ARTICLE

Blinding International Justice

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The past twenty years have seen a tremendous rise in international dispute settlement mechanisms. As international adjudication has become more prominent and pervasive, some of its most fundamental tenets have also come under scrutiny. Recently, a new debate has emerged regarding party-appointments — a widespread feature in international arbitration. While international arbitrators, like national judges, are supposed to exercise independent judgment and be neutral and impartial, practitioners and scholars concur that arbitrators often lean in favor of the nominating party. As a result of concerns over a lack of impartiality, "blind appointments" — where nominees do not know which party appointed them — have been suggested as a corrective intervention in the arbitration field.

This Article explores the causes, implementation challenges, and possible limitations of blind appointments in arbitration. It makes three contributions. First, it proposes a conceptual framework to understand the different biases introduced with the nomination of judges in international adjudication: compensation, affiliation, selection, and epistemic effects. Second, considering new data from investment arbitration proceedings and experimental surveys on arbitrators, it shows that blinding is a promising intervention to target affiliation effects while maintaining potential benefits resulting from party participation in tribunal formation. Third, it explains how blind appointments may have important limits as to their corrective properties and explores the conditions that are most favorable for the success of this proposal in other fields of international adjudication.

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I. INTRODUCTION

A transformation is under way in international law: a slowdown in formal treaty lawmaking and a corresponding increase in the production of law by international courts and tribunals (ICs).[1] This transformation has been so extensive that scholars see the authority of ICs expanding beyond simply enforcing treaties between States and into more profound

1. Evan J. Criddle & Evan Fox-Decent, *New Voices: Rethinking the Sources of International Law*, 103 PROC. ANN. MEETING (ASIL) 71 (2009); Joost Pauwelyn, Ramses A. Wessel & Jan Wouters, *When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking*, 25 EUR. J. INT'L L. 733 (2014). For recent statistics, see Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225 (2012).

administrative or constitutional roles, such as legitimating the exercise of public authority.[2] As international adjudication becomes more relevant and pervasive, can international justice be delivered in an independent, neutral, and impartial fashion?

Truly "blind international justice" is a growing concern in international legal studies.[3] At issue is whether the decisions of international judges reflect ideological and political bias or objective legal reasoning.[4] The issue is timely, as demonstrated by a recent phone-tapping scandal involving ex parte communications between a government and its party-appointed arbitrator that resulted in Croatia backing out of a delicate border dispute with neighboring Slovenia.[5] The incident caused both a rise in tensions between the two nations and a decline in the trust afforded to the international legal profession and international judicial system.[6]

Inherently, political decisions can lead to a lack of normative legitimacy, especially when ICs are tasked with resolving disputes that concern

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2. Laurence Helfer, *The Effectiveness of International Adjudicators*, *in* OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 464, 465 (Cesare P.R. Romano, Karen J. Alter & Yuval Shany eds., 2014) (roles of ICs "include exercising constitutional, enforcement, and administrative review"); KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW Ch. 3 (2014); Dinah L. Shelton, *Form, Function, and the Powers of International Courts*, 9 CHI. J. INT'L L. 537 (2009).

3. Eric A. Posner & Miguel F. P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599 (2005). In this influential study, Posner and de Figueiredo found that ICJ judges favor States at similar levels of development with a related political system.

4. For a classical study in domestic courts, see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1997); *see also*, Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, in JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 590, 593 (Shimon Shetreet & Jules Deschênes eds., 1985). In international law, see MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 (2002) (criticizing international law on the basis that it is difficult to separate from the interests of American imperial power); Martti Koskenniemi, *Law, Teleology and International Relations: An Essay on Counterdisciplinarily*, 26 INT'L REL. 3 (2012); *cf.* Joost Pauwelyn, *The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Panelists are from Venus*, 109 AM. J. INT'L L. 761 (2015) (generally arguing that WTO's success is due to the fact that panelists are "political" as opposed to investor-state arbitration, which is under fire in part because of "a-political" arbitrators).

5. Arman Sarvarian & Rudy Baker, *Arbitration Between Croatia and Slovenia: Leaks, Wiretaps, Scandal*, EJIL TALK! (July 28, 2015), http://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal/ (last accessed Dec. 1, 2015). Prior to the scandal, an arbitration between Croatia and Slovenia concerning delimitation of the maritime and land boundary between the two States was brokered by the European Commission. After learning of the ex-parte communication with the party-appointed arbitrator, Croatia applied to the tribunal to "suspend the proceedings with immediate effect." The dispute is on hold after it had been active for over three years.

6. Arman Sarvarian & Rudy Baker, *Arbitration Between Croatia and Slovenia: Leaks, Wiretaps, Scandal (Part 2)*, EJIL TALK! (August 7, 2015) http://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal-part-2 (last accessed Dec. 1, 2015); *see also*, Patricia Živković, *Severe Breaches of Duty of Confidentiality and Impartiality in the Dispute Between Croatia and Slovenia: Is Arbitration Immune to Such Violations?*, KLUWER ARB. BLOG (July 29, 2015), http://kluwerarbitrationblog.com/2015/07/29/.

consequential policy with economic implications.[7] Consider, for instance, Phillip Morris's recent investor-state dispute settlement (ISDS) claims that Australian and Uruguayan efforts to limit the marketing of tobacco constitute violations of its intellectual property rights.[8] Had they been successful, these cases could have constrained the ability of States to regulate marketing and set health and safety standards — long areas of sovereign prerogative.[9] International adjudicators, who are often unsupervised by any superior entity, and whose decisions bind States and affect their citizens, have now more power over these and other similarly delicate disputes.[10]

Party appointments in arbitration — a feature with a long-standing pedigree in international law and dispute settlement[11] — has recently come under fire for its role in contributing to bias, particularly as international adjudication has become more prominent.[12] International arbitration tribunals are typically composed of three members: two appointed unilaterally by each party in the litigation, and a third arbitrator who acts as

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7. *See* Ruth Mackenzie & Phillipe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271 (2003) (stating that judicial independence is recognized as a significant factor in maintaining the credibility and legitimacy of international courts and tribunals); *see also* Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 CHI. J. INT'L L. 647 (2012); Susan Franck et al., *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*, COLUM. J. TRANSNAT'L L. (2015).

8. Philip Morris Asia v. Commonwealth of Austl., Case No. 20012-12, Notice of Arbitration, ¶¶ 7.15–.17 (Perm. Ct. Arb. 2012). Moreover, a case under the Switzerland–Uruguay BIT was filed by Phillip Morris before ICSID in relation to a legislation requiring all cigarettes manufacturers to adopt a single presentation requirement. Such case remains pending. *See* FTR Holding S.A., Philip Morris Products S.A. (Switz.) & Abal Hermanos S.A. (Uru.) v. Oriental Republic of Uru., ICSID Case No. ARB/10/7 (2010).

9. A tribunal at the Permanent Court of Arbitration issued a decision dismissing the arbitration against Australia. Notwithstanding this dismissal, a separate claim against Australia at the WTO remains pending. *See* Jarrod Hepburn & Luke Eric Peterson, *Australia Prevails in Arbitration with Philip Morris over Tobacco Plain Packaging Dispute*, IAREPORTER (Dec. 17, 2015), http://www.iareporter.com/articles/breaking-australia-prevails-in-arbitration-with-philip-morris-over-tobacco-plain-packaging-dispute/. Philip Morris was also defeated in the case before ICSID against Uruguay. *See* FTR Holding S.A., Philip Morris Products S.A. (Switz.) & Abal Hermanos S.A. (Uru.) v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award (Jul. 8, 2016) ¶¶ 235–309, *available at* www.tobaccofreekids.org/content/press_office/2016/2016_07_08_uruguay.pdf.

10. For the WTO case, see *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging,* WTO, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm (last accessed Sept. 30, 2015) (discussing how four countries, mobilized by tobacco companies, are trying to bring down Australia's law in ongoing cases before the WTO, arguing that the act limits the use of trademarks and thereby constitutes a breach of agreements under the WTO).

11. David D. Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AM. J. INT'L L. 104, 116 (1990) ("On the municipal level, arbitration is attractive because it is perceived to be a desirable alternative to the courts. But on the international level, there often is no alternative to arbitration. In many international situations, neither party will agree to submit all possible disputes to the courts of the other.").

12. *See infra* section II(C)(1) and accompanying notes.

the chair, appointed by a neutral authority or by agreement of the parties.[13] While all arbitrators should be neutral and impartial — including the two appointed by the parties — practitioners and scholars alike contend that party-appointed arbitrators are biased in favor of the nominating party.[14] Proposals for reform range from eliminating party appointments altogether to introducing minor changes and increasing the pool of arbitrators.[15] Most, however, seem farfetched or unlikely as a practical matter. One that does seem plausible is to "blind" appointments by preventing nominees from knowing which party appointed them.[16]

In this Article, I use the blind appointments proposal as an entry point into the debate over biases and judicial politics in ICs.[17] First, in an attempt to improve our theoretical understanding of this issue, I explain and conceptualize the different sources of possible biases resulting from the appointment and nomination of judges in international adjudication. These different sources can cause both conscious (selection and compensation) and implicit or cognitive (affiliation and epistemic) effects that bias decision-making.[18] Here, I contend that most studies have borrowed research strategies developed in domestic court systems, ignoring important aspects of international adjudication.[19] Accordingly, I propose a new conceptual

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13. Chiara Giorgetti, *The Arbitral Tribunal: Selection and Replacement of Arbitrators, in* LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER'S GUIDE 145 (Chiara Giorgetti ed., 2014).

14. *See, e.g.,* Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 821, 834 (Mahnoush H. Arsanjani et al. eds., 2011).

15. For a review of the current debate and proposal, see Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 U. PA. J. INT'L L. 431 (2014) (arguing for the adoption of stricter arbitrator challenge rules and enlarging the pool of arbitrators).

16. Jan Paulsson, *Moral Hazard in International Dispute Resolution,* 25 ICSID REV. FOREIGN INV. L.J. 339, 355 (2010) ("[M]y proposal [is] that we turn our backs on the practice of unilateral appointments . . . and experiment with 'blind appointments.'").

17. For classics in this field, see Thomas M. Franck, *Some Psychological Factors in International Third-Party Decision-Making*, 19 STAN. L. REV. 1217 (1967); *see also* Response to Posner *in* Rosalyn Higgins, *Alternative Perspectives on the Independence of International Courts: Remarks*, 99 PROC. ANN. MEETING (ASIL) 135; Rosalyn Higgins, *Reflections from the International Court*, *in* INTERNATIONAL LAW 3, 3 (M. Evans ed., 2006); Abram Chayes, *Nicaragua, the United States and the World Court*, 85 COLUM. L. REV. 1445, 1447–48 (1985); Lyndel V. Prott, *The Role of the Judge of the International Court of Justice*, 10 BELGIAN REV. INT'L L. 473, 473. In the context of arbitration, see Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957 (2005) (stating that in modern scenarios parties want the outcomes of their disputes to be warranted by reasons from an impartial authority bound by law).

18. *See infra* section II(B).

19. *See* Posner & de Figueiredo *supra* note 3; Michael Waibel & Yanhui Wu, Are Arbitrators Political? 34 (Nov. 5, 2011) (unpublished manuscript), *available at* https://www.researchgate.net/profile/Michael_Waibel/publication/256023521_Are_Arbitrators_Political/links/5693558408aed0aed816d008/Are-Arbitrators-Political.pdf (cited with permission). For a classic study of the idiosyncratic aspects of international adjudication, see Dr. Ian Brownlie, *The Justiciability of Disputes and Issues in International Relations*, 42 BRIT. Y.B. INT'L L. 123, 142 (1967); *see also* Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 391, 397 (2012) (comparing international

framework to distinguish between litigant-introduced and system-generated biases.

Second, relying on the analysis of all proceedings administrated by the World Bank Group's Centre for Settlement of Investment Disputes (ICSID) prior to September 2015 and data from an experimental survey involving 266 arbitrators, I explain the potential effects of the party-appointing system. I argue that an important issue in the debate over party appointments is whether professionals within the field are as susceptible to implicit influences as other legal actors. In other words, would they make better decisions or handle cases more effectively if relieved of implicit biases? To address this, I propose a new method to observe potential biases by looking at judicial outputs other than outcomes and voting patterns — the traditional variables observed by leading empirical studies.[20] These new indicators include settlement rate, liability findings, compensation awarded, case duration, resignations, dissenting and separate opinions, and the use of remedies against the decisions.[21]

Third, after elaborating on the potential role of biases at play in arbitration appointments, I argue that blinding can yield benefits without sacrificing the alleged advantages of party participation in the formation of arbitration tribunals — the main argument used to defend party appointments.[22] I also demonstrate important limits to the implementation as well as the corrective effects of such a proposal. In particular, blind appointments can only improve the practice of arbitration by directly addressing the effects of cognitive influences resulting from the party appointment system. Indirectly, blinding may also reduce arbitrators' incentives to use information regarding the source of appointment strategically — mitigating selection bias. Moreover, important implementation challenges exist in settings with thick social structures or embedded institutional regimes such as close-knit networks of legal actors involved in an area of litigation prone to normative or ideological polarization. In such fields, a combination of different strategies will be needed to insulate arbitrators from selection bias.[23]

The next section summarizes the blind appointments debate and proposal within the literature of bias and judicial politics and proposes a conceptual framework for analysis. Part III uses the experience of investor-state arbitration under ICSID to understand the possible effects of party appointments and assess the blinding proposal. After describing the

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investment arbitration to an "agency" that "legislates, administers, and adjudicates the rules of the international investment game").

20. *See, e.g.,* Posner & de Figueiredo, *supra* note 3; Waibel & Wu, *supra* note 19.

21. *See infra* sections III(B)–(C).

22. *See infra* section IV(A).

23. *See infra* section IV(B).

available alternatives, Part IV explains the benefits as well as the problems and limitations of blinding appointments in international arbitration. I conclude with some thoughts about the implications of this work for the larger field of international law.

II. BIASES AND THE DEBATE OVER PARTY APPOINTMENTS

A. The Growth of International Adjudication and ISDS

For the last half-century or so, globalization, political interdependency, and economic liberalization have all contributed to an increase in transnational adjudication.[24] In fact, the growth and expansion of international dispute resolution is considered by many international legal scholars as "the single most important development of the post-Cold War age."[25]

The expansion of international adjudication has affected not only the volume of cases but also their depth. Traditionally, the principal function of ICs was to provide an independent forum to assist nation States in settling their legal disputes amicably.[26] With the rising number and variety of international mechanisms and the increased density and relevance of international treaties, the role of international judges has expanded. This role now includes exercising constitutional and administrative reviews, stabilizing normative expectations, legitimating the exercise of public authority, and engaging in judicial lawmaking to clarify substantive legal obligations.[27] In part as a result of this expansion, debates over the role and functioning of international adjudication are rapidly emerging, often assessing concerns over ICs' capacity, independence, neutrality, and impartiality — principles associated with adequate judicial functioning in

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24. For recent statistics, *see* Shany, *supra* note 1.

25. Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 709 (1999) (stating further that the enormous expansion of the international judiciary will probably be seen by future international lawyers and scholars as the single most significant post-cold war development in international law); *see also* Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697 (1999) (discussing the history of international law and its contemporary ramifications, particularly the adherence to previous judgments and court procedures, and the dramatic increase in the rate of change from ad hoc tribunals to permanent ones); Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999) (discussing the issue of the rapid proliferation of international courts and tribunals and the increased activity of many of the courts).

26. U.N., HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES 37 (1992); Ian Brownlie, *Peaceful Settlement of International Disputes*, 8 CHINESE J. INT'L L. 267 (2009).

27. As explained by Helfer, other tasks include improving state compliance with primary legal norms and enhancing the legitimacy of international norms and institutions. Helfer *supra* note 2, at 464.

domestic courts.[28]

If there is a field where these concerns are evident, it is investor-state arbitration or ISDS — the controversial method for international investment dispute settlement. Chief among these concerns has been the ability of international arbitrators to respond to modern expectations for disputes involving challenges to public law by powerful actors.[29] These pressures have increased as the nature of cases has evolved to include topics such as tax policy, environmental issues, and health and social regulations. Controversial cases in this field include: consolidated claims against Argentina by tens of thousands of Italian bondholders who lost substantial portions of their investment in sovereign debt;[30] a dispute brought by a Swedish utility demanding compensation after Germany's reversal of its nuclear energy policy;[31] and the controversial cases brought by tobacco giant Philip Morris against Uruguay and Australia over labeling requirements.[32] These proceedings rely on expansive bases for adjudication — for example, the concept of "fair and equitable treatment," or FET — in ways that

28. For recent assessments and analyses of the resulting literature, see Detlev Vagts, *The International Legal Profession: A Need for More Governance?,* 90 AM. J. INT'L L. 250 (1996); INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013); Emilie M. Hafner-Burton et al., *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT'L L. 47, 51 (2012).

29. GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 156, 159–64 (2007) ("[A]rbitrators autonomously resolve core questions of public law: . . . The difficulty here is not that these issues are resolved by international adjudication but that they are resolved by private adjudicator without adequate supervision by public judges."); *see also* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System,* 107 AM. J. INT'L L. 45, 75–93 (2013) (discussing the changing nature of investment arbitration and the evolution of debates).

30. Abaclat & Others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, ¶¶ 68, 238(i)–(iii) (Aug. 4, 2011) (formerly Giovanna a Beccara & Others v. Argentine Republic), http://www.italaw.com/sites/default/files/case-documents/ita0236.pdf. Around 2007, tens of thousands of Italian "bondholders" of Argentina's sovereign debt brought a consolidated claim under the Italy-Argentina Bilateral Investment Treaty. The case challenged the country's debt restructuring policy upon alleged violations of the treaty and international investment law. The decision on the merit is still pending, but a judgment on jurisdiction recognized the right of qualified bondholders to bring the consolidated claims.

31. Vattenfall AB & Others v. Fed. Republic of Ger., ICSID Case No. ARB/12/12. The dispute resulted from a decision of the German Parliament to abandon the use of nuclear energy by the year 2022. The amendment to the Atomic Energy Act resulted in a case brought before the International Centre for Settlement of Investment Disputes by the Swedish energy group Vattenfall (the operator of the Krümmel and Brunsbüttel nuclear power plants) for "the phasing out of nuclear energy." *See* Vattenfall AB & Others v. Fed. Republic of Ger., ICSID Case No. ARB/09/6, Claimant's Request for Arbitration (Mar. 30, 2009), http://italaw.com/documents/Vattenfall_Request_for_Arbitration_001.pdf.

32. *See supra* note 8. For other controversial disputes, see Chevron Corp. & Texaco Petroleum Co. v. Republic of Ecuador, Case No. 2009-23, Claimant's Notice of Arbitration (Perm. Ct. Arb. Sept. 23, 2009) (a case involving billions of dollars over an Ecuadorian court's decision for environmental damage compensation).

impose greater discipline on previously considered sovereign affairs.[33] All of these disputes have at least one thing in common: they will be decided by international arbitrators with limited oversight.

The impact of such decisions can be massive. For one, it may affect the way in which States prospectively assess their regulatory authority and policy space.[34] Moreover, it is in this field that scholars have routinely complained about features borrowed from private commercial arbitration, including the fact that a small network of self-regulated professionals with uniform backgrounds appointed by the parties decides most cases.[35] Recently, United States Senator Elizabeth Warren has emerged as a high profile critic of ISDS, calling it a generous and favorable system for corporations, where "white shoe" lawyers make most decisions.[36] Senator Warren is neither alone nor the first to express strong criticism. In fact, many important academics agree that ISDS places important decisions within the control of super-elite, like-minded male lawyers with strong pro-capitalist views who operate largely outside of the local political process or real investment decisions.[37]

While substantial disagreements about the many problems with ISDS exist, it is now largely accepted that the political and legal sustainability of

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33. For an expansive interpretation of FET clauses, see Técnicas Medioambientales Tecmed SA v. Mexico, Case No. ARB(AF)/00/2, Award, ¶ 154 (Perm. Ct. Arb. 2003), http://www.italaw.com/sites/default/files/case-documents/ita0854.pdf ("The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently . . . . State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations.").

34. For further discussion, see Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L., 1 (2014).

35. YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996); Christopher R. Drahozal, *Private Ordering and International Commercial Arbitration*, 113 PENN ST. L. REV. 1031 (2009); Rogers, *supra* note 17 (reviewing the literature, exploring sociological explanations, and proposing a methodology for developing clearer standards of conduct for international arbitrators and an approach to review allegations of misconduct). *But see* 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, 472 (2009).

36. *See* Letter from Senator Warren to Ambassador Michael Froman, Office of the U.S. Trade Representative (Dec. 17, 2014), *available at* http://www.warren.senate.gov/files/documents/TPP.pdf (criticizing ISDS as a mechanism to "challenge U.S. government policies before a panel of private attorneys that sits outside of any domestic legal system").

37. *See* Letter by Law and Economics Professors to Reject ISDS, Sept. 7, 2016, *available at* https://www.citizen.org/documents/isds-law-economics-professors-letter-Sept-2016.pdf; *see also* Jason Webb Yackee, *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*, 32 FORDHAM INT'L L.J. 1550, 1611 (2009); George Kahale III, *Is Investor-State Arbitration Broken?*, TDM 7 (2012), *available at* http://www.curtis.com/siteFiles/News/Is%20Investor-State%20Arbitration%20Broken.pdf; Gus Van Harten, *The (Lack of) Women Arbitrators in Investment Treaty Arbitration*, 59 COLUM. FDI PERSP. 1 (2012), *available at* http://ccsi.columbia.edu/files/2014/01/FDI_59.pdf.

this system hinges, in part, on the transparency, neutrality, and legitimacy of the process of determining who decides these cases.[38] Part of this debate is how to improve the process of selecting arbitrators. I address this part after proposing a conceptual framework to analyze how the process of appointment and nomination of judges may create biased decision-making in international adjudication.

B. Biases in International Courts and Tribunals: A Conceptual Framework

Questions of independence and judicial politics are complex, to say the least.[39] Leaving aside problems of what an unbiased application of the law actually means,[40] judges operate in different legal and institutional contexts that create an array of incentives that may result in behaviors often associated with "bias."[41] In international adjudication, where States tend to exercise varied levels of control over the adjudicatory decision-making process — depending, for instance, on the level and depth of delegation of authority — these questions can be hard to assess systematically.[42]

To start dissecting these complex questions, international law scholars have looked to studies of domestic courts that propose a range of motives for judges to display bias. For instance, like their domestic homologs, international judges and arbitrators may seek to maximize their wealth or status; they may be limited by their political ambitions or background; and they may be influenced by prior commitments or future career prospects.[43] In addition to these personal motives, however, there are multiple

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38. Mackenzie & Sands, *supra* note 7 ("[T]he accompanying issues of credibility, legitimacy and transparency merit a comprehensive review of standards of judicial independence and impartiality."); Giorgetti, *supra* note 15, at 448; *see also* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions,* 73 FORDHAM L. REV. 1521 (2005); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988) (arguing that decision-makers who are perceived as legitimate enhance the legitimacy of the dispute resolution system itself).

39. *See*, *e.g.,* Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1487–93 (1998); *see also* Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals* 24 (Univ. of Chi. John M. Olin Law & Econ., Working Paper Series, Paper No. 508; N.Y. Univ. Law & Econ. Research Paper Series, Paper No. 10-06, 2010), *available at* http://ssrn.com/abstract=1536723.

40. Michael D. Goldhaber, *The Global Lawyer: Arbitration Without Legitimacy*, LITIG. DAILY (June 7, 2013), *available at* http://www.litigationdaily.com/id=1202603368340/The-Global-Lawyer-ArbitrationWithout-Legitimacy (quoting Catherine Rogers as stating, "[N]o study can control for the correct legal outcome").

41. *See* Joanna M. Shepherd, *Are Appointed Judges Strategic Too?*, 58 DUKE L.J. 1589, 1607–08 (2009).

42. Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J INT'L L. 411, 416 (2008) (describing mechanisms of State control over international adjudicatory bodies).

43. ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM 145 (2009).

institutional factors that also play a key role in judicial outputs, some of them idiosyncratic to international adjudication. For instance, the existence (or lack thereof) of an appellate proceeding, the role and influence of a secretariat or registrar of a court, the embeddedness (or not) of the court in a particular regime or legal community, and the *ex ante* or *ex post* control mechanisms imposed by States that create the court (jurisdictional mandate, applicable rules, staffing, budget, etc.) can all affect such outputs.[44]

Legal scholars and political scientists agree, however, that an important source of bias, ideology, and State control is the nomination or appointment of adjudicators.[45] This function is performed in many different fashions, depending on a series of factors, including the type of tribunal, the jurisdictional mandate, and the enforceability of the decisions.[46] Compare, for instance, the appointment of judges in two important ICs: the International Court of Justice (ICJ) and the panel members of the World Trade Organization (WTO). Fifteen judges, each serving a nine-year, renewable term, compose the ICJ.[47] The terms are staggered, so that the composition of the court routinely shifts.[48] No two judges may share a common nationality. If a State appears before the court as a party and a national from that same State is not currently a judge, that State may appoint an ad hoc judge to serve only for that case.[49] Judges are nominated by States and then voted on by the Security Council and the General Assembly of the U.N.[50] In contrast, at the WTO panel level, arbitrators are most frequently (around 64% of appointments) selected by the WTO Director-General (DG) upon advice from the WTO Secretariat (within the Legal Affairs or Rules Division, depending on the type of dispute).[51] In practice, panels are composed of three members and candidates are only appointed if both parties agree. At this stage, each party has a veto right. Only if no mutual agreement can be reached will the WTO Secretariat (formally the DG)

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44 Cogan, *supra* note 42; *see also* Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631 (2005); Laurence R. Helfer, *Why States Create International Tribunals: A Theory of Constrained Independence*, in INTERNATIONAL CONFLICT RESOLUTION 253 (Stefan Voigt, Max Albert & Dieter Schmidtchen eds., 2006); Pauwelyn, *supra* note 4.

45. Cogan, *supra* note 42; Erik Voeten, *The Politics of International Judicial Appointments. Evidence from the European Court of Human Rights,* 61 INT'L ORG. 669 (2007); Manfred Elsig & Mark A. Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, 20 EUR. J. INT'L REL. 391 *(*2014).

46. RUTH MACKENZIE, KATE MALLESON, PENNY MARTIN & PHILIPPE SANDS, SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS (2010).

47. Statute of the International Court of Justice, 1945 I.C.J. Acts & Docs. arts. 3(1), 13.

48. *Id.* art. 13(2).

49. *Id.* art. 31.

50. *Id.* arts. 4, 6.

51. *See* Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes , Marrakesh Agreement Establishing the World Trade Organization, Annex 2 arts. 6, 8, Apr. 15, 1994, 1869 U.N.T.S. 401 [hereinafter DSU].

appoint panelists.[52] Hence, the Secretariat is highly influential — first formally, as it proposes panelists to the parties, and then informally through the DG if the parties cannot agree.[53]

Empirical studies on the effects of the appointment system so far have been suggestive of important biases but inconclusive as to the overall effects. In an influential study, Eric Posner and Miguel de Figueiredo analyzed the role of national identity in the appointment system of the ICJ.[54] They found that judges favor States that appoint them and States whose wealth level is close to that of their own State.[55] Similar works have followed suit, including a study on how personal background influences arbitration outcomes in ISDS, which had similar findings.[56]

While pioneering, these works do not address the different influences that may result from the process of nomination and appointment of judges. In their efforts to isolate and show the effects of specific background characteristics, they avoided a systematic treatment of other possible influences. Nevertheless, these groundbreaking works have identified key conceptual distinctions and paved the way for further empirical investigations.

Among the most consequential of the distinctions identified is that between economic or material incentives and psychological or cognitive limitations. The former result in explicit strategic decisions on the part of judges, and the latter may result in implicit influences.[57] For instance, a judge may decide a case strategically to increase his or her chances of reappointment or promotion to a more prominent IC. At the same time, judges are subject to various cognitive biases that have been extensively documented in the social sciences.[58] In other words, a judge, like any other person, may have a hard time seeing a case from a different angle or have a predisposition towards a particular type of litigant.[59]

While the distinction between economic (or material) and psychological

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52. *See* Pauwelyn, *supra* note 4.

53. *See* Andrew W. Shoyer, *Panel Selection in WTO Dispute Settlement Proceedings*, 6 J INT'L ECON. L. 203 (2003); *see also* David. Palmeter, *The WTO as Legal System*, 24 FORDHAM INT'L L. J. 444 (2000) (discussing the appointment process).

54. Posner & de Figueiredo, *supra* note 3, at 624. The authors also found that "[j]udges vote in favor of their own countries and in favor of countries that . . . (somewhat more weakly) [match the] cultural attributes [i.e. language and religion] of their own countries." *Id.*

55. *Id.* at 625.

56. Waibel & Wu, *supra* note 19 (finding that arbitrators routinely appointed by the investor scrutinize the actions of host states more closely as compared to arbitrators typically appointed by host states, and that arbitrators are more lenient to host countries from their own legal family).

57. *Id.*

58. D. Michael Risinger et al., *The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion*, 90 CAL. L. REV. 1 (2002).

59. Lord David Hacking, *Well, Did You Get the Right Arbitrator?,* 15 MEALEY'S INT'L ARB. REP. 32, 35 (2000) (explaining that at the forefront of appointments by international arbitration institutions "is

(or cognitive) biases is significant, it is also insufficient to systematically understand the ways in which the appointment process potentially generates "biased" outcomes. In particular, this distinction does not capture the difference between influences that result from strategic decisions by the litigating parties and influences resulting from adjudicatory settings more generally. The first is often referred to as litigant-introduced effects, and the second I will refer to as system-generated effects.[60]

Let me expand on this second distinction. For some judges, a particular decision may result from the desire to maintain a stream of income. This is, most likely, a rational decision of the appointee, but one over which the litigating party has very little (if any) influence. In fact, the compensation scheme — and other potential benefits resulting from the appointment, such as social capital — is predetermined and is a function of the general adjudicatory setting. Hence, the *compensation effect* does not necessarily lead to decisions favoring the appointing party and is likely to be stronger where judges are more dependent on reappointments. This is overall a systemic issue and a function of the type of IC (and larger adjudicatory setting) in which the process is embedded.[61]

At the same time, the nomination and appointment of a particular judge is often a calculated choice by a litigant or potential litigant. A rational litigant will try to select a judge who has reliably shown the appropriate judicial philosophy towards a particular set of issues relevant to the litigant's goals. In this sense, the nomination of judges introduces what is often referred to as *selection effect*, a particular influence resulting from a choice made by a litigant or potential litigant.[62] As in the case of the compensation effect, this may result in the judge making a conscious or deliberate choice; however, the bias introduced by the selection effect is mostly the result of a calculated effort by the litigant or potential litigant.

Judges may also find it difficult to maintain impartiality on a cognitive level, making it difficult to neutralize preferences through introspective reflection. For instance, a judge appointed by a particular litigant or potential litigant may, in spite of his or her best intentions, be predisposed to favor a

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a concentration upon the appointment of arbitrators who are, and can be seen to be 'neutral' and 'independent' of the parties").

60. Christopher Tarver Robertson, *Blind Expertise,* 85 N.Y.U. L. REV. 174 (2010) (discussing the term "affiliation bias").

61. Hans Smit, *The Pernicious Institution of the Party-Appointed Arbitrators*, 33 COLUM. FDI PERSP. 1 (2010), *available at* http://ccsi.columbia.edu/files/2014/01/FDI_33.

62. *See* Martin Hunter, *Ethics of the International Arbitrator*, 53 ARB. 219, 223 (1987) ("[A] party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias.").

party — most commonly the appointing party.[63] This *affiliation effect* has been documented in other litigation settings.[64] While it is also an effect introduced by the litigant in the process of appointment, it is different from the selection effect, as the judge may be unaware of its influence. In fact, the arbitrator may even resist its influence yet still be affected by it.

Finally, judicial appointments take place in a larger context, where rules, procedures, rituals, or social norms are very relevant.[65] In some contexts, a particular career background is necessary as a matter of practice.[66] Linguistic or gender differences may also interfere with the decision and the IC's dynamic.[67] These factors inevitably inform an individual's view of the world, and diplomats, corporate lawyers, and politicians may have different and idiosyncratic views. Particular experiences and worldviews may favor some legal principles and political ideas over others. Hence, the lack of diversity among judicial candidates may filter out particular views, creating a cultural or, as I call it here, *epistemic effect*.[68] In simple terms, the IC system may be biased, even though the individual judges are unbiased.[69] Even impartial judges who are able to resist economic effects are part of the culture and politics of expertise of a particular legal field.[70] The four different effects

63. M. Scott Donahey, *The Independence and Neutrality of Arbitrators*, 9 J. INT'L ARB. 31, 41 (1992) (explaining that in "international arbitration, a party [appointed] arbitrator may be predisposed to his appointing party's position, but must . . . render his decision in good faith and [in] an independent manner").

64. Christopher T. Robertson & David V. Yokum, *The Effect of Blinded Experts on Juror Verdicts,* 9 J. EMPIRICAL LEGAL STUD. 765 (2012).

65. MACKENZIE ET AL., *supra* note 46.

66. Leigh Swigart, *The "National Judge": Some Reflections on Diversity in International Courts and Tribunals*, 42 MCGEORGE L. REV. 223, 224 (2010); *see also* Thordis Ingadottir, *The International Criminal Court Nomination and Election of Judges*, § 4.6 (2002), *available at* http://www.pict-pcti.org/publications/publications.html.

67. *See, e.g.,* Grossman, *supra* note 7.

68. Samrat Ganguly, Note*, The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health,* 38 COLUM. J. TRANSNAT'L L. 113, 166 (1999) (suggesting that arbitrators are subject to influence, which may be the result of a shared nationality, political or economic philosophy or legal culture).

69. For a similar point, see Posner & de Figueiredo, *supra* note 3.

70. For a provocative argument, see DAVID ROTHKOPF, SUPERCLASS: THE GLOBAL POWER ELITE AND THE WORLD THEY ARE MAKING (2008).

likely to result from the appointment process can be summarized as follows:

	Litigant-Introduced	**Systematically Generated**
Conscious Effects (Economic/Material)	Selection	Compensation
Implicit Effects (Psychological/Cognitive)	Affiliation	Epistemic

Table 1: Different Effects of the Appointment System of Judges

While I will elaborate on how these influences operate in the specific context of ISDS under ICSID, it is important to summarize the lessons of this framework for international arbitration more generally:

> *Selection effect*: Because litigants nominate the arbitrators, they can choose arbitrators with the maximum predisposition toward their case. The litigant can draw from the pool of arbitrators who have shown reliability and the appropriate attitudes towards the party's case.
>
> *Affiliation effect*: Because litigants nominate them, party-appointed arbitrators may have some predisposition to favor the nominating party. This predisposition may operate as an implicit bias; as a result, arbitrators would have a tendency to side with the nominating party even if he or she attempts to maintain neutrality and independence.
>
> *Compensation effect*: Because arbitrators do not have a permanent appointment, they may be affected by incentives for reappointment in other similar cases. Those incentives can be very strong, depending on the amount of and dependency on compensation drawn from the appointments and the opportunity cost. Other types of capital, including social capital, may also influence a decision to rule in a particular way.
>
> *Epistemic effect*: Procedures and rules as well as rituals and social norms surrounding the appointment of arbitrators limit the pool of potential candidates. A professional culture may filter some arbitrators out, skewing the view of the law, for instance, to certain values (predictability) over others (fairness). The group dynamics have important effects on outcomes as a result of conformity and

collegial pressures, but this may be unconscious as the arbitrators genuinely embrace a particular worldview.

C. Party-Appointments as Litigant-Introduced Bias

While systemically generated biases are often the source of concern for ISDS scholars, the emerging debate over party appointments is really about litigant-introduced influences. To be sure, litigant- and systematically induced biases may overlap and reinforce each other, but for analytical purposes (and to enable some conceptual clarity and empirical testing) it is best to treat them separately. This compartmentalized approach may yield prescriptions that can best address specific effects. First, however, I briefly summarize the current debate over party appointments.

1. The Debate over Party Appointments

The practice of parties unilaterally appointing arbitrators has existed for centuries, especially in international arbitration.[71] Instruments establishing such a system include the 1796 Jay Treaty (between the United States and Great Britain),[72] many modern bilateral investment treaties (BITs),[73] most if not all of the major international arbitration rules,[74] and many domestic arbitration laws,[75] including the UNCITRAL Model Law that serves as a basis for the harmonization of national arbitration laws.[76] This feature is also common in many other international dispute settlement systems, including

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71. LUCY REED, JAN PAULSSON & NIGEL BLACKABY, GUIDE TO ICSID ARBITRATION 77–79 (2d ed. 2011).

72. Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116.

For a discussion of the Jay Treaty, see STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800, at 375–449 (1993).

73. *See, e.g.*, 2012 U.S. Model Bilateral Investment Treaty, arts. 24, 37, *available at* http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf; German Model Treaty Concerning the Encouragement and Reciprocal Protection of Investments, 2008, arts. 9, 10, *available at* http://www.italaw.com/sites/default/files/archive/ita1025.pdf; Canada Model Agreement for the Promotion and Protection of Investments, 2004, arts. 24, 48, *available at* http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf.

74. *See, e.g.,* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, ICSID Convention, Regulations and Rules (amended Apr. 2006) [hereinafter ICSID Convention]; UNCITRAL Arbitration Rules (as revised in 2010), G.A. Res. 65/22, U.N. DOC. A/RES/65/22 (Jan. 10, 2010); *see also* Rules of Arbitration of the ICC, International Chamber of Commerce (1998) [hereinafter ICC Rules]; LCIA Arbitration Rules, LCIA (1998) [hereinafter LCIA Rules]; Arbitration Rules, Arbitration Institute of the Stockholm Chamber of Commerce (2007) [hereinafter SCC Rules].

75. *See, e.g.*, Marcel Storme, *Belgium: A Paradise for International Commercial Arbitration*, 14 INT'L BUS. L. 294, 294–95 (1986); *see also*, Gaillard, *The UNCITRAL Model Law and Recent Statutes on International Arbitration in Europe and North America*, 2 ICSID REV. FOREIGN INV. L.J. 424, 425–26 (1987).

76. Adopted by the United Nations Commission on International Trade Law on June 21, 1985, I.L.M. 1302 (1985).

trade, tax, and administrative international tribunals — the latter resolving disputes between employees and the international organizations for which they work.[77]

The practice of each party appointing one of the arbitrators raises concerns that arbitrators will behave as representatives for the interests of the appointer and not as neutral adjudicators. Some have argued that such control over appointments is desirable and that expectations of arbitrator neutrality are misplaced.[78] But international lawyers widely believe that arbitrators should act independently,[79] and independent judgment is required by the main international arbitration rules.[80] In fact, in a high-profile arbitration between Slovenia and Croatia, allegations that the arbitrator appointed by Slovenia was secretly in contact with the Slovenian agent infuriated the legal community, which has denounced the arbitrator's actions as misconduct.[81]

This recent scandal has renewed an interest in the selection method of arbitrators. Yet the issue has been on the mind of international lawyers at least since Professors Jan Paulsson and Albert Jan van den Berg, both well-known arbitrators, questioned party appointments after problems with the tribunal in *Loewen et al. v. United States of America* were revealed.[82] In that case, a Canadian claimant unsuccessfully argued that his treatment in Louisiana courts violated the "minimum standard of treatment" under NAFTA (a treaty pioneering ISDS).[83] Notably, a few years after the decision, the United States' appointee publicly revealed that he had met with U.S. Department of Justice officials who allegedly told him, "You know, judge, if we lose this

77. DSU, *supra* note 51, art. 17; *see generally* DOCUMENTS ON INTERNATIONAL ADMINISTRATIVE TRIBUNALS (Chittharanjan Felix Amerasinghe ed., 1989).

78. *See* David J. Branson, *American Party-Appointed Arbitrators — Not the Three Monkeys*, 30 U. DAYTON L. REV. 1 (2004); David J. Branson, *Sympathetic Party-Appointed Arbitrators: Sophisticated Strangers and Governments Demand Them*, 25 ICSID REV. FOREIGN INV. L.J. 367, 367-69 (elaborating on the convenience of party-appointment in investor-state arbitration); *see also* James H. Carter, *Living with the Party-Appointed Arbitrator: Judicial Confusion, Ethical Codes and Practical Advice*, 3 AM. REV. INT. ARB. 153 (1992).

79. *See generally* Catherine A. Rogers*, Lawyers Without Borders,* 30 U. PA. J. INT'L L. 1035 (2009).

80. *See, e.g.,* ICSID Convention, *supra* note 74, art. 14(1); ICSID, *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)* Rule 6(2) (2006), *available at* http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partf.htm [hereinafter ICSID Arbitration Rules].

81. *See* Sarvarian & Baker, *supra* note 5; *see also* Živković, *supra* note 6. The unilateral withdrawal from the arbitration by Croatia signals that it desires termination of the proceedings. However, Slovenia opposed this request and wished the proceedings to continue to their completion, proposing the replacement of "its" arbitrator with a non-Slovenian national. The tensions remain.

82. Loewen Group, Inc. v. U.S., ICSID Case No. ARB(AF)/98/3. 42 ILM 811 (2003), *available at* http://www.state.gov/documents/organization/22094.pdf.

83. *See* Jan Paulsson, *Moral Hazard in International Dispute Resolution*, Inaugural Lecture as Holder of the Michael R. Klein Distinguished Scholar Chair at the Miami University School of Law 11 (Apr. 29, 2010), *available at* www.arbitration-icca.org/media/4/69377396990603/media012773749999020paulsson_moral_hazard.pdf; Albert Jan van den Berg, *supra* note 14, at 834.

case we could lose NAFTA," to which he allegedly replied, "Well, if you want to put pressure on me, then that does it."[84]

To the extent that much of the power and legitimacy of arbitration tribunals stem from an appearance of expertise, neutrality and impartiality, a common bias toward the appointing party poses significant challenges to international investment adjudication. Moreover, some argue that this system of party appointments translates into concrete repercussions for the arbitrations, including bitter dissents or complicated compromises that do a disservice to the rule-based system.[85]

What has ensued is a vigorous response defending the use of party appointments, including by Johnny Veeder, who used the pulpit of the annual meeting of the American Society of International Law to defend the system. With eloquence and wit, the British barrister (and successful arbitrator) argued that the party-appointment system is the "keystone" of arbitration because it gives the parties "ownership" over the process.[86] Echoing this sentiment, Charles Brower — another well-known arbitrator and a repeated party appointee — believes that appointing an arbitrator is an attractive aspect of arbitration "as an alternative to domestic litigation" and "is the highest form of a merit system."[87] They argue that a change to the party-appointed system in ISDS is unwarranted and unwise as it will erode the right to participate in the formation of the tribunal and will too radically transform the field of international arbitration.[88]

This important debate has lacked a clear framework to understand the different sources of biases as well as empirical evidence to assess its merits. Moreover, as I discuss below, prescriptions to address the problem range from proposals to eliminate party appointments altogether to suggestions to

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84. Paulson, *Moral Hazard in International Dispute Resolution*, *supra* note 83 (quoting Judge Abner J. Mikva). On the case, see William S. Dodge, *Loewen v. United States: Trials and Errors Under NAFTA Chapter Eleven*, 52 DEPAUL L. REV. 563, 575 (2002) (stating that the main allegation of the claimant is that the Mississippi court proceedings amounted to a denial of justice contrary to the minimum standard of treatment under NAFTA and international law).

85. Jan Paulsson, *Are Unilateral Appointments Defensible?,* KLUWER ARB. BLOG (Apr. 2, 2009), http://kluwerarbitrationblog.com/blog/2009/04/02/are-unilateral-appointments-defensible/ (criticizing the mechanism of appointment of arbitrators by party).

86. V.V. Johnny Veeder, Inaugural International Arbitration Lecture in Honor of Charles Brower, 107th ASIL Annual Meeting (Apr. 5, 2013), *available at* https://www.youtube.com/watch?v=BIgnALvoElE5.

87. *See* Charles N. Brower, *The (Abbreviated) Case for Party Appointments in International Arbitration*, A.B.A. SEC. INT'L L. NEWSL., no. 1, 2013, at 10; *see also* 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*, 29 ARB. INT'L. 7 (2014).

88. *See, e.g.*, Charles N. Brower, Michael Pulos & Charles B. Rosenberg, *So Is There Anything Really Wrong with International Investment Arbitration as We Know It?*, *in* CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS (Arthur W. Rovine ed., 2013) (suggesting that certain alterations or "tweaks" to the system of appointment of arbitrators could be beneficial to international arbitration).

expand the pool of arbitrators.[89] In terms of empirical evidence, critics of the system often point to an increasingly polarized field, especially in ISDS, where arbitrators have clear tendencies either in favor of the responding states (progressive) or the complaining investors (conservative).[90] Other indicators include an apparently growing number of dissenting opinions.[91] Defenders of party appointments, on the other hand, point to the voluntary participation, the win/loss ratio between investors and States, and the high rate of compliance with decisions as evidence of the success of the party-appointment system.[92]

This debate raises issues that concern the quality of decision-making, ethics, biases, and judicial politics in arbitration. It is unsurprising then that prominent arbitrators seem eager to respond to the insinuation of dishonesty, especially given the limited and mostly anecdotal evidence presented by those arguing against the system of appointments. At the same time, the vigorous response from those defending party appointments may seem self-serving, especially when the defenders are the same arbitrators with an interest in the status quo. As I now explain, the assessment of the debate and resulting prescriptions lie on unresolved empirical questions.

2. Blinding and Affiliation Bias

The empirical shortcomings in the debate are understandable for several reasons, including the limited publicly available information on arbitration.[93] However, without further clarification, there is ample margin for speculation about what stakeholders should do (or not do) to improve the appointment system in ISDS. In fact, prescriptions are often not grounded in empirical

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89. *See* Jan Paulsson, *supra* note 16, at 355 ("[M]y proposal [is] that we turn our backs on the practice of unilateral appointments."); Smit, *supra* note 61 (stating that "party-appointed arbitrators should be banned" unless their affiliation to the party that nominated them is fully disclosed).

90. Pauwelyn, *supra* note 44. For a discussion of repeating arbitrators, see generally Fatima-Zahra Slaoui, *The Rising Issue of 'Repeat Arbitrators': A Call for Clarification*, 25 ARB. INT'L. 103 (2009) (arguing that the issues of "repeated appointment" and "repeat arbitrator" are in need of more attention).

91. José I. Astigarraga et al., *International Arbitration Committee Newsletter Regarding Arbitrator Appointments*, A.B.A. SECTION INT'L L. NEWSL., no. 1, 2013, at 1.

92. *See* Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 477–87 (2009) (arguing that the international arbitration system currently functions reasonably well without needing radical structural overhaul); Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 49–50 (2007) (statistically supporting the contention that more than 57.7% of cases end without investors receiving an award or payment of an award); Giorgio Sacerdoti, *Is the Party-Appointed Arbitrator a "Pernicious Institution"? A Reply to Professor Hans Smit*, 35 COLUM. FDI PERSP. (2011), *available at* http://ccsi.columbia.edu/files/2014/01/FDI_35.pdf (arguing that "the rejection of most disqualification requests confirms that the great majority of arbitrators are serious professionals").

93. For conceptual problems with empirical research in arbitration, see Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, *supra* note 92, at 14–15. For confidentiality issues, see Christoph Schreuer, *The Future of Investment Arbitration*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN, *supra* note 14, at 788.

analysis but rather based on assumptions about the origin of the problem and the likely effects of the prescribed interventions.

Consider three examples: Gus Van Harten, one of the most avid critics of the ISDS system, suggests the creation of a permanent international investment court to correct many shortcomings, including the "lack of security of tenure of arbitrators."[94] Chiara Giorgetti, on the other hand, recommends that we "enlarge the pool of arbitrators."[95] For her, the main problem is the lack of diversity and that "[m]ore arbitrators from outside Europe and North America, and more women are needed."[96] The late Hans Smit — a distinguished professor, leading scholar, and practitioner in the field — proposed the banning of party appointments because "the incentive of the party and its counsel is to appoint an arbitrator who will win the case for them. That incentive will be particularly strong when its case, on its merits, is not particularly strong."[97] These three positions rightly see the party-appointment system as generating *compensation*, *epistemic*, or *selection* effects respectively, but express no clear articulation of the mechanism of bias at play or the manner in which we should assess the proposed reforms.

Moreover, the debate over party appointments has shown the reluctance on the part of arbitration professionals to move away from the system, limiting what reforms are feasible.[98] As in many other areas of legal practice, there is a history, a political economy with resulting interests and stakeholders, and a culture that limits the array of possible adaptations in ISDS.[99] However, Jan Paulsson has proposed an alternative that may resolve some of the concerns that emanate from the party-appointment system, without eradicating the virtues claimed by the defenders. With blind appointments, parties can continue to appoint arbitrators, but a mechanism

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94. GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 167 (2007). Recently the European Commission has proposed an Investment Court System. *See* Press Release, European Commission, *Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations,* Sept. 16, 2015, *available at* http://europa.eu/rapid/press-release_IP-15-5651_en.htm.

95. Giorogetti, *supra* note 15, at 481.

96. *Id.* at 454.

97. Smit, *supra* note 61, at 1.

98. Paul Friedland & Stavros Brekoulakis, White & Case, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* 5 (2012), http://events.whitecase.com/law/services/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf (concluding "that there is general disapproval of the recent proposals calling for an end to unilateral party appointment"). To be sure, States could also agree to form a permanent court on investment. *See, e.g.,* Unified Agreement for the Investment of Arab Capital in the Arab States, Nov. 26, 1980, http://www.pipa.ps/files/file/Unified-Agreement-for-the-Investments-of-Arab-Capital-en.pdf.

99. For the reasons for evolution of the system, see Joost Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can be Reformed*, 29 ICSID REV. FOREIGN INV. L.J. 372, 395 (2014); Tom Ginsburg, *The Culture of Arbitration*, 36 VAND. J. TRANSNAT'L L. 1335, 1340 (2003).

can be introduced to ensure that nominees do not know who appointed them.[100]

Paulsson's proposal may directly address the affiliation effect — that is, a cognitive or implicit influence resulting from the litigant's choice of arbitrator. It will not resolve all the concerns with ISDS. However, what makes this proposal interesting is its operational viability and political acceptability. As I explain below, this is a litigant-oriented solution to the extent that it maintains party rights to participate in tribunal formation. It involves incremental (as opposed to radical) changes as it maintains the party appointments. Finally, it may mitigate the incentives that exacerbate the selection effect by, for instance, reducing the availability of key information that is often used to maximize reappointments.[101]

Surprisingly, this is a reform alternative that has received little scholarly attention, and when addressed, it has been met with skepticism.[102] Before expanding on the possibilities and challenges, we shall assess the available empirical evidence surrounding bias resulting from party appointments.

III. THE CASE OF INTERNATIONAL INVESTMENT ARBITRATION

Among the most important challenges with research in international arbitration is that proceedings are typically private, most cases settle, and very few awards are published.[103] ICSID, however, provides an unprecedented opportunity for a more robust empirical analysis. Under the rules of this international body, ICSID's Secretariat must make available to the public significant information concerning the proceedings, including the method of constitution, the composition of all arbitration tribunals, and, at some level, the outcomes of the cases.[104]

Before the main analysis on the effect of appointments, I provide a brief

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100. Paulsson, *supra* note 16, at 353 ("Institutions may experiment with a variety of solutions, such as 'blind appointments' (i.e., seeking to ensure that nominees do not know who appointed them).").

101. *See, e.g.,* Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 430 (1992) ("[J]udges, like legislators, may adopt strategies to maximize their chances for reelection, especially given the demonstrated tendency of judges to act strategically . . . .").

102. Herman M. Duarte, *Unilateral Appointments of Arbitrators: Perverse Incentives in International Arbitration*?, Latin American and the Caribbean Law and Economics Association Annual Conference (2012); *see also* Giorgetti, *supra* note 15, at 448.

103. Drahozal, *supra* note 34.

104. *See* ICSID, ICSID Administrative and Financial Regulations reg. 23, *available at* https://icsid.worldbank.org/ICSID.

background to ICSID and its arbitration process.

A. What is ICSID?

ICSID is one of the five organizations of the World Bank Group (WBG) and is the result of the 1965 Washington Convention.[105] ICSID was designed to facilitate the settlement of disputes between States and foreign investors as a mechanism for "stimulating a larger flow of private international capital."[106] Its practical utility in stimulating investment continues to be fiercely debated.[107] Nevertheless, new evidence suggests that ICSID's contribution may be stronger in diplomatic domains with respect to incentivizing political allegiances.[108]

The Washington Convention, best described as an administrative treaty, established ICSID's Secretariat and mandates the creation of uniform procedural rules for arbitration (and conciliation), including a methodology for appointing arbitrators.[109] Hence, ICSID is not properly an IC, but it supports ad hoc tribunals deciding disputes originating under international investment treaties (including BITs), international investment contracts, and foreign investment promotion laws.[110]

ICSID tribunals adjudicate a wide range of disputes arising out of cross-border investments, many of which are energy-related and infrastructure disputes, often involving billions of dollars.[111] Under some legal

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105. S*ee* ICSID CONVENTION, *supra* note 74.

106. *Report of the Executive Directors of the International Bank for Reconstruction and Development on the ICSID Convention* ¶ 9 (1965), *available at* http://icsidfiles.worldbank.org/icsid/ICSID/StaticFiles/basicdoc/partB-section03.htm.

107. For a summary of the multiple articles on this issue, see Christian Bellak, *How Bilateral Investment Treaties Impact on Foreign Direct Investment: A Meta-Analysis of Public Policy* (2013), *available at* http://www2.gre.ac.uk/__data/assets/pdf_file/0006/822705/Christian-Bellak-How-Bilateral-Investment-Treaties-Impact-on-Foreign-Direct-Investment-A-Meta-analysis-of-Public-Policy.pdf.

108. Adam S. Chilton, *The Politics of the United States' Bilateral Investment Treaty Program* (U. Chi. Coase-Sandor Inst. for Law & Econ., Research Paper No. 722, 2015), *available at* http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2409&context=law_and_economics; Sergio Puig, *Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda,* 36 FORDHAM INT'L L.J. 465, 471–75 (2013) (discussing the history of ISDS and the idea of de-politicization of investment disputes).

109. Nienke Grossman, *Legitimacy and International Adjudicative Bodies,* 41 GEO. WASH. INT'L L. REV. 107, 113 (2009).

110. Antonio R. Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 22 ICSID REV. FOREIGN INV. L.J. 55 (2007).

111. *See, e.g.,* Luke Eric Peterson, *Ecuador Must Pay $1.76 Billion US to Occidental for Expropriation of Pil Investment; Largest Award Ever in Bilateral Investment Treaty Case at ICSID*, IAREPORTER, (Oct. 5, 2012), http://www.iareporter.com/articles/ecuador-must-pay-1-76-billion-us-to-occidental-for-expropriation-of-oil-investment-largest-award-ever-in-bilateral-investment-treaty-case-at-icsid/ (stating that about a quarter of the cases are energy-related); *see also* WORLD BANK, *The ICSID Caseload: Statistics* (ICSID Caseload Statistics Working Paper no. 2015-1, 2015), *available at* http://documents.worldbank.org/curated/en/206301467992462106/The-ICSID-caseload-statistics.

instruments, investors enjoy a right to trigger a remedy for compensatory damages when affected by the "excessive" intervention of a host State.[112] With many notable exceptions, the State parties to ICSID proceedings have been poor or emerging economies. Conversely, the investors have been mostly companies controlled by nationals or corporate groups based in wealthy European (the Netherlands, the U.K., Germany, France, and Italy) and North American (the United States and Canada) States.[113]

ICSID had a slow start. The first dispute submitted to ICSID was registered in 1972, five years after the establishment of the Centre.[114] During the first twenty-five years there were only nineteen cases, almost all originating in investment contracts (mining, oil, infrastructure, and other similar concessions).[115] However, in the 1990's, the fall of the Berlin Wall, the Soviet collapse, and the rapid proliferation of BITs that often provide for prior general consent to ICSID arbitration brought new relevance to this international organization.[116]

Today ICSID is the main pillar of ISDS, although an important number of proceedings (about 30%) take place outside ICSID's domain.[117] According to ICSID, as of September 2015, the Centre had registered 527 cases — 201 pending and 326 concluded.[118] In 2015 alone, ICSID registered nearly fifty new proceedings.[119] Such exponential growth, however, has resulted in increasing complaints that arbitrators are not truly impartial and

112. Aron Broches, *Development of International Law by the International Bank for Reconstruction and Development*, *in* SELECTED ESSAYS: WORLD BANK, ICSID, AND OTHER SUBJECTS OF PUBLIC AND PRIVATE INTERNATIONAL LAW 79, 80–84 (1995).

113. ANTONIO R. PARRA, THE HISTORY OF ICSID 136 (2012); *see also* UNCTAD, WORLD INVESTMENT REPORT 2015: REFORMING INTERNATIONAL INVESTMENT GOVERNANCE (2015), *available at* http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf.

114. Pierre Lalive, *The First 'World Bank' Arbitration (Holiday Inns v. Morocco) — Some Legal Problems*, 51 BRIT. Y.B. INT'L L. 123, 127–28 (1981) (discussing Holiday Inns v. Morocco, ICSID Case No. ARB/72/1); *see also* ICSID, ICSID SIXTH ANNUAL REPORTS 1971/1972 (1972).

115. *See* Asian Agric. Prods. Ltd. v. Rep. Sri Lanka, 30 I.L.M. 577 (1991); S. Pac. Props. (Middle East) Ltd. v. Arab Rep. Egypt, 8 ICSID REV. FOREIGN INV. L.J. 328 (1993); Klöckner v. Cameroon, Decision of the Ad Hoc Comm., 1 ICSID Review 89 (1986).

116. ICSID, 10 NEWS FROM ICSID 2 (1993), *available at* https://icsid.worldbank.org/en/Documents/resources/vol%2010%20summer%201993.pdf (announcing that with Russia and other former Soviet States there were 118 signatories of the Convention).

117. UNCTAD, 1 International Investment Agreements Issues Note: Latest Developments in Investor-State Dispute Settlement 2, U.N. Doc. UNCTAD/WEB/DIAE/IA/2012/10 (2012).

118. *See* ICSID Caseload-Statistics, *available at* https://icsid.worldbank.org/en/Pages/resources/ICSID-Caseload-Statistics.aspx.

119. *See* WORLD BANK, *supra* note 111.

independent.[120]

B. ICSID and the Institutional Environment of Arbitrators

1. Process of Appointment

ICSID arbitration tribunals are typically composed of three members. Article 37 of the Convention provides that if the parties do not agree — which is common — on the number of arbitrators and the method of their appointment, "the tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties."[121]

Presiding arbitrators are only occasionally appointed by agreement as directed by the rules.[122] However, to prevent the frustration of the arbitration process, the Convention gives authority to the Chairman of ICSID's Administrative Council (i.e., the WBG's President) to select from among a list of arbitrators or roster the remaining arbitrator(s) — most commonly the president of the tribunal.[123] In practice, this function is performed on the recommendation of ICSID's Secretary-General (who is routinely accused of "paying heed" to the United States and other rich countries).[124] Each State party to the ICSID Convention appoints four persons to the roster in addition to the ten persons appointed by the Chairman.[125] Roster members serve for a renewable term of six years.[126]

The parties to the ICSID Convention proceedings are bound by the final award, which is not subject to appeal or to any other remedy except those provided for by the Convention.[127] The most relevant remedies

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120. William W. Park, *Arbitrator Integrity, in* THE BACKLASH AGAINST INVESTMENT ARBITRATION: PERCEPTIONS AND REALITY 189, 191 (Michael Waibel et al. eds., 2010); Asha Kaushal, *Revisiting History: How the Past Matters for the Present Backlash Against the Foreign Investment Regime*, 50 HARV. INT'L L.J. 491 (2009) (explaining the mounting critique against the regime and its internal contradictions).

121. ICSID Convention, *supra* note 74, art. 37.

122. *See* Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387 (2014).

123. *Id.*

124. Antonio R. Parra, *The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes*, 22 ICSID REV. FOREIGN INV. L.J, 55 (2007). Both the President of the WB and the Secretary-General of ICSID have routinely been perceived as biased in the practice of appointments, often in favor of U.S. interests. For a recent example, see, e.g., Douglas Thomson, *Is ICSID a "Monarchy"?,* GLOBAL ARB. REV. (2016).

125. ICSID Convention, *supra* note 80, art. 13.

126. Article 14(2) states that "[t]he Chairman . . . [shall] pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity." *Id.* art. 14(2). ICSID's former officials have admitted that designations are not always made "with due regard of assuring representation [of the principal legal systems]." PARRA, *supra* note 113, at 129, 162, 207.

127. ICSID's Additional Facility (AF) arbitrations do not result in awards that benefit from the enforcement scheme that shelters ICSID awards from the scrutiny of national courts. *See* ICSID,

provided for are revision (Article 51) and annulment (Article 52).[128] In contrast to arbitration proceedings, there are no party-appointed arbitrators in proceedings resolving annulment applications — the control mechanism most commonly used — although it is limited to very narrowly defined circumstances. In these proceedings, the WBG's President appoints an ad hoc committee of three members. The Convention contains a number of requirements for members serving on ad hoc committees.[129]

As explained below, the rules allow for arbitrators to be challenged if there is reasonable doubt about their competence or impartiality.[130] The use of a challenge is growing and is the only available tool to police arbitrators' misconduct after they are appointed.

2. Arbitrators and Institutional Conditions

All arbitrators are supposed to be independent and impartial, including the two party-appointed arbitrators. The rules provide no elaboration on these concepts, but it is often argued that this "independence relates to the lack of relations with a party that may influence an arbitrator's decision. Impartiality, on the other hand, concerns the absence of a bias or predisposition toward one of the parties."[131] When accepting an appointment, arbitrators sign a declaration either confirming independence and impartiality or disclosing circumstances that might compromise independent judgment.[132] Arbitrators must agree that they "shall not accept any instruction or compensation with regard to the proceedings from any source except as provided" by the ICSID Convention.[133]

Given the transnational nature of the disputes, the rules also attempt to limit perceptions of bias due to national alliances.[134] Hence, the majority of

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ADDITIONAL FACILITY RULES, ICSID Doc. ICSID/11 (2006); Aron Broches, *The "Additional Facility" of the International Centre for Settlement of Investment Disputes (ICSID)*, 4 Y.B. COM. ARB. 373 (1979).

128. ICSID Convention, *supra* note 80, arts. 49, 52. In addition, a party may ask a tribunal that neglected to decide a submitted question to supplement its award and may request interpretation of the award. *Id.* arts. 49(2), 50.

129. *Id.* art. 52(3).

130. *See infra* section III(C)(3).

131. Suez, Sociedad General de Aguas de Barcelona S.A., & InterAguas Servicios Integrales del Agua S.A. v. Argentine Rep., ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal ¶ 29 (Oct. 22, 2007) (citations omitted).

132. ICSID Arbitration Rules, *supra* note 80, Rule 6.

133. *Id.*

134. *See* Preliminary Draft of a Convention for the Settlement of Investment Disputes Between States and Nationals of Other States (October 15, 1963), *in* 2 HISTORY OF THE ICSID CONVENTION 213, *available at* https://icsid.worldbank.org/en/Documents/resources/History%20of%20ICSID%20Convention%20-%20VOLUME%20II-1.pdf (explaining that this requirement "[seeks] to minimize as far as possible the danger, inherent in conventional systems, of appointment of partisan arbitrators. This new principle applies also to appointments of arbitrators made by the Chairman under Section 3 of this article").

arbitrators cannot share the nationality of the home State of the investor or the State party.[135] As with many procedural rules, this requirement can be waived by agreement of the parties.[136]

The complex institutional environment is very relevant to understanding who is appointed as well as the incentives of the appointed and the appointee. To explain such conditions, I use the taxonomy of the effects resulting from the appointment proposed in section II(B).

Selection Effect Conditions: Party-appointed arbitrators are chosen unilaterally with the requirement that they be persons of "high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment."[137] A law degree is preferable but not an absolute requirement; as stated by Article 14(1), "Competence in the field of law shall be of particular importance."[138]

Because of the importance of legal discourse in the disputes, litigants spend a great deal of time and effort scrutinizing the backgrounds of arbitrators — most prominently their "judicial philosophy" or decision-making approach.[139] The choice of an arbitrator can be determinative if they are persuasive and, of course, arbitrator views vary. As explained by Waibel and Wu in the context of ISDS: "We would expect 'conservative' arbitrators to tend to favor the protection of property rights without much reservation, whereas 'progressive' arbitrators would tend to give greater weight to other societal values such as protection of the environment or public service delivery."[140]

The incentive for re-appointment based on a particular judicial approach to a case is likely to affect an arbitrator's behavior. Securing a reputation, for example, as "conservative" or "progressive" may trigger strategic decisions on the part of an arbitrator. In an environment like ICSID, it is conceivable that once an arbitrator has received a number of appointments by the same type of litigant (i.e., State or investor), he or she

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135. Most leading institutional arbitration rules provide that a presiding or sole arbitrator shall not have the same nationality as that of any of the parties (unless otherwise agreed). *See* ICC Rules, *supra* note 74, art. 9(5); LCIA Rules, *supra* note 74, art. 6(1).

136. ICSID Administrative Rules, *supra* note 104, r. 27.

137. ICSID Arbitration Rules, *supra* note 80, art. 14. As described before, unless waived, arbitrators cannot have the nationality of the State of the investor or the Defendant State. *Id.* art. 39.

138. *Id.* art. 14(1).

139. Other factors include ethical behavior, prior appointments, and potential scheduling conflicts, as well as the managerial style of the president of the tribunal. For discussion, see Claudia T. Salomon, *Selecting an International Arbitrator: Five Factors to Consider*, 17 MEALEY'S INT'L ARB. REP. 25 (2002); *see also* William W. Park, *Income Tax Treaty Arbitration*, 10 GEO. MASON L. REV. 803, 813 (2002) (in arbitration the applicable trinity is "arbitrator, arbitrator, arbitrator").

140. Waibel & Wu, *supra* note 19.

will have a reputation associated with certain preferences.[141] While it is impossible to predict how each arbitrator will assess the relevant environment, I have argued elsewhere that strategic behavior on the part of arbitrators is likely to be more prevalent in ICSID.[142]

Compensation Effect Conditions: Arbitrators usually accept ICSID appointments, as the financial incentives are considerable.[143] At $3,000.00 USD for an eight-hour day (plus expenses), the incentives are higher for arbitrators whose opportunity costs are lower (e.g., tenured professors, judges sitting in other permanent courts). For practicing lawyers who act as professional arbitrators, while the financial incentives may be low ($375 USD hourly, compared to $600 USD hourly, the average rate of a partner in major law firms), the reputational value of an appointment to a typically high-profile, investor-state case creates additional incentives.[144] Appointment can signal competence in the field of arbitration (or experience in a particular economic sector) and result in future appointments in higher remunerated settings or possibly motivate other investors to hire him or her as counsel.

Of course, conflicts of interest (a growing problem), strategic decisions on the part of the arbitrator (e.g., accepting only appointments as president), or simply lack of interest in the case at issue (for economic or other reasons) may result in an arbitrator refusing to accept a nomination. In fact, some arbitrators complain informally about the low rate of ICSID as compared to other arbitration settings.[145]

To the extent that the incentives work in any particular direction, it is fair to say that they work in the direction of seeking re-appointment. What exactly is best for an arbitrator's career is less clear and under-theorized. Arbitrators may believe that it is best to be perceived as non-partisan and to

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141. Puig, *supra* note 122.

142. *Id.*

143. Although it is impossible to know the rate of failures to accept an appointment, anecdotal evidence suggests that the rate is low. *Id.* at 16.

144. *See* Jeffrey Lowe, *Major, Lindsey & Africa 2014 Partner Compensation Survey*, MAJOR, LINDSAY & AFRICA, *available at* http://www.mlaglobal.com/partner-compensation-survey/2014; Ravinder Casley, *International Arbitration — The End of the Boom?,* CHAMBERS MAG., 2007, *available at http://www.chambersmagazine.co.uk/Article/International-arbitration-INVESTMENT-ARBITRATION — The-end-of-the-boom* (quoting Eric Schwartz, of LeBoeuf Lamb Greene & McRae, "It's hard to get publicity for commercial arbitration work because of confidentiality. With investment arbitrations, you can boast"). The LCIA set the hourly rate at $700 USD (£450) per hour. Other institutions calculate an arbitrator's fee as a proportion of the amount in dispute. For example, arbitrators can earn on average of up to $350,000 USD in the ICC for a $100 million USD dispute.

145. Puig, *supra* note 122; *see also*, John V. O'Hara, *The New Jersey Alternative Procedure for Dispute Resolution Act: Vanguard of a "Better Way"?,* 136 U. PA. L. REV. 1723, 1743 (1988) ("Considering that the parties normally select the arbitrators, and that the arbitrators only derive income when they work, it does not require much imagination to realize that an arbitrator has a strong interest in keeping everyone as happy as possible.").

be appointed by all different sources (i.e., investors, States, arbitrators, and institution). However, it seems, and I have suggested elsewhere, that a clear signaling of preference may result in more cumulative appointments.[146]

Epistemic Effect Conditions: As explained above, parties are free to appoint any qualifying individual, yet they tend to be careful to maximize the chances of "winning" in a highly legalized system. While mostly lawyers act as arbitrators, non-lawyers have been appointed in a few instances.[147]

ICSID tribunals are not isolated, as litigants and arbitrators interact routinely. This gives an advantage to inner-circle arbitrators, who have a high social status within the community. While reputation, persuasion, collegiality, and deference may all play some role in this close-knit community, conformity pressures are likely common.[148] Indeed, a prominent lawyer in ISDS has recently stated that "arbitrators have a tendency to compromise [and] the arbitration community seems to place a premium on unanimity."[149]

The over- or under-representation of a particular demographic of arbitrators is also an issue of growing concern. Empirical research has demonstrated that the views of a decision-maker are unlikely to be completely independent from those of her colleagues or, more generally, from those of the professional community.[150] Since the deliberative process before the arbitral tribunal is likely to be relevant, the diversity of views may be crucial for an unbiased process and outcome. If the community of arbitrators is dense and homogenous, one would expect a more narrowly informed body of doctrine with particular tendencies.[151]

Affiliation Effect Conditions: Party appointments are likely to result in a propensity of the arbitrator to be more sympathetic to the arguments put forward by the appointing party.[152] An appointment to an arbitration

146. *Id.*

147. ICSID, *Composition of ICSID Tribunals*, NEWS FROM ICSID (Summer 1987); *see also* Dr. Jose-Luis Alberro, an economist, *in* Aguas del Tunari, S.A., v. Bol., ICSID Case No. ARB/02/3. For background on Dr. Alberro, see *José Alberro*, CORNERSTONE RES., https://www.cornerstone.com/Staff/Jose-Alberro (last visited Mar. 4, 2017).

148. Puig, *supra* note 122.

149. Kahale III, *supra* note 37, at 7.

150. Many studies have pointed to a large role for collegial politics emerging from the interaction of judges for judicial outcomes. *See, e.g.,* Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591 (2010); Lee Epstein & Carol Mershon, Paper Presented at the Annual Meeting of the Midwest Political Science Association, Chicago: The Formation of Opinion Coalitions on the U.S. Supreme Court (1993), *available at* http://epstein.wustl.edu/research/conferencepapers.1993MPSA.pdf; William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

151. Waibel & Wu, *supra* note 19.

152. Alexis Mourre, *Are Unilateral Appointments Defensible? On Jan Paulsson's Moral Hazard in International Arbitration*, KLUWER ARB. BLOG (Oct. 5, 2010), http://kluwerarbitrationblog.com/

proceeding may be a career or self-esteem booster, and at the very least a source of income.[153] Moreover, the literature on implicit biases has documented the existence of affiliation bias using experimental studies in similar contexts. The question is *not* whether party-appointed arbitrators suffer from this effect. They do. The issue is the strength of this effect in a particular legal setting.[154] Currently, ICSID makes no effort to remind or educate arbitrators of potential effects of implicit biases, yet appointees are reminded of their duties when they accept the appointment.[155]

A final note is pertinent here. There are complex challenges in empirically assessing system-generated biases (compensation and epistemic). An articulation of a theory of the direction of such biases in ISDS is needed in addition to a better understanding of the actual politics of expertise of the field (beyond the overly contrived "conservative" or "progressive" divide) and the role of economic incentives.[156] Litigant-introduced biases will tend to favor the appointing party and are hence more suitable for empirical investigations. As I explain below, the problem is how to isolate each of the two effects (selection and affiliation).

C. Empirical Evidence of Litigant-Introduced Bias

In spite of the small number of cases, the high percentage of settlements, and the limited public records on the cases, some simple strategies can be deployed to make use of observational data on disputes to understand the effects of litigant-introduced biases. These strategies have important limitations, most of which are explained in this section before discussing the empirical evidence, including experiments that confirm affiliation effects.

1. A Methodological Caveat

Most scholars and practitioners who claim bias resulting from party appointments often point to arbitrators' votes (or dissenting/separate

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2010/10/05/are-unilateral-appointments-defensible-on-jan-paulssons-moral-hazard-in-international-arbitration/.

153. Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47 (2010) (discussing the incentive for reappointment).

154. *Cf.* Giorgetti, *supra* note 14, at 455 ("The issue is whether party-appointed arbitrators suffer from inevitable bias: does the very nature of party appointment skew their incentives from the start?").

155. ICSID Arbitration Rules, *supra* note 80.

156. In particular, it seems unconvincing that the reappointment incentive necessarily translates into a bias for the appointing party. *Cf.* Waibel & Wu, *supra* note 19. *But see*, Susan D. Franck, *Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes*, 55 VA. J. INT'L L. 13 (2014).

opinions) as a principal indicator of arbitrator bias.[157] Defenders, on the other hand, point to the voluntary participation in proceedings, win/loss ratio between investors and States, or high rate of compliance with decisions as positive consequences of such system of appointments.[158] Most of these indicators are relevant but insufficient to assess the issue at hand. Others, like compliance with decisions, are in fact unavailable for systematic analysis; hence claims of bias are made with anecdotal evidence or mere speculation.[159]

In ICSID, roughly 80% of final awards between 1972 and 2015 were unanimous and only about 14.5% of decisions came with a dissenting opinion attached. This trend can be explained in part by the adverse professional consequences of dissent. In a project developed with Anton Strezhnev, we found that arbitrators who issued dissenting opinions were on average about three times less likely to be re-appointed as presiding arbitrators in subsequent disputes compared to arbitrators who did not.[160]

Moreover, looking at individual votes in particular may obscure the true effects of arbitrators' biases. While votes are individual, decisions are not. Since both parties to the litigation appoint an arbitrator, some may argue the influences or votes "cancel out" each other.[161] More likely, however, compromises or "barters" happen. This is reflected in many other complicated aspects of the award: for instance, the wording of decisions, the nature of violations identified, or the amount of damages awarded.[162] This exchange of concessions by arbitrators may serve to explain the relatively low number of actual dissents in ISDS: dissenting is very costly for the

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157. *See* Alan Redfern, *The 2003 Freshfields — Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, 20 ARB. INT'L 223 (2004); Eduardo Silva Romero, *Brèves Observations sur l'Opinion Dissidente*, *in* LES ARBITRES INTERNATIONAUX SOCIÉTÉ DE LEGISLATION COMPARÉ 179 (2005); *cf.* Sacerdoti, *supra* note 91, at 2 (arguing that "empirical evidence from the rejection disqualification requests confirms that the great majority of arbitrators are serious professionals").

158. Veeder, *supra* note 86; Charles N. Brower & Sadie Blanchard, *From "Dealing in Virtue" to "Profiting from Injustice": The Case Against "Re-Statification" of Investment Dispute Settlement*, 55 HARV. INT'L L.J. ONLINE 45, 51 (2014), http://www.harvardilj.org/wp-content/uploads/2014/01/Brower_Blanchard_to_Publish.pdf (refuting claims about the concerns with ISDS).

159. There is no mechanism to verify the payment of final awards under ICSID, and the Secretariat relies only on anecdotal evidence. *See* David D. Caron, *ICSID in the Twenty-First Century: An Interview with Meg Kinnear,* 104 AM. SOC'Y INT'L L. PROC. 413, 426 (2010) (Kinnear noting, "I think the best you can surmise is that if people holding successful judgments are not coming back to ICSID, they have hopefully in most cases had their judgments realized, but maybe some have given up. Anecdotally . . . the information that comes back to us, is that the vast majority of ICSID awards are honored by states and honored in full.").

160. Anton Strezhnev, *You Only Dissent Once: Re-Appointment and Legal Practices in Investment Arbitration* (2017) (on file with The Virginia Journal of International Law).

161. Posner & de Figueiredo, *supra* note 3, at 601.

162. Mark Kelman, Yuval Rottenstreich & Amos Tversky, *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287 (1996) (describing effects of "compromise" and "contrast" behavior on jury decision-making).

dissenters' career, while bartering may not be.

In fact, in Paulsson's call for a change in the party-appointment system, he makes this same point, elucidating the complexity of collegial decision-making in arbitration. In explaining the problems with the *Loewen* case (where the arbitrators recognized that the conduct of the U.S. Court system was so flawed as to constitute a miscarriage of justice but dismissed the claim on very technical grounds), he concludes:

> [T]he decision-making is profoundly disturbing, because the award explicitly recited that the tribunal was unanimous, including with respect to its conclusion that there had been egregious judicial impropriety [by the U.S. courts]. Yet the American arbitrator remembered himself as having been a dissenter, thus rather strongly suggesting that he had not agreed with his fellow arbitrators, but, in order to ensure that the U.S. would not lose the case, engaged in barter: going along with that conclusion of judicial impropriety in exchange for a curious technical trump card which secured an ultimate "triumph" for the U.S. [based on] a highly abstruse point of public international law.[163]

This sole point should make scholars who look at ICSID through an empirical lens pause and carefully determine what other actual evidence of biases exist — outside of votes. At the very least, one should conclude that voting records are of limited use, especially if these strategic actions and compromises on the part of arbitrators are as common as anecdotal evidence suggests.[164]

On top of compromises, there are other issues that can make the use of voting and win/loss ratio more problematic from a methodological point of view. Two important ones are selection issues resulting from the filing stage rather than the appointment stage[165] and selection issues resulting from termination prior to final, third-party adjudication.[166] Moreover, forum shopping may exacerbate sample issues as it can confound outcomes with the quality of the case and representation — two difficult variables to control for.[167]

Combined, the selection issues resulting from filing and settlement as well as strategic choices by litigants such as forum-shopping bring into

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163. Paulsson, *supra* note 83, at 7.

164. *Id.*

165. Posner & de Figueiredo, *supra* note 3, at 613.

166. In ISDS, a great number of cases settle or are terminated prior to final adjudication — around 40 percent — often in terms impossible to know for the general public. *See infra* section III(C)(3).

167. Richard H. Kreindler, *Parallel Proceedings in Investment Arbitration: A Practitioner's Perspective*, *in* THE BACKLASH AGAINST INVESTMENT ARBITRATION — PERCEPTIONS AND REALITY (M. Waibel et al. eds., 2010) (arguing that forum shopping in ISDS is inevitable).

question the use of a win/loss ratio as a proxy for bias. Without a model of the effect of these factors, a 50/50 victory ratio bears no rational relationship to actual outcome distribution in ISDS. Voting may reflect partisanship, but it is a weak indicator of bias at best. Finally, compliance information is not widely available for systematic treatment and analysis.

2. Beyond Voting and Win/Loss Ratio

The considerations described above require us to systematically gather all available information that may signal favoritism to evaluate how party appointments induce biased decision-making. However, to assess the debate between proponents and defenders, it is also necessary to include variables that suggest potential benefits of such a system to the process. Or, in terms of the old idiom, we must take the bitter with the sweet.

Deciding what indicators are relevant can be idiosyncratic to the structural aspects of the particular legal field of adjudication in question.[168] At a very high level of abstraction, key relevant indicators of bias in international adjudication should involve both types of considerations: substantive (e.g., findings of state liability and compliance with decisions) and procedural (e.g., case duration, appeals filed, and judges' resignations) as well as economic (e.g., awarded damages or legal fees) and non-economic (e.g., parties' satisfaction or language that may inflict reputational cost). The resulting associations depend on how one defines the systemic goals of the adjudicatory, such as access to justice, conflict resolution, peaceful dispute settlement, and de-politicization.

In the case at issue, international arbitration is often considered to be a consensual, collegial, cost-effective system with preference for agreed solutions, unanimity, and finality of awards.[169] This definition may not perfectly suit ISDS, but it can at least serve to identify other key indicators to complement the traditional indicators often adduced. From this definition, we can take other important aspects of the dispute as relevant to assess the debate. For instance, elements such as settlement rate, outcomes (i.e., findings of state liability), damages awarded, case duration, arbitrators' challenges and resignations, dissenting and separate opinions, and the use

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168. For instance, in international fields where parties vie for favorable precedent in addition to an economic outcome, the language of a decision may be very relevant, as it can lead to future benefits. This may be increasingly the case in adjudication before the WTO. However, ISDS proceedings are not intended to create formal precedent and therefore structural litigation is not a big concern — at least for the time being. On the other hand, the length of legal proceedings can be more relevant at the WTO, since trade complainants cannot claim retrospective damages — it is a prospective remedy. In ISDS, conversely, the length of the proceedings can be less relevant, at least for claimants with deep pockets, as it is a retrospective remedy.

169. W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L. J. 739 (1989).

of remedies against the award can be useful complements. As explained in more detail below, they provide crude yet useful yardsticks to explore the plausible effects of party appointments.[170]

* * *

With the methodological caveats expressed above, a good starting point for observational data is to adopt complementary empirical strategies. First, one can compare key indicators of the proceedings in cases *with* party-appointed arbitrators against cases *without* them. In other words, to understand the effects of party-appointments, it is useful to try to look into the "counterfactual," i.e., outcomes that would result but for the appointment of the arbitrators by both parties. Second, one can evaluate the responsiveness and variation of arbitrators' votes to the nominating party. Finally, we can assess the behavior of the small number of arbitrators preferred by litigants, i.e., the effects of partisan arbitrators in votes and other arbitration outputs. After this, one can then look at the existing evidence from experimental approaches, especially on affiliation effects. Combined, this evidence may cast some light on the potential effects of party appointments as a preliminary step to gauging the need for and effect of blinding appointments.

3. "Counterfactual"

Out of the 311 ICSID tribunals constituted in the analyzed period, eighteen involved two or more arbitrators agreed upon by the parties, the arbitrators, or selected by ICSID.[171] This group of cases with uncharacteristic tribunals is not random, and case-specific aspects are certainly at play. Nevertheless, a good starting point is to observe the variations in key indicators between the two groups: tribunals with two party-appointed arbitrators (*with*) and tribunals without two party-appointed arbitrators (*without*).

The comparison of these key indicators lends some support to the concerns over the party-appointing system. Tribunals *without* two party-appointed arbitrators handle cases faster and settle more often. Their decisions tend to be unanimous and go almost unchallenged in annulment proceedings. However, the indicators also partially confirm claims that

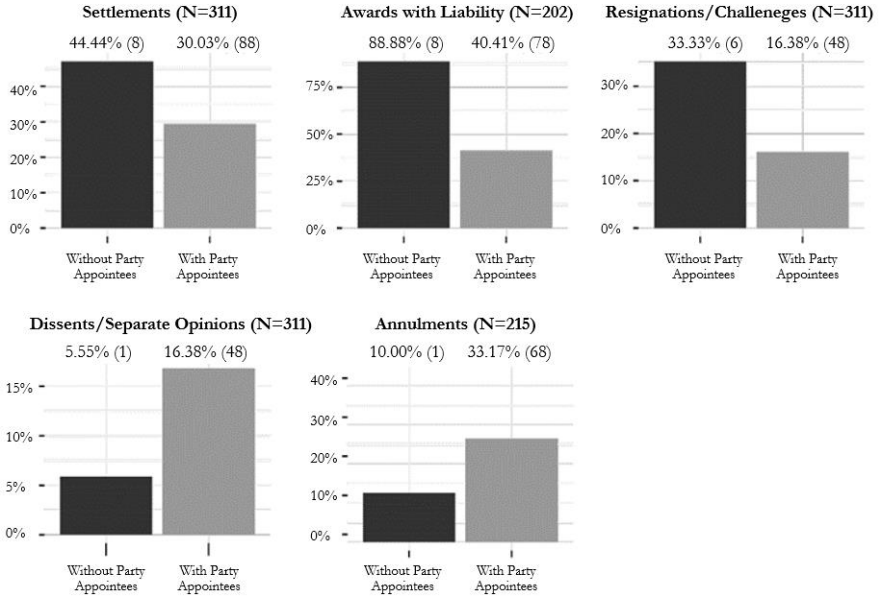
170. *See infra* section III(C)(3); *cf.* Rogério Carmona Bianco, *The International Centre for Settlement of Investment Disputes (ICSID): An Empirical Research on the Voting Behavior of Arbitrators* (2009), *available at* https://ssrn.com/abstract=1514882.

171. Some of these cases involved tribunals where the parties simply agreed to all three arbitrators (nine cases) or cases where a party failed to appoint an arbitrator, arguably to show its disregard for the process (nine cases). In addition, ten cases were resolved by a sole arbitrator; those have been taken out of the analysis.

without party appointments, support over the process seems to diminish. For example, the rate of challenges and resignations in tribunals without party-appointed arbitrators is higher. Of course, there are simply more targets for challenges because parties will not try to exclude their own nominee and there may be norms against challenging the opponent's nominee. At the same time, the higher rate of resignations in tribunals *without* two party-appointed arbitrators seems to affect the duration of the case, plausibly explaining a higher mean in the duration of those cases.

The methodological annex reports the statistical analysis and the bases for using each indicator. Here the results explained in the prior paragraph are summarized with a figure.

Figure 1: Comparison of Key Indicators in Proceedings



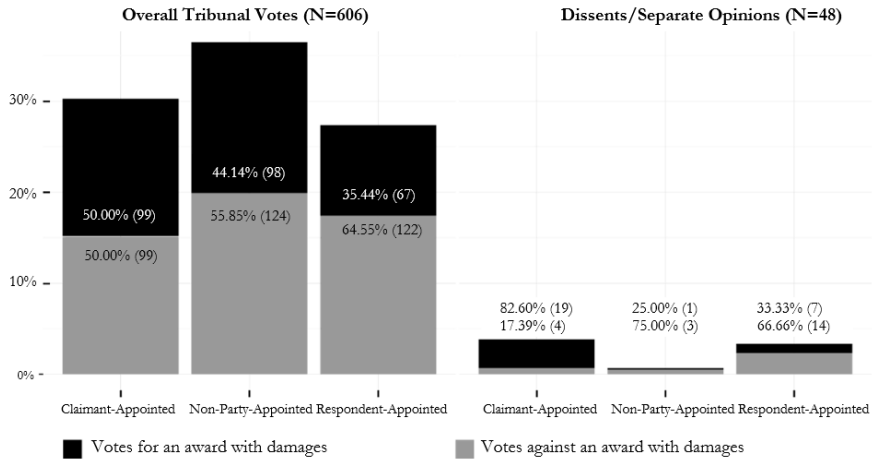
4. Voting Behavior

A second analysis involves the individual votes of arbitrators. As previously explained, looking at individual votes may obscure the true effect of arbitrators' biases, including those resulting from the affiliation effect. Nevertheless, critics note that party-appointed arbitrators issue most of the dissents and argue that this is a negative feature resulting from the appointment system.

While the number of dissenting votes is relatively low (8% of the total votes in the awards), party appointees vote for the nominating party more often than non-party appointees. This trend is especially visible in arbitrators appointed by respondents or States. Moreover, dissents are overwhelmingly

issued by party appointees (94%), never against the interest of the nominating party, and very often in support of the nominating party's position (some, however, just make procedural or seemingly neutral doctrinal points). In this sense, if anything, the voting behavior also confirms the role of party appointments in contributing to bias.

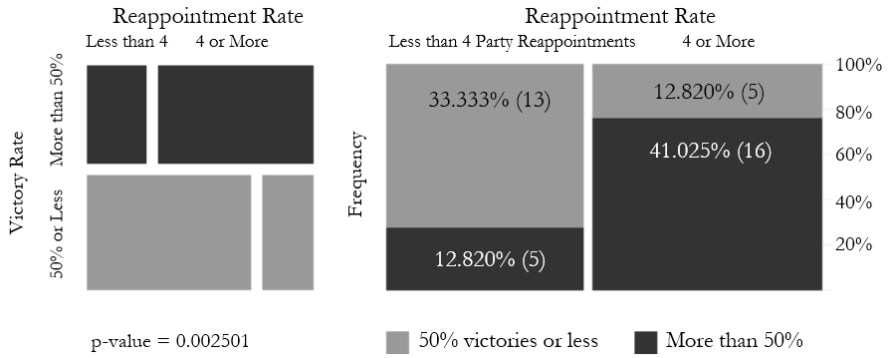
Figure 2: Arbitrator's Voting Patterns by Appointing Party



5. "Partisanship"

The analysis of arbitrators' "partisanship" is more revealing of litigant-introduced biases. While more than 400 different arbitrators have sat on arbitration tribunals so far, about 10% of the total pool accounts for more than 50% of all the appointments to the tribunals. More extreme, a small group of 39 arbitrators accounts for nearly 80% of all the cases decided. This concentration of appointments and cases in a small number of decision-makers is in large measure driven by the role of repeat party-appointments. Arbitrators are often appointed by a particular class of litigants: claimant or investor, or respondent or State. In fact, 39% of all the cases have one of the "top" arbitrators in the tribunal, 29% have two "top" arbitrators, and in nearly 9% of the cases all three arbitrators belong to this selective group. Within this small pool, the party-appointed arbitrators who sat on cases that were more often "won" by the appointing party were three times more likely to be reappointed to four or more cases. In other words, the repeat appointment factor is, to a large degree, a product of the "effectiveness" of the arbitrators.

Figure 3: Relationship Between Victory and Party Reappointment Rates (N = 39)



To further understand the effects of party appointments, one can group arbitrators based on the historical record of appointments by the same type of appointing method and compare case outcomes. Using a binary scale, the rate of claimants' success decided by all tribunals is roughly 44%.[172] However, if a top arbitrator labeled as *pro-investor* based on the frequency of party appointments by claimants (more than half of appointments) serves in the tribunal, the average rate of success increases to roughly 50% (n=51). Interestingly, this rate is the same when considering all tribunals with a *pro-investor* arbitrator, regardless of who appoints him or her (i.e., ICSID, the parties, arbitrators, or even the respondents or States) (n=74). Conversely, if a top arbitrator labeled as *pro-state* (n=19) is appointed by the State in the dispute, the average rate of claimant success decreases to roughly 26% (n=57). The number is also similar when considering all tribunals with a *pro-state* arbitrator regardless of who appoints such person: 24% (n=76).

What all this means is that there is an important premium when the parties appoint arbitrators that are clearly favored by a particular type of litigant. This speaks to litigant-introduced bias. However, this effect should not be attributed to the arbitrators only; there is no controlled study. It may be that more experienced lawyers choose better cases and appoint more suitable arbitrators. But it is interesting to note that this effect practically disappears if both parties appoint an arbitrator labeled as *pro* and is not observed in tribunals without repeat party-appointed arbitrators labeled as *pro*.

172. Franck *supra* note 156, at 199.

Figure 4: Diagram of Arbitrators Labeled as "Pro" (N = 39)

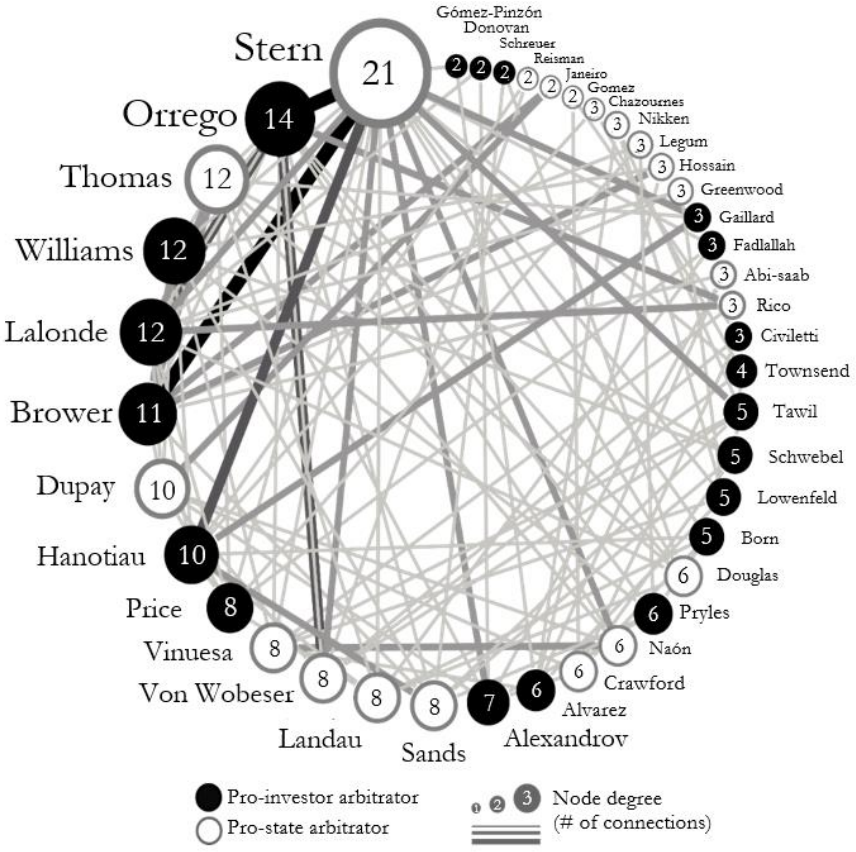
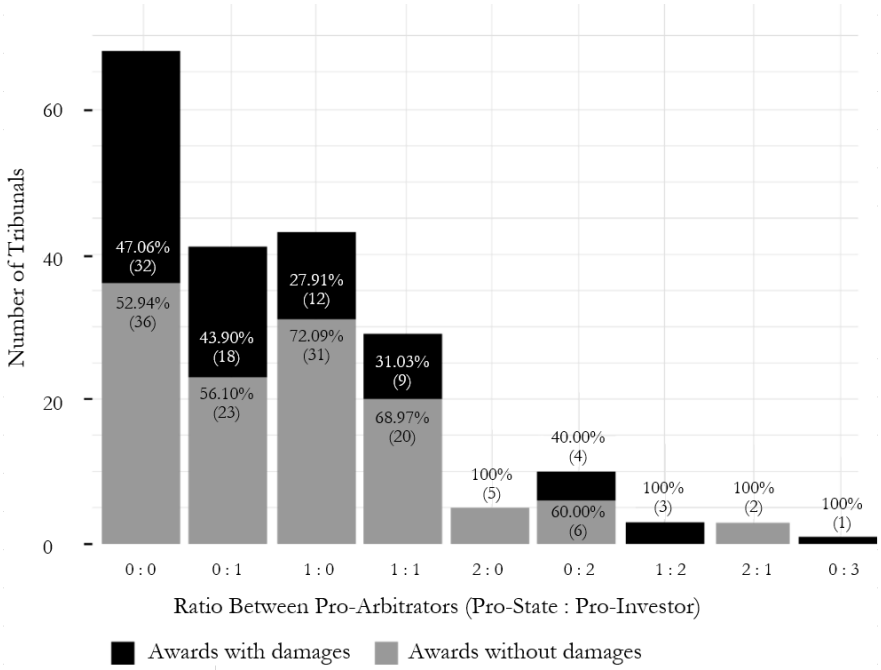


Figure 5: Success Rate by Tribunal Involving Arbitrators "Pro"

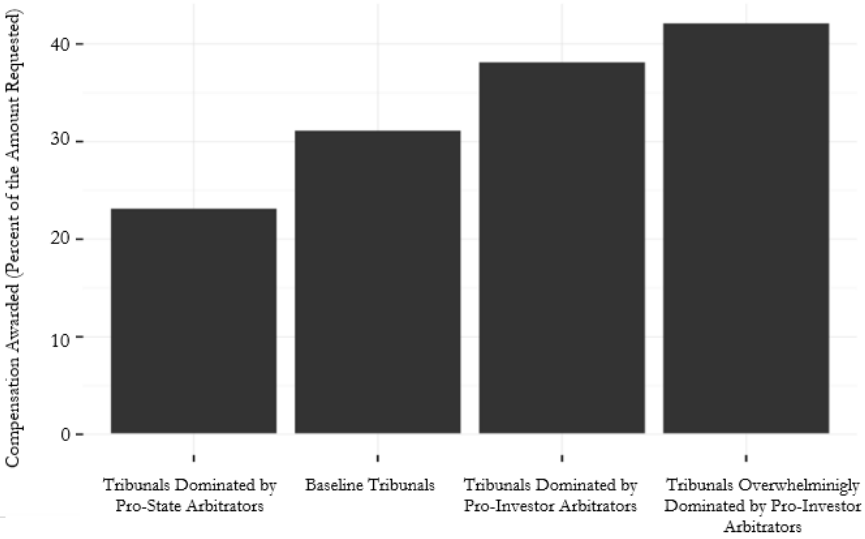


Additionally, data related to amounts awarded in cases where the claimants are successful can reveal whether party appointees are more likely to compromise. Unlike the binary win/loss variable, looking at this outcome may help to identify more meaningful differences or variance in amounts awarded as a function of the composition of the arbitration tribunal.

After looking at a sample of two-thirds (or 67%) of the published awards where a State is found liable (n=89), it can be estimated that the mean of compensation is roughly thirty-one cents on the dollar, that is, 31% of the amount initially requested. Looking at tribunals based on partisanship can be revealing. In fact, there is an increase to almost 39% recovery in those cases in which *pro-investor* arbitrators dominate the tribunal (i.e., either one *pro-investor* and no *pro-state* countering or two *pro-investor* and one *pro-state* sit on the tribunal) (n=18). This number increases to forty-two cents on the dollar in those tribunals where pro-investor arbitrators are overwhelming (2-0 or 3-0) (n=6). Conversely, there is a reduction to roughly 23% of the amount requested in those tribunals with at least one *pro-state* arbitrator and no *pro-investment* arbitrator (n=5).[173]

173. No claimant has been awarded damages when the majority of pro-state arbitrators was overwhelming.

Figure 6: Recovery Rate in Cases Decided by "Pro Arbitrators"



Combined, these additional analyses suggest that there is a minority group of party-appointed arbitrators who sit on a large number of tribunals, resulting in a robust litigant-introduced bias. Litigants tend to prefer these arbitrators in part because they are effective and help increase the chances of favorable outcomes for the nominating party, including the increase or reduction of monetary awards. It shows that ICSID arbitrators repeatedly appointed by investors or States are more likely to make decisions that support the interest of investors or States respectively.

What seems clear is that the party-appointing system in ISDS has a biasing effect in great part because of a *selection effect*. To be sure, at some level *affiliation effect* is also affecting the decision-making process. However, these two effects, selection and affiliation, are typically confounded because litigants choose arbitrators already predisposed to the litigant's case. In order to understand whether an observed voting correlation is mostly driven by the selection effect (a strategic decision of the litigant) or a true affiliation effect (the implicit bias of the arbitrator), an experimental approach is a possible methodological alternative.

6. Experimental Evidence

To diagnose the efficacy of blind appointments, it is important to distinguish between affiliation and selection effects. Only the first can be directly addressed with blinding appointments — although blind appointments may also indirectly mitigate selection effects. To understand the precise role of affiliation effects in arbitral decision-making, ideally one would compare two identical arbitrators deciding two identical cases but

receiving appointments by different parties. Such matched pairs are nearly impossible to discern with confidence in observational data; hence the need for experimental evidence.

In another project with Anton Strezhnev, we designed an experiment to measure affiliation effects by manipulating the source of the appointment to the tribunal. That is, we randomly assigned actual international arbitrators participating in our experimental survey to one of two conditions: a party appointment or a blind appointment. By randomly manipulating the appointment source, any observed variation can be attributed to the affiliation of the arbitrator itself as opposed to the selection by the litigant.

Based on the results of 266 participants, we estimated that an appointment of a party had the effect of roughly twenty percentage points in the likelihood of shifting costs to the non-appointing party, suggesting a strong affiliation effect.[174] To be sure, the limitations of our experiment are clear: it is unable to assess how exactly implicit biases of individual arbitrators affect outcomes of the collective body. Nevertheless, if the affiliation effect is as strong as we believe based on the experiment and the evidence presented here, a blinding mechanism could improve the practice of arbitration.

IV. THE CASE FOR BLINDING ISDS

In theory, the parties to an arbitration proceeding can always choose to eliminate, amend, or "improve" the system of party appointments. In practice, such options may be limited or unavailable once the parties to a dispute are at an advanced stage of a conflict and unwilling to compromise and thus in need of previously agreed-upon default appointment methods. Before concluding, this section explains different alternatives available to the party-appointed system and why blind appointments are a sensible and at least more promising alternative to de-biasing arbitration, addressing both challenges with implementation and effectiveness.

A. Alternatives to Party Appointments

Appointments of Sole Arbitrators. The simplest alternative to party appointments is to completely dispose of the system by moving from three arbitrators to one. In lieu of a three-member tribunal with two party appointees, sole arbitrators can be appointed by agreement of the parties or by any other agreed-upon method of designation — for example, by an appointing authority. The advantage of a sole arbitrator is that it reduces the

174. Sergio Puig & Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach* (Ariz. Legal Stud. Discussion Paper No. 16-31, 2016), *available at* https://ssrn.com/abstract=2830241 or http://dx.doi.org/10.2139/ssrn.2830241.

biases introduced by the party-appointment system as well as any other influences resulting from collegiate decision-making (e.g., the "compromise effect" or the implicit influence of adding different perspectives) and all the potential "barter" and negotiation that may quietly happen within a tribunal.[175]

The most obvious problem with this alternative is that parties generally cannot agree on a single arbitrator or may not be entirely satisfied by the appointment made by the appointing authority.[176] In some cases, finding a single arbitrator with the substantive and procedural expertise to tackle several, often-complex legal issues may be challenging — hence the low rate (less than 4% of the ICSID caseload) of sole arbitrator cases at ICSID. Additionally, abolishing party appointments could in fact reduce the collaborative and legitimating elements that result from participation in the formation of the tribunal. As we saw, party appointments may lead to smoother processes and less frequent use of arbitrator challenges as a litigation tool. In the long run, delegating the power to arbitral institutions may create "distance between the arbitral community and the users of arbitration."[177]

Appointments by Agreement. A similar challenge is the alternative of allowing only appointments made by agreement of the litigation parties. In theory, this could also relieve the proceedings of the effects of unilateral party appointments, as it would effectively eliminate such a system. In practice, however, not only is agreement difficult to achieve, it may also disguise the very same system of party appointments ("I agree to your appointee if you agree to my appointee"). Therefore, to be truly effective as a de-biasing alternative, agreed appointments should also use some sort of blinding mechanism (as I explain below).[178]

Appointments by a Neutral Party. A commonly proposed alternative is to let a third, neutral party decide all members of the tribunal.[179] It is often suggested that arbitral institutions carry out this function, as they are in the best position to do so.

This method grants the institution a great deal of power and control over the dispute. Although the institution could exercise this authority through random selection as in other settings,[180] a constant criticism of this significant delegation is that arbitral institutions often have their own politics

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175. CASS R. SUNSTEIN. BEHAVIORAL LAW AND ECONOMICS (2000).

176. *See, e.g.,* Branson, *supra* note 78; ICSID Convention, *supra* note 74, art. 58; ICSID Arbitration Rules, *supra* note 80, r. 9(4); ICSID, ADDITIONAL FACILITY RULES, *supra* note 127, art. 15(5).

177. Branson, *supra* note 78, at 386.

178. *See infra* section IV(B).

179. Paulsson, *supra* note 16, at 356.

180. *Id; see also* Robertson, *supra* note 60, at 179.

and bureaucracy. Hence, arbitral centers like ICSID can easily become subject to institutional capture by professionals who benefit economically from such appointments or fall prey to pressures from other powerful actors.[181] Another general problem is that arbitral institutions often rely on a small pool of arbitrators and the diversification of arbitrators can be challenging, largely because of significant entry barriers, and especially given the constraints that arbitral institutions like ICSID face.[182] Moreover, as observed in the previous section, party control over the formation of the tribunal may have a positive role that would be lost if only arbitral institutions appointed the arbitrators.

Appointments of Non-Neutrals. A radical alternative is to move away from the current expectation of independence and impartiality. In fact, there are different perspectives on what the role of an arbitrator should be, including the position that arbitrators need not be neutral. Some professionals, especially in the United States, seem more at ease with having the arbitrator serve the role of "advocate" within the tribunal, especially in areas where parties are not represented by lawyers.[183] While this perspective is definitively not shared among the global community and would do the opposite of de-biasing the system, it certainly corrects the disconnection between the normative expectation and the practical reality.

As discussed, Hans Smit proposed the ban of party appointments "unless their role as advocates for the party that appointed them is fully disclosed and accepted."[184] Proposals of this nature seem more radical and might require reforms to most arbitration rules. In international arbitration settings, including ICSID, independence and impartiality are prerequisites to serve in the tribunal.[185] One benefit of this option, however, is that it would allow the parties to retain significant control over the formation of the tribunal and the outcome of the disputes.

B. Blind Appointments: Possibilities, Challenges, and Limitations

Blinding is perhaps one of the most viable alternatives to correct litigant-introduced biases resulting from the current practice of unilateral party appointments. Primarily, it can help to reduce affiliation effects by limiting the possibility of an arbitrator knowing which disputing party

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181. Peter B. Rutledge, *Toward a Contractual Approach for Arbitral Immunity*, 39 GA. L. REV. 151 (2004).

182. Giorgetti, *supra* note 13, at 449–53.

183. *See, e.g.*, Branson, *supra* note 78.

184. Smit, *supra* note 61.

185. For a discussion on ICSID, see Suez, Sociedad General de Aguas de Barcelona S.A., & InterAguas Servicios Integrales del Agua S.A. v. The Argentine Republic, ICSID Case No. ARB/03/17, Decision on the Proposal for the Disqualification of a Member of the Arbitral Tribunal 29 (Oct. 22, 2007) (citation omitted).

appointed her or him. It may, indirectly, mitigate the strength of selection effects by curtailing the opportunities of arbitrators to act strategically on response to such information, i.e., catering to the appointing party in order to develop a partisan reputation. In other words, blinding can, in the short run, attenuate the implicit effects of litigant-introduced biases. In the long run, it can help to lessen the material effects by limiting the strategic use of the information of the source of appointment.

Blind appointments are, at the very least, less disagreeable than the options described above. By introducing a mechanism to keep the appointment source confidential yet maintaining the practice of party appointments, the system of arbitration need not be reinvented. Arbitration rules can operate in a similar way to the current system, without requiring arbitral institutions to find arbitrators to whom both parties could agree.

Blinding also allows for maintaining the benefits — substantial or not — resulting from the parties' participation in the tribunal's formation, while limiting some of the costs that come with the appointment. The practice need not be implemented solely for party appointees (those mainly affected by the litigant-introduced biases) but can be easily extended to all members of the tribunal without distinction, increasing the incentives of neutrality. In other words, for the parties it may be obvious which side made each appointment, but individual arbitrators might assume that they are neutral and unbiased and thus suspect (and optimistically hope) that a neutral authority or process appointed them. Finally, blinding is a "litigant-oriented" solution to the extent that it maintains party rights to participate in tribunal formation — a "right" often invoked when dismissing proposals to reform party appointments.

Surprisingly, blinding has received very little attention from arbitration professionals and scholars alike, and when addressed, it has been met with skepticism.[186] As discussed below, the preoccupations of those who express distrust of this approach are for the most part exaggerated or can be remedied.

1. Implementation Challenges

Among the most important challenges for blinding appointments is the administration and enforcement of this practice. One commentator notes that the "main problem with [blind appointments] is that it is not so reliable in practice, where it would be extremely easy to find out which party appointed who."[187]

This is a valid concern, but it depends on the mechanism and commitment to implementing the practice by different actors involved in

186. *See, e.g.,* Duarte, *supra* note 102.
187. *Id.* at 25.

arbitration. The most obvious issues stem from the fact that when arbitrators are appointed by the parties, rather than a neutral authority, professional norms still consider it proper to interview the arbitrators in advance of the nomination (although some arbitrators will refuse to be interviewed).[188] Wanting to interview an arbitrator is especially understandable at ICSID given that substantial sums of money as well as important decisions over public law or regulatory matters might rest in the hands of arbitrators. In fact, with limited tools to assess their background and experience (CVs, website information, or word-of-mouth), or even to assess their judicial philosophy (especially in other fields such as commercial arbitration), it may be advisable to allow some form of exchange between the counsels of the parties to the litigation and potential arbitrators. This is even more important if we consider the absence of guiding precedent in many sub-fields of arbitration.

This particular challenge, however, is not insuperable. For one, parties to the instruments providing for consent to arbitration can prohibit ex parte interviews or include guidelines on how to conduct such interviews without frustrating blind appointments. Parties could also agree not to interview arbitrators at all or to agree to an interview phase that allows both parties to conduct preliminary interviews on all potential, previously disclosed candidates. Once each party has made a decision on the appointee, arbitrators can be notified with a communication from both parties or from the arbitral institution, seeking at all times to ensure that nominees do not know which party nominated them.

Arbitral institutions can also issue blinding policies that address interviewing. In fact, professional best practices on interviewing arbitrators are just emerging and could start including direction on how arbitral institutions can intermediate between the parties and the potential nominee to prevent indiscretions.[189] For institutionally conducted arbitrations, the arbitral institutions can even facilitate the infrastructure for enabling the interviews that prevent the nominee from recognizing the interviewing party and its counsel (e.g., use of an intermediary or written interrogatories), and in the process generate an additional source of income.

A second obstacle is that arbitration rules (e.g., ICSID arbitration rules) often require the institution to disclose the specific method used to

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188. Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT'L 395 (1998); James H. Carter, *Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for "Nonneutrals"*, 11 AM. REV. INT'L ARB. 295 (2000).

189. *See, e.g.,* CHARTERED INST. OF ARBITRATORS, INTERNATIONAL ARBITRATION GUIDELINES 2011 (2011). *See, also,* INTERNATIONAL BAR ASSOCIATION, IBA GUIDELINES ON PARTY REPRESENTATION IN INTERNATIONAL ARBITRATION 2013 (2013).

constitute the tribunal.[190] What exactly should be disclosed can be subject to legal interpretation. While there are reasons to opt for a broad interpretation that results in more, rather than less, information for the general public (e.g., transparency of the adjudicatory system), there is very little value in disclosing the source of appointment — at least during the pendency of the dispute. As it is widely known, arbitrators owe their ethical obligations to both parties and the process, not only the nominating party.[191] Therefore, arbitrators must disclose any circumstance that compromises their neutrality, whether the appointing source is implicated or not. Moreover, given that there may be value in this information — for instance, to keep better track of arbitrators' scores — the information could be concealed until the final award is rendered or the proceedings terminated.

Another important obstacle is how to manage challenges of arbitrators while, at the same time, maintaining the blinding mechanism. In most arbitration settings, including ICSID, the challenged arbitrator is invited to furnish explanations as to the alleged grounds of misconduct. Because a party will rarely if ever challenge its own party-appointed arbitrator, challenged arbitrators can presume that the party not making the appointment is the party making the challenge. There are no easy solutions, but blinding arbitration challenges could help in preserving the mechanism of blind appointments.

Finally, an example of a more mechanical matter: arbitral institutions must transmit to each member of the tribunal any communication received from either party. In transmitting information to the members of the tribunal, institutions should redact information that is relevant to and may reveal the source of appointment. Operational policies could even be established across arbitral institutions for requiring appointments made in separate confidential documents that are concealed from the nominees.

2. Limitations

Even if implemented successfully, it remains to be seen whether blinding can substantially reduce the partisanship observable in ICSID under the current appointment rules as well as the effects in the decision-making process of a collective group. Perhaps the main complexity with "asymmetrical" arbitration settings like ICSID is that the structure of process routinely confronts a class of litigant (e.g., investor or State, employer or employees, consumers or businesses) in the moving and receiving end of claims — hence the term "arbitration without privity."[192]

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190. ICSID, Administrative and Financial Regulations 2006, Reg. 23.

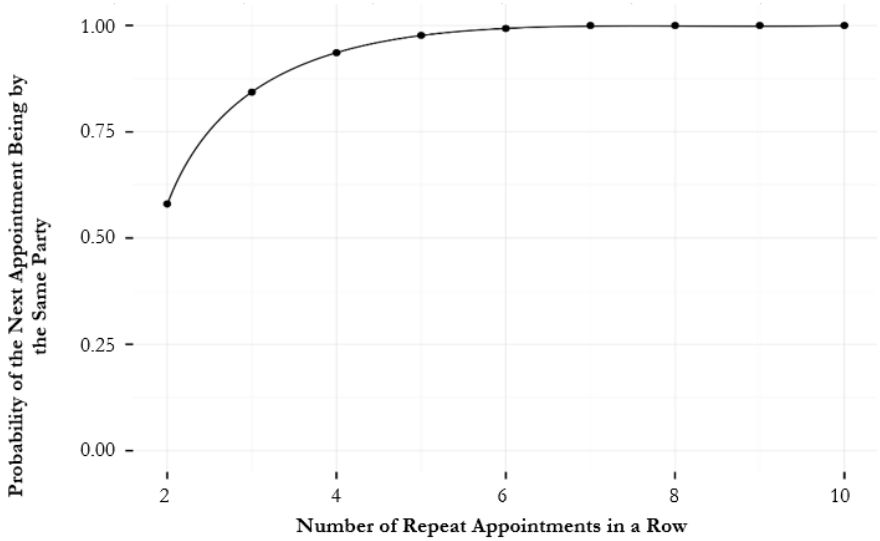
191. *See, e.g.*, International Bar Association, Rules of Ethics for International Arbitrators (2014) (General Standard 1).

192. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232 (1995).

In these types of settings, different biases (affiliation and selection) may reinforce each other as parties to the litigation become more aware of arbitrator leanings through the record of appointments, decisions, and dissents, or by parties or their counsel simply interacting with the arbitrators and learning about their particular preferences, experiences, or political views. In other words, some types of international adjudication settings like ISDS may be more prone to ideological polarization given the values, interests, and political ideas that they routinely see confronted in the disputes.

In fact, Figure 7 below displays the probability of an appointment by a nominating party after a cumulative number of appointments by the other nominating party. It shows how at ICSID after four consecutive appointments by the same type of litigant (investor or State), the probability of an appointment by a different type of litigant (investor or State) is close to zero.

Figure 7: Repeat appointments conditional probability forecast (binomial time series)



In short, what this suggests is that blind appointments could be more effective in symmetrical settings where consenting parties may end up on either side, complainant or respondent, of the arbitration process (think of international commercial arbitration). In asymmetrical arbitration, where one set of actors (investors) is typically seeking compensation from another who has to defend its actions (State), blinding may be less effective as selection bias plays a more important role. In fact, it is possible that blinded arbitrators may become even more partisan as they feel the need to signal their preferences more strongly by dissenting. Hence, in a setting like ISDS it would be advisable to combine blind appointments with other

complementary mechanisms such as permitting only anonymous dissenting or separate opinions — a common practice in other settings like the WTO's Appellate Body.

More generally, as blinding solutions become more prevalent in legal environments, context should always be taken into account. Arbitration takes place in a close-knit community of legal actors and repeat players who interact routinely. International arbitration practitioners rely on symbolic capital and individual reputations (e.g., progressive, conservative, etc.) and have an interest in furthering both their own status as insiders as well as the field. Once members of the profession develop a reputation, this information is passed along the network in different ways. In fields like ISDS, this translates into more nominations potentially because of the observed leanings. Such social dynamics may limit the potential of blinding as a solution for bias. ISDS under ICSID is a unique arbitration setting where arbitrator selection is reflexive of the field's history and politics. This is unlikely to change in the short run, even if blinding is implemented. In the long run, however, blinding might help to change ICSID practice more profoundly so that arbitrators reconceive of themselves in other ways, although such progress toward a less politicized and more rule-based system will take time. Nevertheless, blind appointments could work well in new legal spheres of international dispute settlement that are just emerging (e.g., international tax arbitration).[193] This could set a positive path towards blinding international justice.

V. CONCLUSION

The expansion of international adjudication calls for a better understanding of the politics and preferences of the men and women making such important decisions. This exercise requires conceptualizing how these individuals may be affected by the adjudicatory settings in which they execute their authority.

The evidence presented in this Article suggests that party appointments in international arbitration result in what is often referred to as litigant-introduced biases. Hence, blinding appointments appears to be a promising reform to reduce affiliation effects and mitigate selection effects while also maintain the legitimacy and collaborative elements of the party-appointment

193. *See, e.g.,* Itai Grinberg & Joost Pauwelyn, *The Emergence of a New International Tax Regime: The OECD's Package on Base Erosion and Profit Shifting (BEPS),* ASIL INSIGHTS, Oct. 2015, https://www.asil.org/insights/volume/19/issue/24/emergence-new-international-tax-regime-oecd%E2%80%99s-package-base-erosion-and (suggesting that "[t]wenty countries (including the United States, Canada, Japan, Australia, and several European countries) declared their commitment to provide for mandatory binding arbitration in their bilateral tax treaties").

system.

While the implementation challenges are not insuperable, the effectiveness of blinding as a mechanism to reduce bias is dependent on the setting. Blind appointments may be less effective in arbitration contexts that are more prone to ideological polarization, such as where a particular class of litigants is always in the same litigation position, or in close-knit communities where legal actors are unable to avoid close scrutiny by their peers.

Nevertheless, this work points to the need for exploration of blinding as a solution to bias as well as a topic for further experimental studies. Experiments could add additional insight to this and other debates over the implicit biases and influences at work in international law.[194] These types of interdisciplinary approaches are long overdue and are key to illuminating how international justice works.

194. Tomer Broude, *Behavioral International Law,* 163 U. PA. L. REV. 1099 (2015) (calling for behavioral research in international law as "a viable, enriching alternative and complement to conventional economic analysis, so long as it is pursued with academic and empirical rigor as well as intellectual humility").

METHODOLOGICAL ANNEX

Settlement and Liability Awards. The arbitration process administrated by ICSID is designed to respond to concerns over procedural justice and to seek a settlement or award that confirms that an investment disrupted by the State had value.[195] However, ICSID dispute settlement techniques are consensual and should encourage negotiated outcomes (that is, amicable settlement between the parties).[196]

Many ICSID Convention cases are terminated through settlements or prior to a decision by the tribunal.[197] Cases handled by tribunals with party-appointed arbitrators settle at a 30% rate, as compared to a 45% rate in tribunals without. For cases that reach a decision, one can start the analysis with a binary scale. According to this scale, the claimant wins if the claimant received some monetary award, and the respondent wins only if the claimant received nothing (excluding the cases settled or discontinued). Cases handled by tribunals with party-appointed arbitrators assign damages in 40% of the cases. The same indicator shows 89% for cases without two party-appointees.

Duration. The ICSID system grants a right of action for compensation to affected investors. While investors are limited to retroactive damages (including those accumulated during the lapse of the arbitration), the expectation is that ISDS is more expeditious and less formal than the system of diplomatic espousal and adjudication under general public international law. Moreover, by allowing an individual or a corporation to proceed directly against a State in an international forum, ICSID arguably also helps to reduce the interference of the investor's home State in the domestic affairs of the host state.

These are two important considerations that justify the litigants' expectation of procedures that are not too burdensome and extended. As to this indicator, the average duration of cases handled by a traditional tribunal is 1066 days, with a median of 976 days, compared to 1196 days, with a median of 859 days, when handled by non-traditional tribunals.

Resignation and Challenges: A related indicator is the rate of resignations

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195. *See generally* E. Allan Lind et al., *Individual and Corporate Dispute Resolution: Using Procedural Fairness as a Decision Heuristic*, 38 ADMIN. SCI. Q. 224, 225 (1993).

196. ICSID Arbitration Rules, *supra* note 80, r. 21.

197. What I call settlement can arise in three distinct ways: first, the parties agree to an actual resolution of the dispute; second, the parties agree to discontinue the proceeding without a formal settlement; and third, one party to the dispute requests that the case be discontinued and there is no objection from the other party. *See* Emilie Hafner-Burton, Sergio Puig & David G. Victor, *Against Secrecy? The Social Cost of International Dispute Settlement,* 42 YALE J. INT'L L. (forthcoming 2017) (on file with The Virginia Journal of International Law).

and disqualifications of arbitrators. The applicable rules allow for arbitrators to be challenged if there is reasonable doubt about their competence or impartiality. Given that the rules generally place the two arbitrators in the uncomfortable position of deciding on a challenge to one of their peers, a challenge or even an intimation of it may result in the resignation of an arbitrator before a decision on the request is made. The ICSID system provides for specific rules to fill a vacancy due to inability to serve, adding considerable time to the proceedings facing resignations.

Overall, in 16% of proceedings with traditional tribunals a resignation is observed. In contrast, tribunals without party-appointed arbitrators have seen resignations at a higher rate: 33% of the cases.

Dissents and Separate Opinions. The issuance of dissenting or separate opinions by individual arbitrators is often offered as both a sign of dysfunctional tribunals and the result of the polarization created by party-appointments. This need not be true. In fact, John Uff offers an alternative, sociological explanation: "arbitrators appointed from the Bar or from practising solicitors will have no difficulty in taking on board their duty in relation to the party that appoints them [whereas] retired judges … in that their tradition while on the Bench is to act entirely impartially [would not hesitate] to express any disagreement with the majority without restraint."[198]

At ICSID, dissents are infrequent but may indicate serious disagreements between the members of the tribunal. Bearing this in mind, there is at least one dissent in 16% of 311 cases analyzed, all of them except one in tribunals with party appointments.

Remedies. The main post-award remedy in ICSID is annulment. It is limited to very narrowly defined circumstances and may render arbitration decisions, partially or completely, without force.[199]

It is often argued that arbitrators strive for compromise and typically broker sustainable deals or issue decisions that are tolerable or palatable for the parties to a dispute even if such decisions are not doctrinally exact.[200] Therefore, the use of remedies that may disrupt the equilibrium between finality and correctness is often viewed unenthusiastically.

In 33% of ICSID cases decided before traditional tribunals a party has filed an annulment; this occurs in only 10% of cases managed by tribunals without party appointments.

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198. John Uff, Fourth Public Lecture at The Great Hall, King's College, London: Duties at the Legal Fringe: Ethics in Construction Law (June 19, 2003).

199. Anthea Roberts & Christina Trahanas, *Judicial Review of Investment Treaty Awards: BG Group v. Argentina*, 108 AM. J. INT'L L. 750 (2014).

200. *See, e.g.*, Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts,* 79 L. CONTEMP. PROBS. 1, 3–4 (2016).

ANNEX

CASE OUTCOMES

	With party appointees		*Without party appointees*			
	Count	Percent	Count	Percent	Chi-square	P
Settlements (n=311)	88	28.30	8	2.57	1.04	0.31
Liability Finding (n=203)	78	39.39	8	4.04	2.10	0.15
Resignation/challenges (n=311)	48	15.43	6	1.93	2.32	0.13
Dissent/separate opinions (n=311)	48	15.43	1	0.32	0.79	0.37
Annulment (n=216)	68	31.48	1	0.46	1.38	0.24

CASE DURATION (DAYS)

	Min	Max	Median	Mean
Without Party Appointments	133	3649	859	1196
With Party Appointments	92	4069	976	1066
All	92	4069	975	1073

ARBITRATOR APPOINTED BY

Dissent Against	# of Dissents	Claimant(s)	Respondent	Others
Respondent	20	15 (48%)	4 (13%)	1
Claimant(s)	15	4 (13%)	8 (26%)	3
Unclear	19			
Total	54			

OUTCOMES RECOVERED (CENTS ON DOLLAR)

Type of Tribunal	Min	1st Quarter	Median	Mean	3rd Quarter	Max
Pro-Investment	2	16	27	38.83	54	93
Confrontational	1	7.25	29.5	33.5	54.25	74
Pro-State	18	18	19	23	30	30
Baseline	2	5.25	26	30.8	32	92

Pro ARB Matrix	**WINS**	**PERCENT WINS**	**LOSSES**	**≥ 4 PARTY APPOINTMNETS**	**TOTAL PARTY APPOINTMENTS**
V.V. VEEDER	4	100	0	yes	4
Eduardo MAGALLÓN GÓMEZ	3	100	0	no	3
Claus VON WOBESER	6	85.71428571	1	yes	7
J. Christopher THOMAS	5	83.33333333	1	yes	6
Franklin BERMAN	4	80	1	yes	5
Ibrahim FADLALLAH	4	80	1	yes	5
Raúl E. VINUESA	4	80	1	yes	5
W. Michael REISMAN	4	80	1	yes	5
Bernard HANOTIAU	3	75	1	yes	4
David A.R. WILLIAMS	3	75	1	yes	4
Emmanuel GAILLARD	3	75	1	yes	4
Gabrielle KAUFMANN-KOHLER	3	75	1	yes	4
Brigitte STERN	10	71.42857143	4	yes	14
Piero BERNARDINI	4	66.66666667	2	yes	6
Jan PAULSSON	2	66.66666667	1	no	3
Juan FERNÁNDEZ-ARMESTO	2	66.66666667	1	no	3
Rodrigo OREAMUNO	2	66.66666667	1	no	3
Vaughan LOWE	2	66.66666667	1	no	3
Albert Jan VAN DEN BERG	5	62.5	3	yes	8
Francisco ORREGO VICUÑA	3	60	2	yes	5
Marc LALONDE	7	53.84615385	6	yes	13
Philippe SANDS	2	50	2	yes	4
Toby LANDAU	2	50	2	yes	4
Charles N. BROWER	4	44.44444444	5	yes	9
Ahmed Sadek EL-KOSHERI	1	33.33333333	2	no	3
Alexis MOURRE	1	33.33333333	2	no	3
Andrew ROGERS	1	33.33333333	2	no	3
Benjamin R. CIVILETTI	1	33.33333333	2	no	3
Eduardo SIQUEIROS T	1	33.33333333	2	no	3
Francisco REZEK	1	33.33333333	2	no	3

Pro ARB Matrix	**WINS**	**PERCENT WINS**	**LOSSES**	**≥ 4 PARTY APPOINTMNETS**	**TOTAL PARTY APPOINTMENTS**
Horacio A. GRIGERA NAÓN	1	33.33333333	2	no	3
James R. CRAWFORD	1	33.33333333	2	no	3
Karl-Heinz BÖCKSTIEGEL	1	33.33333333	2	no	3
Stanimir A. ALEXANDROV	1	33.33333333	2	no	3
L. Yves FORTIER	1	16.66666667	5	yes	6
Bernardo M. CREMADES	1	10	9	yes	10
Guido Santiago TAWIL	1	0	3	no	3
J. William ROWLEY	1	0	3	no	3
John BEECHEY	1	0	3	no	3

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