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INTERNATIONAL ARBITRATORS AS IMPARTIAL SPECTATORS

For an empathetic approach to justice based on Ronald Dworkin and Adam Smith

Dissertation to obtain a master's degree in litigation and arbitration

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March 2022

ANTI-PLAGIARISM STATEMENT

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Num. de Identificação: 14153571
Data: 2022.07.01 18:46:08+01'00'

ACKNOWLEDGMENTS

To all who contribute to the adverbial value of my life. All the good I achieve I owe to each of you. Especially Sofia, who in such a selfless and tender way reminds me every day that our love is the source of endless wonder and beauty; Lia, my sister, who gives me the warm comfort of knowing that, no matter what, loneliness will remain an unknown reality; João Mineiro, not only for his kindness and honesty, but also for his keen sense of justice and intellectual seriousness; João Costa, for his friendship, intellectual acuity, and for making sure that, with intelligence and rigor, we strive for nothing but excellence in our lives; Luís Varandas, Vera Palos, Mariana Gomes, Mariana Martins, Gonçalo Pessa and so many others who do not hesitate for a second to share their time with me. It would be a disregard of my moral obligations to each and every one of you if I did not take the time to write these heartfelt words. I am forever indebted to you.

ABSTRACT

Even a careless glance at the data on the composition of international arbitral tribunals would suffice to reveal—regardless of the criteria we choose—an obvious lack of diversity. This circumstance is all the more worrying when we consider that the consequences of international arbitral awards transcend all boundaries. This weakens their political and, eventually, even their legal legitimacy. Against this background, initiatives and projects calling for greater diversity in the composition of these tribunals are flourishing in international arbitration. This is a political demand. I therefore seek to understand how such a claim, if granted, might affect the way we think and produce legal thought—and if so, how and to what extent. To this end, I examine the way adjudicators in general, and international arbitrators in particular, think and make their decisions. *First,* I address the influence of our identities and culture, as well as ethics and morality. *Second*, I analyze the idiosyncrasies, debates, and challenges related to legal theory and the phenomenology of legal reasoning, without which any work of this kind would be hopelessly compromised. In particular, I propose to identify the specific responsibilities of adjudicators in their search for the right interpretation of propositions of law. In doing so, I reject positivist approaches to the concept of law, particularly that proposed by Herbert Hart (1907-1992), and adopt the theoretical framework proposed by Ronald Dworkin (1931-2013). What follows, then, is based on the insight that, on the one hand, legal problems cannot be fully understood without recognizing the inseparability of law and morality, and that, on the other hand, any interpretation of a proposition of law must fit with the past institutional decisions of the community to which it refers and be justified by its principles of political morality. I proceed to address the particular responsibilities of international arbitrators in interpreting the applicable procedural and substantive laws and to explain what awaits them when they accept the appointment to serve as arbitrator. I close the circle by returning to the original idea of Adam Smith (1723-1790) and suggesting how viewing the international arbitrator as an impartial spectator may contribute to a holistic and empathetic approach to justice.

RESUMO

Até um olhar desatento para os dados sobre a composição de tribunais arbitrais internacionais seria suficiente para revelar, independentemente do critério que decidamos adotar, uma manifesta falta de diversidade. Tal circunstância é tão mais preocupante se considerarmos que as consequências decorrentes de sentenças arbitrais internacionais ultrapassam todas as fronteiras. Enfraquece-se, assim, a sua legitimidade política e, eventualmente, até jurídica. Neste contexto, na arbitragem internacional, florescem as iniciativas e os projetos que reivindicam uma maior diversidade na composição daqueles tribunais. Trata-se fundamentalmente de uma exigência política. Procuro, pois, compreender de que forma tal reivindicação, se deferida, poderá impactar a forma como pensamos e produzimos o pensamento jurídico e, em caso afirmativo, como e em que medida. Para tanto, considero a forma como os julgadores, em geral, e os árbitros internacionais, em particular, pensam as suas decisões. *Em primeiro lugar*, abordo a influência das nossas identidades e cultura, mas também da ética e da moral. *Em segundo lugar,* analiso as idiossincrasias, os debates e os desafios relacionados com a teoria do direito e a fenomenologia do raciocínio jurídico, sem os quais qualquer exercício deste género encontrar-se-ia insanavelmente comprometido. Em particular, proponho-me demonstrar as responsabilidades específicas dos julgadores na sua procura pela correta interpretação de proposições jurídicas. Rejeito as abordagens positivistas sobre o conceito de direito, em particular a proposta por Herbert Hart (1907-1992), e adoto a o quadro teórico proposto por Ronald Dworkin (1931-2013). O que se segue, então, decorre do entendimento de que, por um lado, os problemas jurídicos não podem ser plenamente compreendidos sem que se reconheça a indissociabilidade entre o direito e a moral e que, por outro lado, qualquer interpretação deve ser compatível com as decisões institucionais passadas da comunidade com a qual se relaciona e ser justificada pelos seus princípios de moral política. Concluída esta etapa, procuro identificar as responsabilidades específicas dos árbitros internacionais na interpretação do direito processual e substantivo aplicável e explicar o que os espera ao aceitarem uma nomeação arbitral. Fecho o círculo retornando à ideia original de Adam Smith (1723-1790) propondo como olharmos o árbitro internacional como um *espetador imparcial* poderá contribuir para uma abordagem holística e empática da justiça.

STATEMENT REGARDING LENGTH OF DISSERTATION

The body of this dissertation, including spaces and notes and excluding the appendixes, occupies a total of 243,688 characters.

ABBREVIATIONS

BIT	Bilateral Treaty for the Protection and Promotion of Foreign Investment
CAC	Arbitration Centre of the Portuguese Chamber of Commerce and Industry
CAC Arbitration Rules	Arbitration Rules of the CAC
Convention for the Pacific Settlement of International Disputes 1899	Convention for the Pacific Settlement of International Disputes, done at The Hague, on 29 July 1899
Convention for the Pacific Settlement of International Disputes 1907	Convention for the Pacific Settlement of International Disputes, done at The Hague, on 18 October July 1907
DESA	Department of Economic and Social Affairs of the UN Secretariat
DIS	German Arbitration Institute
ECT	Energy Charter Treaty, done at Lisbon, on 17 December 1994
GRULAC	Group of Latin American and Caribbean States
HKIAC Arbitration Rules	Hong Kong International Arbitration Centre Rules, in effect as of 1 November 2018
IBA Guidelines on Conflicts of Interest in International Arbitration	IBA Guidelines on Conflicts of Interest in International Arbitration, adopted by resolution of the IBA Council on 23 October 2014
IBA Guidelines on Party Representation in International Arbitration	IBA Guidelines on Conflicts of Interest in International Arbitration, adopted by resolution of the IBA Council on 25 May 2013
IBA Rules on the Taking of Evidence in International Arbitration	IBA Rules on the Taking of Evidence in International Arbitration, adopted by resolution of the IBA Council on 17 December 2020
ICC Arbitration Rules	International Chamber of Commerce Arbitration Rules, in effect as of 1 January 2021
ICCA	International Council for Commercial Arbitration
ICSID	International Centre for Settlement of Investment Disputes

ICSID Arbitration Rules	ICSID Arbitration Rules, in effect as of 10 April 2006
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, opened for signature on 18 March 1965
IIA	International Investment Agreement
ISDS	Investor-State Dispute Settlement
LCIA Arbitration Rules	London Court of International Arbitration Rules, in effect as of 1 October 2020
Mauritius Convention	United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, done in New York, on 10 December 2014
New York Convention	The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, on 10 June 1958
PAL	Portuguese Arbitration Law (Law No. 63/2011, of 14 December 2011)
Portuguese Constitution	Constitution of the Portuguese Republic (adopted by Decree of 10 April 1976 and as amended by Constitutional Law No. 1/2005 of 12 August)
PCA	Permanent Court of Arbitration
PCA Arbitration Rules	PCA Arbitration Rules, in effect as of 17 December 2012
PCC	Portuguese Civil Code (Decree Law No. 47344/66, of 25 November 1966, as amended by Law No. 65/2020, of 4 November 2020
PITAD	PluriCourts Investment Treaty Arbitration Database
SCC	Arbitration Institute of the Stockholm Chamber of Commerce
SCC Arbitration Rules	Arbitration Rules of the SCC, in effect as of 1 January 2017
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law

UNCITRAL Arbitration Rules	UNCITRAL Arbitration Rules, as revised in 2013
UNCITRAL Model Law	UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006
UNCTAD	United Nations Conference on Trade and Development
VIAC	Vienna International Arbitration Centre
Washington Convention	Convention on the Settlement of Investments Disputes between States and Nationals of Other States, done at Washington, on 14 October 1966
WEOG	Western European and Other States Group

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INTRODUCTION

The reason for the present dissertation cannot be traced to a single source. It is the result of several interwoven events and destinies. It is therefore necessary to explain its genesis and place it in a larger context in order to understand it thoroughly. The premises began to take shape when I read Michael Walzer's *Thick and Thin: Moral Argument at Home and Abroad* about four years ago and learned of his call for moral universalism, an approach I had always been too skeptical of. I remember that the soundness of his arguments left a deep impression on me. I vividly recall the passage in which Walzer recounts that when he watched the political protests of the Velvet Revolution of 1989 on television, he could not help but sympathize with the demonstrators who carried signs demanding 'truth' and 'justice' (1994, 1). The feeling of familiarity and common cause made me realize that people are much closer than they often want to admit.

The second incentive lies in those early days as a law student—a time when I had no contact with law despite the vulgar and unreflective awareness of the "popular representation of law" (Latour [2002] 2010, 235).[1] For a short time, I naively assumed that the formalist method, if properly applied, would be sufficient to create a perfect and somehow unchallengeable legal outcome that knew no exceptions. I began then to wonder whether legal thinking and reasoning would be substantially different if conducted by lawyers with different ethical and moral convictions.[2]

Personal and professional experiences also played a large role in my decision to move forward with this project. I have been fortunate to have several unique opportunities to work in the field of international dispute resolution and international law. In each of these opportunities, I have been able to engage in countless exciting discussions with many

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1 I was fortunate to be able to learn from some of the most prominent and insightful Portuguese scholars at NOVA Law School. I could not go on without expressing special thanks to them and acknowledging their immense influence on this dissertation. I am forever indebted to them.

2 Or other equally influential factors such as personal background, past experiences, psychological variables such as emotions, power, prestige, work incentives, money, income, leisure, self-esteem. It is important to point out that even if these factors influence legal thinking, it would be a mistake to separate them from either of these sympathies. This is because the influence of both factors cannot be understood separately, since our sympathies are determined as much by our background, experiences, personal characteristics, and desires as the latter factors are determined by our sympathies.

intelligent and inspiring people from around the world. Through these discussions, I have had the opportunity to gain first-hand insight into the immense human diversity.

In an increasingly interdependent world, there is constant interaction between local and global communities and institutions, and between morality and multiple cultural and ideological arrangements. A state in which they do not interact is currently unimaginable. In this context, there has been a growing demand for diversity in general and in international arbitration in particular. The issue of diversity is quite present in our daily lives. But the intertwining of international arbitration and diversity makes the present dissertation even more critical and challenging, considering that the former is already a product resulting from the interaction of several legal cultures. In response, national and international actors, including arbitral institutions, appointing authorities, international arbitrators, and disputing parties, have developed a consistent response that is currently ongoing.[3] Any attempt to understand the impact of greater diversity in the composition of international arbitral tribunals on the interpretation and enforcement of the law is therefore a natural step forward.

The relationship between judges sitting in a distant domestic court or at the table of a picturesque international tribunal and the law has always been an issue of concern. However, the peculiarities of international arbitration and its importance to the robustness and efficiency of international affairs lend the present dissertation unprecedented relevance. Despite its contract-based nature, the function that international arbitral tribunals perform is essential to the public pursuit of international justice, regardless of whether it can be argued that international arbitration has a *de facto* monopoly in the resolution of international disputes (Paulsson 2009, 2).[4] This is true for a wide range of disputes involving different types of

[3] Users of international arbitration believe that arbitral institutions, either directly (by making the appointments) or indirectly (by having the most information about international arbitrators), are in the best position to help improve diversity in international arbitration. Arbitral institutions, however, reject this preference by emphasizing that when international arbitrators are appointed, the disputing parties (or their legal advisors) are responsible for half of all appointments. This latter position seems to be supported by relevant data and statistics (Puig 2014, 412; Queen Mary - University of London and White & Case 2018, 16, 18–19).

[4] During the last decade, economic globalization, in which international arbitration has played an essential role (Banakar 1998, 349), has suffered a setback. Criticisms of ISDS as a form of global governance exemplify the growing tensions surrounding international arbitration (due in part to the fact that issues with increasingly public implications and involving public policy have been addressed through methods and rules that have often been applied to private disputes. Amid public pressure from civil society, but also in light of the consequences of previous international arbitration awards in favor of foreign investors, some governments around the world have withdrawn their support for the ISDS system. I do not, however, turn a blind eye to reality by ignoring the often-justified criticisms of international arbitration, most of which have arisen because of the public fallout from arbitral awards. I believe, however, that this situation can only

entities and individuals: from states to transnational corporations, from small and medium-sized enterprises to international organizations, from non-profit organizations to governmental entities and state-owned enterprises.[5] This is because disputing parties seek—perhaps, above all[6]—a *neutral* forum in which and through which they can finally resolve the dispute with the assistance of impartial third parties (Park 2003, 280; 2010, 33; Esposito and Martire 2012, 331).[7] This purpose would not be served if the disputing parties had to resort to one of their legal systems in which the specter of a hypothetically biased judgment is omnipresent.

In this context, a distinctive feature of international arbitration is that the parties have the option to nominate the arbitrators who will arbitrate the dispute (Born 2014, 3:1686).[8]

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be overcome if users, legal advisors, arbitrators, arbitral institutions, international organizations, government agencies, and civil society more broadly work together to address it. In this context, several multilateral initiatives are positive, such as the ongoing negotiations in the UNCITRAL Working Group III (Investor-State Dispute Settlement Reform) (for additional information, see https://uncitral.un.org/en/working_groups/3/investor-state, last accessed on February 4, 2022).

5 The importance of international arbitration in resolving disputes between sovereign states should not be understated, as many high-profile international arbitrations have taken place over the past two decades involving only sovereign states. See, for example, the South China Sea (*Philippines v. China*), Arctic Sunrise Arbitration (*Netherlands v. Russian Federation*), the Duzgit Integrity Arbitration (*Malta v. São Tomé and Príncipe*), Indus Water Kishenganga Arbitration (*Pakistan v. India*), ARA Libertad Arbitration (*Argentina v. Ghana*), Arbitration Under Timor Sea Treaty (*Timor-Leste v. Australia*), MOX Plant Case (*Ireland v. United Kingdom*), the Enrica Lexie Arbitration (*Italy v. India*), the Dispute concerning Coastal State Rights in the Black Sea, and Kerch Strait (*Ukraine v. Russian Federation*), Dispute concerning the Detention of Ukrainian Naval Vessels and Servicemen (*Ukraine v. Russian Federation*), and even an arbitration between a sovereign State and a liberation movement, namely the Abyei Arbitration (*The Government of Sudan v. The Sudan People's Liberation Movement/Army*).

6 While emphasizing this line of thought, Paulsson further argues that the element of neutrality is far more relevant in the international arena than those related to the cost, transparency, and speed of the process, as well as the alleged increase in expertise of the third parties involved, including international arbitrators (Paulsson 2009, 2).

7 It is perhaps worth noting that this neutrality is also relevant, for example, to the conclusion of important international instruments such as the New York Convention or the UNCITRAL Model Law, because states are more likely to agree to and contribute to a parallel system of dispute settlement when there are fewer reasons to fear corruption or biased judgments (Rivkin 2013, 339).

8 The composition of an arbitral tribunal may result from a variety of arrangements. In the case of three-member arbitral tribunals, the most common method is for each of the disputing parties to unilaterally select the two co-arbitrators, who then appoint the presiding arbitrator. When an arbitral institution administers the arbitration and the disputing parties fail to make their appointments, the institutions typically step in and make the missing appointment on behalf of the defaulting disputing party. A 2012 survey found that of all respondents, (i) 76% prefer that two co-arbitrators be selected unilaterally by each disputing party in three-member arbitral tribunals; and (ii) 54% prefer that the presiding arbitrator (or sole arbitrator) be selected by agreement of the disputing parties (Queen Mary - University of London and White & Case 2012, 5–6). On this topic, Ibrahim Fadlallah notes, for example, that under Shari'a as applied in Saudi

The consequence of this right is twofold. *First*, virtually anyone can be designated as an international arbitrator, which means that international arbitration can easily become a place where different languages engage in dialog—the modern version of the Tower of Babel in dispute resolution.[9] This is because national and international laws rarely set binding requirements for the suitability of international arbitrators that go beyond the legal duties of impartiality and independence (Waibel and Wu 2017, 5).[10-11] *Second*, it may contribute significantly to whether a higher degree of diversity is achieved in the composition of arbitral tribunals—a consequence that depends largely on whether the actors involved in the dispute, primarily the disputing parties, view diversity as a relevant criterion at the time of appointment. It is, therefore, quite conceivable that an international arbitral tribunal is composed of individuals whose cultural origins and moral convictions are completely heterogeneous. Indeed, intercultural coexistence is a watermark of international arbitration. In these and similar circumstances, it is clear that the challenges associated with cultural neutrality are increasingly salient (Goodman-Everard 1991, 157; Esposito and Martire 2012, 326–27; Heilbron, QC 2016, 271).

Arabia, "where arbitration is local and subject to supervision by jurisdictions that check primarily its conformity to Muslim law […] non-Muslim and women are barred from participating in arbitration, even as counsel" (2009, 314). For an overview of the international legal framework for the appointment of arbitrators, see Article 10 of the PAL; Articles 8 to 10 of the UNCITRAL Arbitration Rules; Articles 8 to 10 of the PCA Arbitration Rules; Articles 37 to 40 of the ICSID Convention; Article 12 of the ICC Rules; Articles 5 of the LCIA Arbitration Rules; Article 8 of the HKIAC Arbitration Rules; Article 11(1) of the CAC Arbitration Rules; Article 12 of the UNCITRAL Model Law.

9 International arbitrators may differ from each other based on their professional experience, cultural background, education, ideological and political affiliations, psychological characteristics, and languages spoken.

10 A relevant exception is Article 14 of the ICSID Convention [*ex vi* Article 40(2) of the ICSID Convention], which establishes that arbitrators shall (i) be persons of high moral character; (ii) have recognized competence in the field of law, commerce, industry, or finance; and (iii) be independent. It is interesting to note that the drafters of the ICSID Convention disagreed fiercely about whether international arbitrator must have a legal background (International Centre for Settlement of Investment Disputes 1968, II:728–30). This is without prejudice to the criteria agreed upon by the parties or soft-law-based rules on ethics, for example.

11 See, for example, Article 9(3) of PAL; Articles 11 and 12 of the UNCITRAL Arbitration Rules; Articles 11 and 12 of the PCA Arbitration Rules; Article 14(1) of the ICSID Convention; Article 11(1) of the ICC Rules; Articles 5.3-5.5 of the LCIA Arbitration Rules; Article 11(1) of the HKIAC Arbitration Rules; Article 11(1) of the CAC Arbitration Rules; Article 12 of the UNCITRAL Model Law. There are useful non-binding instruments—unless the disputing parties agree that the arbitral tribunal in question is bound by them—that can guide us interpret and apply the vague concepts of impartiality and independence, such as the IBA Guidelines on Conflicts of Interest in International Arbitration.

Therefore, because diversity indeed implies the coexistence of completely different individuals, it presents a number of challenges, including with respect to the interaction of international arbitrators with the law applicable to the dispute and the procedural law—both of which are usually agreed upon by the disputing parties.[12] The existence of a sense of social belonging, grounded in and reflected in idiosyncratic practices, among those who share an identity and who therefore share certain behaviors may be sufficient to explain the similarity in the way they see and interact with the world. However, the reverse is also representative, as individuals, including international arbitrators, who have different identities and reproduce different social practices may perceive reality differently. In this context, it is important to consider whether diversity plays a relevant role in the phenomenology of legal reasoning—and if so, how and to what extent.

Lawyers are often outraged when they find that the law has not been correctly interpreted and enforced.[13] There are explicit and strong claims that legal norms must be interpreted and applied in a certain way. It is argued that international arbitrators, who may be unfamiliar with the law and procedural law applicable to the dispute, often fail to grasp its true meaning and scope. However, the question of what it means to interpret and enforce the law is at the same time a source of controversy and misunderstanding. It is therefore essential to answer anew the question of what it means for a proposition of law to be true and objective. To this end, however, the analysis of legal systems would be woefully incomplete if morality and cultural diversity were ignored. These issues are inextricably and closely linked to the political demand for more diversity in international arbitration.[14]

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12 See Articles 31(1) and 39 of PAL; Articles 18(1) and 35 of the UNCITRAL Arbitration Rules; Articles 18(1) and 35 of the PCA Arbitration Rules; Articles 18(1) and 21(1) of the ICC Rules; Articles 16.1 and 16.4 of the LCIA Arbitration Rules; Articles 14(1) and 36 of the HKIAC Arbitration Rules; Articles 15(1) and 35 of the CAC Arbitration Rules; Articles 20(1) and 28 of the UNCITRAL Model Law.

13 Apart from the fulfillment of specific methodological steps [discussed in Chapter III(D.4)], what makes a proposition of law right or wrong is highly controversial.

14 A recurring debate among arbitral experts and enthusiasts relates to the question of whether international arbitrators actually base their legal reasoning on the normative solutions provided for in the applicable substantive and procedural laws. As a rule, it is up to the disputing parties to agree on the applicable substantive and procedural law—usually in the arbitration agreement, in which the arbitral tribunals find the source of their jurisdiction (França Gouveia 2019, 126).

Most of the discussion of the implications of diversity in this regard has taken place in the field of comparative law research. This approach is not without merit.[15] It contributes significantly to the enforceability and thoroughness of international arbitral awards, making them "more understandable or palatable for the party whose national law is not applied" (Goodman-Everard 1991, 161).[16] Relying on this approach alone, however, seems insufficient to understand the whole. This is because comparative approaches frequently treat the law as a critical concept—as if there were a definitive test that we all agree upon to guide its application. For this to work, broad agreement on what counts as law is required; otherwise, true propositions of law prove illusory. It is therefore worthwhile to take an alternative but complementary path that highlights the synergies between ethics, personal and political morality, identities, and the law, as the latter is at some point interpreted and enforced by individuals whose moral convictions often differ. I adopt a similar approach to that of Paolo Esposito and Jacopo Martire, who considered "the broader cultural element (of which the legal culture is an appendix) and its social element (which may not be technicalities of the legal proceedings themselves, but which are still elements deeply affecting the proceeding itself)" (Esposito and Martire 2012, 326, fn.2). The goal of this dissertation is to discuss whether the relationship between international arbitrators and the law can be fully understood "without an appreciation of the deep and pervasive influence of society on [their] 'thinking, choosing and doing'" (Sen 2009, 245). And if this is not the case, one must explain how and why this influence is relevant. To this end, I draw on political and philosophical discussions on law, justice, cultural diversity, and ethics and morality. I aim to contribute to the discussion of whether the flourishing of different legal justificatory frameworks is an inevitable consequence of the greater diversity of international arbitral tribunals. To this end, I engage in particular with Dworkin's *Justice for Hedgehogs* (2011) and *Law's Empire* ([1986] 1998).[17] And while

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15 Considering that "the cross-pollination between international jurisdictions is accelerating" (Steyn 2002, 19), it is relatively likely that normative solutions can be found in the jurisprudence and literature of other legal systems. Moreover, in the field of international arbitration in particular, valuable legal instruments were only created by conducting thorough comparative law analyzes, such as the New York Convention, the Washington Convention, the UNCITRAL Arbitration Rules, or the UNCITRAL Model Law on International Commercial Arbitration, all of which still play a fundamental role in promoting and harmonizing international arbitration.

16 Moreover, "[b]y using comparative law as a framework, an arbitrator allows himself to check his instincts against the solutions offered by the legal systems involved in a case, while at the same time providing the legal reasoning, he needs to support the solution he feels should be reached, justifying himself in his role of international arbitrator" (Goodman-Everard, 1991, p. 161).

17 Others dialogued with other philosophers. Paolo Esposito and Jacopo Martire, for example, developed a theoretical model based on Juergen Habermas's theory of communicative action that aims to include in the discourse of international arbitration "the different backgrounds of the

this dissertation also draws on ethnographic findings (Latour [2002] 2010), it does not claim to be ethnographic in nature or methodology. Rather, it aims to make a theoretical contribution to the development of legal doctrine in order to justify the legitimacy and influence of diversity on the interpretation and enforcement of the law.[18]

To do so, I believe it is essential to consider moral and ethical issues because they are "inescapable dimensions of the inescapable question of what to do" (Dworkin 2011, 25). The emergence of new social groups reveals other perspectives on life, often involving alternative ways of interpreting social practices in which the concepts of justice and fairness feature, thus promoting alternative and sometimes novel behaviors. This diversity may manifest itself, for example, in different political and ideological tendencies, economic perspectives, conceptions of justice, and views of the public good or good governance (Hespanha 2009, 28). However, this does not legitimize those situations in which the law is either bypassed altogether or simply interpreted creatively for moral, political, or even personal considerations or priorities. In other words, I am concerned with legal reasoning conducted impartially by persons who remain at a distance from the object being interpreted (Latour [2002] 2010, 198–99). As a result, I leave aside the strategic considerations of arbitrators—as Langord, Behn, and Usynin use the term (2018, 7). In addition, the question of what is the concept of law is part of the subject of this dissertation.

However, it would be naïve to believe that the power struggle among international arbitrators that Dezalay and Garth identified nearly 30 years ago (1995, 40) does not have a significant impact on how international arbitrators think, choose, and ultimately act. The reason for leaving this topic aside is twofold: *first*, the strategic considerations of international arbitrators may be so numerous and overwhelming that their consideration in this dissertation would distract us from the core topic—what it means to conduct in ideal terms a process of legal reasoning and how diversity may affect it; *second*, since such considerations are sensitive to context, their consideration would require alternative methodological approaches, including anthropological fieldwork, which would be incompatible with the scope and formal constraints of this dissertation.

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acting parties and bridge the gap between diverse and often conflicting (social, legal, economic) cultures" (Esposito and Martire 2012, 332).

[18] The adjective "international" thus refers to the composition of the arbitral tribunal and not to the characteristics of the dispute on which its existence is based.

It is nonetheless clear by now that the relationship between diversity, morality, and phenomenology of legal reasoning raises numerous thought-provoking questions, the answers to which are the subject of this dissertation. Each of these questions led me on an incredible journey through legal systems, moral philosophy, and cultural diversity.

CHAPTER I | THE DEMAND FOR INCREASING DIVERSITY IN INTERNATIONAL ARBITRATION

A. Introductory remarks

There is a relentless debate about the need to promote diversity in international arbitration. From academic books and articles to institutional initiatives and reports,[19] from blog posts to national and international pledges,[20] from international conferences to non-governmental organizations and institutional networks,[21] from non-profit projects to entrepreneurial initiatives,[22] they all have in common the call for more diversity.

Such a demand cannot be seen as an isolated phenomenon. It is part of a much broader ethical, political, and philosophical phenomenon that demands that "everyone be seen as morally and politically relevant" (Sen 2009, 117). Respect for diversity requires that each ethical existence be equally valued and treated as an indispensable requirement for fulfilling

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19 For academic books and articles, see the list in the Bibliography section below. For institutional initiatives and reports, see United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), A/CN.9/ WG.III/WP.203, dated November 16, 2020; the Gender Balance of ICC Tribunals prepared by the ICC; the Women in Arbitration (WIA) initiative of the HKIAC (https://www.hkiac.org/women-arbitration-wia); the Young ICCA of the International Council for Commercial Arbitration (https://www.arbitration-icca.org/YoungICCA); the Report on Gender Diversity in Arbitral Appointments and Proceedings of the ICCA's Cross-Institutional Task Force.

20 For international pledges, see *Equal Representation in Arbitration* (http://www.arbitrationpledge.com/news, accessed February 4, 2022), *The African Promise* (https://researcharbitrationafrica.com/the-african-promise/, accessed February 4, 2022), and the *Racial Equality for Arbitration Lawyers* (https://letsgetrealarbitration.org/, accessed February 4, 2022). For blog posts, see *Is Increasing Gender and Ethnic Diversity in Arbitral Tribunals a Valid Concern?* (available at http://arbitrationblog.kluwerarbitration.com/2020/03/01/is-increasing-gender-and-ethnic-diversity-in-arbitral-tribunals-a-valid-concern/, accessed February 4, 2022), and *Diversity in International Arbitration: A Call to Action*, 2020 (available at http://arbitrationblog.practicallaw.com/diversity-in-international-arbitration-a-call-to-action/, accessed February 4, 2022) and T*he Past, Present, and Future of Arbitral Diversity in Investment Arbitration* (available at https://blogs.kcl.ac.uk/kslrcommerciallawblog/2020/05/11/the-past-present-and-future-of-arbitral-diversity-in-investment-arbitration-ana-prundaru/, accessed February 4, 2022).

21 For international conferences, see the 15th Annual ITA-ASIL Conference: Diversity and Inclusion in International Arbitration; the 1996 Seoul Conference. For nongovernmental organizations and institutional networks, see Arbitral Women, the Alliance for Equality in Dispute Resolution, and the Young Arbitration Forum.

22 For nonprofit projects, see PITAD (at https://pitad.org/). For entrepreneurial initiatives, see Global Arbitration Review (at https://globalarbitrationreview.com/) and the Arbitrator Intelligence (at https://arbitratorintelligence.com/).

one's capabilities—in Kant's words, treating all people as ends in themselves ([1785] 2017, 36–37). This apparent simple remark holds within itself a vast complex philosophical theory, as we shall see later on. For now, suffice it to say that throughout history, perceptions of diversity and the ways in which demands related to it have been framed have changed—sometimes dramatically. The history of diversity is inextricably linked to the history of inequalities and is often associated with the phenomenon of lack of social mobility, discrimination, segregation, and violence. Our identities emerge and develop in large part with reference to these phenomena (Wieviorka 2002, 150, 168–69).[23]

In this context, international arbitration is part of the much broader phenomenon of transnationality and globalization, reflected in "an increase in the number of cross-national business interactions and a corresponding rise in transnational litigation and arbitration" (Puig 2014, 388). According to a 2018 survey, "an even larger number of high-stakes disputes are being resolved across multiple jurisdictions, in virtually all existing legal systems, and involving parties from all over the world" (Queen Mary - University of London and White & Case 2018, 16).[24]

There is, however, another fundamental feature of international arbitration that is worth noting: disputes, of whatever nature, are resolved within the framework of specific legal jurisdictions—there is always a link between them and international arbitration. Even in cases where the resolution of a dispute must be in accordance with the applicable rules and principles of international law, arbitral tribunals are often required to interpret municipal law. This, of course, raises questions regarding the relationship between the search for the truth of propositions of law and those empowered to conduct such exercises. Diversity in international arbitration thus raises challenging and interesting questions within this broader framework. It is essential to determine what it means to call for increasing diversity in international arbitration, and in particular to determine whether such calls are in any way related to notions

[23] At the time, it was recognized that economic hardship and social injustice affect specific social categories—women, ethnic, religious and other minorities, people of color, children—more severely.

[24] As early as 2008, Professor Loukas Mistelis noted that "[i]t is well established that International Arbitration is the dispute resolution method of choice for cross-border transactions and disputes relating to foreign direct investment" (Queen Mary - University of London and Pricewaterhousecoopers 2008, 1).

of nationality, gender, socioeconomic conditions, or the cultural upbringing and background of international arbitrators.

In order to answer these questions, we must first identify the existing landscape in terms of diversity in international arbitration, particularly in what it relates to the composition of international arbitral tribunals. For the understanding and development of international arbitration depends on our understanding the cultures of its actors (Esposito and Martire 2012, 339). Otherwise, we run the risk of distancing the current discussion from reality.

The basic justification for calling for more diversity in international arbitration often refers to the need to shift the balance of power within international arbitration. Something that depends on creating better conditions for the participation of more diverse individuals versus those who make up the current establishment—often referred to as the 'pale, male and stale' (Greenwood and Baker 2012). Or to put it less metaphorically, "the 'median international arbitrator' was a fifty-three year-old man who was a national of a developed state and had served as arbitrators in ten arbitration cases" (Franck 2015, 466).[25] Data analysis, such as that conducted by Puig, shows that there is "an interconnected network of appointments […] [with] a densely connected centre with some clusters" (2014, 413–14). It is based on the belief that the reach of arbitral awards can be so overwhelming that their sociological legitimacy,[26] even if only symbolic, depends on incorporating diverse viewpoints, including those of the people most affected by such award (International Council for Commercial Arbitration 2020, 12–14; Franck 2015, 496–98; Grossman 2014, 6, 8–9). Or, as Esposito and Martire put it,

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[25] I note, however, that the call for diversity in international arbitration only marginally is related to the law and its interpretation. It is primarily a political demand that, if followed—and I believe it should—may have relevant legal implications. The extent and likelihood of such implications are debatable and will be addressed later. Regardless of their nature, there are numerous civil society organizations, projects, and initiatives that seek to promote diversity in international arbitration. Arbitral Women (AW), the Young Arbitration Forum (YAF), an initiative of the International Chamber of Commerce, or the Association of Young Arbitrators (AYA) are just a few of these organizations.

[26] Banakar explains the concept of legitimacy as follows:

> Legitimacy is a concept used to indicate the strength of the feelings and attitudes that the governed have towards the law, its processes, institutions and the results that it produces. Legitimacy is about the people's faith in law, a factor which can vary considerably from culture to culture (Banakar 1998, 351).

> "[a] practice of communicative action in international arbitration would fruitfully bind together the structure of the argumentative process and the parties' rational acceptability of the [arbitral] decision; this as a result of a procedure of that is culturally sympathetic to and respectful of the participants' different background (sic)" (2012, 333).

Moreover, the claim is multifaceted in that the issue of diversity in international arbitration can be, and often is, viewed from a variety of angles—nationality and geographic representation, gender, cultural and ethnic backgrounds, age, and legal training. In the last decade, however, the perspectives of gender and geographic representativeness have occupied most of the space in the discussion of this topic, while the other perspectives have received less attention. This is to the point that users of international arbitration believe that diversity efforts "should be broadened to also include other aspects of diversity" (Queen Mary - University of London and White & Case 2018, 18), including the ethnicity of counsels and arbitrators. It is interesting to note, however, that socioeconomic conditions rarely figure in the debate over the lack of diversity in international arbitration.

Be that as it may, the consideration of diversity in international arbitration in itself raises relevant questions about the interaction between the law and the different identities we have, especially because international arbitration leaves local and transnational realities in constant interaction. Nevertheless, the existence of alternative perspectives is not in itself a sufficient reason for us to welcome them on board, for they may be present but entirely unconvincing and irrelevant. Something else is required, namely their invaluable contribution to the scrutiny and objectivity of our own viewpoints, as they will contribute to improving "the informational basis of [our own] evaluations" (Sen 2009, 169). Moreover, these alternative perspectives can help us ask questions we have not previously considered. As we look elsewhere for answers, we may encounter evidence to support our own limited views or reasons to abandon them.

In this regard, Susan D. Franck pointed to the "lack of empirical evidence about the identity of actors in international arbitration, particularly those who actually serve or might serve as arbitrators" (2015, 435).[27] Since then, however, significant efforts have been made to

[27] The following data and findings do not claim to be exhaustive. There are a significant number of *ad hoc* and institutional arbitrations, the details of which are not publicly available and are kept strictly confidential. Therefore, findings based on available data are indicative only.

promote transparency in this area.[28] Arbitral institutions and other stakeholders have been at the forefront of these efforts, collecting data and issuing reports, promoting initiatives—such as conferences—or establishing task forces to address issues of interest.[29] In most cases, data collection focuses on the gender and nationality of the actors involved. In this dissertation, I address each of these aspects, but only in the context of the issue of diversity in the composition of arbitral tribunals.[30]

B. Gender diversity in international arbitration

On the issue of gender diversity in the composition of arbitral tribunals, the Report on Gender Diversity in Arbitral Appointments and Proceedings (2020), produced by the ICCA Cross-Institutional Task Force, is one of the most comprehensive data collection projects. Among other relevant data, it collected and analyzed data on arbitrator appointments from 2015-2019 in various types of arbitration proceedings. Table 1[31] confirms that the appointment of female arbitrators accounted for only 21.3% of all appointments in 2019 in arbitrations administered by the ten arbitral institutions identified therein.[32] It also shows that while the number of female arbitrators is still far from the threshold of gender parity, it has nevertheless

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28 See, for example, the Mauritius Convention and Article 1(4) of the UNCITRAL Arbitration Rules.

29 The ICSID report for fiscal year 2020, for example, highlights the remarkable progress "in enhancing the diversity of arbitrators, conciliators, and *ad hoc* committee members appointed to ICSID cases" (International Centre for Settlement of Investment Disputes 2021, 19). Much is due to the extraordinary work of PITAD and its team.

30 The following findings are only in part the result of data that I personally collected.

31 Tables referenced in the text can be found in the Appendices section below.

32 For the methodology used, see International Council for Commercial Arbitration, 2020, p. 16. In addition, in relation to another study, Table 5 shows that of 46 female subjects who had sat as arbitrators, 32.2%, 51.9%, and 15.5% responded that in these proceedings the arbitral tribunals to which they belonged had either (i) no other women, (ii) 1-10 times another woman, or (iii) more than 10 times another woman. Only one woman indicated that she had sat on an arbitration panel with another woman more than 10 times (Franck 2015, 489–90). Moreover, according to the SCC, which studied 1251 appointments in 60 disputes, between 2015 and 2019 "[t]he average fee for women chairs was 72 percent of the average fee of their male counterparts," (2021, 10) meaning that female arbitrators sat on tribunals that dealt with smaller and simpler cases—the SCC uses an *ad valorem* fee system in which arbitrators' compensation is linked to the complexity of the case [cf. Appendix IV (Schedule of Costs) to the SCC Arbitration Rules]. However, this fee discrepancy did not occur when sole arbitrators were appointed (2021, 11).

increased by about 74.6% from 12.2% in 2015 to 21.3% in 2019.[33] This confirms the trend of more women being appointed as arbitrators over the past 30 years (2020, 19).

Data collected by ICCA Cross-Institutional Task Force also show that arbitral institutions, in their capacity as appointing authorities, have contributed more to reducing the existing gender imbalance than co-arbitrator or disputing parties have over the above period. Tables 2, 3, and 4 show that in 2019, institutional appointments included approximately 34% women arbitrators, while the appointments by co-arbitrators and disputing parties were only 21.5% and 13.9%, respectively.[34]

Tables 1 through 5 present data from all types of arbitrations—contract-based, treaty-based, ICSID *ad hoc* committees, emergency arbitrations. However, the lack of gender diversity is even more striking when looking exclusively at appointments of women arbitrators in investment arbitrations.[35] In this regard, data on arbitrator appointments in 231 ICSID investment arbitrations show that "[i]n less than 10% of the cases, a female arbitrator is appointed as an arbitrator" (Waibel and Wu 2017, 15). This percentage is consistent with previous findings on the appointment of women in ICSID investment arbitrations. For example, Sergio Puig concluded that of all 1,412 appointments made in arbitrations under the ICSID Convention and the ICSID Additional Facility through February 2014, "around 93 per cent

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33 The survey to which I refer in the previous footnote provided us with a somewhat different result, considering that of the 253 people who participated in the survey and had previous experience as arbitrators, 17.6% were women (Franck 2015, 452–53). The divergence can be explained by the methodology used. In this study, the author did not use institutional information on appointments. Instead, respondents (who attended the 2014 ICCA conference in Miami) were asked to complete a survey.

34 These data confirm the finding that institutional authority is important, but by no means decisive, in weighing arbitration dates (Puig 2014, 412, 416). According to the ICSID report for fiscal year 2020, ICSID, respondents, claimants, and disputing parties together were responsible for appointing 53%, 34%, 3%, and 10% of women arbitrators (2021, 28).

35 By 'investment arbitration,' I mean an international arbitration that relates to a dispute arising under an IIA, an investment-related contract, or a domestic foreign investment law between a foreign investor and the state hosting its investment. According to UNCTAD's Investment Policy Hub, as of August 2021:

(i) there were 3,238 signed IIAs, of which 2,815 and 423 were BITs and international agreements containing investment provisions;
(ii) of the 2.815 signed BITs, 2.247 were in force;
(iii) of the 423 signed international agreements containing investment provisions, 329 were in force.

This is information is available at https://investmentpolicy.unctad.org/international-investment-agreements (last accessed February 4, 2022).

[or 1,313] of all the appointments are of male arbitrators" (2014, 404–5). These data confirm that party autonomy—reflected in the right of disputing parties to appoint international arbitrators—has produced conservative and poor results in terms of diversity. They confirm the conclusion that "experience almost always trumps other considerations, including diversity," (Bjorklund et al. 2020, 13) making resistance to reform more likely. This disparity appears to be confirmed by other studies that cover a broader scope (*i.e.*, that include data on appointments in non-ICSID investment arbitrations), although "there is no shortage of women working in the field of investment arbitration" (Bjorklund et al. 2020, 16). For example, Table 6 shows the 25 most frequently appointed arbitrators in investment arbitration (as of January 1, 2017).[36] The 25 individuals identified therein were appointed approximately 35.24% of the time (or 943), revealing a significant concentration of appointments among a small group of arbitrators. Moreover, it is reported that only two women—Professor Stern and Professor Kaufmann-Kohler, "the formidable women" (Yackee 2012, 446, fn.247)—were part of this list, with 144 appointments,[37] even though the pool of arbitrators has grown substantially since the 1990s (Langford, Behn, and Lie 2017, 323).[38] It is instructive, however, that Professor Stern and Professor Kaufmann-Kohler receive the most appointments, even though the number of women in investment arbitration is increasing. Table 7, which lists the 25 women with the most appointments (as of February 1, 2019), shows that of the 314 appointments, Professor Stern and Professor Kaufmann-Kohler top the list with 57% of all appointments (or 179).[39]

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[36] Approximately 3.97% of a total of 629 international arbitrators. This data includes (as of January 1, 2017) (i) all known 831 investment arbitrations arising under the IIA, treaties providing for ICSID dispute settlement, and applicable domestic foreign investment law, and (ii) all appointment methods-appointment by a party, appointment by a co-arbitrator, and appointment by an appointing authority, such as the Secretary-General of ICSID or the Secretary-General of the PCA. Because of the confidentiality of these types of arbitrations and the hurdles to accessing information about them, these data cannot be described as comprehensive (Langford, Behn, and Lie 2017, 306–7). Be that as it may, it is possible to establish a match between the names in Table 6 and the core of the ICSID network identified by Sergio Puig (2014, 412). Of the twenty-five (25) international arbitrators listed in Table 5, twenty-two (22) are also in Puig's network. Note, however, that (i) the data collected were only partially consistent; and (ii) the methods used in the studies were different.

[37] Professor Yackee refers to Professor Stern and Professor Kaufmann-Kohler as the "formidable women."

[38] Moreover, according to data collected by PITAD.beta, as of December 31, 2018, of a total of 2,522 referee appointments, only 203 were women (*i.e.*, approximately 8.05%).

[39] Reappointments are not an exclusive feature of female appointments, as they occur across the spectrum. The statistics show that as of January 1, 2019, of the 3,519 known appointments, there is a group of 50 who have been appointed a combined 1,710 times (or nearly 50% of all

C. Geographic and regional diversity in international arbitration

Along with gender diversity, geographic representativeness takes center stage when it comes to diversity in international arbitration. Many IIAs even make both criteria mandatory. The methods used to determine geography vary across the many studies that have been conducted in this area. In this dissertation, I refer to the nationalities of the international arbitrators.[40] However, places of residence are equally relevant, as there are a significant number of international arbitrators who are not nationals of a WEOG State but who studied, reside, and/or work in such a state (Langford, Behn, and Usynin 2018, 7).[41] The importance of this element cannot be overstated, as there appears to be statistical evidence that in investment arbitrations, for example, "arbitrators with the nationality of a developing country are significantly less likely to affirm jurisdiction and liability" (Waibel and Wu 2017, 24). It is no coincidence that international practice—codified in the arbitration rules of the leading arbitral institutions—is that either all members of the arbitral tribunal, or at least the presiding arbitrator, must be of a nationality other than those of the parties to the dispute.

However, this indicator should be taken with a grain of salt. This is because the nationality of arbitrators can be used as a proxy for other considerations, such as political-ideological orientation, and can be misleading if it is assumed that there are no differences between those who share a nationality (Bjorklund et al. 2020, 4; Koskenniemi 2009, 13).[42]

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appointments made by that date). This also means that the majority of international arbitrators who have served in an ISDS case have done so only once (Bjorklund et al. 2020, 7).

40 I use the United Nations' system of regional groups—Group of African States, Group of Asia-Pacific States, Group of Eastern European States, GRULAC, and WEOG. For more information, see https://www.un.org/dgacm/en/content/regional-groups (last accessed on October 20, 2021). There are alternative methods to measure the geographic distribution of the appointment of international arbitrators. For example, Susan D. Franck measured diversity based on the following criteria: (i) whether the states of which the arbitrators were nationals belonged to the OECD; (ii) the World Bank's classification system, which categorizes states as "high income," "upper middle income," "lower middle income," and "low income;" and (iii) the Human Development Index of the UN Development Program (2015, 462–64).

41 Article 20(2) of the Dutch Model BIT provides, in relevant part, that "[i]n appointing the Members of the Tribunal, the appointing authority shall strive for gender and geographic diversity." Other international treaties have similar provisions. See, for example, Article 36(8)(a)(ii) of the Rome Statute.

42 Equally misleading is the assumption that the genre indicator could not be used in a similar manner.

Consider the relevant data on the appointment of arbitrators in ICC arbitrations.[43] Between January 1, 2016, and October 24, 2021, 1,987 individuals have served as arbitrators in such proceedings, amounting to a total of 4,010 appointments distributed across 107 nationalities. Table 8 shows that of the arbitrators with only one nationality (1,720 or 86.56%), 54.50% of them (or 1,083) had the nationality of a WEOG State, representing 55.11% (or 2,210) of the appointments. It is further significant that, of the arbitrators with more than one nationality (267 or 13.44%), the vast majority of them (260) had as one of their nationalities that of a WEOG State.[44]

Further evidence of the lack of geographic diversity can be seen if we look only at the list of arbitrators that accounted for the most appointments within this period. Table 9 lists all those who had up to 8 appointments and confirms that 85.07% of them were nationals of a WEOG State.[45] However, the gap appears to be narrowing and is no longer as pronounced. For 2020, Table 10 shows that while the ICC made or confirmed 1,520 arbitral appointments in 2020, 70.39% (or 1,070) of appointments were of a national of a WEOG State.

The picture is similar for investment arbitration. Looking at all ICSID arbitrator appointments made through February 2014,[46] the individuals who received the most appointments were nationals of WEOG States—particularly New Zealand, Australia, Canada, Switzerland, France, the United Kingdom, and the United States of America. This disproportionate distribution is confirmed by more recent data. Tables 12 and 13 summarize data on the distribution of arbitrators and arbitration appointments by region (as of August 1, 2018). They show that 65% (or 454) of all arbitrators ever appointed in investment arbitrations (or 695) and 74% (or 2,452) of all arbitrators ever appointed in such proceedings (or 3,327) were nationals of a WEOG State—although non-WEOG States figured more frequently as

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43 The ICC is the arbitral institution with the largest caseload in the world, including in international arbitrations. In its efforts to promote transparency and diversity, the ICC provides important information about ICC arbitrations, including the nationality of arbitrators. This data can be found at https://iccwbo.org/dispute-resolution-services/arbitration/icc-arbitral-tribunals/ (last accessed on October 24, 2021).

44 For the distribution of dual nationals in the other regions, see below, fn.188 below.

45 Notwithstanding the fact that 7 of these international arbitrators also have the nationality of a state of another regional group. These arbitrators are Eduardo Silva Romero (Colombia), Hamid G. Gharavi (Iran), Giovanni Ettore Nanni (Brazil), Georges Affaki (Syria), Nayla Comair-Obeid (Lebanon), Jose Feris (Guatemala and Dominican Republic), and Franz Xaver Stirnimann Fuentes (Peru).

46 See, fn.36 above. In total, by that time, arbitrators appointed in ICSID investment arbitrations were nationals of 87 states.

respondent (Langford, Behn, and Usynin 2018, 6).[47] The lack of geographic diversity is also evident in the twenty-five most frequently appointed arbitrators (as of January 1, 2017) (Table 6). Only four individuals were not nationals of WEOG States.[48] Interestingly, these four individuals were either residents or had their professional practice in a WEOG State (Stanimir Alexandrov and Rodrigo Oreamuno) or were from high-income Latin American states (Chilean Francisco Orrego Vicuña and Argentinian Horacio A. Grigera Naón). Moreover, among the twenty-five most frequently appointed arbitrators who are not nationals of a WEOG State (Table 14), a disproportionate number of arbitrators are from a GRULAC state—44% (or 11) with approximately 54.14% (or 242) of the appointments—than from any other regional group.[49]

D. Concluding remarks

The current state of diversity in international arbitration is marked by inequality. Data on gender, and geographic and regional diversity is evidence of this. However, the issue of diversity in international arbitration can be viewed from a variety of angles. Indeed, arbitration users seem to be increasingly aware of the importance of taking into account alternative considerations such as the ethnicity of arbitrators. Educational background, legal or otherwise,

47 These figures are consistent with those of Sergio Puig, who analyzed all 1,412 appointments made in arbitrations under the ICSID Convention and the ICSID Additional Facility through February 2014 (Puig 2014, 405). According to the ICSID report for the fiscal year of 2020, the institution achieved "the greatest nationality diversity in arbitrator appointments" with the appointment of individuals of 44 different nationalities (2021, 26). It goes on to say that 15% of all appointments were first-time and 42% of them were nationals of low- or middle-income countries (*Ibid*).

48 These arbitrators are Stanimir Alexandrov (Bulgaria), Francisco Orrego Vicuña (Chile), Rodrigo Oreamuno (Costa Rica), and Horacio A. Grigera Naón (Argentina). Looking at the list of 25 female arbitrators with the most appointments in investment arbitrations (as of February 1, 2019) (Table 7), the picture is similar—only 5 female arbitrators are not nationals of a WEOG State, namely Teresa Cheng (Hong Kong), Nina Vilkova (Russia), Nayla Comair-Obeid (Egypt), Maja Stanivuković (Serbia), and Mónica Pinto (Argentina).

49 These arbitrators are Francisco Orrego Vicuña (Chile), Rodrigo Oreamuno (Costa Rica), Horacio Grigera Naón (Argentina), Claus von Wobeser (Mexico), Eduardo Zuleta (Colombia), Raúl Vinuesa (Argentina), Guido Santiago Tawil (Argentina), Eduardo Silva Romero (Colombia), Ricardo Ramírez Hernández (Mexico), Enrique Gómez Pinzón (Colombia), and Pedro Nikken (Argentina).

professional experience,[50] age,[51] ethnicity, ideological and political preferences,[52] psychological and behavioral characteristics are just a few alternative angles. But the landscape of international arbitration is changing and changing gradually. The relevant data is also evidence of this trend. In this context, it is worth recalling Dezalay and Garth's words about the status of the ICC, as they are indicative of what happens with the appointment of international arbitrators in general. They said as follows:

> […] history is a key legitimator in the legal field. No one can compete with tradition without ending up underscoring that one group is a new arrival and another the established elite, akin to the aristocracy. The passage of time also tends to obscure the politics that created an institution, thereby giving it an aura of naturalness. (1995, 46).

Be that as it may, this change cannot be properly understood unless it is placed within the broader political framework that calls for increasing diversity across a range of fields and disciplines. After all, the trend we are now witnessing is also part of the international arbitration community's goal to make its social interests more heard and to further contribute to its legitimacy.[53] But regardless of whether international arbitration is indeed diverse enough, it remains important to determine whether the application of the law varies depending on who interprets it. To this end, we must address how we think and decide as

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50 It should come as no surprise that the professional profiles of international arbitrators are not simply the result of change, but of careful consideration. Indeed, members of the arbitral establishment and newcomers interact with each other in such a way that "each side seeks to promote the value of the know-how or the competence that it has mastered the best […] [and] to gain a diversified portfolio of arbitration capital" (Dezalay and Garth 1995, 42–43).

51 For an overview of the generational conflict between the pioneers of international arbitration and the technocrats who came after them, see (Dezalay and Garth 1995). The issue of age is controversial among users of international arbitration. Some have disregarded the lack of age diversity, emphasizing that relevant experience is more important. Others have observed that "in general, they have felt younger arbitrators display a particular drive to perform well in arbitration, hoping that their proficient conduct will be noticed and that they will therefore attract more appointments in the future" (Queen Mary - University of London and White & Case 2018, 17).

52 For example, there has been speculation as to whether the consistent appointment of Charles Brower (96.15%), Horacio A. Grigera Naón (85.71%) and Stanimir Alexandrov (78.13%) by foreign investors, on the one hand, and Brigitte Stern (93.18%), J. Christopher Thomas (97.67%), and Phillipe Sands (83.33%) by respondent states, on the other, has anything to do with their favoring either foreign investors or host states.

53 See, fn.26 abobe.

human beings before we plunge into the wonders of legal doctrine. I will proceed as suggested in the following chapter.

CHAPTER II | HOW WE THINK, CHOOSE, AND ACT

A. Somatic markers as the basic framework for what is coming

More than a hundred years ago, Dostoevsky noted puzzlingly that "human motives are generally much more complicated than we are apt to suppose, and that we can very seldom describe them accurately" ([1868] 1963, XXIX:494).[54] The bewilderment of human motives was not only a source of wonder in Russian literature. Fortunately, we are no longer in the same place in this respect, and the scientific investigations that followed have shed more and better light on the wonders of the human mind. I shall now provide a brief account of how we think, choose, and act based on psychological and neurobiological findings. I undertake this task, albeit out of caution and prudently, because I believe that if we are to conduct a thoughtful analysis of the phenomenology of legal reasoning, we must take into account the larger framework within which our daily thinking, choosing, and acting take place, in addition to welcoming on board at a later stage the idiosyncratic features of the legal doctrine. Otherwise, I fear, for this reason alone, the essence of the latter could never be achieved—after all, the quality of humanity takes precedence over that of a lawyer, an adjudicator, an attorney.

By thinking and reasoning, either consciously or intuitively, we try to choose an answer from alternative possibilities. Accordingly, recognizing how we think in everyday life is paramount to understanding legal reasoning. For every legal decision, regardless of its inherent complexity, is also the result of a thorny network of biological mechanisms, cultural and personal references, and value-based judgments in which attention, working memory, emotion, and the ability to select one possibility from a diverse repertoire are indispensable tools.

In reasoning, the mental landscape is not equivalent to a blank canvas waiting for a painter to fill it with colors. Even before we begin to reason, an extensive and rich repertoire of images populates our minds, which we draw upon in the face of the specific circumstances we face. Each of these images—perceptual or recalled—reflects a variety of words, languages, ideas, broad knowledge—including legal knowledge—priorities, interests, experiences, and preferences that form categories to which we constantly draw upon to guide us in making

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[54] Free translation of "*Não esqueçamos que os móbeis das acções humanas são habitualmente muito mais complexos e mais variados do que parecem à primeira vista; raro é que se definam nitidamente.*"

decisions as they all vie for the highest relevance. In this regard, somatic markers prove useful in explaining how our brains carry out decision-making processes that lead to more accurate and efficient outcomes. They reveal the most likely relevant components, thus reducing the available options for our minds to consider. Moreover, there appears to be compelling evidence to support the idea that somatic markers are largely a product of upbringing and socialization, both of which are intricately linked to secondary emotions. This means that personal experiences and history, as well as social practices, play a fundamental role in their formation and development (Damásio 1995, 166, 170, 175–79).

At this stage, before somatic markers come back into play, Damásio says that attentional tools and working memory are also relevant, because they allow us to keep certain images in mind to the exclusion of others. This process is essential to reduce the available options, from which a final choice will be eventually made. However, the exclusion of certain categories obviously depends on value-based judgments about the competing alternatives in question. In other words, based on a given landscape, especially given our fidelity to certain behavioral patterns, we select and reach conclusive outcomes by first reducing the relevant components to the possible minimum and then comparing and ranking their potential outcomes.

Notwithstanding their contribution to improving the efficiency and accuracy of the reasoning process, however, somatic markers can also have the malignant effect of "creating an overriding bias against objective facts or even by interfering with support mechanisms of decisions making such as working memory" (1995, 192, 196–98). According to Damásio,

> "[o]ne possibility is that when different somatic markers are juxtaposed to different combinations of images, they modify the way the brain handles them, and thus operate as a bias. The bias might allocate attentional enhancement differently to each component, the consequence being the automated assigning of varied degrees of attention to varied contents, which translates into an uneven landscape. […] Since many decisions have an impact on an organism's future, it is plausible that some criteria are rooted, directly or indirectly, in the organism's biological drives (its reasons, so to speak). Biological drives can be expressed overtly and covertly, and used as a marker bias enacted by attention in a field of representations held active by working memory. The automated somatic-marker device of most of us lucky enough to have been reared in a relatively healthy culture has been accommodated by education to the standards of rationality of that culture. In spite of its

> roots in biological regulation, the device has been tuned to cultural prescriptions designed to ensure survival in a particular society. If we assume that the brain is normal and the culture in which it develops is healthy, the device has been made rational relative to social conventions and ethics" (1995, 199–200).

The way we think, choose, and act is the result of a complex and potent interplay of our biological predisposition, our cultural and personal references, and our ancestry, as well as the value judgments we make in light of these factors. There is compelling evidence that these references and evaluations are linked to secondary emotions. Thus, if we want to understand how the phenomenology of legal reasoning works, we should look at what identities are and how they actually affect us.

B. Identities and socialization

Respect for any particular perspective depends on accurately identifying its roots and understanding the resulting affiliations, which largely depends on recognizing the dominant features of the way we organize and interact. Social organization, which consists of a pervasive network of categorizations across groups, is embedded in the understanding that we do better and achieve our goals more easily when we stick together. The behavioral frameworks that we often unreflectively draw upon in our everyday lives (Zigon 2007, 138) form the backbone of our identities and influence, in part, how we think, choose, and act "in situations to which some criteria of intergroup division can be meaningfully applied" (Tajfel et al. 1971, 153). Our identities aim to give coherence to the social environment in which we find ourselves and to give meaning to our lives. Therefore, the way we interact with each other cannot be fully understood without taking them into account. Each of our identities—ideology, class, culture, ethnicity, geography, race, gender, religion—includes certain practices based on specific historical and personal perspectives, memories, and traditions, all of which are fundamental to understanding who we are, how we think, and what and how we feel (Wieviorka 2002, 41, 200–201).[55] They reflect our psychological makeup and provide us with valuable information

[55] Although memories are an essential feature of any identity, there are times when forgetting is equally fundamental to its construction. As noted by Wieviorka, national identities are often built on episodes of extreme violence that when they become permanently embedded in the collective consciousness of their members those identities become under threat. Accordingly, in looking back on their history, members of identities feel the need to purge the more violent episodes,

in relation to our various psychological views and each dimension of our lives—education, health, love, kinship, parenting. Our identities mark the boundaries of our 'being-in-the-world' (Zigon 2007, 138) and help fill in our mind landscapes. And while subjectively it says much about who we are, identity is also a key contributor to how we perceive those who belong to other groups as different, alien, or even threatening. Assuming an identity means that we reproduce certain practices, including in our relations with others, and it often influences us to categorize others in the dichotomous terms of 'us' and 'them.'[56]

The claim is that the social practices linked to our identities serve as reference points on which we base our perceptions of the world and our convictions of how we should treat others. They often reflect competing values, interests, and priorities, and their interplay can trigger contradictory, rejecting, or discriminatory behaviors. In the words of Amartya Sen,

> "[o]ur entire understanding of the world, it can be argued, is thoroughly dependent on the perceptions we can have and the thoughts we can generate, given the kind of creatures we are. […] Our very understanding of the external world is so moored in our experiences and thinking that the possibility of going entirely beyond them may be rather limited" (2009, 170–71).

This is further evidenced by the fact that various instances of prejudice and discrimination against outgroups, while varying in degree, "clearly display a set of common characteristics" (Tajfel 1970, 96). Members of one group tend to treat members of another group and whatever they represent with hostility, suspicion, or distrust, even in the absence of external factors exerting a negative influence (such as economic hardship) or even when they oppose scientific evidence that supports a position contrary to their values (Kahan 2014, 6–7).

"at least as long as a collective mourning work has not been carried out" (2002, 201–2) (free translation of "[…] *pelo menos, enquanto um trabalho de luto colectivo não tiver sido levado a cabo*.")

[56] In a series of experiments between 1970 and 1971 aimed at activating the "norm of 'groupness'" (Tajfel et al. 1971, 174), Tajfel and his team concluded that, when asked to choose between rewarding or punishing members of their own group or members of the other group, they tended to favor members of their own group more strongly (Tajfel 1970, 101). The two experiments conducted show that "outgroup discrimination is extraordinarily easy to trigger off" (1970, 102), even if fairness always played a significant role. They also show that when faced with alternative choices, we tend to think and decide in the interest of the groups to which we belong.[56] It should also be noted that, when participants were asked to reward only members of their own or the other group, their choices were narrowly distributed around the point of maximum fairness. In another experiment, they also found statistical significance for subjects' preference to maximize own-group gains and to increase the difference between own-group and outgroup gains (Tajfel 1970, 101–2; Tajfel et al. 1971, 167–69).

Accordingly, the demand for diversity can be understood either as an urge for group survival or as part of its quest for greater visibility, or as an urge to deprive opposing groups of their dignity, influence, respect, power and money (Wieviorka 2002, 84, 120).[57] As Damásio categorically puts it, "reasoning is something we often do in groups, in order to serve group ends" (1995, 85).

However, our identities are rarely homogeneous and unchanging, primarily because in any community there are a variety of social groups and cultural references to which we can refer in constructing our own selves (Wieviorka 2002, 22–23).[58] Furthermore, for many people "not one but several cultures contribute to a single identity," meaning that "[n]ot only societies, but people are multicultural" (Gutmann 1993, 183). The richness of identities thus varies from place to place, community to community, and historical context to historical context. This provides us with additional reasons to reject the idea that social groups and identities, and the intersubjective relations that follow from them, have only a unique cultural framework as their essential core, even that of a community organized around a state or nation.

As a result, there are no insurmountable boundaries between identities, but rather they are likely to interact with each other in multiple and unexpected ways (Wieviorka 2002, 24–25, 63), the extent of which depends on the degree of liberty individuals enjoy and the type of obligations imposed on them. However, this does not change the fact that the values upheld by the political communities to which we belong, often embodied in a specific scheme of political morality, have a crucial impact on our identities. It simply means that these identities do not define individuals in their entirety and that, except in a probabilistic sense, it would only be possible to construct an incomplete picture of ourselves if we were to infer from our political affiliations the values with which we identify (Gutmann 1993, 185–88).

Our thinking, reasoning, and acting are related to our identity footprint, and each of our choices is best understood through the social practices of our groups and what they reflect. Those who come from the same group tend to interact similarly with their environment, and

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[57] The confrontation of identities does not always lead to victory or defeat in the sense that one must survive and the other perish—when one identity assimilates the other or denies it any influence in a given space and historical period. Such confrontations can sometimes create something new as the result of an acculturation process in which the confronted identities influence each other.

[58] This is perhaps more the case in modern and liberal democracies, where the individual enjoys a greater degree of liberty, where he finds support for his idiosyncrasies and for his willing search for alternative points of reference according to which he wishes to lead his life (Wieviorka 2002, 173).

their survival may actually depend on their ability to reproduce these shared practices. But no matter how homogeneous identities may be, there is always the likelihood of disagreement among those who share them. We are not hostages to our identities. The way we interact with our identities as individuals is crucial because the ties that bind us can be torn, altered, or reshaped at any time. Even more, individuals can—and often do—define themselves against a particular identity (Wieviorka 2002, 177–81). Even when an identity is shared by only a handful of people, they may ascribe different priorities to shared values and shape their lives in different terms accordingly (Dworkin 2011, 215).

Accordingly, the weight of each identity is rarely equal and its influence homogeneously distributed; some may be strong identities to which we attach great importance, while others have less relevance. The identities do not even all come into play at once. It is the various circumstances in which we may find ourselves that play a significant role in determining which of our identities is activated—and with it exactly which framework should be used for understanding the reasons behind a specific action or decision. Often, such activation tends to occur when the corresponding identity is threatened. Only through conscious and vivid reflection can we find out which identity is triggered and then familiarize ourselves with the underlying conditions, motives, goals, and meanings, no matter how challenging that may be.

C. How our decisions reflect value

> *He looked at his fellow prisoners and was amazed to see how they all loved life and prized it. […] Could they care so much for a ray of sunshine, for the primeval forest, the cold spring hidden away in some unseen spot, which the tramp had marked three years before, and longed to see again, as he might to see his sweetheart, dreaming of the green grass round it and the bird singing in the bush?* (Dostoevsky [1866] 2010, 714)

So, our identities help us reduce social complexity in our interactions. In particular, "[s]ocial interaction is necessary both for one to learn to be a self-conscious moral person, a person with moral sentiments and moral conscience, and to make proper moral judgments" (Carrasco and Fricke 2016, 249, 260). However, the question of how they enable us to give value to our choices and actions remains unanswered. Understanding how we can do just that, therefore, requires more than recourse to alleged bare facts demonstrated by science or otherwise. Rather the truthfulness of a moral judgment requires that we present a case within morality itself to support it. For "[m]orality stands or falls on its own credentials […] we need a theory of what questions we must have asked ourselves before we are entitled to hold and act on a moral opinion" (Dworkin 2011, 80). The truthfulness of any moral judgment, then, must be asserted within morality itself.[59]

We must, then, place our choices and actions within a larger framework of value in which our ethical responsibility to live well and our moral responsibility for how we should treat others are the essential features. However, the notion of living well requires more of us than simply acting in accordance with our moral obligations and duties (2011, 202). Moreover, we must strive for coherence among our moral convictions, which arise from our interpretation of the moral concepts we all share. Although we may have different practices depending on our identities, we do share moral concepts—justice, cowardice, honorableness, fearlessness, righteousness. But we often disagree about what makes something righteous, cowardly, honorable, fearful, or righteous. This is because the interpretation of moral concepts is not criterial in the sense that we have agreed in advance on a decisive test to determine their content. Discussions regarding criterial concepts based on predetermined criteria can lead to disagreement only in borderline cases (2011, 158–61). Instead, the correct application of moral

[59] On this topic, see (Gomes Moreira 2016).

concepts asks for the best interpretation of the practices in which they figure (2011, 12, 158–69).

Moral reasoning is thus interpretive and claiming its objectivity does not amount to denying the possibility of moral disagreement about which the best interpretation is. It is nonetheless a kind of objectivity that is different from that of science. It is important to resist the temptation to confuse this approach with moral subjectivism. For it is a type of objectivity that is position-dependent because, while the object under interpretation is the same, it needs to take into consideration the positional variability of those making the judgments. Amartya Sen explains the notion of 'positional objectivity' as follows:[60]

> "[w]e are concerned here with person-invariant but position-relative observations and observability, illustrated by what we are able to see from a given position. The subject matter of an objective assessment in the positional sense is something that can be ascertained by any normal person occupying a given observational position" (Sen 2009, 157–58).

It is unlikely, however, that at each moment of our lives we find ways to achieve a state of full ethical and moral coherence. But, even if along the way failure in fulfilling that quest is inevitable, it seems altogether gratuitous to ignore the importance of aiming at that goal. Accordingly, while conscious of such moral and ethical challenges, it is necessary to understand how to integrate both concepts in a universal and objective framework of value by which we ought to guide our lives.

1. The meaning of living well: self-respect, authenticity, and judgmental responsibility

It is legitimate to ask what living well actually means and requires of each of us. As mentioned earlier,[61] this concept is related to the success with which we live our lives, as opposed to what we can achieve in that time. These concepts point to different realities, but at times they are potentially juxtaposed. It is conceivable that we have lived well without living a good life; that we have achieved our best possible life without having lived well; or that we have lived well and had a good life. The concept of living well reflects how we choose to live and shape our lives—its adverbial value—while whether we live a good life refers to our ability to satisfy our crucial interests—its product value. An ethical value approach, therefore, means

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60 The concept of 'positional objectivity' had already been put forward. See, for example, (Le Bon [1895] 2020, 13).

61 See, Chapter II(B) above.

taking seriously both the adverbial value of our lives—the principle of self-respect—and our personal responsibility to act in accordance with the ethical choices we make throughout that time—the principle of authenticity.[62] The reciprocity, then, between recognizing human dignity as objectively important and the way we live our lives means that the success with which we do the latter depends not only on whether we achieve what we truly desire. It is above all a question of our ability to live up to our ethical responsibility to lead an ethically successful life. For only when we do so do we express our highest respect for our lives and the lives of others. This understanding marks the limits of civilization (Dworkin 2011, 112, 195–204).

If we are to take our lives seriously and live up to this ethical responsibility, we must particularly strive for independence in choosing the lifestyle we find most valuable.[63] Such a choice should not be arbitrary but be guided by a desire to live well in particular historical, cultural, and political contexts (Dworkin 2011, 208, 211, 215–16; Wieviorka 2002, 124, 170). As explained elsewhere,[64] in making such decisions we are influenced by a variety of desires—from the need to challenge a particular social situation to the rejection or adoption of a particular cultural model (Wieviorka 2002, 150). It is in light of these guiding principles, upon which we base our decisions and judgments, that we can make sense of our lives and that we seek out the groups and identities we deem best suited to fulfil our desire for belonging and a meaningful and successful life.

The anthropological fact that identities are formed by reference to diverse social practices has its ethical justification right here. We find it important to take seriously the pursuit of living well because we believe that the adverbial value of our lives has an objective and universal meaning. Ethical independence, then, is not at odds with the relevance of social conformity and cultural pluralism, for the latter remains essential to contextualize our thoughts, choices, and actions—and, more importantly, to give us the meaning we desire. Independence,

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62 These two ethical principles must be developed in conjunction with our moral duties and obligations to others. In other words, the content of these principles is directly influenced by morality. As Kamm succinctly explains: "[…] our attraction to morality can be explained by the threat to our own dignity if we do not treat others as important in their own right. […] if one has a special responsibility for one's own life going well, this will be true of every other person, and will affect what is morally expected of each person" ([2002] 2010, 694).

63 The responsibility for living well that should guide our choices presupposes that actors possess a set of judgmental capacities. All those exceptional cases in which the acting agents do not have these capacities (*e.g.*, children, the mentally ill) means that they should not be held responsible for their allegedly unethical decisions.

64 See, Chapter II(B) above.

therefore, requires that we consider the relationship between social conformity and our independent choices. Even though social practices influence our judgments and decisions, attempting to behave appropriately ultimately means "to behave according to one's best understanding of the situation" (Tajfel 1970, 96, 102), and this requires us to engage in further interpretative exercises.

This responsibility is, as Scanlon qualifies it, "non-delegable," ([2002] 2010, 606) and requires some degree of self-reflection (Wieviorka 2002, 174, 190–91). If we thoughtlessly base our choices on social practices, whether voluntary or imposed, we would be living an inauthentic life overall and rejecting that objective and universal ethical meaning (Dworkin 2011, 204). We are thus responsible for our decisions and actions.[65]. Our ethical independence must go hand in hand with the notion of judgmental responsibility, for dignity demands that we commit ourselves to what we have chosen for our lives. In determining our responsibility, it is completely irrelevant whether our actions were in any way planned and their causes are beyond our control. We are responsible for our choices whenever we are "conscious of facing and making a decision, when no one else is making that decision through and for [us], and when [we have] the capacities to form true beliefs about the world and to match [our] decisions to [our] normative personality" (2011, 228).[66] In other words, assuming we are acting consciously, we are ethically responsible if our choices meet both thresholds—the capacity to form true beliefs and the capacity to pursue a particular path in light of them (2011, 230–33, 241–52). This is without prejudice, of course, to those cases in which a decision or an action can be said to be attributable to the agent—because he possessed both of these capacities at the time he decided to perform it—but the context of injustice under which he actually decided to do so—situations of coercion or acute social injustice—may justify a lesser degree of culpability (Dworkin 2011, 250–52; Scanlon 2010, 609–10).

It is undeniable, however, that many of the most important relationships of our lives—involve coercion and responsibility, and thus hopelessly attacks our sense of dignity. But these relationships are at the same time one of the most important sources of adverbial value in our lives. So for them to be compatible with our dignity, some conditions must be met, including

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65 For those who hold a deterministic view, the question must be answered in the negative, since for them our behavior is predetermined in whole or in part by past events over which we have no control. Therefore, it is unreasonable to hold anyone responsible for the resulting consequences. As mechanically as our actions, our values, beliefs, and decisions are the product not of free will but of a script. In this view, our judgmental responsibility is merely illusory.

66 Even if we accept that their causal explanations come from an external, uncontrollable force.

reciprocity.[67] When this is the case, the adverbial value of our lives increases because each of these relationships contributes to the adverbial value of our lives (Dworkin [1986] 1998, 198).

As mentioned earlier,[68] we all have multiple identities at the same time, and even when we try to find principled answers, the results we arrive at are often contradictory. Living well, then, depends on our ability to strive for ethical coherence and integrity, because no matter how challenging, a haphazard life is completely incompatible with that goal. The way we typically exercise our responsibility to live well seems to underpin this understanding—we strive for coherence among our values, ideas, loyalties, preferences, and priorities with the goal of achieving a state in which they are mutually supportive (Dworkin 2011, 101, 105).[69] If we want to live an ethical life full of adverbial value, it must be consistent with the principles of self-respect and authenticity. Only then will we recognize the lives of others as equally important. This is the basis for how we should treat others, which is a question of morality. It is the subject of the following section.

2. The essence of morality: our responsibilities toward others

Before proceeding with the integration of morality and ethics, it is important to explain what I mean by the that concept. Morality refers to the duties and obligations we should have in our dealings with others. In the previous section, I highlighted the importance of the principles of self-respect and authenticity, and explained how both are important in the pursuit of a life with adverbial value. The first principle commands us to recognize the objective meaning of our lives and that this objectivity requires that we recognize equal value in the lives of others. However, if we are to be coherent, we must also ask ourselves what this recognition

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67 Ethical independence also determines the limits of liberty from government interference—negative liberty. It is our responsibility to define and pursue our own concept of existence. State interference should be allowed only if it is justified on moral and ethical grounds. Since these are interpretive concepts, defining these limits is a matter of interpretation to find a mutually supportive scheme. This is a question of political morality, a topic I will address in Chapter III(A) below.

68 See, Chapter II(B) above.

69 As Scanlon notes, our past actions—which were the product of our values, conceptions, loyalties, preferences, and priorities at the time—can be reevaluated and challenged at any time ([2002] 2010, 607). This is also why we often perceive them with a sense of regret because, after careful reevaluation, we conclude that we no longer accept those justifying motives, no matter how coherent we thought they were before.

means in terms of how we should treat others. Otherwise, an integrated and mutually supportive framework of value remains unattainable.

One could say that in the realm of morality and ethics there are no right or wrong answers to moral disagreements. One explanation is that the social practices of each identity, in their diversity and comprehensiveness, provide sufficient resources to determine what we owe each other in our interactions. According to this understanding, the distribution of social goods should be based solely on a supposed social consensus on idiosyncratic social practices. There is no determinacy, no commensurability, and no objective in the search for the best way to make this distribution. Social consensus and social practices serve as the ultimate, factual, and sole moral authorities.[70]

Such indeterminacy therefore leaves us little room for moral criticism (Gutmann 1993, 173, 176). If a moral disagreement is to be resolved in this way, then the preference of one side's arguments to the detriment of the other depends entirely on the social practices of the community in which the disagreement arises. That is, when we think about and weigh all perspectives, we conclude that each answer can be equally valid and convincing, and that everything depends on where the disagreement takes place. This indeterminacy, however, is nothing less than a positive moral judgment, which also calls for a positive, coherent, and mutually supportive case within the boundaries and throughout the spectrum of morality and ethics. Indeterminacy is not a default position and should never be considered as such (Dworkin 2011, 90–96).

Social practices alone, however, are not enough to answer the question of how our treatment of others is morally valuable. There is something else we need to consider if we are to live morally fulfilling lives. It goes without saying, moreover, that we normally think and act on the basis that the truthfulness of our moral judgments is indeed objective and universal, that is, that moral truthfulness exists in our interactions with one another whether we believe it or not. After all, the propositions that killing is wrong and objectively condemnable, or that generosity and solidarity are virtuous and praiseworthy, are not moral convictions unique to particular identities. But what else do we need? As mentioned elsewhere,[71] our moral convictions are not just a matter of fact, but of interpretation and argument. It is based on the

[70] It is worth noting that even within identities there is no guarantee that there will be broad agreement on the justifications for particular moral judgments. Everywhere and within the full range of identities, dominant groups may take on the task (sometimes even unilaterally and without extensive debate) of defining the best moral understanding of a particular question.

[71] See, Chapter II(C) above.

notion that each of our social practices—a matter of fact—has an inherent value that is expressed in the many moral concepts we share. But what the content of these moral concepts is and what they require of us is a matter of interpretation based on recognition of the importance of the lives of others (2011, 104, 260–61). Their meaning is never fixed forever, as is the case with criterial concepts. Instead, we must systematically ask ourselves what their best interpretation is so that we can determine the content of our moral duties and responsibilities. This determination varies from community to community—where prevailing social practices vary—from time to time, of course, but also from person to person.

Our decisions and actions, then, should be examined in light of our moral convictions, the content of which is derived from the best interpretation of these many concepts.[72] The question of what moral concepts require of us, then, is not immune to controversy. Indeed, conflicting judgments about what we owe one another—in terms of aid or not harm—can arise because we disagree about what it means in practice to treat every human life as objectively important. The prerequisite for such a judgment to reach the required threshold, therefore, is that it be based on a morally responsible argument that allows "our various concrete interpretations achieve an overall integrity so that each supports the others in a network of value that we embrace authentically" (2011, 101). In other words, for a moral conviction to be sound, one must make an argument in support of it.

However, our moral obligations and responsibilities do not always require everyone to do the same. An important aspect of how we are to treat others is that the content of particular moral obligations and responsibilities is in some sense *personal* and *special*, for they exist only within particular relationships and bind exclusively those who play a role in those relationships. These moral obligations and responsibilities can be either performative or associative, depending on whether they arise voluntarily or involuntarily respectively. As with the other more general moral obligations, this is not just a matter of describing social practices, but also of further interpretive exercises. As noted earlier,[73] however, any such moral obligation or responsibility need to be reciprocal. Otherwise, our dignity would be at risk (Dworkin 2011, 312).

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72 Different people have therefore different moral convictions.

73 See, Chapter II(0) above.

Thus, for our choices to be morally defensible, it is not enough for us to unconsciously rely on or imitate social practices, as if that alone would absolve us of our moral obligations and duties. Instead, what is expected of us in our dealings with each other should be based on the best interpretation of the moral concepts that figure in these practices. This framework therefore acts as a filter through which, and in light of which, our priorities, interests, and biases must be censored and shaped.[74]

> Our moral responsibility requires us to try to make our reflective convictions into as dense and effective a filter as we can and in that way to claim as much force as possible for conviction within the more general causal matrix of our personal history as a whole. This requires that we seek a thorough coherence of value among our convictions. It also requires that we seek authenticity in the convictions that cohere: we must find convictions that grip us strongly enough to play the role of filters when we are pressed by competing motives that also flow from our personal histories. Our convictions are initially unformed, compartmentalized, abstract, and therefore porous. Responsibility requires us critically to interpret the convictions that seem initially most appealing or natural—to seek understandings and specifications of these initially appealing convictions with those two goals of integrity and authenticity in mind. We interpret each of these convictions, so far as we can, in the light of the others and also in the light of what feels natural to us as a suitable way to live our lives (2011, 108–9).

The depth and relevance of such an approach means that the commands associated with our personal history are not morally binding or immutable (Gutmann 1993, 185, 188).[75] It further means that our personal history, however relevant, cannot by itself provide the justification for our decisions and choices, even though it may explain why we made them.

Accordingly, the achievement of any degree of certainty about whether our actions pass through that filter does not require us to rely on any external entity—be it biological, physical, or metaphysical. What we ought to do instead depends on circular value-based interpretations

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74 Although Wieviorka sees the need to resort to an external agency—the law and reason—to justify the truthfulness of a moral judgment, he nevertheless seems to accept that this is a filtering function of morality (Wieviorka 2002, 178).

75 To avoid any kind of skepticism about this idea, it is worth returning to Tajfel's conclusions that fairness plays an essential role in the choice between ingroup and outgroup (*i.e.*, when subjects had the choice of rewarding either members of their own group or members of another group).

in which we strive for coherence among our conceptions of moral and ethical concepts. It is to say that the truthfulness or falsehood of our moral judgments stems from a first-order moral theory (Dworkin 2011, 44, 66–67).

Recognizing that much is not, however, tantamount to denying the relevance of the social practices and conventions and the frameworks of behavior associated with them. Morality neither quashes cultural diversity nor does it imply that there is no space for uncertainty and disagreement. Not only social practices are useful to reduce the uncertainty surrounding the question of what morality indeed requires from us, but in them figure the moral concepts on which we base our moral convictions (Dworkin 2011, 316). Our morally convictions are contextually sensitive, for they take place from and within particular points of view and reflect "understandings of and reactions to social precepts and practices" (Gutmann 1993, 189).

D. Concluding remarks

It is legitimate to ask what the relationship between identities, ethics and morality, law, and international arbitration is. I think the answer is quite straightforward. No one is immune from their overwhelming influence, not even international arbitrators, however brilliant some of them may be—and they would not see it any other way. They, too, have certain identities that shape and influence their thinking, their decisions, and their actions—all the tensions, conflicts, violence, and antagonisms that arise from diversity mobilize everyone at the core of our communities (Wieviorka 2002, 26). They, too, make decisions that reflect—or should reflect—value judgments based on ethical and moral convictions. Moreover, "morally responsible people act in a principled rather than an unprincipled way; they act out of rather than in spite of their convictions (Dworkin 2011, 103).

In the Introduction, I noted that in this dissertation I am concerned with how the law should be interpreted and enforced. It is unlikely that the way international arbitrators think is irrelevant to the decisions they reach. Otherwise, it would seem nonsensical how much time and energy disputing parties spend investigating arbitrators' backgrounds before making an appointment. Thus, based on the recognition that acting in a principled way is relevant, it is worth examining how legal reasoning is affected when adjudicators act in this way. It seems insufficient to say that arbitral decisions are subject to the risk of bias and groupthink, and that diverse panels improve their underlying quality—although there may be nothing to argue

against such a hypothesis.[76] It is essential to establish a link between political morality and legal doctrine if we are to thoroughly discuss the issue of diversity in international arbitration. It is necessary to integrate all these dimensions into a mutually explanatory and interconnected system, because legal doctrine "cannot be divorced from its main social actors" (Puig 2014, 393). In the following chapters, I will attempt to do so.

[76] The *2018 International Arbitration Survey: The Evolution of International Arbitration* asked users of international arbitration whether they believed there was a causal relationship between diversity in an arbitral tribunal and the quality of its decision-making. Users' responses did not predominantly focus on a single viewpoint, but were distributed as follows:

(i) 25% of responses indicated that "the effect of diversity across a panel of arbitrators on the quality of that tribunal's decision-making 'depends on the particularities of the dispute in question;"
(ii) 22% of responses indicated that "diversity brings about 'some improvement in quality;"
(iii) 18% of responses indicated that "diversity leads to 'significant improvement in quality;"
(iv) 19% of responses considered the survey irrelevant "because they consider diversity to be inherently valuable in and of itself;" and
(v) the remaining 16% believed that "diversity does not make an appreciable difference in quality or can even reduce the quality of the decision-making."

(Queen Mary - University of London and White & Case 2018, 16).

CHAPTER III | POLITICAL MORALITY AND THE LAW

> *Justice, on the contrary is the main pillar that upholds the whole edifice. If it is removed, the great, the immense fabric of human society, that fabric which to raise and support seems in this world, if I may say so, to have been the peculiar and darling care of Nature, must in a moment crumble into atoms* (A. Smith [1793] 2015, 142).

A. There is more: political communities and political morality

In the previous chapter, I addressed the question of how our decisions and choices reflect and retain their value from an ethical and moral perspective. In line with Dworkin, I rejected the notion that ethical and personal moral responsibilities are simply a matter of fact. Instead, the truthfulness of moral convictions requires that an argument within morality itself be made in support of them. Moreover, these arguments must reflect how our interpretations fit with what we believe to be the best conceptions of other concepts.

I have also found that there are people with whom we form or maintain special relationships—love, friendship, kinship, professional relationships. We cultivate such relationships in part because they add adverbial value to our lives. But these relationships also give rise to special moral obligations and responsibilities.[77] Because moral concepts are not criterial, their content cannot be determined by a definitive test, the application of which establishes exactly what each special relationship requires of us. In other words,

> […] the members of these relationships "do not treat their association as empirically contingent, which would amount to viewing their membership in that community as a matter of circumstance. Moreover, members do not assume that the content of negotiated rules exhausts their obligations to each other, which would amount to viewing their community as a matter of rules (Faggion 2020, 322).

Among these special relationships is a particularly important one that we have with those who belong to our own political community, within which political organizations are empowered to exercise coercive power under certain conditions, often by means specified in

[77] See, fn.74 above.

constitutional texts.[78] Reciprocity is, as in any other associational relationship, a requirement to preserve our dignity from irreparable harm. In plain language, the acceptance of political coercion by members of a political community and the restriction of one's liberty to do what one believes is right depends crucially on everyone in that community respecting collective decisions as moral obligations and the policies and principles that underlie them.

For such collective obligations to arise, of course, it is essential that those vested with coercive power exercise their power on the basis that each member of the community in question has equal dignity and is of equal worth. It is against this background that the notion that political rights derive from the principle of dignity must be understood: as an expression of our dignity *vis-à-vis* the political institutions that legitimately exercise coercive power over us (Dworkin 2011, 319–23, 330). Political communities—through their officials—act as particular moral agents and as such can be held morally accountable. What kind of policies, priorities, and decisions fail to recognize the dignity of members of a political community and are therefore morally condemnable is, again, admittedly open to interpretation and controversy (Dworkin [1986] 1998, 175).[79]

Let us take an interesting and illustrative hypothetical exercise from Amartya Sen's *The Idea of Justice* (2009, 13): three children—Anne, Bob, and Carla—argue over a flute. Each of them argues why they believe they have the right to keep the flute for themselves. On one side, Anne argues that she is the only one of the three who can play the flute. Therefore, it would be unjust to give it to one of the others. On the other hand, Bob claims that he should keep the flute for himself since he lives in poor circumstances and has no other toys. Carla claims that she made the flute herself and therefore she has the right to keep it. This dilemma is a metaphor for the way governments should use their coercive power to distribute wealth and property among members of their community—Anne, Bob, and Carla. As mentioned

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78 According to the Constitute Project database, as of February 4, 2022, of the 193 member states of UN, there were 193 countries with a total of 201 constitutional texts in force (available at https://www.constituteproject.org/, accessed February 4, 2022). Even in the absence of a written constitution, there are cases—such as in the United Kingdom—where courts have granted constitutional status to certain fundamental rights. For a comparative overview on the place of human dignity in modern constitutional texts, including the German Basic Law, see (Al-Najjar and Saeed 2021).

79 There are authors who oppose the idea that modern states can be considered as *true communities*—or even *bare communities*—from which political obligations arise (Faggion 2020, 322). In addition, on the influence of the principle of human dignity in the in Latin-American constitutions, see (Napoleão Barros 2020).

elsewhere,[80] the solution to this dispute cannot be simply found in the social practices of the community in which it arises. Any solution would require instead that we place the problem within a larger framework of value—a framework whose core is the need for equal concern and respect for all its members. What this requires is, of course, subject to controversy. But imagine that one of the children—Anne—is the daughter of the official who has to make the decision, and that the official has decided, after careful consideration, to give her the flute because their special kinship requires it. This circumstance alone would justify the decision particularly badly because it would mean a flagrant violation of the responsibility to treat all members of the community equally.

It is not irrelevant, then, whether officials of a political community, including courts and tribunals, make unprincipled or principled decisions. Rather, this hypothetical dilemma shows us that it is fundamental to the integrity of the political community itself that officials act in a principle way (Dworkin [1986] 1998, 184). In addition, it would also require that past political decisions not only be relevant in the most obvious way—to ensure predictability and consistency—but also that each decision reflects and respects standards that public officials and community members alike must continually consider before making a decision.[81] As Dworkin notes,

> Integrity […] insists that each citizen must accept demands on him, and may make demands on others, that share and extend the moral dimension of any explicit political decision. Integrity therefore fuses citizens' moral and political lives: it asks the good citizen, deciding how to treat his neighbor when their interests conflict, to interpret the common scheme of justice to which they are both committed just in virtue of citizenship. […] Political obligation is then not just a matter of obeying the discrete political decisions of the community one by one […]. It becomes a more protestant idea: fidelity to the scheme of principle each citizen as a responsibility to identify, ultimately for himself, as him community scheme ([1986] 1998, 189–90).

80 See, Chapter II(C) above.

81 Faggion considers that "associative obligations cannot justify the comprehensiveness and coerciveness inherent in the domain of political obligation" (2020, 328).

So, there are several questions that need to be answered within each political community when it comes to the political decisions they collectively deem appropriate. What kind of tax structure should be put in place; what kind of participatory mechanisms should exist; what matters should be beyond the interference of governments; whether judicial review should be incorporated into the legal system; whether a distributional policy or a social security system should be put in place—and if so, under what conditions and modalities. Most importantly, the guiding principles of these decisions must always be equal concern and respect for all, for they are the political backbone of any political community. Accordingly, the practices of the community in question should be understood and interpreted in their light.

But the question of what the law is and what role it plays remains unanswered. Many philosophers have endeavored to find out what is meant by the concept of law. Attempts to get to the bottom of this question inevitably lead to a variety of theoretical discussions. From viewing legal systems as a set of general orders with threats in case of disobedience, as John Austin suggested, to viewing them as a collection of "if-clause" norms under which officials are instructed to apply certain sanctions when certain factual conditions are met, as H. Hart proposed, the pool is filled with many interesting and illuminating theories. In this dissertation, however, I rely on Dworkin's theory of interpretivism, which I briefly outline in the following subsection.[82] This is what follows now.

B. The concept of law and its interpretation

> *In law even more than in science,* apodeixis – *demonstration – evolves with apodictic force only if the full weight of* epideixis – *the conviction of the totality – is behind it* (Latour [2002] 2010, 163).[83]

1. Law as part of political morality

Law does not exist in a vacuum, nor does it arise from it. It is a core element of political communities.[84] It is an imprint of the political principles, priorities, and goals associated with

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82 Whenever relevant, I choose to do so in opposition to other theories, namely legal positivism and pragmatism. The debate between Dworkin's interpretivism and Hart's legal positivism has been the subject-matter of many works. With varying approaches and degrees of rigor, see *inter alia* (Hespanha 2009, 114–34, 532–40; Fernando 2021; Cardona Ferreira 2013; Bertaso 2015; Bello 2012).

83 Emphasis in original.

84 Political communities with moral agency.

the general moral theory the community has adopted. Law must therefore be understood and interpreted within the framework of this political theory (Banakar 1998, 358). For if law depends primarily on the existence of political associations,[85] its existence must in turn be embedded in the political framework of the community in question. Thus, it is not just a matter of communication between alternative normative systems—political morality and the law—from which law derives its substantive priorities and finds the justifications for overcoming moral stalemates. For interpretivism, law is, more precisely, part of the political morality of a particular political community (Dworkin 2011, 402).[86] However, one might mistakenly assume that law and political morality are always morally virtuous because they are a part of each other.[87] This, however, would be a false assumption. For the integration of law and political morality does not eliminate the controversial question of what the law should be. For the general political theory in which legal rights and collective programs find their justification may, to varying degrees, completely disregard the ethical importance of its members—or of a minority within the community.[88]

Political rights and legal rights are similar in that both confer rights on individuals *vis-à-vis* other individuals and the community as a whole. Yet they are different when it comes to their enforcement. On the one hand, political rights, which serve as background rights, are not enforceable on demand, even if there is a strong moral case to submit in their support. On the other hand, legal rights are enforceable in just this way through institutions that have decision-

85 The latter assessment also holds for political rights more broadly—their existence depends on people coming together to form a community in which actors make decisions with moral and ethical content.

86 On this topic, see (Gomes Moreira 2016). Legal positivism, on the other hand, proposes a different theoretical approach that only incidentally accepts any conceptual connection between law and morality. According to Hart, the existence of legal rights and duties does not depend on moral justification. Consequently, for legal positivism, laws with a morally iniquitous content are still law "since they may differ only in their iniquitous moral content from the laws of morally acceptable regimes while sharing with them many distinctive features of law (e.g., forms of law creation, forms of adjudication and enforcement)" (Hart [1961] 2012, 270). Max Weber also argued, in the words of Banakar, that "[…] the modern western legal system, working in accordance with its own internal logical formal rules of procedure, does not require extralegal values in order to justify itself morally, politically or in any other way" (Weber 1968; paraphrased in Banakar 1998, 352, fn.16). See also, opposing Dworkin's interpretivism, (Leiter 2009).

87 See, Hart 2012, 268–72. Hart argues that it is better to deny the link between morality and law because the question of whether legal systems actually contain evil and unjust laws is controversial and the resources we have to do so are "highly flexible" (2012, 270).

88 On the subject of the legitimacy of legal disobedience on moral grounds on the basis of interpretivism, see, *inter alia* (Lima and Weber 2020).

making and coercive powers, such as legislatures, courts, or international arbitral tribunals. They are institutional rights because, in the context of a general moral theory, they provide a justification for the relevant institutions to make decisions that support that political aim (Dworkin 1975, 1069–70).[89] Adam Smith's invisible hand—taken in its proper context—is instructive for distinguishing between legal and political rights and for illustrating the inadequacy of the latter as an instrument for pursuing a general moral theory. In the *Theory of Moral Sentiments* (A. Smith [1793] 2015), the relevant passage reads as follows:

> It is to no purpose, that the proud and unfeeling landlord views his extensive fields, and without a thought for the wants of his brethren, in imagination consumes himself the whole harvest that grows upon them. […] The capacity of his stomach bears no proportion to the immensity of his desires, and will receive no more than that of the meanest pleasant. *The rest he is obliged to distribute among those, who prepare, in the nicest manner, that little which he himself makes use of, among those who fit up the palace in which this little is to be consumed, among those who provide and keep in order all the different baubles and trinkets, which are employed in the economy of greatness*. […] The rich only select from the heap what is most precious and agreeable. They consume little more than the poor, and in spite of their natural selfishness and rapacity, though they mean only their own conveniency, though the sole end which they propose from the labors of all the thousands whom they employ, be the gratification of their own vain and insatiable desires, they divide with the poor the produce of all their improvements. *They are led by an invisible hand to make nearly the same distribution of the necessaries of life, which would have been made, had the earth been divided into equal portions among all its inhabitants, and thus without intending it, without knowing it, advance the interest of the society and afford means to the multiplication of the species* (A. Smith [1793] 2015, 310).[90]

The accumulation of capital and property raised no moral concerns for Adam Smith in principle. Nevertheless, he believed that the rich, despite "their natural selfishness and

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89 Institutional rights can be further divided into abstract and concrete rights depending on their degree of concretization (Dworkin 1978, 93–94).

90 Emphasis added.

rapacity," had a moral responsibility—embodied in the metaphor of the invisible hand—to provide the poor with the necessities of life to which they were entitled. The question of redistributive justice has been raised again and again by philosophers, sociologists, economists, and politicians. I want to emphasize, however, that the political right to the necessities of life cannot in any case be enforced on demand by the request of the poor, even if a compelling moral case could be made for it. Political rights are ineffective in this sense because they are not enforceable on demand and depend on members of the political community acting in accordance with their demands. Our collective need, however, demands that the efficacy of political rights not depend on the "the slowness and uncertainty of philosophical researches" ([1793] 2015, 273). There will always be areas of moral uncertainty, and any moral understanding should be the result of transparent and comprehensive deliberation in which competing views have the opportunity to influence and affect social consensus (Gutmann 1993, 202). This is at least what can be expected from societies in which democratic values and fairness prevail.

The solution to this challenge, then, is to translate political rights into legal rights. For interpretivism, the way legal rights come about varies from political community to political community, as each holds different general political theories that translate into different political and legal practices (Dworkin 2011, 404–5). Be that as it may, preexisting political rights (or background rights) become individual rights (or institutional rights) when they are justified by the general political theory of the community in question. Such rights are therefore based on arguments of principle (1978, 82).[91]

It is the case, however, that the law goes beyond the direct enforceability of political rights—that would indeed be an inadequate representation of the complexity of contemporary legal systems. *First*, it aims to regulate certain issues within our personal and ethical dimension, provided that government interference remains outside the boundaries of the principle of authenticity (2011, 368–71).[92] If these boundaries are not respected, then the claim that the primacy of the law is unjustified and illegitimate because it suppresses individuality is well

[91] The quality of a right derives from the fact that it meets "a certain threshold weight against collective goals in general; unless, for example, it cannot be defeated by appeal to any of the ordinary routine goals of political administration, but only by a goal of special urgency" (Dworkin 1978, 92). Its existence, then, is independent of the promotion of any actual collective goal (1978, 96).

[92] See, Chapter II(C.1) above.

founded. *Second*, the law also aims to achieve and promote certain collective goals. Such enactments are therefore better understood by arguments of policy, *i.e.*, the collective desire to achieve a common goal, such as economic efficiency. In this case, the law does not merely provide a legal basis for pre-existing political rights. Instead, it reflects the specific trade-offs between benefits and burdens that the community deems appropriate to achieve a collective benefit consistent with a particular conception of the collective aggregate good (1975, 1059–68; 1978, 82). Each such conception of the aggregate collective good is itself deeply rooted in a general political theory that imposes on legislators the responsibility to pursue that conception (Dworkin 1975, 1085). That is, different general political theories place different constraints on the set of public policies that public officials may pursue. In this sense, legal systems can also be understood as "the output, or the mirror, of a particular way to conceive a balance of power" (Caroccia 2016, 67), with the set of policies so enacted being the product of conflict.

In most cases, arguments of principle and policy provide the relevant legal grounds on which the law is based.[93] In any case, the law is neither neutral from the point of view of political morality, nor does it simply reflect given social practices. It is, moreover, inherently conservative, for it seeks to protect and promote a particular state of affairs that supports a political aim—a general political theory—and seeks to protect its members from decisions that might jeopardize that goal (1975, 1067–68; 1978, 91). This conservative aspect of the law is reflected in the principle of integrity in legislation; it requires that the law always remain coherent with the larger framework of value adopted by the political community in question ([1986] 1998, 167).

The law thus fits with and is justified by the prevailing general moral theory of the political community in question—a theory that answers a variety of questions, including the status of human rights, the protection of the environment, the redistribution of wealth, and whether public intervention in the market is necessary to maximize the dignity of its members. Thus, what rights and goals a community pursues depends partly on arguments of principle,[94] on the one hand, and partly on arguments of policy, on the other. It can also be—and often is—the result of both. Accordingly, the law changes and expresses through its metalanguage the compromise that the community has made with respect to its scheme of political morality, as

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93 In adjudication, the enforcement of rights is always a matter of principle, even when the law whose enforcement is sought has been justified by arguments of policy (Dworkin 1978, 94).

94 As mentioned above [Chapter II(C)], moral reasoning requires that the practice in which moral concepts figure be taken into account.

well as the wide variety of ways in which that project can be enforced. In one way or another, the law is indeed filled with political and moral meaning. As Latour notes, "[t]here is no stronger metalanguage to explain law than the language of law itself. Or, more precisely, law is itself its own metalanguage. […] All the social interests, all the power struggles can push the wheel, but the judicial vehicle will not budge an inch if it is not hitched onto law. […] Law judiciarizes all of society, which it grasps as a whole in its own peculiar fashion ([2002] 2010, 259, 262). Recognition of this fact underpins the claim that the legal practices of a political community are justified by a general political theory, and that the principles and purposes underlying the law must be taken into account in the search for the truth of propositions of law,[95] since they are also an integral part of the structural orientation and limits of the legal system. Thus, the law is neither only the reality of society and social violence (Bourdieu 1987), nor only the mechanical and formal reality of rules.

2. Adjudication and the truthfulness of propositions of law

The ability to enforce rights on demand is thus the central difference between political rights and legal rights. In any political community, therefore, it is essential that adjudicative institutions responsible for enforcing the law be established and available in precisely this way.[96] These institutions play an authoritative role in determining the truth of propositions of law and thus in deciding what the law actually requires.[97] As noted elsewhere,[98] many philosophers have attempted to provide an answer to the question of what is necessary for such a proposition to be right. This is a heated and now timeless debate. Since this dissertation is an attempt to understand whether the legal reasoning of international arbitrators can be influenced by moral convictions, it would be unwise not to navigate these waters and overlook this essential question.

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95 For a comparative analysis on the relationship between Dworkin's legal principles and the Islamic law's Maqāṣid, see (Moqbel 2017).

96 In Portugal, for example, the courts and arbitral tribunals are the bodies that exercise sovereignty and are empowered to administer justice on behalf of the people (see, Article 202 and Article 209 of the Portuguese Constitution).

97 But their decisions should by no means be taken as the sole guide to answering this question. They are part of the history of the practice to be interpreted, but not its *only* history.

98 See, Chapter III(A) above.

One of these theories is legal positivism, which has greatly influenced legal thought in recent decades. H. Hart, one of its main proponents,[99] developed his positivist proposal in opposition to the prevailing theory of the time, according to which the law consists of a series of commands issued by a sovereign, the compliance of which is ensured by the threat of punishment (Hart [1961] 2012, 112).[100] Instead, he suggested that the law is composed of primary and secondary rules. On the one hand, primary rules—which were already present in primitive communities—would impose duties on members of a community by requiring people to do or refrain from doing something. On the other hand, secondary rules, for their part, aim to overcome the uncertainty, immutability, and ineffectiveness of primary rules by specifying "the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined" ([1961] 2012, 94). Among the secondary rules,[101] the 'rule of recognition' would seek to establish a procedure—a final criterial test—to specify in an authoritative way the requirements whose fulfilment would be an indicator of a legal quality of a rule. Such a rule would serve its purpose by specifying the criteria whose fulfilment is mandatory for a rule to qualify as legal and to be accepted as such. In other words, legal positivism treats law as a criterial concept, meaning that the truthfulness of any proposition of law depends on whether it meets the specific criteria established by the practice—often unspoken and empirical—of courts, officials, and private citizens ([1961] 2012, 94, 100–102). H. Hart acknowledges that while the decisions of courts and tribunals recognizing these common criteria constitute only a tiny fraction of all such decisions, they have, by comparison, "a special authoritative status conferred on it by other rules" ([1961] 2012, 101–2).[102] So, there is a causal factual connection between the existence of any legal rule or principle and the social practices of a particular community.[103] Therefore, disagreement in

99 Together with Hans Kelsen with his *Pure Theory of Law* (1967).

100 With varying approaches to Hart's theory, see (Hespanha 2009, 114–34, 532–40; Fernando 2021; Cardona Ferreira 2013; Bertaso 2015).

101 There are also 'rules of change' and 'rules of adjudication.'

102 Moreover, Hart argues that contemporary law includes provisions aimed at overcoming potential conflicts between different criteria ([1961] 2012, 101). In Portugal, for example, this would be the case with Articles 1, 3, and 4 of the Portuguese Civil Code and Articles 3(3), 8, 56, 112, 115, 161, 164-165, 198, 226, and 241 of the Portuguese Constitution.

103 In *Is the Rule of Recognition Really a Conventional Rule?*, Professor Dickson provides us with a stimulating discussion of the difference between "understanding the common official practice of recognizing certain things as constituting valid law as an existence condition of the rule of recognition, and as that to which judges must look in identifying the rule on the one hand, and understanding that practice as reason-giving, and as supplying judges with reasons for accepting and adhering to the rule of recognition on the other" (2007, 401). In short, while Professor Dickson accepts that the content of the rule of recognition depends on a community's officials

law can only be empirical disagreements about what the record of past institutional decisions actually says (Dworkin [1986] 1998, 7,9).

Rather than treating it as criterial, interpretivism holds that the law is an interpretive concept—just as ethics and morality are. This means that legal practices have an intrinsic and independent value, not necessarily explicit, upon which the truth of the proposition of law rests, and in relation to which legal rights should be organically "understood or applied or extended or modified or qualified or limited by that point" ([1986] 1998, 47). Interpretivism thus rejects the idea that the question of the truth of propositions of law depends exclusively on the criteria contained in past institutional decisions.[104] It holds that adjudicators must, of course, refer to their explicit content, but that they must also attempt to decipher and adopt the underlying principles of the system of which they are an integral part.

As such, adjudicators' decisions must fit with and be justified by the comprehensive theory of general principles of the community in question (Dworkin 1978, 105). As Zagrebelsky summarizes, "[i]t is within this deeper level of law […] that judges can find the best answer to legal questions left unsolved by the legislator's law—though this does not mean necessarily the clearest or most obvious answer" (2003, 625). Accordingly, interpretivism proposes a holistic and broader proposition about what requirements propositions of law must meet in order to be right. It further contests therefore the idea that disagreements in law involve only empirical disagreements about the record of past institutional decisions (Dworkin 2011, 407, 413; [1986] 1998, 226–27; 1975, 1063–65).

The conclusion that legal positivism admits only empirical disagreement has been questioned. In particular, Professor D'Almeida argues that a disagreement about whether a statutory provision is valid can be resolved—at least apparently—in ways other than empirical. For example, in addressing the question of whether the book containing that provision *is* the official book, the disagreement might raise an additional question about "the truth of some

following a common practice, she points out that the reasons why they do so do not depend on a common practice. Rather, the issue is "[…] whether and under what conditions judges ought to accept as binding and follow the rule of recognition of their legal system" (2007, 402). Whether the shared practiced embedded in the ultimate rule of recognition provides in itself enough reasons for adjudicators to adopt it is beyond the question of what the content of this rule really is. It is therefore dubious why Dickson believes that this issue could put in question the conventional nature of the rule of recognition. In any case, as explained in Chapter II(C) above, it might be the case that Hart believed these reasons are equally empirical.

104 With varying approaches to Dworkin's theory, see (Moniz 2017; David 2017).

further, higher-order proposition(s) of law (such as those concerning the law-making powers of the relevant bodies, or the procedures on which the validity of legislative enactments depends)" (2016, 168). Professor D'Almeida believes that the differences between external and internal statements of law offer grounds for this alternative reading. He argues that, external statements of law are indeed always empirical, while internal statements are different because they are normative and the determination of their content may not be based solely on empirical evidence (2016, 174).

In my reading, however, what interpretivism disputes is that the grounds of propositions of law arise exclusively from those empirical and descriptive facts, *i.e.*, from the social practices of the relevant community, as explained elsewhere.[105] This is because internal statements—which are normative—aim to shape community behavior by reference to a set of primary rules whose authority derives from the conventional acceptance of a rule of recognition that qualifies those rules as legal (Hart [1961] 2012, 250). Hart's insights into the pathologies of legal systems are instructive in explaining why. He argued, with respect to the transition from a colonial and subordinate legal system to a new and independent legal system, that the validity of the latter derives from a new rule of recognition that, while no longer referring to past institutional decisions of the official institutions of another territory, is simply based on the fact that

> […] it is accepted and used as such a rule in the judicial and other official operations of a local system whose rules are generally obeyed. […] They are valid because, under the rule of recognition locally accepted, enactment by the local legislature is an ultimate criterion of validity ([1961] 2012, 120–21).[106]

In his postscript, Hart also seems to reinforce this reading by saying that:

> […] even if the judges and the lawyers of all the legal systems of which the general and descriptive legal theorist had to take account themselves did in fact settle questions of meaning in this interpretative and partly evaluative way, this would be something for the general descriptive theorists to record as a fact on which to base his general descriptive conclusions as to the meaning of such propositions of law (Hart [1961] 2012, 244).[107]

105 See, Chapters II(C) and Chapter III(B) above.
106 Emphasis added.
107 Emphasis added.

Hart thus argues that from the external perspective it is a matter of simple fact that there are two independent legal systems. This is also the case from the internal perspective of a citizen or official of the new legal system. However, from the internal perspective of an official of the previous parent legal system, there is only one legal system according to the relevant past institutional decisions. To be clear, the *de facto* acceptance of the criteria incorporated in the rule of recognition—whose content derives from the social practices of the community and is reinforced by its acceptance by the community's political institutions, including courts and parliaments—is a fundamental feature of any legal rule (Hespanha 2009, 132–33). Professor D'Almeida, however, sees the normative quality of internal statements as a reason to dispute the premise of the critique of legal positivism (2016, 170). To return to the question of the validity of the Californian statute book—which Dworkin did not specifically address—it can be said that its validity—a normative question—arises from the fact that it satisfies the criteria of the rule of recognition. These criteria are a matter of fact because they express the social practices of the community. The difference between internal and external statement of law is not that one is empirical and the other is not, because both are. The difference is that the one submitting the internal statement of law accepts the social practice and does not just describe it.

Despite their disagreements, these two theories fundamentally agree that the law is inherently purposive, and they further agree on which legal practices require interpretation—constitutions, statutes, and precedents. These are the paradigmatic and consensual legal practices of contemporary communities.[108] Consequently, any plausible theory of interpretation must be constructed with the aim of revealing their inherent purposes.[109] Indeed, in this sense, legal positivists ask the question that Professor D'Almeida finds relevant: "what does this statutory provision, properly interpreted, mean?" (2016, 172). But recognizing the extent to which purpose is relevant to both theories and how adjudicators may capture it are

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108 For interpretivism, the preliminary definition of the rules and standards embedded in the legal practice to be interpreted—the existence of which presupposes a certain degree of consensus—characterizes the pre-interpretive phase of any interpretive process. Some authors believe that constitutions, statutes, and precedents alone do not provide the full picture of modern legal systems. Technical norms, best practices, and norms of self-regulation should also be included. For an analysis on this issue, see (Hespanha 2009, 522–40). The question of whether this is the case is a matter of interpretation and should again be based on the scheme of political morality adopted in the community in which the relevance of these practices is considered.

109 Interpretivism does not deny that legal positivism accepts this premise, for it clearly does (Hart [1961] 2012, 127; 1958, 607–11; Hespanha 2009, 606).

other essential questions for understanding where legal positivism and interpretivism drift apart. Otherwise, we run the risk of conflating something that is incompatible.

As explained, legal positivism makes the truthfulness of propositions of law contingent on their meeting the criteria or test imposed by the rule of recognition. Among the criteria for legal validity, the rule of recognition "might explicitly incorporate besides pedigree, principles of justice or substantive moral values, and these may form the content of legal constitutional restraints" (Hart [1961] 2012, 247). There is no triviality in the use of the words 'might' and 'explicitly.' For it explains two fundamental differences between legal positivism and interpretivism: for legal positivism, the inclusion of such values in law is only a possibility, provided that it is explicit, that is, included in a prior institutional decision, such as a constitutional provision. Interpretivism, in turn, asserts that such propositions are true if they are consistent with, and thereby justified by the principles that the practice is intended to achieve (Dworkin [1986] 1998, 52). As Zagrebelsky explains, "[t]he concretization of principle is not the creation of new law, in the sense of an extension of the field of action of the law to new subjects, relationships, or situations. The case already falls under the law" (2003, 631).

It is, therefore, not just a matter of possibility but of certainty that the law contains such values—even in the most trivial statutory provisions—whose content can be grasped by interpretation. It is important to note that what seems at first glance to be just a minor theoretical dispute with no obvious relevance is in fact a completely diverse way of looking at the law. For interpretivism, the fact that the law reflects independent values does not depend on the existence of social consensus factually described in a rule of recognition. Instead, the argument that these values exist and require something of us depends on moral argument. As Zagrebelsky notes,

> "[t]he refusal simply to consider the legal norms as written down in a public text of official rules reveals the antipositivistic nature of this theory and highlights its reliance on a level of law lying deeper than the one carved out by any legislator" (2003, 625).

It is important to keep in mind that the early development of interpretivism had its legal background essentially in the structure of common law systems. Its application to continental legal systems, where the law—including legal principles—is contained in written and express documents, therefore requires further distinctions (2003, 627). For legal positivism, the principles that interpretivism considers relevant to justify a particular reading become relevant

only from the moment they can be described in the consensual practice of the community, that is, when they become a fact. Hart's conclusion that this amounts to a refutation of Dworkin's claim, however, is not valid. For even if legal principles can be incorporated into past institutional decisions, this fact should not lead us to conclude that the existence of legal principles depends on their reflecting accepted social practices incorporated in a rule of recognition. However, it is undeniable that past institutional decisions with such content help to reduce the space for controversy and uncertainty. For even if the structure of the principles in this case is inconclusive, they are helpful and serve as guidance. Remember the obligation of the rich to provide the poor with the necessities of life to which they are entitled?[110] Well, the truthfulness of such a moral conviction does not depend on the community's consensual acceptance of it. It requires that a case within morality be presented in support of it.[111]

The structuring difference between interpretivism and legal positivism remains untouched. Therefore, in answering the above question, legal positivism argues that the proposition of law 'the statutory provision *x*, properly interpreted, means *z*' is true from an internal perspective only if it meets the criteria accepted by the community, including its relevant officials—ultimately, the courts. That is, if this acceptance is true as an empirical fact—and that any disagreement about what criteria are accepted by the community must also be empirical. Interpretivism rejects this reading. Rather, it argues that the explicit content of these past institutional decisions, however relevant, does not exhaust the relevant legal grounds for making a proposition of law true. Only a more comprehensive and systemic approach that takes into account the coherent structure of principles of the system allows for an organic development of the law without requiring the *a priori* interference of officials to determine its content. As Dworkin argues:

> [i]f people accept that they are governed not only by explicit rules laid down in past political decisions but by whatever other standards [that] flow from the principles these decisions assume, then the set of recognized public standards can expand and contract organically, as people become more sophisticated in sensing and exploring what these principles require in new circumstances, without the need for detailed legislation or adjudication on each possible point of

110 See, Chapter III(A) above.
111 See, Chapter II(C) above.

> conflict. This process works less effectively, to be sure, when people disagree, as inevitably they sometimes will, about which principles are in fact assumed by the explicit rules and other standards of their community. But a community that accepts integrity has a vehicle for organic change, even if it is not always wholly effective, that it would not otherwise have at all ([1986] 1998, 188–89).

For the sake of completeness, however, it is also important to understand how this reading should be done, on the one hand, and how past institutional decisions are relevant, on the other. But before addressing this, we should note how these two issues relate—at least in part—to the requirement that the law be predictable and consistent. I will address this issue in the following subsection.

3. Predictability and coherence as fundamental political virtues

The demand for predictability and coherence in law is, at its core, about how adjudicators ought to enforce the law. In Alexei Peshkov's *Mother*, there is a crucial moment when the protagonist—the mother of a revolutionary activist on trial for his political activities—affirms that "young people ought to be tried by young judges, and not by old ones"(Gorky [1906] 1920, 464). The latter suggestion implicitly assumes that the best interpretation of the law changes over time. Therefore, younger judges should judge younger generations, as they would presumably enforce similar conceptions of what the law requires. Although the proposal is absurd, its advantage lies in that it suggests that the law is an interpretive concept. It also raises the question of how relevant the past should be to adjudication.

It has been claimed that the law aims at eternity, that "law goes against time" (Caroccia 2016, 72), and that "[p]redictability [...] is a needful characteristic of any law worthy of the name" (Scalia 1989, 1179). These statements sound familiar to any lawyer or law student. The notion that the law must be predictable and coherent is present in the classroom of every law school. This is an important distinction between jurisprudence and scientific knowledge. Predictability and coherence require that the past be considered in what we do in the present. But while scientists often grapple with it in order to disprove it, their relationship to the law is quite different. Latour describes this difference—in a rather picturesque way—as follows:

> […] whereas scientific research can engage with the turbulent or violent history of innovation and controversy, a history that is continually being renewed, law has a homeostatic quality which is

> produced by the obligation to keep the fragile tissue of rules and texts intact, and to ensure that one is understood by everyone at all times. A premium is put on legal stability but there is no such thing as scientific stability. Scientists, once they have added their own particular pebble to the edifice of a discipline, might well see themselves in the role of Samson shaking the columns of the temple, overturning paradigms, overthrowing common sense and bankrupting old theories. Legists, even when they make an especially daring argument for overturning established precedents, have to secure the integrity of the legal edifice, continuity in the exercise of power and smoothness in the application of the law. Science can tolerate gaps, but the law has to be seamless. Science can draw on lively controversy, but the law has to restore the equilibrium. Although one might speak admiringly of 'revolutionary science', 'revolutionary laws' have always been as terrifying as courts with emergency powers ([2002] 2010, 242–43).

There must, however, be a moral argument for considering the limitation of creative judgment and the promotion of predictability and consistency as political moral virtues, *i.e.*, an argument for why these goals are worth supporting in a principled political community. Different legal theories provide alternative rationales for how the past should be relevant in determining the truthfulness of propositions of law. Interpretivism attaches great importance to the principles embedded in these decisions and considers them an essential part of any justification of the truthfulness of propositions of law. Accordingly, history is important to interpretivism in this integrative and interpretive way. It is important for adjudicators to find in such past institutional decisions the trace of the principles of the legal system that best justify the legal practice to be interpreted. Adjudicators must not, therefore, treat the past uncritically. They must, of course, refer to the explicit content of the relevant institutional decisions of the past, but they must also try to decipher the underlying principles that best justify them (Dworkin 2011, 413; [1986] 1998, 226–27; 1975, 1063). Once adjudicators succeed in identifying such principles, political communities impose on adjudicators the responsibility to ensure that pending decisions are justified within the framework of a comprehensive political theory of the community in which the issue arises (1975, 1064–65).

In his ethnographic work, Latour witnesses the homeostatic quality of the law and how adjudicators attached importance to past decisions. In particular, he noted the adjudicators'

practice of "reshaping, chewing over and digesting [past decisions], making them say nothing other than what they have always said, even if it was not clearly heard until today" ([2002] 2010, 188). Thus, the truthfulness of propositions of law depends on the adjudicators' ability to determine what the best interpretation of those principles actually requires in a given case. This means that they must strive for coherence and integrity in law—as everyone in ethics and morality must—and "conceive the body of law they administer as a whole rather than as a set of discrete decisions that they are free to make or amend" (Dworkin [1986] 1998, 167).[112] But impossible as it is to achieve complete ethical and moral coherence and consistency over a lifetime, it would be unreasonable to demand that from adjudication. As Rivkin wisely notes, "[i]nconsistency is just a fact of life, and it is not fatal" (Rivkin 2013, 348).[113]

For interpretivism, therefore, the relevance of the past should not be overlooked or disregarded. Past institutional decisions—depending on what is relevant in each jurisdiction—provide adjudicators with the raw material they need to justify present decisions. Innovation and creativity are not values to be chased at every opportunity—a small difference from what is expected from scientific claims (Latour [2002] 2010, 205; Dworkin 2011, 153). For this reason, legal reasoning becomes increasingly complex over time. Consequently, the justification of innovative and creative readings and the overturning of paradigms must always be guided by a desire for coherence.[114] It is against this background that one can understand the statement that "law produces no new knowledge" (Latour [2002] 2010, 234). The way the truthfulness of propositions of law may be determined is the subject-matter of the following subsection.

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112 See also, Steyn 2002, 9.

113 In this respect, the statement that "equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve" (Scalia 1989, 1182) does not seem to be a sufficient reason to justify a formalistic approach to legal interpretation.

114 In any case, as Latour reports, in the structure of the *Conseil d'État*, the commissioner of the law plays an important role in ensuring this coherence. His account is as follows:

> [t]here is always a certain freshness to commissioners of the law, and they are in any case worn out after a few years. But unlike scientist, who dream of overturning a paradigm, of putting their names to a radical change, a scientific revolution or a major discovery, commissioners of the law invariably present their innovations as the expression of a principle that was already in existence, so that even when it deeply transforms the corpus of administrative law it is 'even more' the same than it was before ([2002] 2010, 219).

4. Legal interpretation: the dimensions of fit and justification in interpretivism

In the Introduction, I emphasized that the purpose of this dissertation is related to the phenomenology of legal reasoning. I stand by my words. But before I turned to this subject, I had to take a long detour through other fields of knowledge. I did so out of the conviction that limiting the question to the field of legal doctrine would inevitably lead to an incomplete picture of how legal reasoning actually works. It is worth remembering, then, that legal reasoning, however idiosyncratic and complicated, resort to the same mechanisms as other kinds of human reasoning, including biological mechanisms, cultural and personal references, and evaluations based on personal convictions. Moreover, it is common sense that adjudicators are not superhumans to whom the strengths and weaknesses of the human mind do not apply. For these reasons alone, it is to be expected that legal reasoning suffers from the same weaknesses and virtues.[115] Among other things, it should be undeniable that adjudicators, before they address the legal idiosyncrasies of a particular dispute, have an extensive repertoire of knowledge, language, and biases that they draw upon, albeit intuitively, when addressing legal issues.[116] It is not surprising, then, that before adjudicators put their legal reasoning into words and rationalize it, they already have "a strong [and unarticulated] sense of which way a case should be decided" (Posner 2010, 63). Accounting for such weaknesses and shortcomings in developing and proposing a comprehensive theory of legal interpretation is, therefore, essential.

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115 The cognitive aspect of legal phenomenology becomes even more important when we consider that adjudicators cannot rely on many tools to help them make decisions, other than "their memory and a few notes" (Latour [2002] 2010, 202).

116 As mentioned earlier [Chapter III(D.1)], the law has its own metalanguage, which plays a role primarily in adjudication. It makes little to no sense to separate the process of determining the relevant facts of a dispute from the process of legal classification. When adjudicators determine the relevant factual framework of a dispute, they are already thinking about its legal classification and weighting. The ability to perform such a task, which depends on adjudicators' ability to discern the normative relevance of a given set of facts, necessarily requires that they have some knowledge of the applicable law (Hespanha 2009, 633–34). Moreover, there is a "fragile and provisional linkage between a text and a particular case" (Latour [2002] 2010, 231), which means that the facts of a legal case do not simply reflect naturalistic elements. Their relevance is constructed with reference to the legal practices of the political community in question. Accordingly, in any legal case, there is "a movement of interconnection of a specific case with a corpus of texts" (Latour [2002] 2010, 257), in which adjudicators have the invaluable task of "fitting elements of the claim into the texts and weaving the means [raised by the parties] by bringing them closer and closer to laws and decrees" (Latour [2002] 2010, 88).

Legal interpretation is always purposive. Its aim is to find both the justifying and the inherent goals of a legal practice.[117] Accordingly, the theories of legal interpretation aim to provide the most appropriate framework within which adjudicators should engage in this activity. Each of these theories offers what it believes to be the best method for better understanding the legal practice being interpreted. It is against this background that the claims of the alternative schools of legal interpretation—formalism, social policy, economic analysis of law—should be understood: as suggestions for the best way to determine the inherent purpose of legal practices.

From their core claims and arguments, it is clear that interpretivism and legal positivism deal with an issue that goes beyond the question of legal interpretation. However, a thorough analysis of both theories proves to be a necessary preliminary step in putting on the table the conditions for the validity of a proposition of law. Indeed, for obvious reasons, the question of what makes a proposition of law right takes precedence over this equally fundamental discussion, for it allows for the narrowing of the subject matter that jurisprudence should consider in any interpretation. Given such core claims, one could argue that legal positivism, however meritorious interpretivism may be, is preferable with respect to legal interpretation because it leaves less room for legal uncertainty. The justification for this claim lies in the fact that adjudicators would only have to refer to and interpret the explicit content of past institutional decisions to determine the relevant legal outcome for a given dispute. This would be a false assumption, however, because legal positivism also recognizes that judicial discretion is a much-needed tool, especially when deciding hard cases. This is especially true when ambiguous, abstract, and vague language in the text of statutory provisions makes them unclear. It is also relevant when there are valid arguments justifying competing interpretations of the provision in question because it is disputed which of the two interpretations is best justified by the legal principles of the system. That is, this last category refers to those cases that can be said to be "within the semantic extension of a statute but […] [it is disputed whether they are] within its purpose" ([2002] 2010, 200). These are all cases where there is a tremendous risk of litigation because of their inherent uncertainty.

Adopting legal positivism, then, means that in hard cases adjudicators would first refer to the criteria or apply the test provided in the rule of recognition to determine whether a

[117] For an interesting discussion of the way justifying and intrinsic goals differ in science and law, see (Latour [2002] 2010, 198–243).

particular proposition of law is right. Adjudicators would quickly find that these tools provide little to no guidance in these cases and do not provide the necessary legal certainty because they do not cover many "legally unregulated cases in which on some point no decision, either way, is dictated by the law and the law is accordingly partly indeterminate or incomplete" (Hart [1961] 2012, 272). The only available solution would then be to resort to their limited or non-arbitrary discretion. It is doubtful, however, how Hart expected adjudicators to use their discretion, although he obviously thinks that this is the price of using legal language consisting of general categories. On the one hand, he argues that any adjudicative decision must be based on reason and be the result of adjudicators acting on their beliefs and values "as a conscientious legislator would" (Hart [1961] 2012, 273); on the other hand, he suggests that "in deciding such cases, [adjudicators] cite some general principle or some general aim or purpose which some considerable relevant area of the existing law can be understood as exemplifying or advancing and which points towards a determinate answer for the instant hard case" ([1961] 2012, 274). The latter suggestion seems more likely, however, as it had figured in earlier works (Hart 1958, 612).[118]

The law's inadequacy and indeterminacy become real only because adjudicators who follow this two-step approach use counterfactuals to address the challenges they face. That is, when adjudicators exercise their 'limited discretion' and run hypothetical scenarios in which they ask conditional questions to determine the legislature's intentions and mental states. In this way, the 'point' of the law is supposedly definitively revealed. Thus, legal interpretation is treated as a form of conversational interpretation in which adjudicators attempt to establish communication with the legislature (Dworkin 2011, 149–50).[119]

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118 Richard Posner, a well-known proponent of constrained legal pragmatism, seems close to this line of reasoning. While acknowledging the importance of discretion in adjudication, he nonetheless rejects the idea that adjudicators be vested with unfettered discretion. Since discretion cannot be understood as a *carte blanche*, adjudicators' personal and ideological opinions and priorities are irrelevant *per se* since the fundamental goal is to fulfill the purpose of the rules (Posner 2010, 89).

119 Any attempt to define the mental states of legislators would, in turn, become increasingly difficult in political communities where pluralism and active and broad political participation in public debate are characteristic, and where the participation of diverse interest groups representing a variety of social groups and expressing diverse interests and priorities is encouraged. The notion that legal interpretation is not a kind of conversational interpretation also allows us to avoid the question of whether legislators are reasonable, let alone assume that they are, in order to find the right proposition of law, as Caroccia suggests (Caroccia 2016, 77).

For interpretivism,[120] the law is more than the explicit content of past institutional decisions. It believes in the sufficiency and definiteness of the law and holds that it is not necessary to examine the mental states of legislators to find a solution to the alleged indeterminacy that arises from alleged unregulated cases. Instead, adjudicators seek "to impose purpose over the text or data or tradition being interpreted" (2011, 129–30; [1986] 1998, 228).[121] That is, in deciding novel cases—whether easy or hard—adjudicators must find the postinterpretive conclusions that best fit and are justified by "the great the network of political structures and decisions of [their] community by asking whether it could form part of a coherent theory justifying the network as a whole" ([1986] 1998, 245). As Zagrebelsky notes,

> [i]n the abstract, it can be said that there is no rule that does not correspond to a principle, and there is no principle that does not connect to a value. The principle is the *medium* in which we find a moral opening to the value and a practical opening to the rule (2003, 632).

In contrast to the pragmatic proposal, adjudicators must not be guided in their decisions by their own policy preferences, *i.e.*, by what they personally think is the best balance between collective benefits and burdens. In other words, an external and descriptive explanation of the law that explains the structure of the institution of adjudication should indicate that such decisions fit with the past decisions of the community in which the question arises and are justified by its scheme of the general political morality—even if they merely enforce the literal and unambiguous meaning of the law (Dworkin 1975, 1060, 1074, 1101).

Thus, according to interpretivism, whether a proposition of law is true from an internal and normative point of view depends on whether it fits into the web of political structures and decisions of the community in question, that is, on the public standards it represents as a whole.[122] As a result, adjudicative decisions must refrain as much as possible from leaving any

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120 See also, *inter alia*, (Castanheira Neves 2001; Martinho Rodrigues 2005).

121 It is undisputed that officials of political communities, in exercising their legislative powers, act in a context of data scarcity in which it is impossible to foresee all contingencies that require detailed regulation to address rapid changes in the political, economic, and social landscape. It is recognized that the law, however detailed, cannot anticipate and regulate all cases that may arise in the future. It is not the factual assertion that such an inability actually exists that is the subject of intense debate, but rather how adjudicators faced with a hard case should resolve it.

122 It is not surprising, then, that the environment of adjudicators depends on the "homogeneity of the world of files that are kept, ordered, archived and processed" (Latour [2002] 2010, 203). This homogeneity is, among other things, a prerequisite for granting access to the history of legal

of the structuring divisions unexplained or from emphasizing or giving undue importance to secondary divisions.[123] That is, in adjudication, any decision must consider "the whole set of judgments, texts and precedents, which cannot be broken without lapsing into a denial of justice. […] [For] law has to cover everything completely and seamlessly (Latour [2002] 2010, 243). Adjudicators' decisions about whether interpretations fit these structures and decisions are often intuitive. This is because the relevant elements they use to justify their decisions are part of adjudicators' 'extensive repertoire of knowledge.'

Let us take an interpretation in the field of Portuguese contract law or public international law that concerns a provision of contract or treaty law. In both areas of law, it is undisputed that the principle that agreements must be kept—*pacta sunt servanda*—is a fundamental and structuring standard within both areas of law. Therefore, an interpretation that denies it any relevance or attributes to it only an instrumental influence would completely miss the larger framework of value of that the Portuguese legal system. Any valid interpretation within these departments must give this principle the recognition it demands. Of course, there is never a situation in which adjudicators must decide whether an interpretation is consistent with only one principle. Legal systems are a vast web of rules and principles, and any interpretation must aim to comply and be coherent with as many as possible. The point is that an interpretation that does not fit will be showing "the record of the community in an irredeemably bad light, because proposing that interpretation suggests that the community has characteristically dishonored its

practice. The requirement of integrity requires adjudicators to consider past institutional decisions that they personally believe to be unjust for one reason or another.

123 This phase of the reasoning process is also closely related to the phenomenon of legal qualification. In international law, this requirement presents a particular challenge. Here there is a great deal of fragmentation aimed at creating specific knowledge frameworks, vocabularies, and expertise. Into which areas should an adjudicator place a legal question about the transport of chemicals by sea? In determining which areas are most or least relevant, it is already a matter of finding the interpretation that allows the practice being interpreted to be seen in the best light, taking into account the political structures of the international community. There is no indeterminacy in the sense that adjudicators can rely on their *personal* political convictions so that none of the available vocabularies is 'truer' than the others, as Koskenniemi seems to have suggested (2009, 11). Of course, officials may produce whichever shifts they deem relevant, provided their decisions promote and protect the political aims of the community in question. For that it is indeed important to conquer "the decision-making position within one's institution, and then laying out the agenda of reform" (2009, 12). Nevertheless, it is not for adjudicators to create and elaborate the agenda. Rather, they must consider the decisions of the institution and interpret the agenda in light of the overall political structure of the community to which they also belong.

own principles" (Dworkin [1986] 1998, 257).[124] Adjudicators who approach legal interpretation under interpretivism will often find themselves in one of the following three scenarios:

(i) only one interpretation fits the existing past decisions;
(ii) none of the interpretations in question meets the demanding threshold of fit; or
(iii) more than one interpretation fits the bulk of past decisions.[125]

In the case of (i), no further interpretive step is required, provided that the interpretation also allows the system to be seen in its better light. Only one interpretation meets the threshold of fit, because at some point the other competing interpretations failed to be coherent with any or a structuring part of the system. As a result, adjudicators have found the right proposition of law and must apply it to the case at hand. If alternative (ii) occurs, adjudicators must reject the competing interpretations altogether. Otherwise, the limits of the powers conferred on the adjudicators by the political community would be unlawfully exceeded and they would act *ultra vires*. Finally, in the case of (iii), the adjudicators must continue the interpretive activity and choose one of the remaining interpretations.

Interpretive work would be hopelessly incomplete, however, if there were no way, within the framework of interpretivism, to overcome the indeterminacy that results from the fact that more than one interpretation is apparently right. In this situation, adjudicators could leave the decision to a game of chance or assign a third person to randomly choose one of the alternative interpretations. In either case, the result would be irrevocably wrong. For just as we are expected to act responsibly in our dealings with others, political communities expect adjudicators to act in the same way. Thus, the decision must be made on the basis of a different requirement. Interpretivism requires instead that adjudicators choose the interpretation that is

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124 As noted elsewhere [Chapter II(C)], the existence and relevance of these principles do not depend on empirical and descriptive facts, even if political communities can recognize them in this way. However, they would be discernible even if such practices were not translated into political decisions, because for interpretivism they follow directly from the general political theory of the community in question. It is undeniable that the practice of translating them into concrete decisions promotes the predictability of any interpretation, as it leaves less room for controversy. One could even argue that in this case it would be easier to meet the requirement of fit.

125 Since no adjudicator can have a complete and comprehensive overview of the legal system, this third scenario is more likely. It is only logical that the more past institutional decisions the adjudicator can learn about and thus consider, the less likely it is that more than one interpretation will meet the required threshold of fit. The following interpretation phase is intended to eliminate the possibility that more than one competing interpretation could be equally correct.

best justified by the political structures and decisions of the community (Dworkin 1975, 1104). Thus, the issue is not whether the available interpretations only fit what has gone before, but finding the best way to develop the resulting narrative from the perspective of political morality. As Dworkin explains,

> [adjudicators] must choose between eligible interpretations by asking which shows the community's structure of institutions and decisions—its public standards as a whole—in a better light from the standpoint of political morality. *His* own moral and political convictions are now directly engaged. But the political judgment he must make is itself complex and will sometimes set one department of his political morality against another: his decision will reflect not only *his* opinions about justice and fairness but *his* high-order convictions about how these ideals should be compromised when they compete. […] Different judges will disagree about each of these issues and will accordingly take different views of what the law of their community, properly understood, really is ([1986] 1998, 256).[126]

The interpretation best justified by the political reading of the structures and decisions of the system will be the one that reflects a careful and balanced consideration of competing public standards—equality or dignity, for example—so that the practice being interpreted appears in its better light. It cannot be avoided that adjudicators put *their* moral convictions into motion, in particular their conceptions of the relevant concepts (Zagrebelsky 2003, 638). It is inevitable that numerous factors influence adjudicators' decisions,[127] though the object to be interpreted sets the boundaries within which such factors can exert their influence (Dworkin [1986] 1998,

126 Emphasis added.

127 Such as emotions, personal biases, personal and professional experiences, ideological and political sympathies, external institutional factors. In addition to personal and everyday experiences, adjudicators' professional experiences are largely conditioned by their legal training and by the accumulated institutional history of the institutions to which they belong. Both play a major role in how adjudicators actually think and decide. The influence of the latter is the subject of socio-legal and legal anthropological studies under the concept of 'legal culture'. Since virtually anyone can be appointed as an international arbitrator, the professional experiences to be considered in this broad sense are more numerous than in a similar study of national judges, whose experiences worthy of consideration are likely to be more limited. Thus, to determine how the professional experiences of international arbitrators in this broad sense affect their legal reasoning necessarily requires an anthropological study, which could not be conducted in this dissertation due to methodological challenges.

88; Latour [2002] 2010, 148–49, 214). Any such decision can, for this reason, be controversial because at some point adjudicators will need to rely on their own convictions—and hesitation and deliberation require time, slowness, patience (Dworkin 1978, 81). Here lies the delicate balance between finding the truth and efficiency in adjudication. As Zagrebelsky concludes, a good jurist "is not then merely the person with expertise in law and knowledge of precedents but, rather, the person who combines this expertise with participation in the cultural life of his or her society" (2003, 640).

Be that as it may, there are some subtleties that must be taken into account when interpreting statutory provisions or common/law decisions. I will deal only with those that have to do with statutory interpretation—because of their overwhelming importance in international arbitration and because of the word restrictions to which I must adhere.

Statutory Interpretation

In interpreting statutes, adjudicators' ambitions should resemble those we have just noticed, namely to find the reading that "fits and flows through that statute and is, if possible, consistent with other legislation in force" (Dworkin [1986] 1998, 338). This means that adjudicators must ask themselves "which combination of which principles and policies, with which assignments of relative importance when these compete, provides the best case for what the plain words of the statute plainly require" ([1986] 1998, 338). The assertion that the principles and policies underlying the statutes being interpreted must be taken into account should in no way be taken to mean that adjudicators may interpret them according to their own principles or policy preferences.[128] That would be a glaring error. Statutory interpretation aims to identify the principles or policies that best justify the statutes being interpreted.[129] In other words, adjudicators must worry about the inherent purpose and principles of the statute being interpreted (1978, 105).

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128 Interpretivism thus provides a way to ensure that Bourdieu's descriptive analysis that adjudicative decisions owe more to "the ethical dispositions of the actors than to the pure norms of the law" (Bourdieu 1987, 828) is incorrect.

129 In the search for the implicit goals of laws, other elements can also be taken into account, such as the prevailing public opinion about the policy in question. This is also part of their history (Dworkin [1986] 1998, 340–41). Moreover, the legal practices available to adjudicators may differ from one legal system to another. In Portugal, for example, although adjudicators must consider the legislative history of the statute being interpreted [Article 9(1) of the Portuguese Civil Code], it is not customary to refer to committee reports or public statements by parliamentary representatives. Instead, references to academic opinions and judicial decisions make up the bulk of legal practice.

The wording of statutes is thus a fundamental guide for mindful adjudicators because it "set[s] the limits to the political decisions that the statute may be taken to have made" (1975, 1088; 1978, 109–10). It defines the primary boundary within which the right interpretation must be found. Consequently, an interpretation that is inconsistent with one of these political decisions must be immediately discarded. This is precisely why one should pay attention to the "tyranny of words" (Latour [2002] 2010, 59).[130] Adjudicators are, therefore, well advised never to underestimate the weight and meaning of words, however ambiguous and unclear they may be, for they are a helpful tool in reducing the range of possible interpretations. But they should be prepared for unexpected challenges, especially because words are as much a product of grammar, syntax, and semantic rules, as they are of history and culture. There is a linguistic context to which adjudicators must be sensitive (Hespanha 2009, 650–59).[131]

The justifying purposes of statutes depend on the whole systemic structure of which they are an integral part, and their detection is not merely a matter of conversational interpretation in which adjudicators try to fathom the mental states of the legislators who enacted them. The conversational approach assumes that the inherent purposes of statutes are fixed at the time of their creation. Interpreting statutes is not just a matter of reconciling the mere wording of statutes with the psychological attitudes of their creators. It is about adjudicators taking into account the entire life of the statute being interpreted, *i.e.*, what happened before and after its enactment. As Dworkin notes, "the history [adjudicators] interpret begins before a statute is enacted and continues to the moment when he must decide what it now declares" ([1986] 1998, 316). As part of the legislative history of the statute being interpreted, the statements made by the legislature at the time of enactment, as well as before and after, are of course relevant political acts that adjudicators must take into account. Adjudicators may also speculate about what the drafters of the statute meant to say. Such statements, however, become less relevant over time "because they will have been supplemented and perhaps replaced, as formal

130 The formalist method of interpretation focuses on the wording of statutes and assumes that the purpose of a statute is established at the time of its creation. As a result, the interpretive results are similar to those that result from the application of scientific methods. It deliberately disregards the 'point of the statute.' It allegedly aims to protect the democratic legitimacy of the statute by preventing the political preferences of adjudicators from influencing the law. Thus, the interpretation of statutes must be purely mechanical.

131 For these reasons, the statement that "interpretation is not necessary when the text of the norm is sufficiently clear" sounds inaccurate, even if it is admitted that adjudicator "can expand the semantic horizon of a certain word" (Caroccia 2016, 69).

interpretation of public commitment, by a variety of other interpretive explanations attached to later statutes on related issues" (Dworkin [1986] 1998, 350). In addition to these statements and statutes, there are other political acts that may be part of the history of the statute being interpreted that must be considered, including judicial decisions. The weight and relevance of each act varies from jurisdiction to jurisdiction and from case to case.[132]

Interpretivism further requires that statutes be placed within the larger framework of value provided by the general political theory of the community in which the question arises. This is a requirement rather than a possibility. Even in situations where the wording of the law is clear and unambiguous.[133] In most cases, such inferences can be drawn intuitively, although adjudicators still must submit arguments showing that the competing interpretation fits everything else that has gone before. Acontextual or literal interpretations may ultimately prevail over all others, provided they fit within the record of the statute and are justified by the best interpretation of the system's political structures and decisions. Be that as it may, in both hard and easy cases, statutory interpretation invariably involves questions of political rights, which means that adjudicators are called upon to employ some of their convictions ([1986] 1998, 350–54; 1975, 1086–87, 1104).

5. Legal objectivity in interpretivism

The above is a general overview of the requirements that interpretivism imposes on the truth of propositions of law. A proposition that either does not meet the requirement of fit or is not fully justified by the general political theory of the community is objectively wrong. There is, however, a common objection to interpretivism, which is that it cannot provide an objective basis for its propositions, especially in today's culturally and ideologically diverse world. This is because, by conceding that the truthfulness of propositions of law also depends on that general political theory interpretivism supposedly opens up a space for adjudicators to exercise

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132 It is therefore a misinterpretation of interpretivism to say that it requires adjudicators to disregard the "contemporary will of the people" (free translation of : "*vontade do 'polo atual'*") (Hespanha 2009, 149).

133 In most cases, the wording of the statutory provisions is sufficient for adjudicators to arrive at a clear and unambiguous interpretation. These situations make up the routine and simple cases, "the less important ones for the development of legal doctrine or the impact on society" (Posner 2010, 8). Not surprisingly, as Latour testifies, the way adjudicators approach a dispute has a parasitic effect on the interest and intellectual complexity of the legal issues raised (Latour [2002] 2010, 130–40).

discretion in determining under which conditions people have legal rights (Hart [1961] 2012, 143; Hespanha 2009, 143).

It is useful to understand the source of this criticism. As explained at length elsewhere,[134] legal positivism assumes that whether a proposition of law is right depends solely on whether it satisfies the criteria or test contained in the rule of recognition, the existence of which is a matter of fact. The determination of what is the law would then depend exclusively on "the ability to observe social reality, to recognize regular behaviors, even if that observation also includes [...] the question of the reasons [and] meanings of those behaviors" (Hespanha 2009, 533).[135] In any case, adjudicators could base their decisions by observing social reality, even when the rule of recognition contains moral values.[136] In this context, "*the law looms as an artifact, objectively in existence*, before which the judge must be a pure, simple mirror reflecting reality in order to give a clear, faithful image" (Zagrebelsky 2003, 623).[137]

Interpretivism rejects such an assumption, arguing that "[v]alue judgments are true, when they are true, not in virtue of any matching [with moral facts] but in view of the substantive case that can be made for them" (Dworkin 2011, 11). As explained elsewhere,[138] while this substantial case depends on a consideration of the relevant social practices of a particular community—which are facts in themselves—requires that we go beyond it. Of course, it is likely that any conclusion we draw will be surrounded by controversy. Controversy, however, should not be confused with indeterminacy. Accordingly, those who reject the conclusion must present arguments for the opposite conclusion.

Nevertheless, the question remains as to why critics claim that interpretivism cannot ensure legal objectivity. The criticism is unfounded because it is based on a misconception of what is required for a proposition of law to be true. It confuses legal objectivity with the objectivity that science should strive for because it treats law as a criterial concept subject only to facts. I cannot help but return to Latour's detailed and illuminating words about the difference between the two kinds of objectivity:

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134 See, Chapter III(D.2) above.

135 Free translation of: "[…] a capacidade de observação da realidade social, de constatação de comportamentos regulares, embora essa observação comporte também […] a interrogação das razões dos sentidos, desses comportamentos."

136 Whose existence, I dare add, legal positivism also makes dependent on the existence of facts. A conclusion which I have rejected in Chapter II(C) above.

137 Emphasis in original.

138 See, Chapter II(C) above.

> [t]he strange thing about legal objectivity is that it quite literally is *object-less*, and is sustained entirely by the production of a mental state, a bodily *hexis*, and quite unable to resign its faculty of judgment by appealing to incontrovertible facts. […] Scientific objectivity, on the other hand, is distinguished by the fact that it is *subject-less* because it accommodates all sorts of mental states, and all forms of vice, passion, enthusiasm, speech deficiencies, stammers or cognitive limitations. However unfair, excessive, expeditious or partial researchers might be, they will never lack an object. […] [Adjudicators] can become 'objective' only by constructing an intricate and complex institution which detaches and isolates their consciences from the ultimate solution ([2002] 2010, 236–37).[139]

An objective legal interpretation depends on adjudicators subscribing to the "intricate and complex" legal practice that they wish to interpret, *i.e.*, one that fits what has gone before and is justified by the prevailing general moral theory of a particular political community. Legal interpretations, like any other kind of interpretation, can indeed be fraught with uncertainty, since adjudicators do not agree on what is the best interpretation (Dworkin 1975, 1101–3). But this is one of the reasons why legal systems need to create authoritative mechanisms that settles everything definitively—such as *res judicata pro veritate habetur*—whose goal is nothing other than to end the debate once and for all (Latour [2002] 2010, 237–39).

The possibility of a mechanism with the power 'to have the last word' would be unthinkable in science. Legal interpretations are nonetheless objective—as much as the disagreements surrounding them are genuine—because it is the same object that is being interpreted. Thus, the notion of 'positional objectivity' as used in relation to the objectivity of moral judgments is also useful in the context of the phenomenology of legal reasoning. Legal objectivity also depends on the positional variability of adjudicators, *i.e.*, their conclusions are no less objective because adjudicators see the law through their own eyes. Again, adjudicators neither need to simply repeat previous decisions, nor should they resort to their personal convictions. Instead, they must enforce the law in a manner consistent with the sense of justice of the community in question, *i.e.*, from the standpoint of political morality.

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[139] In this excerpt, the concept of 'object-less' must be understood in contrast to the term "object" as used in science.

> [Interpretivism] at no point provides for any choice between his own political convictions and those he takes to be the political convictions of the community at large. On the contrary, his theory identifies a particular conception of community morality as decisive of legal issues; that conception holds that community morality is the political morality presupposed by the laws and institutions of the community. He must, of course, rely on his own judgment as to what principles of that morality are, but this form of reliance is the second form we distinguished, which at some level is inevitable. It is perfectly true that in some cases Hercules' decision about the content of this community morality, and thus his decision about legal rights, will be controversial. This will be so whenever institutional history must be justified by appeal to some contested political concept, like fairness or liberty or equality, but it is not sufficiently detailed so that it can be justified by only one among different conceptions of that concept. […] It would be silly to deny that this is a political decision, or that different judges, from different subcultures, would make it differently (Dworkin 1975, 1105).

The specter of the discretionary power of adjudicators under interpretivism is now hopefully off the table—something legal positivism cannot be proud of saying, as Zagrebelsky correctly notes (2003, 640). So, it is time to move forward and once again return to our starting point—the claim for more diversity in international arbitration. But now we have the right tools to make an informed proposal about how diversity affects—or at least influences—legal reasoning.

CHAPTER IV | INTERNATIONAL ARBITRATORS AS TEMPORARY MEMBERS OF POLITICAL COMMUNITIES

A. An overview of the path taken so far

In Chapter I, we looked at the demographic characteristics of international arbitration tribunals, based on the genre and geographic and regional origins of international arbitrators. We became aware of the current background of international arbitration, against which the call for more diversity is made: There is still an uneven proportion of male international arbitrators who are nationals of a WEOG State—the pale, male and stale—although there are promising signs of improvement. The central question this dissertation seeks to answer, however, has remained unanswered: Is legal reasoning in any way affected by who we are and how we decide to live our lives and give meaning to them?

In search of an answer, I followed a detailed plan in which I examined how we think, choose, and act, based on the common-sense assumption that adjudicators also draw on and use every day reasoning tools in legal argumentation. We have been concerned not only with how the multiple identities we possess, which affect how we interact with each other and how we live our lives, but also with what is required for an ethically and morally fulfilling life. In this context, I rejected the notion that achieving these goals is simply a matter of maintaining and reproducing the social practices of our communities. Rather, I held that there is an objective truthfulness to what it means to act in a principled way, and that people, including adjudicators, ought to aspire to such meaningful lives in everything they do. In this first phase, we could begin to sketch the framework in which our choices are indeed affected by what we are and how we choose to live our lives. But the fundamental question of whether diversity has an impact on legal reasoning remained unanswered.

This is because there was still a piece of the puzzle missing from this framework, namely the question of what the law is and what it takes for a proposition of law to be true. As a result, I looked into these questions and found that acting in a principled way also means that, in dealing with those who are part of our political communities, we have and must abide by special moral obligations and duties—which are not enforceable on demand. Exactly what those obligations and duties are and require of us is debatable and, therefore, fraught with uncertainty. But because we value predictability and certainty in our lives—without which they

become intolerable—something else is needed to help us overcome these shortcomings of political morality. We then noticed that the law serves this purpose by establishing legal rights that we can rely on and enforce directly before certain coercive political institutions. As a result, the law cannot be understood without taking into account the more general scheme of political morality of which it is an integral part. Consequently, the truthfulness of propositions of law depends not only on whether they are consistent with previous institutional decisions, but also on whether they are justified by that political system. What interpretivism requires from adjudicators was the subject of the second part of the Chapter III.

There is only one preliminary issue that separates us from determining whether more diverse international arbitral tribunals actually have an impact on legal reasoning. It concerns the question of whether international arbitrators and national judges have the same responsibility in determining the truth of propositions of law. This is a debate that has not gone unnoticed in the literature on international arbitration.

B. The responsibilities of international arbitrators and the truthfulness of propositions of law

Simple as it may seem, this question is necessarily interpretive and requires more than recourse to predetermined criteria. The detailed scope of the responsibilities of international arbitral tribunals also involves, like any other legal question, the search for the interpretation that is most consistent with and justified by the general political theory of the community in which the practice takes place. It is, therefore, unlikely that there will be uniform detailed answers suitable for all legal systems that provide for the possibility of resorting to international arbitration.[140] One of the most important questions regarding the responsibilities of

[140] For the present purpose, the minimum level of consensus is sufficient for the preliminary stage of interpretation, *i.e.*, the characteristics that constitute the starting point of any interpretation related to international arbitration. These consensual features can be summarized as follows:

> a non-judiciary and adjudicative dispute resolution method available for certain international disputes in which the disputing parties have broad powers to shape the adversarial process and the power to render a binding decision rests with impartial third parties.

Interestingly, these features shed more light on the procedural characteristics of international arbitration than they do on the relationship between international arbitrators and the content of the law applicable to the dispute—which they say too little about. I have not included the principle that international arbitration is necessarily voluntary in this consensual definition because there are cases in which it does not matter whether the disputing parties wish to submit

international arbitral tribunals relates to whether they are comparable to those of judges sitting on the benches of national courts.

Competing interpretations agree that party autonomy is a core principle of international arbitration. Thus, it is undisputed that interpretations that attach no importance to this principle—and to what it means in terms of the role of the parties' expectations—would be wrong. For such interpretations would leave an important part of the system unexplained. In any case, the right interpretation must explain other parts of the system and, in case of conflict, find the right balance between them. Under interpretivism, such an interpretation must embrace that settlement between conflicting principles which puts the system of political morality of the community in which the interpretation is made in a better light. Even if it is disputed and uncertain what the content of that arrangement is, an answer must be found. Therefore, a one-size-fits-all solution—so common and tempting in international arbitration—is unlikely. Accordingly, for example, greater importance may be attached to the principle of party autonomy and the expectations of the disputing parties, on the one hand, which means that the roles of judges and international arbitrators are indeed significantly different (Park 2010, 43). On the other hand, as important as these features are due to the fact that international arbitration essentially deals with contractual and private matters,[141] there are other features of equal importance that bring international arbitrators and national judges closer (Kalderimis 2018, 548; Rivkin 2013, 337; Shah 2017, 341).

Among the most important and controversial issues related to the subject of the responsibilities of international arbitral tribunals is the debate on determining the content of the applicable procedural and substantive law. It is important to note, however, these responsibilities may differ depending on whether the statutory provision to be interpreted addresses issues of procedure or the merits of the case. It is undisputed, however, that in both cases significant efforts have been made to harmonize the legal framework for international

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the dispute to arbitration. For example, under Portuguese law, there are cases in which recourse to arbitration is mandatory, including in certain consumer disputes [see Article 14(2) of Law No. 24/96 of July 21 (as amended by Law Decree No. 84/2021 of 18 October]. This legal specificity alone does not seem sufficient to deny the quality of arbitration to the method of dispute resolution provided in this legal regime.

141 When international arbitration involves states, public state entities, or state-owned enterprises—as is the case in investor-state or state-state disputes, where public interests are always at stake—there would seem to be compelling arguments to limit the importance of this argument (on this issue and on the application of emergency arbitration to disputes involving states, state entities, and state-owned enterprises, see (Gouveia and Antunes 2019).

arbitration, most notably through key international instruments such as the New York Convention,[142] the UNCITRAL Model Law,[143] and institutional arbitration rules. Greater uniformity in international arbitration, particularly on procedural issues, results from extensive adherence to these international instruments. In interpreting procedural issues, judges and international arbitrators are therefore more likely—and understandably so—to rely more frequently on prior institutional decisions from abroad, including judicial and arbitral decisions that have no obvious connection to the jurisdiction in which the dispute in question arose.[144] It is essential, however, to examine the precise responsibilities of international arbitrators in determining the content of procedural and substantive laws. It is unwise, however, to do so on the assumption that the two issues are one and the same. Different aspects must be considered in both cases.[145] Only then our expectations regarding the scope of responsibilities of international arbitrators will become clear.

1. The content of procedural law

The procedural powers of international arbitral tribunals are aimed at the smooth, effective, and orderly conduct of the arbitral process. The sources of these powers vary, as what international arbitral tribunals can and cannot do further depends on what powers the disputing parties have granted them and whether they respect the limits imposed by the applicable law

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142 The New York Convention has 169 Contracting States (https://www.newyorkconvention.org/countries, last accessed on January 22, 2022).

143 According to UNCITRAL, the UNCITRAL Model Law has influenced legislation in 85 States in a total of 118 jurisdictions (https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status, last accessed on January 22, 2022).

144 These are situations that justify the application of so-called juridical cosmopolitanism, provided that they are also consistent with and justified by the previous institutional decisions of the community of the place of arbitration (*lex arbitri*). The question of whether they justify such a presumption is, however, a matter of interpretation—and such interpretation must necessarily take into account both the international origin of the UNCITRAL Model Law and the purpose of promoting its uniform application [see Article 2A(1) of the UNCITRAL Model Law]. If such an interpretation meets the tests of fit and justification required by interpretivism, there is nevertheless great value in undertaking such comparative analyzes because they allow competing solutions to be weighted (Steyn 2002, 18).

145 That seems to be the approach taken by Esposito and Martire when referring to the concept of neutrality note that "[t]he parochial approach of state-courts has to be resisted in a field where the participants to the process and the elements to be weighted in it all come from different legal, economic, social, cultural and linguistic backgrounds, thus bringing into the proceedings different collective values which may often result in harsh conflicts" (Esposito and Martire 2012, 327–28).

(Blackaby, Hunter, and Redfern 2015, 306–8).[146] Be that as it may, international arbitrators generally have a wide range of procedural powers to shape the proceedings. As a result, the possibilities are immense in terms of the many forms that arbitral proceedings can take, even though there is a clear trend toward standardization of procedures and any solution must adhere to these legal boundaries.[147]

There is no doubt, however, that it is up to international arbitral tribunals to determine the content of their own procedural powers,[148] including the scope of their jurisdiction, the determination of the seat and language of arbitration, the possibility of issuing interim orders, whether to grant the production of documents or the appointment of experts and the necessary testimony. With this goal in mind, international arbitrators must conduct interpretive exercises to find the interpretation of the legal practice that fits with past institutional decisions and best justifies the system of political morality of the community in question. In any case, since the form of arbitration depends largely on the expectations of the disputing parties, the suggestion that "the manner in which the proceeding is conducted should reflect in varying degrees the preferred cultural orientation of the parties or a neutral one with which both parties would feel comfortable," (Esposito and Martire 2012, 338) is instructive overall.

146 See, Articles 18 and 19 of the UNCITRAL Model Law. Articles 30(1) of PAL; Articles 17(1) of the UNCITRAL Arbitration Rules; Articles 17(1) of the PCA Arbitration Rules; Articles 18(1) and 22(4) of the ICC Rules; Articles 14.1 and 14.2 of the LCIA Arbitration Rules; Articles 13(1), 13(5), 13(9) and 13(10) of the HKIAC Arbitration Rules; Articles 17(1), 17(2), and 17(3) of the CAC Arbitration Rules.

147 In part due to procedural instruments—such as the Redfern Schedule or standardized terms of reference or procedural orders—and non-binding instruments—such as the IBA Guidelines on Conflicts of Interest in International Arbitration, IBA Guidelines on Party Representation in International Arbitration, and the IBA Rules on the Taking of Evidence in International Arbitration, the Guidelines for Arbitrators of the SCC. One might add that the lack of diversity may also contribute to this standardization—where the actors of the decisions remain the same, new solutions are unlikely to see the light of day.

148 Even though arbitral awards may later be challenged in a national court, for example, on the grounds that the composition of the arbitral tribunal or the arbitral procedure did not comply with the disputing parties' agreement, or, in the absence of such an agreement, did not comply with the law of the country where the arbitration took place [Article V(1)(d) of the New York Convention].

2. *The content of substantive law*

What about the responsibilities of international arbitral tribunals concerning the determination of the contents of the applicable substantive law of the dispute?[149] Are such responsibilities the same for judges and international arbitrators alike? As a general rule, statutes provide little to no direct guidance in this respect,[150] thus leaving them in the dark (Kaufmann-Kohler 2005, 635). In particular, the law simply requires international arbitrators to decide the dispute in accordance with such rules of law as are chosen by the disputing parties as applicable to the substance of the dispute.[151] So, the question stands: do international arbitrators have the responsibility to make their own inquiries to establish what the content of the applicable law is (*iura novit arbiter*)?[152] Or are they exempted from that obligation because the burden of proving it falls to the disputing parties? To put it in other words: Are international arbitrators free from establishing on its own motion the truthfulness of propositions of law because it is for the disputing parties to do so? The responses are once again interpretative, and the right interpretation must fit with and be justified by the past institutional decisions of the

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149 The substantive law applicable to the dispute is either agreed upon by the disputing parties in their underlying contract, a treaty, or selected by the international arbitrators, either directly or through a set of conflict of laws rules (Born 2015, 962).

150 The possibility of resorting to international arbitration to resolve a dispute is often agreed upon in contractual arrangements that also provide for the substantive regulation of the contractual relations of the disputing parties. The interpretation of contractual provisions raises specific issues that are beyond the scope of this dissertation. Even if the contractual framework comprehensively regulates the parties' relationship, any dispute related to the contract will always raise questions of legal interpretation, including the provisions on contract.

151 See fn.12 above.

152 Most national arbitration laws do not explicitly address this issue. A well-known exception is the English Arbitration Act, Article 34(1) of which states that the arbitral tribunal shall decide all questions of procedure and evidence, subject to the right of the parties to agree on any matter—including whether and to what extent the tribunal itself should take the initiative to determine the facts and the law. There is, however, substantial and varying case law on this issue. See, e.g., Cour d'Appeal de Paris, *Republique de Madagascar v. Peter de Sutter, Kristof de Sutter, DS 2, S.A., Polo Garments Majunga, S.A.R.L,* Arret du 15 Mars 2016, available at https://www.italaw.com/sites/default/files/case-documents/italaw7208.pdf (last accessed February 18, 2022) ; On the subject, see also (Mcgough and Meier 2014); Swiss Federal Court, *Tvornica case*, Judgment of April 15, 2015, available at https://www.swissarbitrationdecisions.com/sites/default/files/15%20avril%202015%204A%20554%202014.pdf (last accessed February 18, 2022); Svea Court of Appeal, *Systembolaget AB vs Vin & Sprit AB2*, Case No. T 4548-08, Decision of December 12, 2009; Caratube International Oil Company LLP v. Republic of Kazakhstan, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP, dated February 21, 2014, available at https://www.italaw.com/sites/default/files/case-documents/italaw3082.pdf (last accessed on February 18, 2022).

community in which the question arises. It is nevertheless controversial whether their expectations are relevant in this respect (Banakar 1998, 349), even if inviting the disputing parties' views is mandatory on the grounds of due process.[153]

Let us assume nonetheless that the right interpretation is that it is up to the disputing parties to establish the contents of the substantive applicable law and that international arbitrators need not to worry about that question. On what grounds are then international arbitrators expected to weigh the submissions of the disputing parties? It seems that even then international arbitrators need to assess the merit of the disputing parties' submissions. In so doing, the scope of international arbitrators' responsibilities continues to include the determination of whether the substantive propositions of law on which the disputing parties' claims are based are right or wrong. For that international arbitrators must still determine if those propositions fit with and are justified by the scheme of political morality of the community in question. The difference is that if international arbitrators come to conclude that the disputing parties have failed to submit compelling arguments that meet such a threshold, they may simply dismiss their claims on the grounds that the burden of proof was not met.

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International arbitral tribunals are, therefore, responsible for determining the content of procedural and substantive law. In international arbitration, they have the final say on both procedural issues and the law applicable to the dispute. In both cases, international arbitral tribunals must ensure, either directly or indirectly, the interpretation they deem right is consistent with and justified by the political morality of the community in which the issue in question arises.[154] This is, of course, without prejudice to the importance of other non-legal mechanisms that govern our contractual relations, such as customs, usages and informal sanctions based on certain standards of conduct (Banakar 1998, 366–69). In any case, it seems

153 Allowing the disputing parties to address all issues related to the arbitration, including questions of law, is "vital both to the arbitrator getting it right and to the parties' sense of being treated justly" (Park 2010, 44).

154 The heated debate over whether the *lex mercatoria* is indeed an independent legal system does not impair this conclusion. For its proponents argue that there is a community *behind* this 'delocalized' legal system, namely the international business community [for an analysis of the different positions in the debate, see (Banakar 1998, 374–82)]. Whether this is the case is again a matter of interpretation and depends on whether such a community meets the requirements of a true community (see, Chapter III(A) above). However, this dissertation is not the place to pursue such an endeavor.

altogether an oversimplification to argue that, since international arbitration is an integral part of the process of globalization,

> the behaviour of international commercial actors are no longer subject to the principles of legitimacy as it was conceived by municipal law and in terms of culturally determined attitudes towards the law and its processes (1998, 353; see also, 355) [and to argue that] […] the authority of law and legal decisions can be legitimized neither by the authority of the state nor by the general consent of a national community (1998, 390).

In any case, the fact that international arbitrators must ensure that their interpretations meet the requirements of fit and are justified by the principles of political morality is not without consequences for their relationship to the law they interpret. This is the question that now follows.

C. International arbitrators as temporary members of political communities

Let us imagine that the disputing parties—a Portuguese company and a Chilean company—had agreed to resort to international arbitration to settle a dispute arising from a distribution agreement they entered into several years ago. The arbitration agreement provided for *ad hoc* arbitration with its seat in Lisbon, Portugal. It also provided that the sole arbitrator must apply Portuguese law as the governing law to the dispute. After discussions on the appointment of the sole arbitrator lasted almost three months, the disputing parties finally agreed on the appointment of Ronald Latour Smith, a well-known American arbitrator. For both disputing parties, the appointment of a neutral third party with profound knowledge of international arbitration was of utmost importance, as the amount in dispute was, among other things, in excess of one hundred million euros. Moreover, the sole arbitrator, who had studied law in France, had previously served as co-arbitrator in three other international arbitrations in which Portuguese law was applicable to the dispute. But other than that experience, he had no other contact with Portuguese law. We now know that Ronald will have to determine, one way or another, which procedural and substantive propositions of law are true with respect to Portuguese law.

This incredible scenario, in which the disputing parties end up appointing an international arbitrator who has no significant connection to the applicable laws, is quite common in

international arbitration. This is in part due to the fact that there are few legal barriers to who can serve as an international arbitrator, aside from the fact that whoever is appointed must be impartial and independent.[155] The differences between external and internal statements of law illustrate well what is then required of these international arbitrators. Hart—allegedly in line with Weber (Múrias 2010, 108–9)—distinguished the two concepts as follows:[156]

> […] it is possible to be concerned with the rules, either merely as an observer who does not himself accept them, or as a member of the group which accepts and uses them as guides to conduct. […] What the external point of view, which limits itself to the observable regularities of behaviour, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of the society. These are the officials, lawyers, or private persons who use them, in one situation after another, as guides to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment, viz-m in all the familiar transactions of life according to rules. For them the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility ([1961] 2012, 89–90).

As Múrias explains, "[…] confronted with a question, the internal perspective is that of the person giving an answer, submitting arguments for the truth in question, or, if the answer has no truth value, submitting arguments for the qualification of that answer in terms corresponding to those of true answers" (2010, 114–15).[157] Unlike judges in national courts, who enforce the law of the political community to which they belong, international arbitrators seldom have such a special relationship to the law they are called upon to interpret and enforce. In our example above, it is even unlikely that the Chilean company would have accepted the Portuguese company's proposal to appoint a Portuguese national as an international arbitrator, since the practice of international arbitration requires that no international arbitrator—or at least the presiding arbitrator—has the same nationality as one of the disputing parties. If not out of a duty to fulfill their mandate, international arbitrators spend most of their lives looking

155 See, fn.10 above.

156 On the subject of legal positivism and the internal point of view, see *inter alia* (Holton 1998).

157 Free translation of: "[…] *perante uma pergunta, a perspectiva interna é a de quem lhe dá uma resposta, dá argumentos em favor da respectiva verdade ou, não tendo a resposta valor de verdade, dá argumentos a favor da qualificação dessa resposta em termos análogos aos das respostas verdadeiras*".

at the applicable laws they interpret from an external perspective. It is more likely to hear them say: "Under Portuguese law, the law states that…" than to hear them say: "It is the law that…" This is because international arbitrators do not see themselves for most of their lives as members of the political community whose law they now need to interpret and enforce. However, if Ronald has accepted his appointment as an international arbitrator and the application of Portuguese law, then he must do more than just describe the former from an external standpoint. Rather, he must be connected with it—even if just for a short while—from an internal perspective. It is a sort of a citizenry fiction as if he himself were a member of the political community whose history and standards he has accepted and must now interpret in seeking the truthfulness of propositions of law.

The question, then, is not whether international arbitrators believe, for example, that human rights should be respected and promoted, but whether those rights, in whatever form and content, are part of the legal system and the history of the law they interpret and enforce. The loyalty of international arbitrators is not to their personal ideological sympathies, policy preferences, or to the principles of their own political communities—even though these may have a structuring significance for who they are. Rather, it is their moral duty to ensure that their decisions are consistent with the set of past institutional decisions that make up the legal system and cast it in its better light.[158] Not because these are the expectations of the disputing parties[159]—although that may be the case—but because it is part of the responsibility that the legal systems impose on them.[160]

Be that as it may, what international arbitrators are, how they live their lives, and what it means for them to live in a principled way will affect the way they interact with and interpret the legal system of which they are temporarily a part from the moment they have willingly accepted their appointment. International arbitrators with different backgrounds and personal

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158 Professor Kaufmann-Kohler argues that international arbitrators have "a *moral* obligation to follow precedents so as to foster a normative environment that is predictable" (Kaufmann-Kohler 2007, 374).

159 For example, W. Park emphasizes that respect for prior decisions of other courts stems from the fact that those decisions "often get taken into account as constituting a corpus of principles representing the litigants' shared expectations" ([2002] 2010, 49).

160 However, the exact responsibilities imposed on international arbitrators are a matter of interpretation, and whatever they turn out to be, they can change in the blink of an eye. All that is needed is an additional political decision showing that international arbitrators must pay particular attention to the expectations of the disputing parties when determining the truth of propositions of law about the law applicable to the dispute.

and professional experiences are likely to weigh competing standards differently when responsibly arriving at alternative judgments.[161] Especially at the moment when they have to decide which interpretation puts the practice to be interpreted in a better light.[162]

The notion that international arbitrators are therefore under no obligation to respect the general political theory of the community to which they temporarily belong would completely miss the point of what should be achieved in any exercise of legal reasoning. If Ronald accepts his appointment, he is not merely accepting another—perhaps very well-paid—professional offer. Rather, he accepts the offer to join a new political community with which he had no intimate relationship and whose standards he must eventually weigh. In doing so, he will likely reach different conclusions, but they will be no less valid or objective than those that national courts have upheld for decades. But none of this is to be deplored; on the contrary, for there is no law without "the hesitation, the winding path, the meanders of reflexivity" (Latour [2002] 2010, 151). Indeed, the decisions of an outsider like Ronald will be of valuable importance in confirming or refuting our own idiosyncratic views of the law.

161 See, fn.127 above.

162 While the right interpretation usually occurs intuitively to national judges, international arbitrators must, of course, enter a conscious state of moral breakdown by stepping out of their "everydayness of being moral" (Zigon 2007, 133).

CONCLUSION | INTERNATIONAL ARBITRATORS AS IMPARTIAL SPECTATORS

> *Our uncertainty concerning our own merit, and our anxiety to think favourably of it, should together naturally enough make us desirous to know the opinion of other people concerning it* (A. Smith [1793] 2015, 209).

The purpose of this dissertation is to determine whether the political call for more diversity in international arbitration might have implications for the development of the law. In particular, whether the potentially more diverse contributions of international arbitrators can make a significant contribution to this development. From the start, I wanted to go beyond the common political claim that diversity should be welcomed for its contribution to the quality of arbitral awards. Rather, I wanted to explore what exactly that contribution might be and at what stage in the interpretation and in the enforcement of the law it might exert that influence. To this end, this dissertation begins with an overview of the current state of diversity in international arbitration. In particular, I address gender diversity as well as geographic and regional diversity in international arbitration. These are only two examples, which receive a disproportionate amount of attention. The truth is that the question of diversity in international arbitration may be viewed from a variety of identity perspectives. Be that as it may, data analysis tells us that there is a clear lack of diversity in the composition of international arbitral tribunals and that the threshold for equitable distribution has not been met.[163] In particular, in the case of investment arbitration, the picture that emerges is of a "a small, dense and interconnected group, where members at the core are unlikely to escape the observation of other members of the core, but may remain insulated from outside influence" (Puig 2014, 418). There are various explanations for this systematic exclusion, "[f]rom social norms and pressures to market collusion, from deficient regulation to legal and institutional design" (2014, 388).

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163 There is no magic formula to solve the problem of lack of diversity in international arbitration. In any case, many avenues have been suggested through various initiatives and projects. These include (i) greater engagement of stakeholders involved in international arbitration to diversify the pool of international arbitrators (from which disputing parties can select those to arbitrate their disputes); (ii) raising awareness of the need for and benefits of greater diversity of arbitral tribunals on the outcome of proceedings; (iii) arbitration conferences and symposia should diversify the list of speakers and presenters; (iv) the scope of existing diversity projects in international arbitration should be expanded; and (v) improve legal education and training (Queen Mary - University of London and White & Case 2018, 19–20).

The search for an answer to the question of whether what adjudicators are and how they stand in the world has an impact on legal reasoning without compromising much-needed legal objectivity began in Chapter II. To that end, the basic premise of this dissertation was put on the table: Adjudicators, including international arbitrators, rely on the same cognitive mechanisms in their legal reasoning as in their everyday reasoning. Therefore, the next logical step for me was to identify each of these mechanisms based on the findings of the neurological sciences. In doing so, I found, in line with Damásio, that these mechanisms are closely linked to our secondary emotions and thus involve our socialization dynamics, our identities, and the value-based evaluations we make. It was thus necessary to examine each of these dimensions. So, I began by addressing the complex issue of our identities as a fundamental part of our socialization and how they directly affect our decisions and actions, especially with regard to group thinking. Our identities are an essential part of our lives because, on the one hand, they give them meaning, while, on the other, the social practices associated with them serve as valuable referents through which we interact with each other and with our environment.

However, I have rejected the notion that the value of our choices and decisions simply depends on our ability to conform to these practices. Rather, the value of principled choices and actions require that we look beyond and adopt an interpretative approach. Accordingly, in line with Dworkin, I have argued in particular that this value depends fundamentally on our ability to live ethically fulfilling lives and to fulfill certain moral duties and obligations to others, including those arising from our political communities.[164] I have further argued that our moral convictions depend not on moral facts but on moral arguments, *i.e.*, they are true when we act in a morally responsible way by seeking to base our moral convictions on a network of mutually supportive moral concepts. Finally, I have argued that it is important for most people, including adjudicators, to act in this way even when a state of complete moral and ethical integrity proves illusory. When we reached this stage, we had convincing evidence of how each of us comes to a decision and strives for value. But there was still one piece of the puzzle missing, without which no adequate work on the phenomenology of legal reasoning could be presented. This piece of the puzzle concerned the object with which adjudicators work—the law—and what they strive for in every decision—the truthfulness of propositions of law.

Accordingly, in Chapter III, I argue that the law does not exist in a vacuum, that it is filled with moral and political meaning, and that the principles of the legal practices being

[164] See, Chapter III(A) above.

interpreted are not a matter of fact. Therefore, I have also pointed out that, under interpretivism, the truth of a proposition of law requires adjudicators, including international arbitrators, to find the best interpretation that fits the past institutional decisions of the political community in question and that best expresses the principles of its general political theory. Moreover, I have emphasized that adjudicators, like all other people in daily life, cannot and will not ignore what it means for them to act in a principled way, and that it would be unreasonable—not to say impossible—to require them to do otherwise.[165] They follow Camus's maxim that "for a man who does not cheat, what he believes to be true must determine his action" ([1941] 2016, 17). They rely on their own convictions about how best to weight competing principles so that the practice being interpreted appears in the best light. Such an approach implies that adjudicators can—and likely will—disagree about which interpretation achieves this.[166] Consistent with the conclusions in Chapter II, I have further argued that legal objectivity is not compromised under interpretivism for the object being interpreted is one and the same.

In Chapter IV, I argue, on the basis of a consensual definition of international arbitration,[167] that the responsibilities of international arbitrators are similar to those of national judges in the sense that they too should be concerned with the truth of propositions of law.[168] Because disagreements about the truth of propositions of law may be related to the convictions of adjudicators about the best interpretation of principles of political morality, I have further argued that the (growing) diversity of international arbitration raises the contribution that international arbitrators can make to the development of the law to an unprecedented level.[169]

This valuable contribution can be explained if we compare the contributions of international arbitrators with those of Adam Smith's impartial spectator—an imaginative, unbiased, well-informed person—whose judgments aim to validate another's moral judgments

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165 Legal systems, of course, set limits on what international arbitrators can bring to the proceedings. The determination of those limits is itself a matter of interpretation, the answer to which derives essentially from the grounds on which an arbitral award may be set aside or its recognition and enforcement refused, including on the ground that such an award is contrary to public policy (Article V of the New York Convention).

166 See, Chapter III(D.4)(D.5) above.

167 See, fn.140 above.

168 See, Chapter IV(B) above.

169 Provided, of course, that it is the result of a proper exercise of legal reasoning, as suggested in this dissertation.

(A. Smith [1793] 2015).[170] That is, the approval or condemnation of a particular judgment depends on the ability of this impartial person to empathize with it. The impartial spectator may take many forms, including that of an external or internal spectator. We appeal to the internal spectator, "the man within the breast, the great judge and arbiter of [our] conduct" ([1793] 2015, 213), when we strive to see our own decisions and actions as other people see them or as we believe they probably would. This dialog with oneself is part of the personal process of making a moral judgment. Adam Smith explains the ways in which the inner spectator works as follows:

> [w]hen I endeavour to examine my own conduct, when I endeavour to pass sentence upon it, and either to approve or condemn it, it is evident that, in all such cases, I divide myself, as it were, into two persons; and that I, the examiner and judge, represent a different character from that other I, the person whose conduct is examined into and judge of. The first is the spectator, whose sentiments with regard to my own conduct I endeavour to enter into, by placing myself in his situation, and by considering how it would appear to me, when seen from that particular point of view. The second is the agent, the person whom I properly call myself, and of whose conduct, under the character of a spectator, I was endeavouring to form some opinion. The first if the judge; the second the person judged of ([1793] 2015, 187).[171]

Even after such scrutiny, our moral judgments may still be fallible, for not only are we uncertain whether they are true, but they may also be the result of misleading features (Paganelli 2016, 320). In this situation, therefore, it is wise to turn to another person, a person

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[170] The proposal of this section is largely based on the revised second edition of *The Theory of Moral Sentiments*, published in 1793. The first edition of Adam Smith's work had been published 34 years earlier, in 1759. I am aware that Adam Smith, instead of speaking of moral convictions and moral judgments, preferred the terms of *moral sentiments* and *moral emotions*. However, after reading his *The Theory of Moral Sentiments*, I believe that Adam Smith's use of these terms is best explained by his desire to emphasize what effect the moral convictions and judgments of others have on us and how better to do this than by resorting to the terms sentiments and feelings? However, there is no reason to assume, as María Carrasco and Christel Fricke do, that such feelings and sentiments are spontaneous or that moral disagreements result from people evaluating the scenario in question from different perspectives and on the basis of different self-interest (2016, 250–52). On the topic of the impartial spectator, see also (Brown 2016; Fleischacker and Fricke 2016; Hurtado 2016; Mueller 2016; Paganelli 2016; V. L. Smith 2016; Urquhart 2016; Weinstein 2016).

[171] See also, (Carrasco and Fricke 2016; Paganelli 2016).

who is not us, someone who can even be at long distance from us.[172] In dealing with such a person—the external impartial spectator—a moral judgment is considered just and reasonable if the external impartial spectator upon bringing "the case home to himself" ([1793] 2015, 15) could sympathize with it, and unjust and inappropriate if it could not.

It therefore calls for a "process of communication in which people—both people in the role of persons concerned and people in the role of spectators—engage in to address moral disagreements, and in the course of which they learn to be impartial, at least more impartial than they were originally" (Carrasco and Fricke 2016, 249). None of the individuals involved has any particular authority to settle the dispute, even if the impartial spectator is at a distance with the case in which the disagreement occurs. Be that as it may, should a moral disagreement arise, the process of communication invites the question of whether one of the participants has erred in his moral judgment. Engaging with the external impartial spectator provides us with a forum for resolving moral disagreements, in which those involved are invited to swap places and consider what is in dispute by putting themselves in the shoes of others (2016, 254). However, as I noted elsewhere,[173] the objectivity of our moral judgments does not depend exclusively on whether they are approved of by the impartial spectator. If you join this forum, participants may simply find that the moral convictions upon which their judgments are based are simply different, but each is the product of a responsible moral exercise. As I understand Smith's impartial spectator, there are compelling arguments for something else mentioned earlier in this dissertation:[174] That what is right can be contested, is never indeterminate by default, and depends on the position from which one views the object being interpreted.

Valuable as it can be as an instrument for confirming our moral judgments, the device of the impartial spectator can play an important role in the search for the right interpretation of the law. For as I have argued in this dissertation the right proposition of law also depends on adjudicators relying on their moral convictions in seeking the best interpretation of the principles of political morality of the community whose law they are asked to interpret.[175] This can be done if the legal arguments put forward in favor of that legal interpretation are

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172 In this sense, the external impartial spectator can actually be a real person. It need not be "an abstract category that we clothe with flesh and blood, knowledge and perspective, to match our circumstances as best we are able" (Mueller 2016, 314).

173 See, Chapter II(C) above.

174 See, Chapter II(D) and Chapter III(D.5) above.

175 See, Chapter III(D.2) and (D.4) above.

valid and convincing. That is, if the international arbitrators' interpretation of the principles of the political community in question allows us to see the practice being interpreted in the best light. International arbitrators—and adjudicators in general—are invited to enter in a dialogue with other international arbitrators as if they were impartial spectators and to consider the results to which their moral conviction gave rise. Of course, our moral convictions do not arise of the vacuum, but are intimately linked to our ethical choices and personal histories, making impartiality hard to achieve. As María Carrasco and Christel Fricke suggest,

> [i]mpartiality comes in degrees. No human being will ever reach ideal or perfect impartiality. Ideal impartiality requires omniscience and complete absence of corruption and self-deceit, something no human being can ever hope to achieve. This does not imply that we should not even strive to constantly increase the level of our own impartiality (2016, 256).

Adjudicators, then, should approve an interpretation of a legal proposition not for the sake of innovation or creativity, but because, after examining the underlying reasoning, they conclude that it can withstand critical scrutiny under interpretivism. As Smith noted, approving another's judgment while interacting with an impartial observer has nothing to do with it being useful, but with it being "accurate, [and] agreeable to truth and reality," because it agrees with our own ([1793] 2015, 22–23). This claim has nothing to do with subjectivism or lack of legal objectivity. As noted elsewhere,[176] the practice being interpreted remains one and the same throughout the exercise. The relevant change is in the position from which we view it, which may affect the decision we are asked to consider. As María Carrasco and Christel Fricke rightly point out,

> [t]he limitations of our perceptual, intellectual, and sensitive faculties do not force us to give up on our claims to universal truth; they do not represent any good reasons for embracing either epistemic or moral relativism. But in the light of these limitations, we can never be certain about the knowledge we have acquired, even if we share the respective evidence with others and if there remains no actual disagreement with anybody. We have at all times to remain open for further revision of our factual and moral beliefs, for taking new evidence into account that is incompatible with our current beliefs (2016, 261–62).

[176] See, Chapter (D.5) above.

Returning to the fundamental question of this dissertation, whether the growing diversity in international arbitration will have an impact on legal thinking and outcomes, the answer is a sound, "Yes, it will!" For the search for the truth of propositions of law, if done properly, will influence the way adjudicators, including international arbitrators, consider and accommodate competing standards.

If the arguments of this dissertation are persuasive, it should be beyond dispute that our legal reasoning can indeed be significantly affected by our moral convictions. In this context, it is of paramount importance that adjudicators, including international arbitrators, adopt a holistic and empathetic approach to justice in which they are both the proponents and the judges of their interpretations, especially in cases of uncertainty—or hard cases. To this end, they can compare them with the interpretive proposals of impartial spectators, even if they are very distant. For they can highlight the limitations, inadequacies and shortcomings of parochial legal interpretations. In other words, adjudicators should apply an open-ended process in which they seek impartial judgments to overcome parochial bias (Sen 2009, 123). The fullness and scope of any legal exercise can only be properly and thoroughly grasped by looking inward through the eyes of others, their moral convictions, concerns, and anxieties (A. Smith [1793] 2015, 183). Therefore, treating international arbitrators as impartial spectators can provide us with thorough evidence that either support our own parochial views or compelling reasons to abandon and refuse them (Sen 2009, 130).

The proposal is not aimed at ensuring that the interpretation of the impartial spectator is always the one that allows the practice being interpreted to be seen in its best light—that would be just another silly version of parochialism. Rather, the proposal simply asks adjudicators to give the benefit of the doubt to the legal interpretation of those who are temporary members of their community.[177] If in doing so they understand and accept the proposed interpretation, then it should be applauded for contributing to the development of the law. If not, then it should be disregarded. This increases the responsibility of international arbitrators, who are no longer expected to simply mimic what national judges do in their decisions. Rather, they must look at the political history of the community whose law they are interpreting and enforcing, and figure out what institutional rights the disputing parties have within that system of political morality.

[177] See, Chapter IV(C) above.

As mentioned elsewhere,[178] the call for more diversity in international arbitration is well founded from a political standpoint. This dissertation also shows why this is the case from a legal perspective. If international arbitration is indeed the modern version of the Tower of Babel in dispute resolution, then adjudicators should welcome empathetic and honest dialog, for many benefits can come from it.[179]

A final word on three additional issues that are essential to adjudication in international arbitration, but which I have not addressed in this dissertation.[180] *First,* as explained, the main theoretical proposal of this dissertation is that our differences, including our different moral convictions, exert their influence on legal reasoning at the moment when international arbitrators must decide which interpretation of the law is best justified by the principles of political morality of the community in question. However, I have not commented on how exactly this influence can be translated into specific decisions and reasonings. This is because any structured and convincing proposal in this regard requires an anthropological study of the problem. As mentioned elsewhere, the constraints and formal limitations of this dissertation have unfortunately prevented me from doing so on this occasion. But it is definitely a challenge that I intend to take up in future research.

Second, I have not taken into account the fact that most disputes are settled by three-member arbitral tribunals. The ideas in this dissertation are more readily applicable to cases where decisions are made by a sole adjudicator because the complexities and challenges of legal reasoning are reduced to making this one person's interpretations count.[181] However, the core claim of this dissertation is relevant even in this rather common scenario, as international arbitrators, even when deliberating collectively, still seek the best interpretation of legal practices, even if the results they reach are influenced by the collective environment in which they arise (Goodman-Everard 1991, 160; Latour [2002] 2010, 91–92).[182]

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178 See, fn.25 above.

179 The call for more diversity in international arbitration would be somewhat hypocritical if its proponents were not prepared to deal with what that diversity produces. Law is no exception in this regard.

180 In addition to those mentioned elsewhere in this dissertation (see, Introduction and fn.127 above), such as the analysis of the strategic considerations of international arbitrators and how their professional experiences, including the institutional memories of the institutions to which they belong, impact how they interpret and enforce the law.

181 Although in the case of collective arbitral tribunals, it is likely that the presiding arbitrators will determine both the pace of the proceedings and the content of the award. The degree of control over what the presiding arbitrator does or does not do depends largely on the proactivity of the co-arbitrators (Heilbron, QC 2016, 267).

182 There are many factors that can have a structuring influence in collective adjudication, such as the authority of adjudicators over their peers (Latour [2002] 2010, 129).

Third, the question of how international arbitrators determine the facts of the dispute and how this determination may be influenced by their acting in a principled way. International arbitrators generally have broad powers and wide discretion to determine the admissibility, relevance, materiality, and weight of evidence.[183] The responsibility of international arbitrators in this regard is primarily also a legal question and, accordingly, is subject to legal interpretation. The limits and content of the authority of international arbitrators in determining the facts of the dispute is, therefore, a question that falls within the scope of this dissertation.[184] But a significant part of what international arbitrators are called upon to decide relates specifically to the determination of the factual framework of the dispute, which is essential to the subsequent enforcement of the law. The challenges faced by adjudicators, including international arbitrators, in this regard vary widely: determining whether a written agreement has been signed or ascertaining the intentions of the parties in entering into such an agreement are issues that present varying degrees of complexity. The ease with which these challenges are met is often related to whether the plausibility of their occurrence can be easily and adequately demonstrated. In determining the truth of facts, therefore, it is important to determine how international arbitrators approach and deal with evidence in the record and whether their need to act in a principled way affects the results they reach—and, if so, how and to what extent.

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183 See, for example, Article 9(3) of PAL; Article 27(4) of the UNCITRAL Arbitration Rules; Article 27(4) of the PCA Arbitration Rules; Rule 34(1) of the ICSID Arbitration Rules; Article 22.1(vi) of the LCIA Arbitration Rules; Article 22(2) of the HKIAC Arbitration Rules; Article 31(1) of the CAC Arbitration Rules; Article 19(2) of the UNCITRAL Model Law.

184 Much has been written on this subject, with the discussion of what kind of truth international arbitrators actually seek perhaps being the most important. The majority view is that perfection in this regard is illusory and that international arbitrators work only with the competing views of the parties to the dispute. In this context, scholars and practitioners often speak of 'adversarial' and 'inquisitorial' models. It has been argued that the two approaches cross-pollinate because users of international arbitration come from different legal systems and legal cultures (Park 2010, 35). This cross-pollination is due in part to the adoption and application of numerous international instruments, such as the 1976 UNCITRAL Arbitration Rules and the 1985 UNCITRAL Model Law, to name just two. Whether this tendency is justified by the applicable law is once again a matter of interpretation that must be resolved within the framework of interpretivism. Be that as it may, it is nonetheless true that "a sense that truth matters remains vital to a perception that justice is being done" (Park 2010, 27). Moreover, there is the question of what evidence international arbitrators may rely on under current law—documentary evidence, expert testimony, inferences, hearsay evidence, burden of proof, personal experience. This, too, is a matter of interpretation. For more on the issue of cross-pollination of national approaches, see (Dezalay and Garth 1995).

The specific challenges and opportunities presented by these three issues are simply too complex to address here with the rigor and depth required. I hope that the basic framework established in this dissertation allows me to revisit each in the future. The same is true for the main theoretical claim of this dissertation. Now that I have presented it, I cannot help but think of ways to advance it further, including through an anthropological approach to show the complex reality of legal reasoning in international arbitration. But the future is as uncertain as moral disagreements are.

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APPENDIXES

Table 1. Appointment of female arbitrators in arbitrations administered by arbitral institutions, between 2015 and 2019

Institution	**2015**	**2016**	**2017**	**2018**	**2019**
CAS	13 (3.7%)	43 (8.7%)	7 (1.9%)	8 (5.4%)	2 (25%)
DIS	40 (13.4%)	33 (12.4%)	50 (15.2%)	29 (12.4%)	33 (17.5%)
HKIAC	16 (9.7%)	19 (12.1%)	27 (14.4%)	32 (12.7%)	51 (18%)
ICC	136 (10.4%)	209 (14.8%)	249 (167%)	273 (18.4%)	312 (21.1%)
ICDR	140 (17%)	180 (16%)	246 (22%)	229 (22%)	213 (24%)
ICSID	21 (11.4%)	21 (13.2%)	37 (18.9%)	55 (23.8%)	37 (19.3%)
LCIA	71 (15.8%)	102 (20.5%)	97 (24%)	102 (23%)	163 (29%)
PCA	6 (12.5%)	4 (10.5%)	5 (15.2%)	9 (19.6%)	5 (20%)
SCC	39 (14%)	41 (16%)	46 (18%)	69 (27%)	52 (23%)
VIAC	8 (14.3%)	12 (17.1%)	7 (16.7%)	15 (24.6%)	11 (16.4%)
Average	*12.2 %*	*14.1 %*	*16.3 %*	*18.9 %*	*21.3 %*

Source: (International Council for Commercial Arbitration 2020, 17).

Table 2. Appointments of female arbitrators by arbitral institutions. between 2015 and 2019

Institution	**2015**	**2016**	**2017**	**2018**	**2019**
DIS	10 (34.5%)	7 (33.3%)	11 (33.3%)	7 (35%)	10 (37%)
HKIAC	8 ([U/R][185])	5 (6.8%)	16 (16.2%)	22 (19.9%)	25 (20.5%)
ICC	73 (19.6%)	95 (23.3%)	112 (29.5%)	113 (27.6%)	134 (34%)
ICSID	3 (5.9%)	7 (18.9%)	14 (24.1%)	21 (29.2%)	16 (25.8%)
LCIA	55 (28.2%)	80 (40.6%)	55 (34%)	71 (43%)	105 (48%)
SCC	27 (26.7%)	22 (22.5%)	33 (37%)	21 (29%)	25 (32.4%)
VIAC	4 (80.0%)	5 (62.5%)	3 (30%)	14 (43.8%)	8 (40%)
Average	*32.5%*	*29.7%*	*29.2%*	*32.5%*	*34%*

Source: (International Council for Commercial Arbitration 2020, 22).

[185] Unreported data by the institution.

Table 3. Co-arbitrators' appointments of female arbitrators between 2015 and 2019

Institution	**2015**	**2016**	**2017**	**2018**	**2019**
DIS	16 (18.8%)	10 (12.5%)	20 (23%)	5 (7.9%)	6 (12.5%)
HKIAC	2 ([U/R][186])	3 (14.3%)	4 (15.4%)	2 (6.7%)	10 (21.3%)
ICC	10 (6.1%)	26 (12.6%)	34 (14.2%)	45 (20.4 %)	45 (20%)
ICSID	3 (18.8%)	0 (0%)	1 (5.9%)	2 (20%)	2 (28.6%)
LCIA	2 (4%)	13 (16.3%)	8 (17%)	17 (23%)	28 (30%)
SCC	1 (10%)	2 (20%)	0 (0%)	5 (56%)	5 (38.4%)
VIAC	0 (0%)	0 (0%)	1 (25%)	0 (0%)	0 (0%)
Average	*9.6%*	*10.8%*	*14.4%*	*19.1%*	*21.5%*

Source: (International Council for Commercial Arbitration 2020, 24).

Table 4. Disputing parties' appointments of female arbitrators between 2015 and 2019

Institution	**2015**	**2016**	**2017**	**2018**	**2019**
DIS	14 (7.6%)	16 (9.6%)	19 (9.1%)	17 (11.3%)	17 (14.9%)
HKIAC	6 ([U/R][187])	11 (17.7%)	7 (11.1%)	8 (8.7%)	16 (13.9%)
ICC	53 (6.9%)	86 (10.8%)	102 (11.8%)	115 (13.5%)	131 (15.3%)
ICSID	15 (12.8%)	14 (12.3%)	22 (18.3%)	32 (21.5%)	19 (15.4%)
LCIA	14 (6.9%)	9 (4.1%)	34 (17%)	14 (6%)	30 (12%)
SCC	11 (6.5%)	17 (11%)	13 (8%)	35 (24%)	22 (16.1%)
VIAC	4 (10.3%)	7 (14.9%)	3 (10.7%)	1 (3.6%)	3 (9.4%)
Average	*8.5%*	*11.5%*	*12.3%*	*12.7%*	*13.9%*

Source: (International Council for Commercial Arbitration 2020, 25).

Table 5. Frequency and percentage of women who sat on arbitral tribunals with another woman

Response Type	**Frequency**
No Tribunal with a Woman	83 (32.2%)
1-5 Tribunals with a Woman	112 (43.4%)
6-10 Tribunals with a Woman	23 (8.9%)
10+ Tribunals with a Woman	40 (15.5%)

Source: (Franck 2015, 490).

186 Unreported data by the institution.
187 Unreported data by the institution.

Table 6. Top 25 arbitrators in investment arbitrations, as of 1 January 2017

Arbitrator	Nationality	Presiding	Claimant Appointee	Respondent Appointee	Annulment Committee	Total Appointments
Brigitte Stern	France	4	1	82	1	88
Gabrielle Kaufmann-Kohler	Switzerland	38	15	2	1	56
L. Yves Fortier	Canada	24	25	2	2	53
Charles Brower	United States	1	50	0	1	52
Francisco Orrego Vicuña	Chile	18	27	3	1	49
Albert Jan van den Berg	Netherlands	15	16	12	1	44
J. Christopher Thomas	Canada	0	1	42	0	43
Bernard Hanotiau	Belgium	12	18	5	5	40
Karl-Heinz Böckstiegel	Germany	26	8	2	4	40
V.V. Veeder	United Kingdom	25	6	6	0	37
Bernardo Cremades	Spain	14	10	10	3	37
Piero Bernardini	Italy	11	13	3	9	36
Marc Lalonde	Canada	8	20	7	0	35
Rodrigo Oreamuno	Costa Rica	15	0	14	5	34
Stanimir Alexandrov	Bulgaria	3	25	1	3	32
Philippe Sands	United Kingdom	1	4	25	0	30
Juan Fernández-Armesto	Spain	21	1	3	4	29
Jan Paulsson	France	13	12	2	1	28
Horacio Grigera Naón	Argentina	2	24	2	0	28
David Williams	New Zealand	10	17	0	1	28
James Crawford	Australia	12	2	10	3	27
Pierre Tercier	Switzerland	22	0	3	0	25
Toby Landau	United Kingdom	3	1	20	0	24
Vaughan Lowe	United Kingdom	13	2	9	0	24
Franklin Berman	United Kingdom	10	5	4	5	24

Source: (Langford, Behn, and Lie 2017, 310).

Table 7. Top 25 female arbitrators in investment arbitrations, as of 1 February 2019

Arbitrator	Nationality	Presiding	Claimant Appointee	Respondent Appointee	Annulment Committee	Total Appointments
Brigitte Stern	France	4	1	109	1	115
Gabrielle Kaufmann-Kohler	Switzerland	43	17	3	1	64
Jean Kalicki	United States	11	0	6	4	21
Laurence Boisson de Chazournes	Switzerland	0	2	13	0	15
Loretta Malintoppi	Italy	1	0	9	3	13
Teresa Cheng	Hong Kong	3	0	0	8	11
Yas Banifatemi	France	3	3	2	0	8
Anna Joubin-Bret	France	0	0	8	0	8
Lucy Reed	United States	5	0	1	0	6
Vera van Houtte	Belgium	3	1	0	2	6
Lucinda Low	United States	3	0	1	2	6
Joan Donoghue	United States	2	1	0	2	5
Inka Hanefeld	Germany	2	0	1	2	5
Nina Vilkova	Russia	2	1	1	0	4
Sabine Konrad	Germany	2	1	1	0	4
Nayla Comair-Obeid	Egypt	2	0	0	1	3
Maja Stanivuković	Serbia	0	0	3	0	3
Hélène Ruiz Fabri	France	0	0	3	0	3
Melanie van Leeuwen	Netherlands	1	1	0	0	2
Fern Smith	United States	0	0	2	0	2
Antonias Dimolitsa	Greece	0	0	0	2	2
Teresa Giovannini	Switzerland	0	0	2	0	2
Carolyn Lamm	United States	0	1	1	0	2
Judith Gill	United Kingdom	1	1	0	0	2
Mónica Pinto	Argentina	0	0	1	1	2

Source: (Langford, Behn, and Létourneau-Tremblay 2019, 35)

Table 8. Arbitrators and appointments by region in ICC arbitrations, between January 1, 2016, and October 24, 2021

Region	Arbitrators	%	Appointments	%
African Statess	65	3.27	106	2.64
Asia-Pacific States	144	7.25	205	5.11
Eastern European Statess	125	6.29	208	5.19
GRULAC states	292	14.70	553	13.79
WEOG States	1,083	54.50	2,210	55.11
More than one nationality[188]	267	13.44	717	17.88
Unknown nationality	11	0.55	11	0.27
All Non-WEOG	637	32.06	1,083	27.01
All Regions	1,987	100	4,010	100

Source: ICC (https://iccwbo.org/dispute-resolution-services/arbitration/icc-arbitral-tribunals/, last accessed on October 24, 2021).

Table 9. Top ICC arbitrators by nationality and type of appointment, as of 1 January 2016

Name	Nationalities	Emergency Arbitrator	Sole Arbitrator	Co-Arbitrator	Chairperson	Total Appointments
Peter Rees QC	United Kingdom	0	0	13	6	19
Yves Derains	France	0	0	7	10	17
José Emilio Nunes Pinto	Brazil	0	0	13	4	17
Melanie van Leeuwen	France Netherlands	1	1	5	10	17
Philipp Habegger	Switzerland United Kingdom	0	0	11	4	15
Guido Tawil	Argentina Uruguay	0	0	10	4	14
John Beechey	United Kingdom	0	0	7	6	13
Daniel Cohen	France	0	3	6	4	13
Eduardo Silva Romero	Colombia France	0	0	7	6	13
Matthieu Boisséson	France	0	1	8	4	13
Carlos Alberto Carmona	Brazil	0	0	10	2	12

[188] Of the total 267 international arbitrators with more than 1 nationality, (i) 22 had at least the nationality of an African States; (ii) 38 had at least the nationality of an Asia-Pacific State; (iii) 16 had at least the nationality of a Eastern European States; (iv) 65 had at least the nationality of a GRULAC State; and (v) 260 had at least the nationality of a WEOG State.

Charles Jarrosson	France	0	2	5	5	12
Jack Coe	United States	12	0	0	0	12
Richard Harding QC	Germany United Kingdom	0	2	8	2	12
Pascal Hollander	Belgium	0	0	4	8	12
Pedro Antonio Batista Martins	Brazil	0	0	7	4	11
Hamid G. Gharavi	France Iran	0	0	8	3	11
Horacio Alberto Grigera Naón	Argentina	0	0	8	3	11
Pierre-Yves Gunter	Switzerland	0	1	5	5	11
Bernard Hanotiau	Belgium Spain	0	1	2	8	11
Eric Schwartz	France United States	0	1	6	4	11
José María Alonso Puig	Spain	0	1	7	2	10
Bernhard Berger	Switzerland	0	3	2	5	10
João Bosco Lee	Brazil	0	0	6	4	10
Xavier Favre-Bulle	Switzerland	0	1	4	5	10
Giovanni Ettore Nanni	Brazil Italy	1	1	4	4	10
Elliot Polebaum	United States	0	2	6	2	10
Klaus Reichert	Germany Ireland	1	0	5	4	10
Georges Affaki	France Syria	0	1	6	2	9
Laurent Aynès	France	0	0	7	2	9
Michael Collins	Ireland United Kingdom	0	1	5	3	9
Nayla Comair-Obeid	France Lebanon	0	1	6	2	9
Jose Feris	Dominican Republic Guatemela Spain	0	0	5	4	9

Simon Gabriel	Switzerland	0	1	3	5	9
Ian Glick	United Kingdom	0	0	5	4	9
Daniel Hochstrasser	Switzerland	0	0	5	4	9
Pierre Mayer	France	0	0	7	2	9
Michael Moser	Austria	0	0	1	8	9
Gabrielle Nater-Bass	Switzerland	0	1	5	3	9
Charles Poncet	Switzerland	0	0	5	4	9
Luca Radicati di Brozolo	Italy United Kingdom	0	1	3	5	9
Maxi Scherer	Germany	0	0	2	7	9
Philippe Stoffel-Munck	France Switzerland	0	0	7	2	9
Doug Jones	Australia Ireland	0	0	5	4	9
Juan Armesto	Spain	0	0	1	7	8
Domitille Baizeau	France New Zealand	0	1	3	4	8
Olivier Caprasse	Belgium	1	1	4	2	8
John Fellas	United Kingdom	0	0	6	2	8
Paula Forgioni	Brazil Italy	0	1	7	0	8
Valeria Galindez	Argentina Brazil	1	0	3	4	8
Rodrigo Garcia da Fonseca	Brazil	0	0	5	3	8
Francisco González de Cossío	Mexico	1	0	5	2	8
Hermes Marcelo Huck	Brazil	1	0	5	2	8
Anna P. Mantakou	Greece	0	0	6	2	8
Nathalie Fabre Meyer	France	1	2	4	1	8
Carmen Nunez-Lagos	Spain	1	0	5	2	8
Paolo Michele Patocchi	Switzerland	0	1	1	6	8

Andreas Reiner	Austria	0	1	2	5	8
Laurence Shore	United Kingdom United States	0	0	4	4	8
Franz Xaver Stirnimann Fuentes	Peru Switzerland	1	1	2	4	8
Christopher John Style	United Kingdom	0	1	5	2	8
Edna Sussman	Israel United States	0	1	5	2	8
Annet van Hooft	Netherlands	0	1	2	5	8
Georg von Segesser	Switzerland	0	0	4	4	8
Todd Wetmore	Canada France	0	0	6	2	8
Jane Willems	France	0	2	2	4	8
Filip De Ly	Belgium	0	0	7	1	8

Source: ICC (https://iccwbo.org/dispute-resolution-services/arbitration/icc-arbitral-tribunals/, last accessed on October 24, 2021).

Table 10. Appointments by nationality and region in ICC Arbitrations, for the year 2020

Name	**Region**	**Sole Arbitrator**	**Co-Arbitrator**	**Chairperson**	**Total Appointments**
Afghanistan	Asia-Pacific	1	0	0	1
Algeria	Africa	0	2	0	2
Argentina	GRULAC	2	20	10	32
Armenia	Asia-Pacific	0	1	0	1
Australia	WEOG	7	9	5	21
Austria	WEOG	8	20	8	36
Azerbaijan	Asia-Pacific	1	0	0	1
Bahrain	Asia-Pacific	1	0	0	1
Barbados	GRULAC	0	1	0	1
Belgium	WEOG	5	18	17	40
Bolivia	GRULAC	0	2	0	2
Brazil	GRULAC	3	58	27	88
Bulgaria	Eastern-European	1	0	0	1
Cameroon	Africa	0	2	0	2
Canada	WEOG	16	22	12	50
Chile	GRULAC	1	11	4	16

China	Asia-Pacific	2	5	0	7
Chinese Taipei	Asia-Pacific	0	2	0	2
Colombia	GRULAC	0	8	5	13
Costa Rica	GRULAC	0	2	3	5
Croatia	Eastern-European	1	0	1	2
Cyprus	Asia-Pacific	1	1	0	2
Czech Republic	Eastern-European	0	2	1	3
Denmark	WEOG	3	3	1	7
Dominican Republic	GRULAC	0	1	1	2
Ecuador	GRULAC	0	0	1	1
Egypt	Africa	1	9	2	12
El Salvador	GRULAC	0	0	1	1
Finland	WEOG	0	2	1	3
France	WEOG	33	43	25	101
Germany	WEOG	11	41	29	81
Greece	WEOG	2	7	4	13
Guatemala	GRULAC	1	0	1	2
Hungary	Eastern-European	0	1	0	1
India	Asia-Pacific	3	15	2	20
Indonesia	Asia-Pacific	0	1	0	1
Iran	Asia-Pacific	1	5	1	7
Iraq	Asia-Pacific	1	1	0	2
Ireland	WEOG	5	4	9	18
Israel	WEOG	0	6	0	6
Italy	WEOG	6	18	10	34
Jamaica	GRULAC	0	1	1	2
Japan	Asia-Pacific	3	0	0	3
Jordan	Asia-Pacific	2	5	1	8
Kazakhstan	Asia-Pacific	0	1	0	1
Kenya	Africa	2	0	0	2
Kuwait	Asia-Pacific	0	1	0	1
Latvia	Eastern-European	1	1	2	4
Lebanon	Asia-Pacific	10	17	3	30
Lithuania	Eastern-European	0	0	1	1

Malaysia	Asia-Pacific	2	1	0	3
Malta	WEOG	0	2	0	2
Mauritius	Africa	0	0	1	1
Mexico	GRULAC	4	33	10	47
Morocco	Africa	1	0	0	1
Nepal	Asia-Pacific	0	1	0	1
Netherlands	WEOG	5	18	17	40
New Zealand	WEOG	2	5	2	9
Nigeria	Africa	1	2	2	5
Norway	WEOG	1	0	0	1
Pakistan	Asia-Pacific	0	1	0	1
Panama	GRULAC	0	2	1	3
Peru	GRULAC	1	5	0	6
Philippines	Asia-Pacific	1	0	0	1
Poland	Eastern-European	2	2	2	6
Portugal	WEOG	6	13	9	28
Romania	Eastern-European	1	3	0	4
Russian Federation	Eastern-European	2	1	1	4
Saudi Arabia	Asia-Pacific	0	3	0	3
Serbia	Eastern-European	0	5	0	5
Singapore	Asia-Pacific	9	13	9	31
Slovak Republic	Eastern-European	0	1	0	1
South Africa	Africa	1	3	0	4
South Korea	Asia-Pacific	0	1	2	3
Spain	WEOG	5	16	16	37
Sri Lanka	Asia-Pacific	0	1	0	1
St. Kittis & Nevis	Asia-Pacific	0	2	0	2
Sweden	WEOG	2	6	4	12
Switzerland	WEOG	36	65	34	135
Syria	Asia-Pacific	0	1	0	1
Tanzania	Africa	0	1	0	1
Thailand	Asia-Pacific	1	1	0	2
Tunisia	Africa	1	0	0	1
Turkey	WEOG	6	14	3	23

Ukraine	Eastern-European	2	2	0	4
UAE	Asia-Pacific	2	5	1	8
UK	WEOG	38	123	59	220
Uruguay	GRULAC	0	5	2	7
USA	WEOG	29	87	37	153
Venezuela	GRULAC	1	4	1	6
Yemen	Africa	0	1	0	1
Zimbabwe	Africa	1	2	0	3
Total		**298**	**820**	**402**	**1520**

Source: (International Chamber of Commerce (ICC) 2021, 27–28).

Table 11. Frequency and percentage of arbitrators who sat on arbitral tribunals with at least one arbitrator from a developing country

Response Type	**Frequency**
No Tribunal with a Developing World Arbitrator	102 (40.2%)
1-5 Tribunals with a Developing World Arbitrator	98 (38.6%)
6-10 Tribunals with a Developing World Arbitrator	25 (9.8%)
10+ Tribunals with a Developing World Arbitrator	29 (11.4%)

Source: (Franck 2015, 491).

Table 12. International investment arbitrators by region – non-western *versus* western, as of 1 August 2018

Region	**1 Appointment**	**More than 1 Appointment**	**Total**	**%**
South America	29	36	65	9
Central America & Caribbean	31	14	45	6
Eastern Europe & Central Asia	19	20	39	6
Middle East	18	18	36	5
South-East Asia	5	6	11	2
Sub-Saharan Africa	14	12	26	4
South Asia	7	4	11	2
East Asia	4	4	8	1
All Non-Western Regions	127	114	241	35
All Western Regions	238	216	454	65
All Regions	365	330	695	100
Non-West %	35	35		

Source: (Langford, Behn, and Usynin 2018, 10).

Table 13. Appointments by region in international investment arbitrators, as of 1 August 2018

Region	Claimant	Respondent	Chairperson	Annulment Committee	Total	%
South America	111	83	69	35	298	9
Central America & Caribbean	10	68	41	28	147	4
Eastern Europe & Central Asia	61	52	16	11	140	4
Middle East	30	44	22	25	121	4
South-East Asia	3	11	20	24	58	2
Sub-Saharan Africa	5	25	3	13	46	1
South Asia	3	23	8	6	40	1
East Asia	0	2	7	16	25	1
All Non-Western Regions	223	308	186	158	875	26
All Western Regions	779	687	787	194	2452	74
All Regions	1002	995	973	352	3327	100
Non-West %	22	31	19	45		

Source: (Langford, Behn, and Usynin 2018, 11; Langford, Behn, and Létourneau-Tremblay 2019, 37).

Table 14. Top 25 arbitrators who are not nationals of a WEOG State, in investment arbitrations, as of 1 August 2018

Arbitrator	Nationality	Region	Claimant Appointee	Respondent Appointee	Chairperson	Annulment Committee	Total Appointments
Francisco Orrego Vicuña	Chile	South America	31	2	18	1	52
Stanimir Alexandrov	Bulgaria	Eastern Europe	1	43	4	3	51
Rodrigo Oreamuno	Costa Rica	Central America	0	16	14	6	36
Horacio Grigera Naón	Argentina	South America	30	2	2	0	34
Claus von Wobeser	Mexico	Central America	1	13	7	3	24
Eduardo Zuleta	Colombia	South America	4	2	12	6	24
Peter Tomka	Slovakia	Eastern Europe	0	6	8	6	20
Raúl Vinuesa	Argentina	South America	1	17	2	0	20
Guido Santiago Tawil	Argentina	South America	16	0	0	0	16
Ahmed El-Kosheri	Egypt	Middle East	1	5	5	4	15

Azzedine Kettani	Morocco	Middle East	0	0	4	9	13
Ibrahim Fadlallah	Lebanon	Middle East	8	4	1	0	13
Cecil Abraham	Malaysia	South-East Asia	0	0	3	9	12
Florentino Feliciano	Philippines	South-East Asia	0	4	3	5	12
Kamal Hossain	Bangladesh	South Asia	0	11	0	1	12
Michael Hwang	Singapore	South-East Asia	2	4	3	3	12
Eduardo Silva Romero	Colombia	South America	0	3	3	5	11
Teresa Cheng	Hong Kong	East Asia	0	0	4	7	11
Makhdoom Ali Khan	Pakistan	South Asia	0	2	3	5	10
Ricardo Ramírez Hernández	Mexico	Central America	1	2	2	4	9
Enrique Gómez Pinzón	Colombia	South America	6	0	2	0	8
Fali Nariman	India	South Asia	0	3	5	0	8
Georges Abi-Saab	Egypt	Middle East	0	9	0	0	8
Pedro Nikken	Argentina	South America	0	8	0	0	8
Yas Banifatemi	Iran	Middle East	2	3	3	0	8

Source: (Langford, Behn, and Usynin 2018, 14–15).