arbitration would inch up to the very edge of Gus Van Harten’s proposal for establishment of an international investment court. Van Harten’s view, shared by others,<sup>111</sup> is that private arbitrators are not suited or appropriate to resolve public law issues. Arbitrators’ lack secure tenure and ensured compensation would ensure an administrative independence that ensure independence and impartiality in national courts and public international law tribunals.<sup>112</sup> Van Harten believes that a permanent investment arbitration court, in which judges share features with national court judges, would resolve some of the most serious concerns about investment arbitrators.<sup>113</sup> This Section challenges some of the assumptions underlying Van Harten’s proposal.<sup>114</sup>

One of the primary advantages of a permanent International Investment Court under Van Harten’s view is that it would be eliminate ad hoc arbitrators in favor of permanent judges. Permanent appointment, it is presumed, structurally ensures independence because it avoids potential incentives that ad hoc arbitrators may have to skew their rulings in a way that will ensure future reappointment. Although framed as a structural critique of investment arbitration, at least some aspects of Van Harten’s proposal appear to be inextricably intertwined with express policy preferences and presumption that those preferences would be better facilitated through structural reforms.

One such policy preference, for example, is Van Harten’s apparent preference for a restrictive scope of jurisdiction to review states’ actions regarding foreign investors. Van Harten hypothesizes that investment arbitrators are more likely to adopt an expansive approach to various contested issues of jurisdiction and admissibility because of “apparent financial or career interests of arbitrators or by wider economic aims of the arbitration industry.”<sup>115</sup> The assumption is that replacing arbitrators with permanent judges will reduce the tendency toward expansive interpretations of jurisdiction.

---

<sup>110</sup> See *infra* notes \_\_\_-\_\_\_, and accompanying text.

<sup>111</sup> Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 Vand. J. Transnat’l L., 775, 782 (2008) (arguing that “interference with [national] regulations by unelected and unaccountable arbitrators is not consistent with basic principles of democracy”).

<sup>112</sup> Some of Van Harten’s and others’ arguments relate to the lack of reciprocity in the current investment arbitration regime (only investors can bring claims), and the absence of an appellate mechanism to ensure consistency. Those concerns, while not entirely unrelated to the arguments here, they are beyond the scope of this paper.

<sup>113</sup> There are other objections that do not relate directly to international arbitrators, such as limited access by third parties, continued limits on transparency, and the inability of States to bring claims. While important issues about system design, which are also related to Van Harten’s proposal, these system features are beyond the scope of this paper.

<sup>114</sup> Other aspects of proposals for an international court include

<sup>115</sup> Van Harten, Gus, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration* (April 19, 2012). Osgoode Hall Law Journal, Forthcoming; Osgoode CLPE Research Paper No. 41/2012. Available at SSRN: <http://ssrn.com/abstract=2149207>.

Van Harten’s empirical research in fact demonstrates a tendency of arbitrators to adopt an “expansive” approach to issues of jurisdiction. He concludes that his study “offers tentative support for expectations of systemic bias in investment arbitration,” but he also acknowledges its limitations.<sup>116</sup> Despite his robust findings on this particular issue, Van Harten acknowledges that they “do[] not establish all the steps of logic that would be required to connect the observed tendency to the underlying rationales for the hypothesis.”<sup>117</sup> There is, as Van Harten acknowledges, “a range of possible explanations for the results—some of which do not at all entail inappropriate bias.”<sup>118</sup>

One potential alternative explanation for the expansive approach to jurisdiction observed in investment arbitration is that all adjudicators, both judges and arbitrators, have a proclivity toward expanding their own jurisdiction. That proclivity, in other words, is not tied to arbitrators’ incentive to be appointed in future arbitrations, but other explanations about the way adjudicators view their function more generally. In fact, judges with permanent and fixed term appointments have, in various national legal systems, been observed as adopting positions and interpretations that expand their jurisdiction.<sup>119</sup> The pattern may arguably be even more exaggerated among permanent international tribunals, where there is a prevailing “assumption[] that judges share an interest in expanding the reach of their court and that governments seek to present such occurrences.”<sup>120</sup> In an ironic historical twist, traditional judicial hostility toward commercial arbitration was the result of national courts guarding their jurisdiction against arbitrator-interlopers.<sup>121</sup> At least with regard to policy preferences for more circumscribed jurisdiction, a permanent international court may not change the current situation.

Another concern that inspires Van Harten’s proposal for a permanent court is that ad hoc appointment of arbitrators “create[s] apparent incentives for arbitrators to favour the class of parties (here, investors) that is able to invoke use of the system.”<sup>122</sup> His argument for a permanent court, echoed by others, is that members would be more likely to demonstrate

---

<sup>116</sup> Van Harten, *supra* note \_\_\_, at 4.

<sup>117</sup> Van Harten, *supra* note \_\_\_, at 35

<sup>118</sup> Van Harten, *supra* note \_\_\_, at 4.

<sup>119</sup> Manoj Mate, *Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, 12 SAN DIEGO INT’L L.J. 175, 209-10 (2010) (documenting strategies for expanding judicial jurisdiction in public interest litigation in India, the United States, Israel). courts to act strategically in expanding their role in governance and policymaking through the gradual and incremental process of case-by-case dispute resolution, by occasionally accommodating the political interests or agenda of political elites, while simultaneously broadening jurisdiction and its own remedial powers

<sup>120</sup> Erik (“[S]cholars have argued that the rulings” of various courts including the ECJ and the WTO Appellate Body have “amounted to judicial policymaking” and criminal tribunals have “helped to establish substantive a new body of international law.”); see also Allison Marston Danner, *When Courts Make Law: How the Iterational Criminal Tribunals Recast the Laws of War*, 59 Vand. L. Rev. 1 (2006); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints*, 98 Am. J. Int’l L. 247 (2004).

<sup>121</sup> See U.S. House Report and the Senate Report accompanying Federal Arbitration Act, H.R. Rep. No. 68-96, at 1-2 (1924) (discussing the jurisdictional “jealousy” of the courts and the resulting refusal to enforce arbitration agreements) (cited in Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the FAA*, 63 Case W. Res. L. Rev. 91 n.5 (2012); John R. Allison, *Arbitration Agreements and Antitrust Claims: The Need for Enhanced Accommodations of Conflicting Public Policies*, 64 N.C. L. REV. 219, 224 (1986) (analyzing courts’ centuries-long struggle by the early courts for jurisdiction and their consequent unwillingness to surrender it). In England, however, it may also have been related to English judges’ almost complete reliance on fees from cases for their income, which meant that arbitrators were unwelcome competitors. See *id.*

<sup>122</sup> Harten, *Arbitrator Behavior* at \_\_

deference to States and their legitimate state interests. This hypothesis is based on certain assumptions about both the nature of international courts and the composition of the judiciary of a potential permanent investment court.

Van Harten seems to assume that judges would be drawn from something other than the pool of existing investment arbitrators. A sudden willingness by States to put forward an entirely new slate of investment judges to replace investment arbitrators may be overly optimistic. Despite recurring pleas from ICSID, states have been notoriously unforthcoming with nominations for the ICSID panel of arbitrators.<sup>123</sup>

At a more fundamental level, Van Harten’s and progressive critics’ calls for creation of a permanent International Investment Court are premised on a general gestalt that such courts better serve the interests of States than to ad hoc tribunals.<sup>124</sup> This confidence in permanent international courts is echoed by numerous commentators who have been examining the recent proliferation in international tribunals.<sup>125</sup> The assumption about the efficacy and desirability of permanent international courts, however, is not entirely consistent with experience.

Instead, States have a long history of preferring international tribunals in which they can control, to some extent, the composition the panel of decisionmakers.<sup>126</sup> For example the ICJ, which is a permanent court, allows States to determine the identity of the adjudicators (through the ad hoc procedures), and the overall composition of a panel that would hear an individual case. According to Stephen Schwebel, a former President of the ICJ and frequent arbitrator in investment arbitration cases, the reasoning behind the ICJ’s statutory allowance of these “ad hoc chambers” was “to permit the parties to the case to influence both the size and the composition of the Chamber.”<sup>127</sup> These mechanisms “provide States the comfort they seek ... that an international court will not venture beyond its assigned mandate.”<sup>128</sup> These control mechanisms are regarded as essential features to keep State parties continuing to use the ICJ for their disputes.<sup>129</sup>

States’ preference to be able to control the composition of decisional panels has, together with other factors, led to what Gary Born refers to as a “second generation” of international

---

<sup>123</sup> **cites**

<sup>124</sup> For example, Van Harten argues that “the current structure of investment treaty arbitrationa pall over all awards” and that the proper

<sup>125</sup> See, e.g., Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT’L ORG. 457, 457 (2000) 458-59, 487-88 (“We define low independence, access, and embeddedness as the ideal type of interstate dispute resolution and high independence, access, and embeddedness as the ideal type of transnational dispute resolution.”); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 300-36 (1997) (establishing a multifactor checklist of what qualities are important in an international judicial body); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 Calif. L. Rev. 899, 904 (2005) (describing the benefits that States derive from “independent” tribunals).

<sup>126</sup> Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT’L L. 411, 419 (2008) (arguing that mechanisms of control “provide States the comfort they seek ... that an international court will not venture beyond its assigned mandate,” and suggesting that when control mechanisms become perceived as inadequate, states will abandon their consent to the jurisdiction of international institutions).

<sup>127</sup> Stephen M. Schwebel, *Ad Hoc Chambers of the International Court of Justice*, 81 AM. J. INT’L L. 831, 832 (1987).

<sup>128</sup> Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT’L L. 411, 419 (2008).

<sup>129</sup> See *id.*



adjudication.<sup>130</sup> This new generation of tribunals has eclipsed in volume and importance traditional so-called “independent” permanent international courts. One reason for the rise of second generation tribunals is that they allow States a degree of control over the adjudicatory decisionmaker that eludes them with traditional, independent, permanent tribunals. Most notably, it permits them to control the composition of the tribunal.<sup>131</sup> While there is undoubtedly a mixed track record among States, those States with experienced counsel handling their cases can be as exacting as investors’ efforts. In one telling example, back in the 1980s, when international telephone rates were high, efforts by U.S. counsel at the Iran-U.S. Claims Tribunal to identify and investigate potential judges earned them a call from Washington for racking up exorbitant phone bills!<sup>132</sup>

An interesting irony in the debate over system design in international tribunals is that, with tribunals in the areas of public international law, human rights and international criminal law, commentators’ analysis appears focused on ensuring strong mechanisms that subject State decisionmaking and actions to international courts’ jurisdiction and judgments. When the international law being enforced is the rights of foreign investors, however, commentators appear more concerned about ensuring States’ ability to make decisions is not hampered by international law.<sup>133</sup> It would be a false equivalence to suggest that the concerns for victims of human rights violations and foreign investors implicate the same concerns, at least generally. Without passing on the merits of this apparent inconsistency, it does suggest that at least some system design analysis may be tied to substantive policy preferences, rather than abstract commitment regarding particular features of effective design of international tribunals. It also suggests that a comprehensive theory of international adjudication, particularly one premised on the notion that adjudication must be a neutral and law-bound process will have to develop a better explanation of the relationship than currently exists.

### III. Proposals for Reforms from Within

Similar to the proposals discussed above, most other proposed reforms would require structural overhaul of the investment arbitration regime.<sup>134</sup> Several of them would also require revisions to the ICSID Convention.<sup>135</sup> These types of sweeping structural reforms, including

---

<sup>130</sup> Gary B. Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 775-76 (2012).

<sup>131</sup> Jason Yackee has argued that party-appointed arbitrators are an imperfect control mechanism, though in arguing for other thoughtful and important potential reforms outside the arbitration process, he seems to discount the value of this control, in part by overstating ethical restrictions on States’ ability to select arbitrators. Yackee, *supra* note \_\_, at 424 (arguing that “increasingly constrained by institutional rules and system norms that impose upon IIL arbitrators stringent standards of impartiality and independence”).

<sup>132</sup> **cites**

<sup>133</sup> See, e.g., William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 Va. J. Int’l L. 307m, \_\_ (2007) (identifying as a weakness in investment arbitration tribunals the inability under ICSID rules of States to appoint their own nationals to ensure that arbitrators have sufficient understanding and sympathy for the context of States’ decisionmaking).

<sup>134</sup> See, e.g., Jason Webb Yackee, *Controlling the International Investment Law Agency*, 3 Harv. Int’l L.J. 391 (2012) (proposing ex ante notice-and-comment procedures and ex post legislative veto).

<sup>135</sup> Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 Vand. J. Transnat’l L. 775, 827 (2008) (“Overall, use of the

elimination of party-appointed arbitrators or replacement of investment arbitration with a permanent court, seem out of reach in either the short or medium term.<sup>136</sup> Nevertheless, there appears to be a growing consensus, even among the stalwarts of investment arbitration, that doing nothing is no longer an option. The “crisis of legitimacy” and a “backlash” against investment arbitration originally identified by outside critics appear to have been internalized as a problem that requires a response.

Without dismissing the potential or need for more comprehensive or structural reforms in the future, this last Part focuses on reforms that can be implemented within the existing framework of investment arbitration but still resolve some of the most trenchant concerns about arbitrators. In the pages that follow, I propose market-based transparency reforms to improve the appointment process and clarify the professional standards that apply to arbitrators. As explained, these reforms can go a long way to alleviate concerns, real or perceived, that investment arbitral tribunals are unduly political.

### A. Procedural Asymmetries

Considerable disagreement still exists within the arbitration community regarding critical features of the arbitrator selection process. According to some commentators and sources, it is impermissible or at least unseemly to engage in any pre-appointment communication with party-appointed arbitrators. Other sources suggest that general inquiries about an arbitrator’s availability and expertise are permissible, but not discussions about prospective chairpersons. Still others contend that, short of discussion of the merits of the case, interviews are permissible and advisable, including discussions about potential arbitral chairpersons. Finally, some parties—particularly those that are new to investment arbitration or are not represented by experienced arbitration counsel—simply do not have any meaningful strategy for how to select arbitrators.

These differences about the process for appointing the tribunal are much more troubling than the oft-noted disagreements about internal procedures.<sup>137</sup> Disagreements about internal procedures can be submitted to the tribunal to resolve during the normal course of an arbitration. In this respect, the disagreements are transparent and subject to fair resolution. Disagreements

---

margin-of-appreciation doctrine on a case-by-case basis allows for the inclusion of public interest issues into investment treaties ....”).

<sup>136</sup> Kate M. Supnik, *Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law*, 59 DUKE L.J. 343, 366-67 (2009) (reasoning that it would be impossible to revise the ICSID Convention); Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT’L L. 471, 497 (2009) (questioning the viability of reforms that would “require a fundamental redesign of the entire system”); William W. Burke-White & Andreas von Staden, 35 Yale J. Int’l L. 283 (arguing that many proposed “changes would be difficult to implement, as they require revision of the ICSID Convention” and proposing instead a different standard of review).

<sup>137</sup> See Serge Lazareff, *International Arbitration: Towards a Common Procedural Approach*, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS 31 (Stefan N. Frommel & Barry A.K. Rider, eds. 1999) (noting an increasing awareness among both arbitrators and practitioners of “an emerging ‘harmonised procedural pattern’ in international arbitration”); Berthold Goldman, *The Application of Law: General Principles of Law—The Lex Mercatoria* in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 124 (Julian D.M. Lew, ed., 1986); Christian Borris, *The Reconciliation of Conflicts Between Common Law and Civil Law Principles in the Arbitration Process* 1, 13-14 in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION: OLD ISSUES AND NEW TRENDS (Stefan N. Frommel and Barry A.K. Rider eds. 1999).

about the arbitrator appointment process, however, often remain masked in opaque phases that precede commencement of an arbitration and appointment of the tribunal. A party may never know whether its opposing party engaged in interviews or exchanged views with its party-appointed arbitrator about appointment of the chairperson.

Although it seems like a minor point of divergence, appointment of the tribunal is one of the most sensitive moments in the life of an arbitration case. If, as argued above, party-appointed arbitrators are to serve as counter-balances on a tribunal, it is essential that they be equally weighted. If one party is carefully vetting arbitrators, while the other is assiduously avoiding any communication, the process is likely producing a lopsided tribunal because one side's arbitrator is selected through a more deliberate process.

Perhaps even more importantly, if only one party discusses with its party-appointed arbitrator potential chairpersons, and that party's preferences are effectuated by the party-appointed arbitrator, what might have been an asymmetrical tribunal can become one that is truly skewed. One party used direct to carefully evaluate the suitability of a party-appointed arbitrator and then compounded that relative advantage by indirectly affecting selection of a chairperson that the party believes is best suited to its case.

This potential for imbalance has particularly important consequences for investment arbitration. As noted above, one reason for potentially disparate selection procedures is one party's unfamiliarity with the appointment process or lack of experienced counsel. Particularly in the earlier years of investment arbitration, this risk and its consequences was a reality for many developing states.<sup>138</sup> With clarification and equalized use of selection procedures, states can maximize their potential to affect the composition of arbitral tribunals. In doing so, they could go a long way to alleviating concerns about the backgrounds and policy predilections of investment arbitrators.

## **B. Information Asymmetries**

While some asymmetries affect the process for selecting arbitrators, asymmetries regarding the substantive issues in selecting arbitrators is a more serious concern. There are often significant information asymmetries that affect the arbitrators selection process. These disparities are again most often born by parties that are less well-funded or do not retain leading arbitration counsel. In investment arbitration, they are disproportionately borne by state parties.

In selecting arbitrators, parties obviously assess an arbitrator's overall reputation for integrity, intelligence, and acumen, as well as expertise in particular national law, subject area, or industry. A party with any degree of sophistication, however, will inevitably consider a range of issues particularly important to that party's case strategy. These issues might also include whether an arbitrator is willing to allow or disallow certain procedures (such as those mentioned above), has strong case management skills, adopts a strict constructionist (or a more flexible)

---

<sup>138</sup> For a survey of challenges facing developing states in participating meaningfully in investment arbitration, Eric Gottwald, *Leveling the Playing Field: Is It Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?*, 22 AM. U. INT'L L. REV. 237, 253 (2007). While today developing states are generally better represented and better positioned to participate in investment arbitration, some disparities still remain and undoubted affect panel composition, as well as other aspects of the arbitration process. While these remain serious concerns, they are not the focus of this article.

approach to contract interpretation, is willing to assert (or reject) an expanded view of arbitral jurisdiction, and the like. Although an arbitrator’s capabilities in all these respects are critical, this last category of information is not generally available through public sources.

The primary means parties and counsel use to obtain information about prospective arbitrators are personal inquiries and related ad hoc research. This process relies heavily on existing relationships among members of the international arbitration community. As a result, it privileges arbitration insiders and well-financed parties who can retain leading arbitration firms. It distinctly disadvantages state parties from developing countries that either do not have extensive experience with investment arbitration<sup>139</sup> or that cannot afford the services of a leading law firm. Typically, as a first step, large law firms and corporations solicit general information from colleagues who have had recent experience with those in the pool of potential arbitrators. So-called “ISO” emails are routine in large-firm litigation and arbitration practices. Information generated from these general inquiries is then followed up on, usually through individualized research and more personal phone calls to colleagues in the field. Those doing the research hope the individuals they contact can provide the most accurate and specific feedback about arbitrators on issues that are most essential to the case at hand.

This information is supplemented by scouring academic works, judicial opinions that might be authored by (or comment on) an arbitrator, and those rarely published arbitral awards by an arbitrator. The aim of all these efforts is to glean insights about the arbitrator’s decisional history, temperament, or intellectual orientation on particular issues. Given the stakes (and the players), it is a surprisingly low-tech process with an inherently hit-or-miss quality. It can also be quite expensive.

The nature and accuracy of information generated by any particular inquiry can vary depending on the identity of the person asking the question, the person responding, and the arbitral candidate. Personal opinions about arbitrators are not always failsafe. Memories can be faulty; assessments can be biased or self-interested; information can be outdated. However, arbitration insiders and large, well-funded parties are much less likely to suffer potential misdirection.

First, those who have the most and best quality information are necessarily among the leading arbitration specialists. These individuals’ willingness to share sensitive information about arbitrators will inevitably depend on how well they know and trust the person making the inquiry. As a result, those who are best able to access quality information are those who are also among the leading arbitration experts. The effect of this individualized sorting of inquires among insiders is that, in theory, counsel for *opposing parties* in the *same arbitration* could pose the *same inquiry* about the *same arbitrator* to the *same person*, but receive *different responses!*

Leading arbitration specialists and well-funded parties can also hedge against imperfect information by casting a broader net. According to one anecdote, a leading practitioner tracking down information about a particular arbitrator personally contacted both sets of opposing counsel for every case in which the arbitrator was determined, based on extensive research by junior

---

<sup>139</sup> Although Argentina may have started out this position of disadvantage, by all accounts, it has now developed an exceptional level of in-house expertise. See Gottwald, *supra* note \_\_, at \_\_\_\_.

colleagues, to have presided in. Given that leading specialists often charge over \$1000/hour, the bills presumably add up quickly.

Information and resource asymmetries exist in many adjudicatory contexts.<sup>140</sup> In the market for arbitrator services they are uniquely severe and they have exceptionally important consequences. These consequences relate directly to some of the most salient critiques of investment arbitration. Van Harten and others are concerned about the background qualifications of arbitrators, as well as their potential incentives to rule for investors to increase future appointments. The ability to appoint an arbitrator is an important, even if imperfect, control that states have in the investment arbitration process.<sup>141</sup> Careful exercise of that process enables states to affect the composition of individual tribunals. Moreover, meaningful exercise of control would go some ways to alleviating concerns that arbitrators decide cases with an eye toward future appointments. To the extent that States are more substantively focused and overtly active in the selection process, it is difficult to see why their interests would be regarded as less important for securing future appointments than investors.

### **A. Improving the Arbitrator Selection Process**

Against this backdrop of information and resource asymmetries, this section proposes a new International Arbitrator Information Project (IAIP) to relieve those asymmetries. The focus of IAIP is to improve the market for arbitrator services and, as a result, the process for selecting international arbitrators.

#### **1. A New International Arbitrator Information Project<sup>142</sup>**

The International Arbitrator Information Project (IAIP) would be defined by its purpose, which would be to increase equal access to comprehensive, substantive, and reliable information about arbitrators through network-based research and responsible editorial policies. Structurally, each arbitrator would have a dedicated webpage that would be electronically searchable. Each page would include standard biographic information, such as education, professional training, nationality, language skills, and arbitration experience. Arbitrator webpages would also include links to all publicly available arbitral awards associated with the arbitrator, and all judicial opinions (translated into English or summarized in English) that reference the arbitrators or their awards.

The IAIP would also include links to arbitrators' academic and professional publications, again fully- or partially-translated into English where necessary. Additionally, the IAIP would also allow searchable access to publications by other arbitrators and academics that comment on the relevant arbitrator's publications, awards, and judicial decisions that rule on or reference

---

<sup>140</sup> Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOCIETY REV. 95, 98 (1974).

<sup>141</sup> Yackee at \_\_\_\_.

<sup>142</sup> Proposals for the IAIP have been previously published in various forms. This discussion draws from a recent pair of posts on Kluwer Arbitration Blog, which can be found at <http://kluwerarbitrationblog.com/blog/2012/08/09/the-international-arbitrator-information-project-an-idea-whose-time-has-come/>, and <http://kluwerarbitrationblog.com/blog/2012/12/10/the-international-arbitrator-information-project-from-an-ideation-to-operation/>

those publications or awards. Given the increasingly sophisticated empirical research being developed about arbitrators and arbitral decisionmaking patterns, it may also include cross-references to that research.

This content would be established through three means. First, the initial phase would collect and index information from arbitrators who consent to be included. Second, to avoid the need to reinvent an entire investment arbitration library, the IAIP would partner with a publisher or publishers that have established electronic databases of awards and arbitrator publications. Ultimately, however, the most valuable ongoing source of information will be from parties, counsel, arbitrators, arbitral institutions, academics, and other members of the arbitration community. These individuals will be able to upload various forms of information into a holding bin at the IAIP. The information would not be immediately accessible to users, but instead subject to verification and, in some instances, translation.

## 2. Arbitrator Feedback

The most innovative, and delicate, aspect of the IAIP would be a mechanism for providing feedback about arbitrators. The aim of this feature is to replicate that critical information that is currently gathered on an ad hoc and imperfect basis, and is not equally accessible to all parties.

The challenge will be to solicit and consistently obtain constructive, reliable and useful feedback. Critics are concerned that the IAIP may simply be a new advertising space for international arbitrators, or another for-profit resource.<sup>143</sup> Others have noted concern that it might be an arbitrator-related version of Wikipedia, or the equivalent of a grocery store “comment box” that acts as a receptacle for all gripes, or a tabloid that collects reckless and scintillating gossip. The challenge will be to provide constructive, reliable feedback.

Constructive and reliable information about arbitrators will be sought primarily through responses to specific questions in a survey designed to address various issues, including those currently pursued through ad hoc inquiries. Judicious editorial policies and procedures will provide safeguards against unprofessional postings and disclosure of confidential information. For this feedback to become regularized and sufficient to develop a critical mass of information, the IAIP will develop a network of relationships with universities and arbitral institutions, which can encourage and assist in collecting feedback. They can also aid in assessing questions that may arise about the reliability, authenticity or legitimacy of certain feedback, pursuant to editorial policies, described below.

Despite the challenges, it may be seen as a reform that does not require destruction or significant reconfiguring of the investment arbitration regime, but at the same time can resolve some of the most trenchant critiques.

Arbitrators are coming under greater pressure from parties and arbitral institutions to demonstrate efficiency and one bad-apple arbitrator can undermine perceptions about the

---

<sup>143</sup> Such resources already exist. See, e.g., [http://www.iaiparis.com/pages\\_p\\_html.asp](http://www.iaiparis.com/pages_p_html.asp) (last visited June 30, 2005); Juris Publishing, *Roster of International Arbitrators*, at <http://www.jurispub.com/books.asp?id=164>.

performance of the entire tribunal. However, the antics of bad-apple arbitrators—such as those identified by Paulsson—are generally known to arbitration insiders, but are rarely known outside inner circles. Although highly-partisan party-appointed arbitrators is a self-correcting problem within an individual tribunal, self-correction across cases requires parties in future cases to be able to access the relevant information.

The mere potential for feedback may be an effective deterrent for arbitrators otherwise inclined to dally at the margin of ethical conduct. Paulsson uses the term “moral hazard” to describe what he considers the presumed untrustworthiness and bad faith of party-appointed arbitrators. Among economists the term has a more technical meaning. Most generically, a moral hazard is a situation when an individual will have a tendency to take risks because the costs that could be incurred by the risk will not be felt by the party taking the risk. For international arbitrators, the relatively closed nature of the proceedings and the arbitration community, as well as the absence of any mechanisms for professional discipline, arguably create a moral hazard.

Feedback that could be made available to future users in the arbitrator selection process would eliminate this moral hazard. It may also be a remedy for the other members of a tribunal to differentiate themselves and avoid being collectively impugned. Weeding out “bad” arbitrators may also increase the potential for appointments by “good” arbitrators. Moreover, publicly available feedback may allow more junior arbitrators, women arbitrators, and arbitrators from outside the traditional international arbitration hubs to establish strong reputations and increase their chances of appointment.

The IAIP would be more cost-effective, systematic, and equally accessible source of this critical information than current methods for obtaining such information. Effectively, the IAIP would reconfigure how information about arbitrators is generated, disseminated, and used in arbitrator selection processes. By leveling the playing field in the arbitrator selection process, making critical information more generally accessible, and increasing arbitrator accountability, the IAIP can resolve some of the most trenchant concerns about investment arbitrators.

### **3. Remaining Questions**

The IAIP undoubtedly raises a number of important practical and legal questions. Who would provide that feedback—counsel or parties? Could arbitrators themselves provide feedback, and would doing so be consistent with confidentiality obligations? How would the process control for the possibility of distortions by disgruntled losing parties and overly buoyant prevailing parties? Would feedback be publicly attributed to the person providing it? If not, how would contributors be accountable? How would the IAIP obtain arbitrator-specific information since most conduct is undertaken as a member of a three-person tribunal? How would confidentiality about the parties’ dispute and arbitral proceedings be protected? Could the IAIP be potentially liable for defamatory or otherwise improper postings?

There may also be some structural obstacles, such as a “collective action” problem and incessant “free ridership,” meaning that narrow self-interest in maximizing their own information relative to others would deter parties and counsel from willingly participating. Moreover, some

may be skeptical that, as so-called “rational actors,” leading arbitration specialists might never agree to any mechanism that would threaten what some have characterized as a tight, monopolistic control over the market for arbitrator services. There are undoubtedly other challenges, in addition to those listed here, that would have to be overcome to implement the IAIP. These are not, however, insurmountable obstacles.

Several of the legal issues can be resolved by predicating participation on consent and support from the arbitration community. Arbitrator webpages would be created for those who consent to participate in the IAIP. Arbitrators might readily consent as an opportunity to build and enhance their reputations. Newer arbitrators and arbitrators from outside the central North-American and European arbitration hubs might also be willing to consent because it would give them a mechanism for developing and enhancing their reputations.

Alternatively, parties—both commercial parties and States—could spur voluntary participation by indicating that they will select arbitrators from among those listed in the IAIP. Meanwhile, parties are already consenting at ever-increasing rates to publication of awards as well as participation in various surveys about arbitration. For similar reasons, there might be reason to assume some general willingness to participate.

Whatever issues could be bridged through consent, there would still be a need for responsible, neutral editorial policies. The IAIP would have an editorial board comprised of leading international arbitrators, specialists, and party-users, as well as an outside advisory board comprised of representatives from arbitral institutions. The editorial board would set policies to ensure content is professional, credible, and germane. These editorial policies might include procedures for allowing responses and clarifications to particular posts, as well as standards and procedures for assessing and removing inaccurate or inappropriate material. The critical marker for any editorial policy or procedure would be how well it will ensure the IAIP provides information that is fair, neutral, and constructive.

No matter how well planned, the IAIP could only be successful if it were able to garner broad support within the international arbitration community. The aim would be to encourage a professional norm that parties’ and counsel commit to contributing useful, responsible feedback for the growth and legitimacy of the system. Such support could be encouraged by structural incentives. For example, party- or law-firm-access to the IAIP could be conditioned on agreement to provide information in the case for which information is sought. As noted above, pressure from parties would be essential, but they have the most to gain from increased transparency and accuracy in arbitrator selection, as well as reduced costs.

Organizations that provide collective representation for parties, such as the Corporate Counsel International Arbitration Group, should realize that their constituencies have much to gain and encourage participation. Participating arbitral institutions, meanwhile, could encourage parties and counsel to contribute, most specifically by assisting in the distribution and collection of questionnaires, in exchange for institutional access to the IAIP. This offer might be particularly enticing to regional institutions, whose resources in this regard are more limited, but whose input and contributions will arguably fill information gaps that currently exist for major European and North American institutions.



#### IV. Conclusion

Critics of international investment arbitration focus on the role of investment arbitrators for good reason. Investment treaties established skeletal frameworks for the substance of international investment law and for investment arbitration procedures. But international arbitrators are the ones putting the meat on those bones. That is an awesome responsibility and exercise of power. It is a power exercised in a high-stakes environment where every issue exists in a tangle of policy disagreement – cases like *Chevron v. Ecuador* and *Philipp Morris v. Uruguay* illustrate that graphically. In this politically charged environment, the power that investment arbitrators exercise in this context could never be perceived as “a-political.” When critics accuse investment arbitrators of being political, however, that is not what they mean.

Instead, they are reasoning that investment arbitrators do not and cannot provide neutral, law-bound decisions on investment law disputes. They provide, instead, political decisions based on their own policy preferences or personal interests. The means of appointing investment arbitrators—on an ad hoc basis and through procedures that involve intentional selection by parties—provides the intuition for these assumptions. Despite this intuition, individualized selection has some features to commend it. Most notably, it is a control function that States have sought to exercise in various other international adjudicatory contexts.

In this debate, both sides of the debate have invoked empirical research in support of their assessment of the nature of investment arbitration and the fairness of its outcomes. Empirical research has an important role to play in sharpening focus on particular questions and providing support for and against particular claims about the system. As Van Harten acknowledges, however, “there is not, and probably never will be, conclusive empirical evidence of the presence or absence of systemic bias in investment arbitration.”<sup>144</sup>

The impossibility of definite empirical answers to critical questions has not slowed the pace of proposed reforms. It remains to be seen which reforms might ultimately gain traction in responding to the legitimacy crisis that is said to grip the investment arbitration regime. In the meantime, some of the critiques of investment arbitrators underestimate the ability of responding to their concerns through the existing frameworks. Party-appointed arbitrators and the tri-partite tribunal can and should provide States with means to shape the field.

This aim cannot be accomplished, however, without eliminating existing inequities and disparities in the selection process. The procedures for selecting party-appointed arbitrators must be express and mutually understood. Perhaps more importantly, certain categories of information that are essential for parties in selecting arbitrators must be made more publicly and equally accessible. The International Arbitrator Information Project will make information that is currently gathered through ad hoc processes more reliable, .

---

<sup>144</sup> Van Harten, *supra* note \_\_\_, at 5.