VOLUME 64, NUMBER 1, WINTER 2023

Reconceptualizing the Party-Appointed Arbitrator and the Meaning of Impartiality

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Despite the popularity of the age-old practice, several prominent arbitrators and industry leaders have proposed eliminating party appointed arbitrators. These critics contend that party appointment injects bias into a tribunal that is supposed to be impartial.

Various empirical studies seem to confirm the uncomfortable contradiction between the rhetoric of impartiality and the purportedly biased conduct of party-appointed arbitrators. Most of these empirical claims, however, are deeply flawed both in their substance and methodology. More fundamentally, these claims ignore Legal Realism's insight that decisionmaker "bias" (or reliance on extra-legal factors) is an inevitable consequence of law's inherent indeterminacy.

If some forms of bias are inevitable, it does not make sense to ask whether *bias exists. Instead, more nuanced questions must be asked:* Which *forms of bias are legitimate?* Who *decides which forms of bias are legitimate? And* how *do we police the boundary between legitimate and illegitimate forms of bias?*

This Article answers these questions with respect to party-appointed arbitrators.

Rejecting both critiques and defenses, this Article makes an affirmative case for party-appointed arbitrators. This Article reconceptualizes party-appointed arbitrators as an essential structural check against various forms of cognitive bias that necessarily exist among all arbitrators on all arbitral tribunals. Arbitrators' cognitive biases cannot be eliminated, even by eliminating party-appointed arbitrators. They can, however, be bounded and counter-balanced by reconceiving party-appointed arbitrators as a type of Devil's Advocate that guards against the cognitive biases that distort tribunal decision making.

In this reconceptualized role, party-appointed arbitrators serve three important functions: 1) They provide a check against individual- and group-based cognitive biases; 2) They also ensure representativeness on the tribunal; and 3) they provide a structural counterweight to the opposing party-appointed arbitrator. This reconceptualized role, in turn, delimits a range of specific impartiality obligations that are both more conceptually coherent and more consistent with actual practice and expectations.

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I. Introduction

In an ongoing now-raging debate, several prominent arbitrators and industry leaders have proposed eliminating the practice of party-appointed arbitrators in international arbitration. Jan Paulsson, one of the first and most vocal critics of this practice, characterizes party appointment as an "ill-conceived" and "unprincipled tradition" that creates a "moral hazard."[1] Other leading arbitrators and commentators, such as Albert Jan van den Berg,[2] Yves Derains,[3] and the late Hans Smit,[4] have expressed similar views.

Unlike some debates, these proposals have gained real-world traction. The Netherlands' new Model Bilateral Investment Treaty has eliminated party-appointed arbitrators altogether.[5] Some reform proposals at the United Nations Commission on International Trade Law ("UNCITRAL") also contemplate eliminating them[6] or creating a new international investment court to obviate them.[7]

Several recent empirical studies seem to confirm critics' worst allegations about party appointment. For example, empirical studies by Albert Jan van den Berg and Sergio Puig analyzed publicly available investment arbitration awards. Their research uncovered the "astonishing fact" that nearly all "dissents" authored by party-appointed arbitrators are written "in favor of" the party who appointed them, or at least never "against the appointing party."[8]

1. Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID Rev. 339, 340, 349, 354 (2010). Paulsson has refined his views over time. His most recent analysis is in his book, where he advocates that parties reconsider unilateral appointment and proposes procedures to encourage such reconsideration. *See* Jan Paulsson, The Idea of Arbitration 276, 277 (2013).

2. Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, *in* Looking to the Future: Essays on Int'l L. in Honor of W. Michael Reisman 824–25 (Mahnoush Arsanjani et al., eds. 2011) (concluding that the "root of the problem is the appointment method" and arguing that unilateral party appointment "may create arbitrators who may be dependent in some way on the parties that appointed them.").

3. Yves Derains, *The Arbitrator's Deliberation*, 27 Am. U. Int'l L. Rev. 911, 915 (2012) ("Too often, the interest of the arbitrator is to favor the party that has appointed him, either by endorsing all those party's positions or, more rarely, by suggesting creative and favorable solutions when he considers that such party is poorly advised by its counsel.").

4. Hans Smit, *The Pernicious Institution of the Party-appointed Arbitrator*, 33 Vale Colum. Ctr. on Sustainable Int'l Inv. 1, 2 (2010) (arguing that party-appointed arbitrators should be banned unless their role as advocates is fully disclosed and accepted).

5. Netherlands Investment Arbitration Agreement (Mar. 22, 2019), https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download [https://perma.cc/UP7P-H9LB].

6. Comm. on Int'l Trade L., Possible Reform of Investor-State Dispute Settlement (ISDS): Selection and Appointment of ISDS Tribunal Members: Annotated Comments from the European Union and Its Member States to the UNCITRAL Secretariat, U.N. Doc. A/CN.9/WG.III/WP.— (Oct. 19, 2020), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/selection_and_appointment_eu_and_ms_comments.pdf [https://perma.cc/6X3B-LKYP].

7. *See* Comm. on Int'l Trade L., Possible Reform of Investor-State Dispute Settlement (ISDS) Appellate and Multilateral Court Mechanisms on its Thirty-Eighth Session, ¶ 3, U.N. Doc. A/CN.9/WG.III/WP.185 (Nov. 29, 2019).

8. Berg, *supra* note 2, at 824; *see also* Alan Redfern, *The 2003 Freshfields – Lecture Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly*, 20 Arb. Int'l 223, 234 (2004) R

In another study, Sergio Puig and Anton Strezhnev presented findings from an experiment which, they argue, demonstrates a cognitive "affiliation bias" arbitrators have for the party that appoints them.[9] Finally, Maria Laura Marceddu and Pietro Ortolani conducted an experiment aimed at measuring public sentiment regarding party appointment in investor-State dispute settlement ("ISDS"). Marceddu and Ortolani set out to test their hypothesis that "the temporary nature of investment tribunals and the untenured character of the arbitrators have a negative impact" on public perception of ISDS.[10] These findings seem to provide concrete support for those who have called for the abolition of the practice of party-appointed arbitrators.[11]

In response to these critiques, defenders of party appointment offer two main arguments. First, as a practical matter, they point out that parties are addicted to party-appointed arbitrators, are unwilling to give them up,[12] and cannot easily be forced to give them up. Available statistics seem to bear these arguments out. Parties vote with their feet,[13] generally eschewing

(noting that in 2001, of twenty-two available dissenting opinions in which it was possible to identify the dissenting arbitrator submitted in ICC arbitrations, all dissents were made in favor of the appointing party).

9. Sergio Puig & Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach*, 46 J. Legal Stud. 371 (2017).

10. Maria Laura Marceddu & Pietro Ortolani, *What is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments*, 31 Eur. J. Int'l L. 405, 422–27 (2020).

11. *See, e.g.*, Robert H. Smit, *Thoughts on Arbitrator Selection: Why My Father Was (Usually) A Good Choice*, 23 Am. Rev. Int'l Arb. 575, 579 (2012) (describing how Hans Smit "was not a fan" of party-appointed arbitrators, how "in his experience [they] were often partisan in favor of the party that appointed them" which negatively "infects the integrity of the arbitral process," and how he believed that that they "should be abolished forthwith.").

12. *See* Michael E. Schneider, *President's Message: Forbidding Unilateral Appointments of Arbitrators – A Case of Vicarious Hypochondria?*, 29 ASA Bull. 273, 273 (2011) ("The basic paradigm in arbitration as we know it is for each party to appoint its arbitrator and for the two then to appoint a chairperson. The model has worked seemingly well for decades if not for centuries . . . ."). Some argue that parties would give up arbitration before they would give up party-appointed arbitrators. *See, e.g.*, V.V. Veeder, *The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator - From Miami to Geneva*, 107 Am. Soc'y Int'l Proc. 387, 403 (2013) ("[T]he traditional system of party-appointed arbitrators remains today the robust keystone to international arbitration, without which arbitration would assume a significantly different form adverse to the interests of its users.").

13. Alexie Mourre, *Are Unilateral Appointments Defensible? On Jan Paulsson's Moral Hazard in International Arbitration*, Kluwer Arbitration Blog (Oct. 5, 2010), http://arbitrationblog.kluwerarbitration.com/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulssons-moral-hazard-in-international-arbitration/ [https://perma.cc/BJ98-ALCG] ("[T]he market seems to have little appetite for a ban on unilateral appointments."). Empirical studies consistently confirm parties' preference of the party appointment process over institutional appointment. In a survey conducted by Berwin Leighton Paisner (now Bryan Cave Leighton Paisner), 79% of respondents felt that party appointments give a party greater confidence in the arbitration process and 66% considered retention of party appointments to be desirable. Berwin Leighton Paisner, International Arbitration Survey: Party Appointed Arbitrators 2 (2017), https://www.bclplaw.com/a/web/147194/3WJp5S/blp_arbitration_survey_2017.pdf [https://perma.cc/6JJZ-4Y29] ("[O]n a scale of 1 (a lot of confidence) to 5 (little or no confidence). . . . [o]nly 7% of respondents had a lot of confidence in the ability of institutions to make good quality appointments (a ranking of 1)."). An earlier survey by White & Case and Queen Mary University of London found that the ability of parties to select their own arbitrators was identified as the fourth-most valuable characteristic of international arbitration. *See* Paul Friedland, White & Case LLP & Loukas Mistells, Sch. Int'l Arb., Queen Mary, Univ. London, 2010 International Arbitration Survey: Choices in International Arbitration 7 (2010), https://arbitra-

alternative methods for appointment of co-arbitrators, including institutional appointments and so-called blind appointment procedures.[14]

Second, defenders of party-appointed arbitrators argue that active party participation in constituting the tribunal increases confidence in arbitral outcomes and thus the perception of international arbitration legitimacy.[15] This confidence is particularly important for a regime in which final outcomes are not subject to substantive review and broad voluntary compliance is essential.[16]

While these two defenses may be descriptively accurate,[17] they are normatively unattractive. The first argument relies on practical obstacles to dismiss substantive criticisms; the second seems almost exclusively concerned with perceived legitimacy by the parties over concerns about institutional legitimacy or perceived legitimacy in the eyes of other stakeholders other than parties. In fact, both institutional and perceived legitimacy are important for a fully mature adjudicatory regime.[18] Both arguments effectively

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tion.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf [https://perma.cc/Q8QQ-GJ8A].

14. Sergio Puig, *Blinding International Justice*, 56 VA. J. INT'L L. 647, 651 (2016). (noting that most alternative methods of appointment "seem farfetched or unlikely as a practical matter" but suggesting that so-called "blind" appointments may be plausible).

15. *See, e.g.*, Veeder, *supra* note 12, at 402 (party-appointed arbitrators give a "sense of ownership by a party over the arbitral process because it has participated in the formation of the tribunal as to which all parties have consented."); Yuval Shany, *Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings*, 30 LOY. L.A. INT'L & COMP. L. REV. 473, 474 (2008) ("Increased party control entails the sacrifice of some degree of judicial independence and impartiality of the appointed adjudicators in exchange for improved confidence of the parties in the adjudicative process."); *see also* BERWIN, *supra* note 13, at 2, 8 ("[T]he ability to select one of the arbitrators gives a party a sense of control and proximity to the arbitration proceedings that engenders confidence in the process and its outcome . . . .79% [of those surveyed] felt that party appointments give a party greater confidence in the arbitration process.").

16. The prevalence of voluntary compliance is confirmed both in industry surveys and commentary that reflects prevailing perceptions. *See, e.g.*, GERRY LAGERBERG, PRICEWATERHOUSECOOPERS LLP & LOUKAS MISTELIS, SCH. INT'L ARB., QUEEN MARY, UNIV. LONDON, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICE 2008 8 (2008), http://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf [https://perma.cc/K447-MAVX] (reporting that 84% of respondents indicated that the opposing party had complied in full in more than 76% of cases); *see also* EMILIA ONYEMA, INTERNATIONAL COMMERCIAL ARBITRATION AND THE ARBITRATOR'S CONTRACT 38 (2010) (noting that losing parties usually comply with arbitral awards).

17. Empirical studies consistently confirm parties' preference for the party-appointment process over institutional appointment. *See* FRIEDLAND & MISTELIS, *supra* note 13, at 26, https://arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf [https://perma.cc/Q8QQ-GJ8A].

18. Institutional legitimacy holds consequences for the political vitality of institutions and the level of voluntary compliance with the institution's decisions. Thomas M. Franck, *Legitimacy in the International State*, 82 AM. J. INT'L L. 705, 708 & 725 (1988); Tom R. Tyler, *The Role of Perceived Injustice in Defendants' Evaluations of Their Courtroom Experience*, 18 L. & SOC'Y REV. 51, 52–54 (1984) (reporting on social scientific research into the effects of perceived injustice); *see also* Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1403 (2005) (reporting on the results of an experiment that empirically tested the "Flouting Thesis," which posits that exposure to laws and legal outcomes that are "perceived as unjust" will make participants more willing, as a general matter, to flout unrelated laws); Andrew V. Papachristos et al., *Criminology: Why Do Criminals Obey the Law? The Influence of Legitimacy and Social Networks on Active Gun Offenders*, 102 J. CRIM. L. & CRIMINOLOGY 397, 412, 436 (2012).

minimize or ignore the critics' core objection: that party-appointed arbitrators inject *bias* into a tribunal that is supposed to be *impartial*.

This Article supports neither the critics nor the defenders. Instead, it reconceptualizes the role of party-appointed arbitrators and hence the debate over their legitimacy, both real and perceived, as adjudicators.

Like all decisionmaking, arbitrators are necessarily subject to various cognitive and heuristic biases, as well as limitations on their memories and other mental tools.[19] If some forms of *bias* are inevitable as part of the human condition, we already know that party-appointed arbitrators are, like all other decisionmakers, "biased."[20] The real questions are more nuanced: *Which* forms of bias are legitimate? *Who* decides which forms of bias are legitimate? And, *How* do we police the boundary between legitimate and illegitimate forms of bias?

In an attempt to answer these questions, Part II of this Article examines what various empirical studies have revealed about the individual *biases* that affect all decisionmakers and all adjudicators.[21] These individual shortcomings are accompanied, augmented, or potentially mollified by biases that affect group decisionmaking, including Groupthink.[22]

The Article then focuses, in Part III, on the important but understudied effects of Groupthink on collective decisionmaking by arbitral tribunals. Groupthink occurs when strong norms of consensus and civility cause a decisionmaking body to produce inferior outcomes because of a failure to consider obvious alternatives or concerns. One proposed solution to Groupthink is called the Devil's Advocate. The idea behind this solution is to assign, on a rotating basis, an obligation on one member to systematically challenge any consensus that arises among the remaining group members.[23]

Part IV takes up this possible solution to the effects of Groupthink, arguing that party-appointed arbitrators are the functional equivalent of a Devil's Advocate. Reconceptualization of the party-appointed arbitrator as a

19. These kinds of cognitive biases or predilections are not the bias, partiality, or lack of independence that are considered impermissible and a basis for challenging arbitrators for an alleged conflict of interest. *See infra* Section II.C.3.

20. I use quotation marks because the term "bias" as used here does not connote the unacceptable "bias" or lack of impartiality that can lead to an arbitrator's disqualification. For detailed analysis of how the language of bias and impartiality complicates the potential for meaningful analysis, see *infra* Section IV.B.3.

21. It is essential to clarify early on that this Article addresses innate, cognitive, and structural biases. It is not directly addressing conflicts of interest that may be a basis for challenging a specific arbitrator. At some point, the two may converge, but that convergence is not relevant for the thesis of this Article. The potential for confusion between the two is, as examined below, a function of the imprecision and over-simplification of terminology used to discuss concepts of bias and impartiality. *See infra* Section IV.B.3.

22. *See* Wendy L. Martinek, *Judges as Members of Small Groups*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 73, 73–75, (David E. Klain & Gregory Mitchell eds., 2010) ("[J]udges serving on appellate courts may squabble like children, bond like family, or behave toward one another in a more detached, professional manner, but both anecdotal and systematic evidence make clear that there is an affective component to the interactions between and among judges serving on appellate courts.").

23. *See infra* Section III.C.1.

"Devil's Arbitrator" not only effectively counters calls to eliminate party-appointed arbitrators; it legitimates their role while also providing a basis to meaningfully assess the *which*, *who*, and *how* of their impartiality obligations.

In this reconceptualized role, party-appointed arbitrators ensure representativeness on the tribunal, provide a check against group-based cognitive biases, and establish a structural counterweight to the opposing party-appointed arbitrator. In turn, party-appointed arbitrators' more clearly defined role delimits a range of specific impartiality obligations that are both more conceptually coherent and more consistent with demonstrated expectations and existing practices. These new impartiality obligations, in turn, enable us to distinguish between appropriate and inappropriate conduct by party-appointed arbitrators.

II. The Trials and Tribulations of Party-Appointed Arbitrators

Party-appointed arbitrators are a long-established tradition in international arbitration. In recent years, however, several prominent voices have called for their elimination. Section A of this Part examines the historical practice of party-appointed arbitrators, including the debate about whether parties have a *right* to appoint an arbitrator. Section B surveys arguments for the elimination of party-appointed arbitrators, and Section C identifies serious flaws in the empirical research that purportedly supports those arguments.

A. Party Appointment as Historical Practice

Party appointment has historically been the norm in both public and private international disputes. In treaties providing for the arbitration of public international law issues, states have insisted on their ability to appoint arbitrators.[24] Some examples include the United States-Great Britain Jay Treaty of 1794, which required arbitration of claims arising out of the War of Independence;[25] the 1871 Treaty of Washington, which required arbitration of the post-civil war *Alabama Claims*;[26] and The Hague Convention of 1899,

24. For an extended examination of the history of the party-appointed arbitrator, see Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson—van den Berg Presumption that Party-Appointed Arbitrators Are Untrustworthy Is Wrongheaded*, 29 Arb. Int'l 7, 36 (2013).

25. *See* Charles H. Brower, II, *The Functions and Limits of Arbitration and Judicial Settlement Under Private and Public International Law*, 18 Duke J. Comp. & Int'l L. 259, 266 (2008) (tracing the history of party-appointed arbitrators).

26. The *Alabama Claims* were brought by a post-Civil War United States alleging that Great Britain had not honored its commitment to neutrality during the American Civil War and had instead supplied war ships to the Confederacy, including the *CSS Alabama.* Ultimately, the tribunal in the *Alabama* arbitration ordered Great Britain to pay $15.5 million in gold to the United States (the equivalent today to approximately $225 billion dollars). *See* Veeder, *supra* note 12, at 390. As the late-great Veeder explains, the most important contribution that the British- and American-appointed arbitrators was "*the fact* that they were party-appointed arbitrators. Without the right to party-appointed arbitrators, albeit

which established the Permanent Court of Arbitration.[27] In each of these treaties, when States agreed to submit their claims to international arbitration, they also reserved to themselves the power to select and appoint arbitrators. This reservation makes intuitive sense—by agreeing to submit to an arbitral tribunal, States are effectively relinquishing sovereign decisionmaking powers. Some ability to control the constitution of the tribunal cushions the blow.

The practice of party-appointed arbitrators migrated from ad hoc State-to-State arbitrations to the Permanent Court of International Justice,[28] and then to the International Court of Justice, where States are allowed to appoint *ad hoc judges*.[29] The practice was further extended and expressly embraced in the first bilateral investment treaties[30] and in the International Centre for Settlement of Investment Disputes ("ICSID") Convention.[31]

Use of party-appointed arbitrators in international commercial arbitration can be traced both to historical practices for localized commercial arbitration, which emphasized compromise, and to public international arbitration, which focused on the nationality of arbitrators.[32] Reflecting this tradition, the UNCITRAL Arbitration Rules[33] include procedures for party appointment.[34]

Today, tripartite tribunals are the norm for international arbitration. In a tripartite arbitral tribunal, the opposing parties typically each select an arbitrator and then either the parties or the two party-arbitrators (sometimes in consultation with the parties)[35] select the chairperson.[36] The rules of nearly

as a minority of the five-member tribunal, there would have been no Treaty of Washington, no Alabama Arbitration, and, most certainly, no Alabama Award." *Id.* (emphasis added).

27. *See* Convention for the Pacific Settlement of International Disputes arts. 24, 32, July 29, 1899, 32 Stat. 1779.

28. Statute of the Permanent Court of International Justice, Dec. 16, 1920, 6 L.N.T.S. 379. *See also* James Brown Scott, Report on the Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists: Report and Commentary (1920).

29. *See* Statute of the International Court of Justice art. 31, paras. 2 & 3, June 26, 1945, USTS 993 (allowing that *a State party* to a case before the International Court of Justice which does not have a judge of its nationality on the Bench *may choose* a person to sit as judge ad hoc in that specific case).

30. *See* Agreement on Reciprocal Encouragement and Protection of Investments Between the Kingdom of the Netherlands and the Republic of Tunisia art. 8, May 11, 1998.

31. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 37(2)(b), Mar. 18, 1965, 575 U.N.T.S. 159, 4 I.L.M. 532 (1965), 1 ICSID Rep. 3 (1993) [hereinafter ICSID Convention].

32. The tradition of party-appointed arbitrators was thought to not only engender compromise, but also clearly separated the process from State mandate.

33. UNCITRAL Arbitration Rules, art. 9(1) (2010); UNCITRAL Arbitration Rules, art. 7(1) (1976). The UNCITRAL Rules are frequently used for ad hoc arbitrations among both public and private parties.

34. Gary B. Born, International Commercial Arbitration § 12.03[D] (3rd ed. 2021).

35. *See* Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 Tex. Int'l L.J. 59, 63 (1995) ("[I]t is expected that the candidates being considered be cleared with counsel.").

36. *See* Alan Scott Rau, *Integrity in Private Judging*, 38 S. Tex. L. Rev. 485, 497–98 (1997) ("Nowhere perhaps is the tension between traditional ideals of adjudicatory justice and the contractual nature of arbitration felt more keenly than in the case of the so-called "tripartite" panel, where each disputant is permitted to select "his" arbitrator and the two arbitrators named in this way are then to name the

all major international arbitral institutions permit party-appointed arbitrators,[37] and the national arbitration laws of almost all States expressly or impliedly permit party appointment.[38]

It is possible for arbitrators to be appointed on behalf of the parties by an arbitral institution or a designated appointing authority. Institutionally-appointed arbitrators, however, are rarely the parties' first choice. These methods are most often the result of a failure by a party or parties to appoint an arbitrator. Institutions appoint, for example, if a responding party defaults or if the two parties cannot reach agreement on a sole arbitrator or a chairperson.[39] Such appointments occur in approximately only 25% of cases.[40]

Ironically, party appointment was implemented to obviate bias, not to embrace it. A principal reason parties choose international arbitration is to avoid the biases—real or perceived—of their opposing party's national courts.[41] Historically, allowing each party to appoint an arbitrator who shares that party's nationality (or other salient qualities) is meant to ensure that no single party's nationality or legal culture dominates or is excluded from the tribunal.[42]

chairman of the panel."); *see also* Lowenfeld, *supra* note 35, at 65 ("There is a perceived need, for party-appointed arbitrators in international arbitration, and the predominant practice, as reflected in the most widely used rules, is to presume, or even to require, that if three arbitrators are to be appointed, each party shall appoint or nominate one of the three."). In this article, I use "chairperson" as a shorthand for arbitrators who have been appointed by an institution or appointing authority, even if some institutionally appointed arbitrators are sole arbitrators and co-arbitrators, and some chairpersons are appointed by party agreement. R

37. *See, e.g.*, INT'L CTR. FOR SETTLEMENT OF INV. DISP., *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)*, *in* ICSID CONVENTION, REGULATIONS AND RULES rule 3(1), https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf [https://perma.cc/ZP8S-32U4]; ARB. INST. OF THE STOCKHOLM CHAMBER OF COM., ARBITRATION RULES art. 13(3) (2010), https://sccinstitute.com/media/1407444/arbitrationrules_eng_2020.pdf [https://perma.cc/N4DU-MWLV]; INT'L CHAMBER OF COM., RULES OF ARBITRATION art. 12(4) (2012); INT'L CHAMBER OF COM., RULES OF ARBITRATION art. 8(4) (1998); INT'L CTR. FOR DISP. RESOL., INTERNATIONAL DISPUTE RESOLUTION PROCEDURES art. 6 (2022), https://www.adr.org/sites/default/files/ICDR%20Rules_0.pdf [https://perma.cc/93KU-LHZ3].

38. For a summary, see Brower & Rosenberg, *supra* note 24, at 13 (citing arbitration laws from France, England, Canada, India, and Singapore). R

39. BORN, *supra* note 34, at § 12.03[D][3] ¶ 20. This Article focuses on tri-partite tribunals that include party-appointed arbitrators. Accordingly, I do not consistently refer to sole arbitrators when mentioning chairpersons, even if most observations about chairpersons would also apply to sole arbitrators. Similarly, I do not generally refer to co-arbitrators appointed by institutions or appointing authorities. R

40. *Id.* at n.189.

41. Of those surveyed, 72% identified neutrality and 64% identified enforceability as "highly relevant" to their decision to arbitrate. CHRISTIAN BÜHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 395 (1996).

42. *See* Ilhyung Lee, *Practice and Predicament: The Nationality of The International Arbitrator (With Survey Results)*, 31 FORDHAM INT'L L.J. 603, 613 (2007). A legal culture may be defined as "those beliefs about how to properly relate to each other that are deeply held, widely shared, and persistent over time." *See* Oscar G. Chase, *Legal Processes and National Character*, 5 CARDOZO J. INT'L & COMP. L. 1, 8 (1997) (citing GEERT HOFSTEDE, CULTURE'S CONSEQUENCES 25 (1980)). Damaška explains: "[D]ominant ideas about the role of government inform views on the purpose of justice, and the latter are relevant to the choice of many procedural arrangements. Because only some forms of justice fit specific purposes, only certain

Given the historic roots and importance of party-appointed arbitrators, some argue that parties have an affirmative "right," or even a fundamental right,[43] to select arbitrators. Others dispute whether party appointment is a right or simply a historical tradition.[44] This debate has largely ended in a standoff and largely misses the point. Regardless of whether party appointment is a fundamental right or merely a historical right, all rights are subject to some limitations.[45] The real question, then, is what those limitations are.

In modern practice, a party's choice of arbitrator is limited by prohibited conflicts of interest, but not much else. Under national law in most jurisdictions, parties can appoint any arbitrator they wish—including non-lawyers and individuals with no arbitration experience—as long as the arbitrator does not have an improper conflict of interest that unduly impinges on their impartiality.

If impartiality is the only constraint on party appointment, the objection that party appointment itself precludes true impartiality would seem to be a devastating blow.

B. *Arguments for Eliminating Party Appointment*

Regardless of whether parties have a right to appoint arbitrators, they undoubtedly have a well-documented preference for the practice.[46] Long-existing alternatives to party appointment are infrequently invoked.[47] The popularity of the practice, however, has not deterred those who advocate eliminating it.

The core argument for eliminating this popular practice is that, by virtue of being intentionally selected by the parties, these arbitrators are necessarily biased or lack the fundamental ability to be impartial. Advocates of this view can call on a number of high-profile examples to support their allegations of pervasive bias and misconduct among party-appointed arbitrators.

1. *Examples of Partisan Party-Appointed Arbitrators*

One of the earliest and most prominent examples of *Arbitrators Gone Wild* involves the U.S. appointees to the Alaska Boundary Commission, which

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forms can be justified in terms of the prevailing ideology." MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 11 (1986).

43. Brower & Rosenberg, *supra* note 24, at 8 ("One important element of perceived legitimacy [of arbitration] is the *significant and timeless right* of the parties to choose the arbitrators.") (emphasis added). BORN, *supra* note 35, at § 12.01[A]; Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 U. PA. J. INT'L L. 431, 470 (2013). R

44. Paulsson, *supra* note 1, at 348. R

45. *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 394 n.407 (1998); Koen Lenaerts, *Limits on Limitations: The Essence of Fundamental Rights in the EU*, 20 GER. L.J. 779, 786 (2019).

46. *See supra* note 13. R

47. *See supra* note 14. R

was charged with resolving ambiguities in the U.S. purchase of Alaska from Russia in 1867.[48] The stakes were high for Canada because a loss would mean it would no longer enjoy the benefit of an outlet to the sea from the Yukon gold fields. At the time, Canada's colonial status meant that its interests were controlled by Great Britain.

On a six-person tribunal, the United States and Great Britain each appointed three arbitrators. Of those appointed by the United States, it is difficult to say any of them could satisfy a meaningful test of impartiality. Henry Cabot Lodge was known as "the most rabid Anglophobe"[49] and an enthusiastic nationalist with expansionist inclinations.[50] George Turner, a former senator from Washington, had publicly endorsed the American position in the arbitration.[51]

The third arbitrator was the illustrious Elihu Root, the Nobel Peace Prize winner who helped create the Permanent Court of International Justice. Despite his commitment to the rule of law and international justice, however, Root accepted appointment to the Commission with a pretty extraordinary conflict of interest—he was then serving as the U.S. Secretary of War.[52]

These individual conflicts were compounded by conduct during the pendency of the case. President Theodore Roosevelt apparently penned wholly inappropriate "personal and confidential" instructions to the U.S. appointees regarding the desired outcome.[53] Meanwhile, Elihu Root is reported to have surreptitiously passed back to Washington one of the British arbitrators' presumptively confidential, off-the-record assessments of the 3. Research on General Adjudicator Biases during social visits to the arbitrator's country estate.[54]

While these conflicts could speak for themselves, British Prime Minister Lord Alford Balfour later offered a more express, if sour, assessment of the American arbitrators. He described the American arbitrators as having "behaved ill" and concluded that they were "neither judicial by position nor by character."[55]

48. As Paulsson describes, "[the] Alaskan Purchase of 1867 had taken place without a proper title search. Some documents suggested that Great Britain had in 1825 promised Russia a 10-mile strip along the entire Coast north of Prince of Wales Island. But other documents put that in doubt. No one had much cared until lumber, fish and especially gold – Klondyke! – came into the picture." Paulsson, *supra* note 1, at 341. **R**

49. Stephen Hess, America's Political Dynasties 455 (2017).

50. John A. Garraty & Henry Cabot Lodge, *Henry Cabot Lodge and the Alaskan Boundary Tribunal*, 24 New Eng. Q. 469, 469–94 (1951).

51. *See* Hugh L. Keenlyside & Gerald S. Brown, Canada and the United States: Some Aspects of Their Historical Relations 178–89 (1952).

52. Paulsson, *supra* note 1, at 342–43. **R**

53. According to research by none other than Philip Jessup, this communication was but one of a "never-ending stream of further letters from Roosevelt to his 'impartial jurists' pounding away at the need to win the case." *Id.* at 342.

54. *Id.*

55. *Id.* at 343.

Jumping forward into the 20th Century, a seminal North Atlantic Free Trade Agreement ("NAFTA") investment arbitration seemed to transfigure the debate over party-appointed arbitrators into a mini-morality play. In *O'Keefe v. Loewen*,[56] the Canadian party challenged the outcome as a denial of the justice guaranteed under NAFTA. After the arbitral proceedings concluded with a U.S. victory, the U.S.-appointed arbitrator publicly recounted his appointment process. He described in detail how representatives of the U.S. government intentionally and apparently unabashedly pressured him by indicating that the United States would withdraw from NAFTA if it lost.[57] The arbitrator confirmed, with a tinge of nervous humor, that he had felt the pressure from the U.S. government and had indicated as much to the U.S. representatives.[58]

This account by a well-respected former U.S. federal-judge-turned-arbitrator seems to confirm everything critics contend: even a respectable party-appointed arbitrator can act under norm-bending pressure exerted by the appointing party, who is then rewarded with a victory in the arbitration.

Similar examples can be found throughout the 21st Century. At the Iran-U.S. Claims Tribunal, two Iranian-appointed arbitrators were alleged to have physically attacked a neutral Swedish arbitrator in an attempt to remove him from the premises.[59] In a State-to-State boundary dispute between Croatia and Slovenia, the Slovenian arbitrator was allegedly caught on surveillance tapes divulging secret tribunal deliberations to, and strategizing with, his appointing-party's counsel. [60] In 2015, the Paris Court of Appeals vacated an arbitral award that it found had been fraudulently rendered in favor of a celebrated French politician and businessman because the arbitrator he appointed had concealed "old, close and repeated links" with the

56. In the still-controversial *Loewen* arbitration, Canadian investors alleged that a Mississippi court judgment for $500 million violated NAFTA protections requiring fair and equitable treatment. The *Loewen* judgment was considered particularly objectionable because it included $400 million in punitive damages, which made it virtually impossible to appeal in light of local law that required the posting of a supersedeas bond equal to 125% of the judgment. Loewen Group and Raymond Loewen v. United States (Can. v. U.S.), ICSID Case No. ARB(AF)/98/3, Award (June 26, 2003), https://www.italaw.com/cases/632 [https://perma.cc/Z4BV-KYBA].

57. The U.S.-appointed arbitrator publicly revealed that he had met with officials of the U.S. Department of Justice prior to accepting the appointment and that, "during the meeting, they told him: 'You know, judge, if we lose this case we could lose NAFTA.' He recalled that his answer was: 'Well, if you want to put pressure on me, then that does it.'" V.V. Veeder, *The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator—From Miami to Geneva*, 107 PROC. AM. SOC'Y INT'L L. ANN. MEETING 387, 388 (2017).

58. There are separate ethical concerns about an arbitrator, whether party-appointed or not, commenting publicly on a case. But for the purposes of this Article, those concerns are not relevant.

59. *See* Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L. ORG. 457, 471 (2000).

60. Matko Ilic, *Croatia v. Slovenia*: *The Defiled Proceedings*, 9 ARB. L. REV. 347 (2017). For examples of other cases that are often used as examples, see CME Czech Republic B.V. v. The Czech Republic, Final Award (UNCITRAL Arb. Proc. 2003), https://www.italaw.com/sites/default/files/case-documents/ita0180.pdf [https://perma.cc/CGR8-8V48]; AT&T Corp. v. Saudi Cable Co., [2000] 1 LLOYD'S REP. 22 (Q.B. 1999) (arbitrator failed to disclose the fact that he was on the board of directors of company that submitted losing bid for contract in dispute).

party and his lead counsel.[61] The Court also held that the arbitrator relied on his position as a former high magistrate and "eclipsed" the other two arbitrators, who were pushed to defer out of "convenience, blind trust, prejudice, or even incompetence."[62]

These high-profile examples amplify many less-famous examples that are often lamented by arbitrators themselves. For example, Juan Fernández-Armesto describes disruptive party-appointed arbitrators "who *impromptu* [stood] up and interrupt[ed] the opposing party lawyer to make a passionate *plaidoyer*;" who wrote "a 140 page dissenting opinion, stating why the award is null and void," and who "procrastinated delivery for months and [ran up] a huge bill"; or "who [was] caught sending emails to the party who appointed him, describing the *minutiae* of the deliberations."[63] Together these examples lend anecdotal credibility to the dim view that party-appointed arbitrators are simply partisan hacks masquerading as impartial adjudicators.

In responding to these examples, some defenders argue that they capture only a few "bad apples," who are neither representative nor a basis for eliminating an otherwise popular practice.[64] Others argue that it is unfair to attack conduct on which legitimate disagreement exists regarding ethical line-drawing.[65] Even if these examples have been corralled into a small corner of aberrant international arbitration practice, they continue to animate the debate over elimination of party-appointed arbitrators.

C. Structural Incentives for Bias

Beyond individual examples of unseemly behavior, critics also point to structural features that undermine the impartiality of party-appointed arbitrators. Some critics argue that arbitrators appointed by a party have a financial incentive to "serve" the party who appointed them in hopes of securing

61. *Paris Court of Appeals Annuls Unanimous €403 Million Award Rendered in Favor of French Businessman Bernard Tapie*, CLEARY GOTTLEIB (Feb. 17, 2015), https://www.clearygottlieb.com/news-and-insights/news-listing/paris-court-of-appeals-annuls-unanimous-403-million-award-rendered-in-favor-of-french-businessman-bernard-tapie21 [https://perma.cc/L5CU-D9U8].

62. *Id.*

63. Juan Fernández-Armesto, *Salient Issues of International Arbitration*, 27 AM. U. INT'L L. REV. 721, 725 (2012) (alteration in original).

64. Brower & Rosenberg, *supra* note 24, at 9. R

65. *See, e.g.*, INT'L BAR ASSOC., IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION. art 4, para. 4.4.1 (2014) (addressing the permissibility of pre-appointment interviews, provided that "th[e] contact is limited to the arbitrator's availability and qualifications to serve, or to the names of possible candidates for a chairperson, and did not address the merits or procedural aspects of the dispute, other than to provide the arbitrator with a basic understanding of the case.") *See also* FRIEDLAND & MISTELIS, *supra* note 13, at 2 (two-thirds of respondents have been involved in interviews, but 12% find them inappropriate); W. LAURENCE CRAIG, ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 213 (2d ed. 1991) ("it is perfectly proper for a party to discuss the case with the potential arbitrator" and "it would be irresponsible for the arbitrator to accept nomination without some knowledge of the scope and nature of the dispute."); INT'L BAR ASSOC., IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL ARBITRATION. art. 4, para 3 (2010). R

future appointments.[66] In investment arbitration, this critique extends not only to an individual appointing party, but to an entire side of the dispute (*i.e.*, investors or states). For example, Gus van Harten hypothesizes that investment arbitrators are more likely to adopt certain substantive positions because of "apparent incentives for arbitrators to favour the class of parties (here, investors)," who are more likely to reappoint them in the future.[67]

Other critics point to the parties' incentives to select arbitrators who are presumed to be favorably inclined toward their cases. For example, Armesto analogized arbitrator selection to a prisoner's dilemma: both parties could select "impartial" arbitrators, but neither side wants to risk the possibility that the opposing party will defect to a more partisan party-appointed arbitrator.[68] Instead, limited only by identifiable conflicts of interest, parties make unbridled and (in Paulsson's words) "unilateral" self-serving appointments.

In response to these structural critiques, defenders argue that overtly partisan party-appointed arbitrators are a self-correcting problem in both the short- and long-term. First, the perception of partisanship in a proceeding alienates other tribunal members. An overtly partisan arbitrator has less credibility and, therefore, arguably less ability to influence the outcome of the arbitration.[69] Colorful anecdotes are often shared of tribunal members physically leaning away from a rambunctious party-appointed arbitrator in arbitral hearings.

In the longer term, inappropriately partisan behavior may reduce, not increase, the likelihood of future appointments.[70] Partisan behavior almost inevitably disqualifies an arbitrator from consideration as a future chairperson. Meanwhile, when the co-arbitrators are serving as counsel in future cases, they may be less inclined to appoint or suggest the unduly partisan arbitrator, in part because counsel will realize hyper-partisan arbitrators are likely to have diminished influence on the tribunal.

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

67. Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 Osgoode Hall L.J. 211, 219 (2012) (Advocacy groups in the investment arbitration context have also been critical of party-appointed arbitrators); *see also* Pia Eberhardt & Cecilia Olivet, Corp. Eur. Observatory & the Transnat'l Inst., Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom (2012), https://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf [https://perma.cc/N54X-37NK]. Other scholars have investigated whether political affiliations affect outcomes among investment arbitrators. *See, e.g.*, Michael Waible & Yanhui Wu, Are Arbitrators Political? 11–12 (July 5, 2012), http://dx.doi.org/10.2139/ssrn.2101186 [https://perma.cc/S8TW-SSFK] (cited with permission).

68. Fernández-Armesto, *supra* note 63, at 724). *See also* Shany, *supra* note 15, at 483.

69. According to Paulsson, if a party names "a partisan arbitrator from outside that circle," the party "run[s] the risk that the two other arbitrators will deliberate within an intellectual zone of shared confidence into which the partisan arbitrator has no access." Brower & Rosenberg, *supra* note 24, at 16. R

70. Anton Strezhnev, You Only Dissent Once: Reappointment and Legal Practices in Investment Arbitration (November 8, 2015) (unpublished manuscript) (on file with Harvard University).

Although neither side has definitively prevailed in this debate over party-appointed arbitrators, the debate itself has animated reform proposals. Most notably, many investment arbitration reforms are designed to restrict or eliminate party-appointed arbitrators. The debate has also spawned an entire genre of empirical research.

D. *Empirical Research on Party-Appointed Arbitrators*

Critics of party-appointed arbitrators are essentially making an empirical claim. They posit that party-appointed arbitrators improperly favor the party who appointed them, which alters the *proper* or *right* outcome in those disputes.[71] The call for empirical testing of this hypothesis has been amplified by two related developments: the increasingly overt partisan divide in investment arbitration[72] and the rise of empirical research about judicial decisionmaking in national and international courts.[73] Not surprisingly, the call has beckoned several scholars who have attempted to study empirically concerns about party-appointed arbitrators.

1. *Research on Dissenting Opinions*

One set of empirical studies focuses on so-called dissenting opinions. Separate and dissenting opinions can provide valuable insights regarding individual arbitrators, who otherwise act as part of a three-person tribunal. Flawed methodologies, however, cause these studies to significantly overstate their conclusions.

Albert Jan van den Berg's study, cited in the Introduction, analyzed dissenting opinions by party-appointed arbitrators in investment arbitrations. From his research, van den Berg argues that nearly 100% of dissenting opinions authored by party-appointed arbitrators were in favor of the party who appointed them.[74] Based on this observation, van den Berg concludes that dissenting opinions by party-appointed arbitrators are suspicious and raise questions about the "neutrality of the arbitrator."[75]

Van den Berg argues that dissents are only appropriate if "[s]omething went fundamentally wrong in the arbitral process" or if the "arbitrator has

71. As I discuss below, belief that there is only one "right" answer in any dispute assumes away the indeterminacy of law and related insights by Legal Realists. *See infra* Section IV.B.1.

72. *See* Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 391, 393 (2012) (noting the explosion in the caseload and the fact that cases required "complex and politically fraught value-balancing.").

73. *See generally* Catherine A. Rogers, *The Politics of International Investment Arbitrators*, 12 SANTA CLARA J. INT'L L. 223 (2013) (analyzing the rise and risks of empirical research regarding investment arbitrators).

74. Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 821, 824 (Arsanjani et al. eds., 2010).

75. *Id.* at 827.

been threatened" with physical danger.[76] In his view, a dissent would not be justified even if an "arbitrator genuinely believes that the majority is fundamentally wrong on an issue of law or fact."[77] Van den Berg's empirical conclusions have largely been taken at face value and stated as fact,[78] even if legitimate questions exist regarding his methodology.[79]

In a similar study, Sergio Puig found that 94% of what he characterizes as "dissenting opinions" are issued by party-appointed arbitrators.[80] Of those opinions, Puig indicates from his data that only 65% of these "dissenting" opinions authored by party-appointed arbitrators *favor* the appointing party.

Sixty-five percent is significant, but also significantly lower than the nearly 100% of opinions van den Berg classifies as in favor of the appointing party. In line with van den Berg, however, Puig concludes that party-appointed arbitrators *never* dissent *against* their appointing parties.[81] From these observations, again in line with van den Berg, Puig concludes that the "voting behavior" he observes "confirms the role of party appointments in contributing to bias."[82]

The findings of bias by both authors are based on several questionable methodological premises, which lead to an erroneous substantive conclusion.

First, methodologically, both studies classify all *separate* opinions as *dissenting* opinions.[83] A classic dissenting opinion disagrees with the *outcome* of the majority. Not all separate opinions, however, necessarily disagree with the outcome. In some legal systems, separate opinions or dissenting opinions are either strongly discouraged or prohibited completely.[84] In other jurisdictions where they are allowed, however, separate opinions are not all lumped into a single category as "dissenting."

For example, in the United States, separate opinions that agree with (as opposed to dissent from) the outcome supported by the tribunal majority are generally referred to as "concurring opinions." Concurring opinions, meanwhile, can be further divided into two sub-categories. First, a simple concurrence refers to separate opinions in which the judge (or arbitrator) agrees with both the outcome and reasoning of the majority decision but has some-

76. *Id.* at 831.

77. *Id.*

78. Elsa Sardinha, *Party-Appointed Arbitrators No More: The EU-Led Investment Tribunal System as an (Imperfect?) Response to Certain Legitimacy Concerns in Investor-State Arbitration*, 17 L. & PRAC. INT'L CTS. & TRIBS. 117, 121 (2018) (citing van den Berg for the statement that "nearly all dissenting opinions in investment arbitration awards are in favour of the party that appointed the dissenting arbitrator.").

79. *See* Rogers, *supra* note 73, at 245; Brower & Rosenberg, *supra* note 24, at 36. R

80. Puig, *supra* note 14, at 680. R

81. *See id.*

82. *Id*.

83. Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 451 (2008) ("a 'dissent' typically means an opinion rejecting the disposition reached by a majority of the Court.").

84. *See* Katalin Kelemen, *Dissenting Opinions in Constitutional Courts*, 14 GER. L.J. 1345, 1371 (2013) ("In Continental Europe, ordinary judges, with a few exceptions, are still not permitted to state their dissent publicly, and constitutional judges, who attach a higher value to institutional loyalty than common law judges, are still quite reluctant to dissent.").

thing to add. Second, a concurrence in the judgment alone refers to a concurring opinion that agrees with the substantive outcome but disagrees with the majority's reasoning for that outcome.[85]

The distinction between concurring and dissenting opinions is important in assessing empirical research and related conclusions.[86] The most important consequence of this distinction is that concurring opinions are, almost by definition, much less readily classified as being either *for* or *against* a party. Puig's own analysis confirms this point.

Puig classifies 35% (19 out of 54) of separate opinions as *uncertain* with respect to which party the opinions *favors*.[87] He also observes that at least some opinions he classifies as dissents "just make procedural or seemingly neutral doctrinal points."[88] This characterization would seem to change the categorization of those opinions that agree both with the reasoning and the outcome of the majority opinion from "dissenting" to "concurring."

Apart from lumping all separate opinions together, both van den Berg and Puig's research also seem to erroneously assume that separate opinions by party-appointed arbitrators *necessarily benefit* the appointing party. Even when a separate concurring opinion can be characterized as consistent with an appointing party's position on particular issues, it does not necessarily follow that that opinion *favors* that party or, by extension, undermines legitimacy.[89]

A separate opinion on a narrow and seemingly insignificant issue provides distinct, clear, and independent confirmation that the party-appointed arbitrator substantively agreed with the majority on both the award's outcome

85. Some argue that opinions in this category should be treated as dissenting opinions. *See* Antonin Scalia, *The Dissenting Opinion*, J. SUP. CT. HIST. 33, 33 (1994) (arguing that opinions that disagree with the court's reasoning should be characterized as dissenting opinions, not concurrences).

86. In empirical studies of judicial behavior, researchers treat concurring or dissenting, as well as concurring or concurring in conclusion, as important distinctions. *See* Corey Rayburn Yung, *A Typology of Judging Styles*, 107 NW. U.L. REV. 1757 (2013) (discussing how methodological assumptions and classification of judicial outcomes can alter empirical analysis and conclusions); Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1924 (2009).

87. *See* Puig, *supra* note 14, at 696. R

88. *Id.* at 681. In his text, Puig states that "at least some" opinions make procedural or neutral doctrinal points. The table on page 696 of the Annex, however, identifies 19 out of 54 separate opinions as "unclear" as to which parties they favor.

89. As I have argued elsewhere, dissenting opinions can contribute meaningfully to the development of law and therefore may have value even if authored by a party-appointed arbitrator in favor of the appointing party. *See* Rogers, *supra* note 73, at 247. Brower and Rosenberg provide numerous examples R of ICSID tribunals citing dissenting opinions in their reasoning and analyzing how dissenting opinions have contributed to the development of law. *See* Brower & Roseberg, *supra* note 24, at 36. Interestingly, R ICSID tribunals have also on several occasions cited dissenting opinions from the International Court of Justice. *See* Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EUR. J. INT'L L. 301 (2008). On the value of dissenting opinions in the U.S. judicial context, see Nina Varsava, *The Role of Dissents in the Formation of Precedent*, 14 DUKE J. CONST. L. & PUB. POL'Y 285, 306 (2019).

and reasoning.[90] Such confirmation from a party-appointed arbitrator may be even more persuasive to a losing party than a unanimous decision.[91]

In a unanimous decision, a losing party may assume that its party-appointed arbitrator had been outvoted or simply acquiesced to the majority.[92] An objection on a minor point confirms to a party that the arbitrator it appointed was paying attention, even to their most minor concerns. Under this view, a separate opinion confirming that a party-appointed arbitrator agreed with the majority except for a minor point also likely makes it more difficult for that party to successfully challenge the award.[93]

In a similar vein, it is inaccurate to assume that a separate opinion that concurs only in the final outcome is more favorable to the appointing party than a unanimous award. An opinion that concurs in the outcome only can convey to a losing party that their loss was inevitable and potentially justified by more than one reason. This kind of separate opinion, again, likely makes it more difficult to effectively challenge the award. Reviewing courts may be more inclined to give effect to an award whose alleged defects were not believed by the objecting party's arbitrator to be necessary to the outcome.

In addition to these methodological issues regarding classification, both van den Berg and Puig also ignore the baseline rate of separate decisions. They both contend that dissents by party-appointed arbitrators are a big problem, but only make passing mention of the fact that separate opinions are issued in only 22% of arbitrations in van den Berg's sample[94] and only

90. Rogers, *supra* note 73, at 247–48. A good example is *Wena Hotels Limited v. Arab Republic of Egypt*, where the arbitrator appointed by Egypt issued a two-sentence separate opinion stating that he "concurs in the Tribunal's entire award," including the award or compound interest, but was "not persuaded" that interest should be compounded quarterly." *See* ICSID Case No. ARB/98/4, Statement of Professor Don Wallace, Jr. (Dec. 8, 2000). R

91. *Cf.* Edwards & Livermore, *supra* note 85, at 1895 (reasoning that making the deliberative process of judging more express is consistent with a process with strong adherence to rules and laws).

92. This assumption is consistent with how Groupthink affects deliberative bodies. *See infra* notes 165–66 and accompanying text.

93. Some argue that unanimous decisions are the product of behind-the-scenes negotiations that result in compromise decisions. For example, one party-appointed arbitrator may agree with the majority on the substance, but argue for a lower award of damages, interest, or costs and fees. *See* Robert H. Smit, *Thoughts on Arbitrator Selection: Why My Father Was (Usually) a Good Choice*, 23 AM. REV. INT'L ARB. 575, 581 (2012) (querying whether a party-appointed arbitrator better serves the interests of an appointing party, "by negotiating a less adverse unanimous award" or by dissenting).

94. *See* van den Berg, *supra* note 74, at 825 n.18. R

16–17% in Puig's sample.[95] In other words, tribunals rendered *unanimous* decisions in 78% (van den Berg) or 83–84% (Puig) of cases.[96]

It would be presumptuous to assume without more detail that 78% or 83% are "big" percentages of unanimous opinions in investment disputes.[97] Sometimes, seemingly high numbers can be deceptive when compared to related baselines.[98] In the investment arbitration context, however, these rates of unanimity seem pretty high in comparison with benchmarks from other international courts. Rates of dissent might be expected to be much higher in investment disputes than in other international courts with tripartite tribunals given that they often involve high stakes on ideologically fraught issues.[99] These features, meanwhile, play out in the absence of any formal *stare decisis* and investment law's deeply indeterminate and evolving standards.

Arguably, if all the worst assumptions were true, we might expect to see dissents in 100% of investment cases authored by the arbitrator appointed by the losing party. Instead, the 78% or 83–84% rate for unanimous awards suggests a surprisingly high degree of consensus on investment tribunals. At a minimum, these percentages appear to undermine some of the worst assumptions that "politics and partisan ideological gamesmanship rule[ ] the

95. Puig, *supra* note 14, at 697. Puig cites 16%, but the numbers he cites 48 out of 311 seem instead to result in 15.43%; in any event the difference is minor. Other scholars have calculated similar rates of dissent among tribunals. *See* Strezhnev, *supra* note 70, at 2 (finding that from January 1972 through April 2015, roughly 80% of ICSID final awards were unanimous and fewer than 15% included a dissent); Audley Sheppard & Daphna Kapeliuk-Klinger, *Dissents in International Arbitration*, *in* THE ROLES OF PSYCHOLOGY IN INTERNATIONAL ARBITRATION 313, 320 (Tony Cole ed., 2017) ("Between 2011 and 2014, ICSID authenticated at least seventy publicly known final awards, in respect of which twelve arbitrators issued dissenting opinions, *i.e.*, in approximately 17% of cases, which means 83% were unanimous."); *but see* Albert Jan van den Berg, *Charles Brower's Problem With 100 per cent—Dissenting Opinions By Party-Appointed Arbitrators In Investment Arbitration*, *in* PRACTICING VIRTUE: INSIDE INTERNATIONAL ARBITRATION 504, 507 (2015) (arguing that 22% "compares badly with commercial arbitration, where the percentage is around 8 per cent.").

96. One study suggests that the high rates of unanimous decisions reflect not true consensus, but instead strategic risk avoidance by arbitrators who fear that a dissent may limit their future appointments. That study only finds, however, that dissent is correlated with fewer appointments as arbitral chairpersons. It does not find any correlation between dissents and future appointments as a party-appointed arbitrator or in commercial cases. *See* Strezhney, *supra* note 70, at 8, 14–15.

97. *See* Christopher R. Drahozal, *Arbitration Innumeracy*, 4 Y.B. ARB. & MED. 89, 92 (2012) (quoting Michael Blastland & Andrew Dilnot, THE NUMBERS GAME: THE COMMONSENSE GUIDE TO UNDERSTANDING NUMBERS IN THE NEWS, IN POLITICS, AND IN LIFE 30 (2009)).

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

99. *See* Rogers, *supra* note 73, at 243 (analyzing empirical studies from the European Court of Human Rights, U.S. appellate courts, and the World Trade Organization ("WTO"). *See also* CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 48–54 (2006) (noting that party affiliation and dissenting opinions have fewer effects on judicial voting in less controversial cases).

day"[100] or that party-appointed arbitrators are now producing "mandatory dissents."[101]

Cumulatively, these methodological errors compel both researchers to conclude substantively that their studies demonstrate that party-appointed arbitrator bias, in van den Berg's case perhaps even individual bias.[102] This conclusion is belied both by the fact that party-appointed arbitrators dissent (or write separate opinions) in relatively few cases and by the reasonable assumption that most separate opinions make awards more difficult to challenge and may even increase party confidence in awards.[103]

2. *Experimental Research on Arbitrator Behavior*

In addition to empirical research, another body of research aims to measure party-appointed arbitrator bias using experimental methodologies.[104] Experiment-based research allows focus on variables that can be difficult to isolate in statistical research.[105]

In one interesting and important study, Puig joined with Anton Strezhenev to conduct experimental research regarding party-appointed arbitrators. They gave volunteer test subjects randomized vignettes on which the subjects, role-playing as arbitrators, were asked to rule on specific issues relating to allocation of costs. In the vignettes, participants were assigned different methods of appointment, either appointment by one or the other party, by a neutral method, or an unknown method.[106]

The authors found that test subjects who were told they had been appointed by a particular party issued hypothetical rulings on costs that were more favorable to those appointing parties. From these observations, Puig and Strezhenev argue that party-appointed arbitrators have a cognitive bias

100. One scholar has argued that high rates of agreement among federal appellate courts disprove allegations that "politics and partisan ideological gamesmanship" exert a significant influence on judicial decisionmaking. Edwards & Livermore, *supra* note 85, at 1944 ("[T]he high level of consensus would almost certainly fall . . . . The simple point here is that the lack of dissenting opinions shows that judges . . . can, and do, agree on the requirements of the law, without regard to their political and ideological leanings. And the low rate of dissents indicates a commitment by appellate judges to follow their shared understanding of governing precedent.").

101. Van den Berg, *supra* note 2, at 830. R

102. Puig limits his conclusions to the "role of the party-appointed arbitrator," but van den Berg seems to suggest individual arbitrators' impartiality is subject to question if they dissent. *See supra* notes 75–82 and accompanying text.

103. *See supra* notes 94–95 and accompanying text.

104. Another important study in this vein is Susan D. Franck et al., *Inside the Arbitrator's Mind*, 66 EMORY L.J. 1115 (2017). That study, however, sought to identify cognitive biases but did not focus on party-appointed arbitrators.

105. Dan M. Kahan et al., *"Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 410–12 (2016); Jeffrey J. Rachlinski et al., *Judicial Politics and Decisionmaking: A New Approach*, 70 VAND. L. REV. 2051, 2052, 2055 (2017).

106. Puig & Strezhenev, *supra* note 9, at 376–79. R

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in favor an appointing party, which they dub an "affiliation bias."[107] These observations are important because they suggest that the mere fact that an arbitrator was appointed by a particular party may have a measurable influence on that arbitrator's decisionmaking and that bias arises even when the stakes are extremely low.

In another study, Marceddu and Ortolani sought to measure any potential differences in the perceived legitimacy of individually constituted investment tribunals as compared with a standing international court with governmentally appointed judges. Similar to Puig and Strezhenev, they used an experimental design that presented participants with vignettes. Distinct from other studies, Marceddu and Ortolani did not aim to test a representative sample, but instead intentionally recruited participants from the "anti-ISDS front."[108] The stated purpose for this targeted participant recruitment was "to grasp what exactly is 'wrong' with investment arbitration *according to the critics*."[109] Targeting exclusively those with a presumed viewpoint, however, precludes potentially valuable insights from comparison with a control group. Such controls can be especially valuable in research designed to evaluate a group's subjective views and to limit the impact of potential biases among researchers.[110]

Based on their findings, Marceddu and Ortolani conclude that "[t]he temporary nature of investment tribunals and the untenured character of the arbitrators have a negative impact on the system's perceived usefulness."[111] They further conclude that public sentiment toward ISDS would improve "if the adjudicators are tenured and not appointed by the disputing parties on a case-by-case basis."[112] From these observations, they conclude that their results support the constitution of a new permanent investment court.[113]

Marceddu and Ortolani purport to observe statistically significant differences in participant responses regarding standing tribunals and ISDS-style

107. *See id.* at 373; *see also* Anne van Aaken & Tomer Broude, *Arbitration from a Law and Economics Perspective*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION (Thomas Schultz & Federico Ortino eds., 2019).

108. The authors explain they recruited participants from among those "close to social groups/circles that have publicly expressed an opinion, often critical, concerning ISDS in the recent past—that is, academics, policy-makers, NGO activists and journalists." Marceddu & Ortolani, *supra* note 10, at 416. R

109. *Id.* at 407.

110. In their research, the authors inquired about and reported on participants' political orientations, presumably as a proxy for their level of support for ISDS. *Id.* at 422. However, this sorting is done within their targeted audience of presumed ISDS critics. These would-be critics were selected because they were on academic faculties and NGOs that were presumed to be critical of ISDS. Better controls could have been achieved by recruiting from among academics and other global players that are both presumed to be critical and supportive of ISDS. Then, a more direct inquiry about the participants' level of knowledge of ISDS and their level of skepticism (asked after completing the substantive questions) would have yielded a more reliable control group.

111. *Id.* at 416.

112. *Id.* at 427 ("[A]ll other variables being equal, the removal of untenured party-appointed arbitrators seems to have a positive effect on the public perception of ISDS.").

113. Id. at 427–28.

tribunals. Several features of their research methodology, however, raise questions about the robustness of these findings.[114]

First, in the vignettes, the authors asked participants to indicate their preference as between "temporary adjudicatory bodies" constituted "with the purpose of resolving a specific dispute between a private investor and a state" or "international courts" that were "constituted with the purpose of resolving disputes concerning human rights."[115] These descriptions seem to bait responders' answers that favor the hypothesis being tested.[116]

For example, while not technically inaccurate or expressly derogatory, the term "temporary adjudicatory body" seems significantly less appealing than other options like "specially-selected international tribunal" or an "international tribunal established to resolve a specific dispute." Some states have expressed reservations about an investment court because their power to appoint decisionmakers will be diluted.[117]

Under this view, a more balanced comparison might have requested feedback as between "a standing investment court in which the State party had only a single vote among potentially 100s of State votes" regarding who is on the roster of judges, on the one hand, and a "specially selected international tribunal in which the State party has the ability to determine the identity of at least one member of the tribunal and to influence the identity of other members." Including in the vignettes some uncomfortable realities about the politics of the appointment of international judges might have also affected responses.[118]

Meanwhile, the description of the hypothetical international court's jurisdiction extends to "human rights." By including human rights in the court's jurisdiction, the research method adds a new variable to one model

114. *Id.* at 418.

115. *Id.* at 421.

116. The authors claim to use a "methodology that does not assume the existence of any correct or wrong answer." *Id.* at 414.

117. For example, the Government of South Africa submitted a rather blunt statement of its concerns to UNCITRAL Working Group III reasoning that on an investment court, "there will only be a few seats for judges" and that situation "will result in competition among the different interests from countries in which political power will play an important role to control the court." In addition to issues of transparency, inequality, and bias, competition for appointment also raises concerns "about ensuring diversity in the composition of the court and the process for addressing challenges to judges." *See* Comm. on International Trade Law, Possible reform of Investor-State dispute settlement (ISDS) Submission from the Government of South Africa, ¶91, 92 U.N. Doc. A/CN.9/WG.III/WP.176 (2019).

118. For example, Manfred Elsig and Mark Pollack describe the vetting process for the WTO Appellate Body as a don't-ask-don't-tell game in which candidates are coached to strategically conceal their "views on hot-button issues of interest" as they progressed through a "gauntlet of ambassadorial interviews." *See* Manfred Elsig & Mark A. Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointments at the World Trade Organization*, 20 EUR. J. INT'L REL. 391, 410 (2014). Elsig and Pollack suggested that the WTO AB appointment process has become as politicized as the U.S. Supreme Court. *See id.* Today, that assessment seems like an understated foretelling of the crises that threaten the legitimacy of both institutions. The WTO is effectively frozen because superpowers are blocking appointments to the AB, while highly politicized appointments to the U.S. Supreme Court have resulted a loss of confidence and credibility of that institution.

that the participants are being asked to compare. This added variable may well have distorted the outcomes. How can we know whether responders registering a preference for an international court that has the "purpose of resolving disputes concerning human rights" is expressing a preference for the appointment method or for the scope of its jurisdiction extending to human rights?

Like statistical research, experimental research about decisionmaker bias also has inherent limitations. Writing neutral vignettes for experimental research in ISDS is undoubtedly difficult, particularly given the divisions in the field regarding even basic terminology. These challenges combine with other complications implicated by the fact that adjudication in the real world occurs in a complex, multi-variable context over a period of time.[119] As Susan Franck, an empiricist who has also conducted experimental research, explains: "There is a difference . . . between answering a hypothetical question during a thirty to forty-minute survey and living through a case for two to three years as a party-appointee."[120]

The most essential methodological feature of this type of research—the ability to isolate one specific aspect of decisionmaking—can itself distort outcomes. As discussed in more detail below, adjudicators are subject to a wide range of cognitive biases.[121] Some of these biases inevitably collide with, overlap, intersect, amplify, or even cancel out other biases. For example, Puig and Strezhenev's own body of research itself identifies several different types of bias that might mollify the effect of affiliation bias: party-appointed arbitrators may also be affected by a sympathy bias (in favor of underdogs),[122] by a desire to accumulate social capital,[123] or by a desire to avoid the "adverse professional consequences of dissent."[124] If you add these all up, there is a push-and-pull effect that would be impossible to measure and, even if measurable, may only confirm that arbitrators are subject to the same foibles as all humans.

Another inherent limitation on empirical research about international arbitrators is that it aims to measure the extent to which extra-legal factors produced outcomes that differ from the "correct" outcomes in particular cases. For reasons elaborated below, it is not only impossible to identify *the*

119. *See* Franck et al., *supra* note 104, at 1159 n.215 (critiquing the Puig-Strezhenev study as "confounded by the failure to address that successful investors reliably have costs shifted in their favor but successful states did not"); *see also* Tigran W. Eldred, *Judicial Impartiality in an Empirical Era*, 70 FLA. L. REV. F. 130, 131 (2019). R

120. *See* Franck et al., *supra* note 104, at 1168 n.249. R

121. *See infra* Section II.C.3.

122. *See generally* Sergio Puig & Anton Strezhnev, *The David Effect and ISDS*, 28 EUR. J. INT'L L. 731, 731–61 (2017).

123. Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L. L. 387, 400 (2014) (concluding a range of factors that may affect arbitrator appointments).

124. Puig, *supra* note 14, at 677. R

correct legal outcome for a particular case, but also inappropriate to assume there is only one correct legal outcome for a case.[125]

These critiques of various empirical and experimental studies are not intended to detract from their valuable contributions. These critiques are instead a caution about the importance of researcher objectivity and rigor in research design. Strong correlation often generates a strong temptation to infer causation.[126] Strong political preferences by researchers can affect how they structure their research and how they interpret their results.[127] With the issue at hand, both the inherent logic and anecdotal evidence of bias among party-appointed arbitrators has successfully tempted researchers to mistake proof of causation from findings of mere correlation.[128]

These critiques are also a warning against drawing strong conclusions from results and, even more importantly, against basing proposed reforms on those conclusions.

3. *Research on General Adjudicator Biases*

Studies regarding arbitrators build on a growing body of literature about adjudicator biases more generally. Some identified biases are tied to judges' personal background, political preferences,[129] cultural cognition,[130] and group identity.[131] Other influences are part of the human condition, such as

125. Arguably, behavioral economics research methods are not appropriate for such inquiries. *See* Thomas D. Granta & F. Scott Kieffaa, *Appointing Arbitrators: Tenure, Public Confidence, And A Middle Road For ISDS Reform*, 43 MICH. J. INT'L L. 171, 202 (2022) ("behavioral economics {is not intended to} concern situations in which there exist *a priori* definitions of 'depart[ure] from optimal decision-making' or of a single 'correct solution.' Its concern, instead, was to *forecast behavior*.").

126. Drahozal & Zyontz, *supra* note 98, at 913. R

127. *See* Rogers, *supra* note 73, at 232, 248 (examining the outsized impact of empirical research on reform proposals in investment arbitration but cautioning against "even striking empirical findings" being used "for proposed reforms without more holistic analysis of the substance and function of the phenomenon studied"); *see also* Granta & Kieffaa, *supra* note 125, at 203–04. R R

128. For an extended discussion of how even sophisticated researchers often erroneously infer causation, see Rogers, *supra* note 73. R

129. The effect of political preferences on judicial decisionmaking has been extensively tested and remains an alluring theory, even though the results do not necessarily point to significant effects. *See* David E. Adelman & Robert L. Glicksman, *Judicial Ideology as a Check on Executive Power*, 81 OHIO ST. L.J. 175, 233 (2020) ("[J]udicial ideology is of secondary importance in most cases and that when it is a significant factor in case outcomes, judicial ideology typically moderates executive branch policies towards centrist positions consistent with statutory mandates."); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 807 (2008) (finding that judicial ideology is not playing a dominant role and that judicial policy choices are not driving arbitrariness review).

130. Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 137 (2007).

131. For example, in judicial settings, empirical research suggests that female judges correlate with harsher outcomes in sex offense and sex discrimination cases, and that black judges are more likely to rule in favor of affirmative-action plans and for plaintiffs in race-based discrimination cases, and that female judges were more likely to grant asylum. *See* Jeffrey J. Rachlinski & Andrew J. Wistrich, *Judging the Judiciary by the Numbers: Empirical Research on Judges*, 94 ANNU. REV. LAW SOC. SCI. 203, 222 (2017); Michael A. Hogg, *Social Identity and Misuse of Power: The Dark Side of Leadership*, 70 BROOK. L. REV. 1239, 1242 (2005) ("Since the groups and categories we belong to furnish us with a social identity that defines and evaluates who we are, we struggle to promote and protect the distinctiveness and evaluative positivity of our own group relative to other groups.").

anchoring,[132] hindsight bias,[133] egocentric bias, framing, and representativeness bias.[134] Judges and arbitrators may also be affected by their sympathies among the parties,[135] as well as "inherent limitations in their memories, computational skills, and other mental tools."[136] As if these were not enough, judges and arbitrators' decisionmaking may also be affected by wholly irrelevant factors, such as what they ate for breakfast[137] or when they ate lunch.[138]

Finally, like all humans, judges and arbitrators also have a subconscious need to reduce complex decisions to "coherent mental models."[139] Research has shown that decisionmakers unconsciously transform the way decisions are mentally represented, which often results in a complex decision being reduced to a seemingly straightforward choice between a compelling alternative and a weak one.[140] This last type of distortion suggests that cognitive biases not only affect adjudicators' legal conclusions, but also their legal reasoning[141] and factfinding.[142]

132. Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784 (2001).

133. Debra L. Worthington et al., *Hindsight Bias,* Daubert*, and the Silicone Breast Implant Litigation: Making the Case for Court-Appointed Experts in Complex Medical and Scientific Litigation*, 8 PSYCHOL. PUB. POL'Y & L. 154 (2002).

134. *See* Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420, 428–44 (2007) (surveying empirical studies finding evidence of various forms of cognitive bias among judges).

135. *See generally* Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEX. L. REV. 855 (2015) (reporting on experimental research with judges that suggest they are affected by feelings about the litigants); Puig & Strezhnev, *The David Effect*, *supra* note 122 (arguing that arbitrators favor underdogs).

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

137. *See generally* Dan Priel, *Law Is What the Judge Had for Breakfast: A Brief History of an Unpalatable Idea*, 68 BUFF. L. REV. 899 (2020) (examining critiques of the claim attributed to Legal Realists that the law depends on what the judge ate for breakfast).

138. Shai Danziger, Jonathan Levav, & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. U.S. 17, 6889 (2011); Kevin Lewis, *Judge Cranky, Presiding: Surprising Insights from the Social Sciences*, BOSTON GLOBE (Apr. 24, 2011), http://www.boston.com/bostonglobe/ideas/articles/2011/04/24/judge_cranky_presiding/ [http://perma.cc/V5YJ-VQZG] ("Justice is supposed to be blind. However, a new study suggests that it is often tired and hungry instead.") (cited in John M. Golden, *Too Human? Personal Relationships Appellate Review*, 94 TEX. L. REV. 70, 70 n.5 (2016)).

139. *See* Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 513 (2004) (presenting empirical evidence of coherence-based reasoning, meaning when decisionmakers "shun cognitively complex and difficult decision tasks by reconstructing them into easy ones, yielding strong, confident conclusions").

140. This heuristic is undoubtedly at work in the very debate about arbitrator and judicial bias, which reduces the complexity of human decisionmaking to simplistic binary options between "biased and unbiased" or "partial and impartial." *See infra* Section IV.B.2.

141. George C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1384 (1998) (stating that while case outcomes in sentencing guideline cases were similar, judicial reasoning of blacks was different from that of whites).

142. *See* Elizabeth Thornburg, *Unconscious Judging*, 76 WASH. & LEE L. REV. 1567 (2019) (presenting empirical evidence to suggest that cognitive biases affect judicial factfinding and factual inferences); *see also* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 525 (1991) ("Because all jurors hear the same evidence and have the same general knowledge about the expected structure of stories, differences in story construction must arise from differences in world knowledge.").

Professional training and commitments to the ideal of impartiality may dampen the effect of these various biases.[143] The effects of these psychological phenomena, however, are not generally a matter of choice. Studies indicate that we are all subject to these shortcomings and drawn to shortcuts in decisionmaking, despite professional training.[144]

Piling onto these individual frailties, decisionmakers are also affected by group-based biases,[145] such as influences from personal relationships among panel members[146] or an inclination to defer to more prominent panel members.[147] That brings us to the important but under-studied group-based bias, Groupthink.

III. Groupthink on Arbitral Tribunals

Today, the term *Groupthink* is part of the modern lexicon. It was born, however, as a psycho-socio theory developed in the 1970s by cognitive psychologist Irving Janis.[148] He defined Groupthink as a "mode of thinking that people engage in when they are deeply involved in a cohesive in-group. In that setting, members' striving for unanimity can override their motivation to realistically appraise alternative courses of action."[149]

This Part provides, in Section A, an overview of the preconditions for and consequences of Groupthink. Section B analyzes how international arbitral tribunals satisfy all the preconditions for Groupthink and how other features of international arbitration may amplify the negative effects of Groupthink. Section C argues that party-appointed arbitrators are functionally equivalent to Janis's proposed solution to Groupthink, a designated *Devil's Advocate*.

143. Susan D. Franck et al., *Inside the Arbitrator's Mind*, 66 Emory L.J. 1115, 1159 n.215 (2017) (finding that "where there is clear law and bounded discretion, there could be decreased risk" of biases observed in experimental research).

144. Even trained psychiatrists and clinical psychologists, whose job it is to make scientific assessments about patients, have been proven to project their own preconceptions and assumptions into diagnoses and assessments of their patients. *See* Loren J. Chapman & Jean Chapman, *Test Results Are What You Think They Are*, *in* Judgment Under Uncertainty: Heuristics and Biases 239, 239–40 (Daniel Kahneman et al. eds., 1982).

145. *See* Mark Seidenfeld, *Cognitive Loafing, Social Conformity and Judicial Review of Agency Rulemaking*, 87 Cornell L. Rev. 486, 530–41 (2002) (discussing group dynamics and its influence on the outcomes of agency decisionmaking).

146. Mark A. Lemley & Shawn P. Miller, *If You Can't Beat 'Em, Join 'Em? How Sitting by Designation Affects Judicial Behavior*, 94 Tex. L. Rev. 451, 452–53 (2016) (finding empirical evidence that the stringency of appellate review might be substantially affected by personal relationships between appellate and trial judges who have sat by designation on the appellate court); Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. Pa. L. Rev. 1319, 1329–31 (2009) (finding that the behavior of judges on a federal appeals panel is better explained as reflexive to the preferences of other members on the panel than as strategic to the possibility of being overruled on appeal). Theodore Eisenberg et al., *Group Decision Making on Appellate Panels: Presiding Justice and Opinion Justice Influence in the Israel Supreme Court*, 19 Psych. Pub. Pol'y & L. 282, 282 (2013).

147. *See* Martinek, *supra* note 22, at 79 (describing the influence that formal leadership and characteristics such as collegiality or competence have on group decisionmaking). R

148. Irving L. Janis, Groupthink 17–75 (2d ed. 1982).

149. *Id.* at 9.

While this analysis provides a structural justification for party-appointed arbitrators, it leaves open the question, taken up in Part IV, of how such a role can be reconciled with the obligation that arbitrators be impartial.

A. The Problem of Groupthink

Janis did not only identify the phenomenon of Groupthink. He also studied the specific preconditions that give rise to Groupthink and measured their effects on decisionmaking. Through this work, Janis documented how strong norms of consensus and civility can cause a decisionmaking body to produce inferior outcomes because of a failure to consider obvious alternatives or concerns.

When Irving Janis first developed his theory of Groupthink, he was focused on explaining major foreign policy failures, not arbitrator conduct. Why, he asked, did President John F. Kennedy's intellectually supercharged advisors decide to pursue the obviously doomed Bay of Pigs invasion in Cuba? Why did U.S. Navy officers based in Hawaii ignore the possibility of the attack on Pearl Harbor, despite having intercepted Japanese messages suggesting such an attack?

Other scholars have applied Janis's model to apparent decisional failures in different types of high-profile groups. For example, could Groupthink explain how (literal) rocket scientists at the National Aeronautics and Space Administration ("NASA") could ignore warning signs that their self-imposed date for the Challenger launch was destined to result in heart-breaking tragedy?[150] Is Groupthink responsible for the failure of Enron's distinguished Board of Directors to properly monitor clearly dubious related-party transactions?[151]

Janis, a research psychologist from Yale, identified a range of preconditions or warning signs that give rise to inferior decisionmaking by otherwise intelligent and august decisionmaking bodies. Although Groupthink is sometimes misused as a shorthand for a group of like-minded people, Janis's criteria were more specific. He delineated an 8-part list of characteristics in cohesive groups with strong civility norms that he believed lead to specific patterns of inferior group decisionmaking.[152]

150. *See* Gregory Moorhead et al., *Group Decision Fiascoes Continue: Space Shuttle Challenger and a Revised Groupthink Framework*, 44 HUM. RELS. 539, 542–46 (1991).

151. *See generally* Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233 (2003); *see also* Bainbridge, *supra* note 136, at 20. As one commentator put it, "[i]t's always been interesting to me that you take these intelligent, accomplished, honorable people, and somehow you put them around a boardroom table and their IQ points drop 50 percent and their spines fly out the room." O'Connor, *supra*, at 1239 n.30 (quoting *All Things Considered*: *Nell Minow Discusses How Companies Can Restore Investor Confidence* (NPR Radio Broadcast July 2, 2002)).

152. Janis identified eight distinct preconditions, from a false sense of invincibility of group members to an undoubting belief in the ethicality of the group to pressure against dissent and self-censorship. JANIS, GROUPTHINK, *supra* note 148, at 174–75. R

Since its inception, Groupthink has been debated and criticized, tested and retested,[153] reformulated (including by Janis)[154] and expanded.[155] Indeed, challenging various aspects of Janis's theory has become something of a cottage industry, with scores of social psychologists and experimental behavioralists seeking (often unsuccessfully) to replicate empirically and experimentally Janis's findings.[156]

Despite mixed empirical findings, the concept of Groupthink has stuck, and its core predicates have been reaffirmed, even if often renamed. Perhaps one reason for Groupthink's endurance is that, as Cass Sunstein and Reid Hastie explain in their own recent reassessment of Janis's theory, we have all experienced some version of the phenomenon.[157] We all understand when Schlesinger explains why he failed to voice his doubts about the Bay-of-Pigs invasion: his impulse to raise the alarm "was simply undone by the circumstances of the discussion" in which all senior advisors were in agreement.[158]

By one name or another, the predicates identified by Janis are used to analyze defective decisionmaking in a range of bodies, including corporate boards of directors,[159] administrative agencies,[160] stock market investors,[161] law firms, attorney work groups,[162] and of course among adjudicators.[163] In

153. David D. Henningsen et al., *Examining the Symptoms of Groupthink and Retrospective Sensemaking*, 37 SMALL GRP. RSCH. 36, 38–41 (2006). Although Janis's views still predominate popular notions about groups, research in the years since his publication has been quite skeptical. *See* Robert S. Baron, *So Right It's Wrong: Groupthink and the Ubiquitous Nature of Polarized Group Decision Making*, *in* ADVANCES IN EXPERIMENTAL SOC. PSYCH. 219, 219 (Mark P. Zanna ed., 2005) ("A review of the research and debate regarding Janis's groupthink model leads to the conclusion that after some 30 years of investigation, the evidence has largely failed to support the formulation's more ambitious and controversial predictions, specifically those linking certain antecedent conditions with groupthink phenomena."); Norbert L. Kerr & R. Scott Tindale, *Group Performance and Decision Making*, 55 ANN. REV. PSYCH. 623, 640 (2004).

154. Janis, *supra* note 148, at 9. R

155. One of the most extensive reexaminations was by Paul Hart, who states that "there [are] several sets of criteria for evaluating and improving the performance of governmental groups." Paul T. Hart, *Preventing Groupthink Revisited: Evaluating and Reforming Groups in Government*, 73 ORG. BEHAV. & HUM. DECISION PROCESSES 306, 307 (1990). For a comprehensive overview, see generally James K. Esser, *Alive and Well After 25 Years: A Review of Groupthink Research*, 73 ORG. BEHAV. & HUM. DECISION PROCESSES 116 (1998).

156. *See* sources cited, *supra* note 155. R

157. CASS SUNSTEIN & REID HASTIE, WISER: GETTING BEYOND GROUPTHINK TO MAKE GROUPS SMARTER 35 (2015).

158. *Id*. at 35 (citing ARTHUR M. SCHLESINGER JR., A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE 258–59 (1965)).

159. Bainbridge, *supra* note 136, at 32 ("Highly cohesive groups with strong civility and cooperation norms value consensus more than they do a realistic appraisal of alternatives."); O'Connor, *supra* note 151, at 1239; Donald C. Langevoort, *The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behavior*, 63 BROOK. L. REV. 629, 639–42 (1997) (citing cognitive simplification, optimism, and commitment as reasons why corporations overlook bad news and underestimate risk).

160. JANIS, *supra* note 148, at 10–13; Michael Barsa & David A. Dana, *Reconceptualizing NEPA to Avoid the Next Preventable Disasters*, 38 B.C. ENVTL. AFF. L. REV. 219, 227–28 (2011). R

161. *See* JAMES MONTIER, BEHAVIOURAL INVESTING: A PRACTITIONER'S GUIDE TO APPLYING BEHAVIOURAL FINANCE 14 (2007) (describing how so-called "herd" behavior leads investors to making bad investment decisions in order to avoid the "social pain" of "social exclusion").

162. Mary Twitchell, *The Ethical Dilemmas of Lawyers on Teams*, 72 MINN. L. REV. 697, 753 n.230 (1988) (describing how problems of "Groupthink" can emerge within lawyer work teams and affect strategic decisionmaking).

Sunstein and Hastie's updated take on Groupthink, they characterize the precise contours of Janis's work as more "akin to a work of literature rather than as a precise account of how groups go wrong."[164] Nevertheless, Sunstein and Hastie also confirm that some otherwise desirable features of groups, such as cohesiveness, can reduce the effectiveness of group outcomes.

In examining group dynamics, Sunstein and Hastie focus on suppression of dissent in cohesive deliberative bodies. This suppression of dissent, they argue, is often in deference to "informational signals" by others in the group (particularly senior members) and in order to avoid social sanctions.[165] When these criteria are present in a decisionmaking body, there is an increased potential for inferior decisional outputs by the group.[166]

In international arbitration, all the preconditions identified by Janis and updated by Sunstein and Hastie are present. As examined in detail below, several of these features (*i.e.*, aversion to dissent, information signals, and deference to senior members) have been empirically tested and appear to be confirmed with respect to international arbitrators. Other features of international arbitration magnify the potential risks of Groupthink.

B. *Groupthink in International Arbitration*

Arbitrators do not act as lone individuals. They exist within elaborate global professional networks that affect their professional development and success.[167] International arbitrators also usually decide cases in three-person tribunals. Both features can create and accelerate the pressures of Groupthink.

1. *Arbitrator Collegiality, Cohesiveness, and Unanimity*

Arbitrators' professional networks are often characterized as being built around an elite group of insider arbitrators who are, even amongst them-

163. Mitchell F. Crusto, *Empathic Dialogue: From Formalism to Value Principles*, 65 SMU L. REV. 845, 856–57 (2012) ("Most judges are unaware of a judicial temperament disorder this Article will refer to as 'empathy deficient myopia,' the result of unconscious judicial classism and judicial groupthink.").

164. SUNSTEIN & HASTIE, *supra* note 157, at 7.

165. *Id.* at 33–36.

166. Notably, Sunstein and Hastie do not expressly identify group cohesiveness as a precondition or factor in inferior group decisions. Sunstein has elsewhere affirmed the role of cohesion, like-mindedness, and close social ties in discussing variants of Groupthink. *See* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 85–86, 109 (2000) ("Cohesive groups of like-minded people whose members are connected by close social ties often suppress dissent and reach inferior decisions, whereas heterogeneous groups, building identification through focus on a common task rather than through other social ties, tend to produce the best outcomes."). It is beyond the scope of this Article to engage in an independent assessment of competing definitions of Groupthink. Despite critiques of Janis's original formulation, Sunstein and Hastie's definition is consistent with the essential elements of Janis's work, and consensus remains around the core preconditions: a cohesive decisionmaking body that prioritizes unanimity and applies peer pressure (informational signals and social sanctions in Sunstein and Hastie' language) to suppress dissent leading to inferior decisionmaking.

167. *See* Puig, *supra* note 123, at 397. R

selves, referred to as a cartel, a fraternity, a "club,"[168] or a "mafia."[169] Apart from these monikers, intimacy and cohesiveness are routinely identified as key features of the pool of international arbitrators.[170] Today, the pool is somewhat more diverse and heterogeneous.[171] However, collegiality, familiarity,[172] and agreeability remain important professional credentials and essential qualities for career advancement.[173]

Commentators across the political spectrum and on both sides of the debate about party-appointed arbitrators confirm, both anecdotally and empirically, the preeminence of cohesiveness and collegiality among arbitrators.[174] They also confirm the importance of these features on individual tribunals.[175]

Yves Dezalay and Bryant Garth first identified the role of collegiality norms as among the most important cultural aspects that lead to success as an international arbitrator.[176] These collegiality norms, Dezalay and Garth

168. *See* Yves Dezalay & Bryant G. Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order 8, 10 (1996) ("Only a very select and elite group of individuals is able to serve as international arbitrators . . . . Members of the inner circle often referred to this group as a 'mafia' or a 'club.'"). *See also* Iran-United States, Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251, 336 (1984) (describing '"professional"' arbitrators as "forming an exclusive club in the international arena," who are "automatically brought into almost any major dispute by the operation of predetermined methods.").

169. Dezalay & Garth, *supra* note 168, at 50 (noting that the international arbitration community is regularly described as a "mafia"); Toby Landau, *The Day Before Tomorrow: Future Developments in International Arbitration*, Clayton Utz, https://www.claytonutz.com/ialecture/previous-lectures/2009/speech_2009 [https://perma.cc/R43P-L5NN]; *but see* Jan Paulsson, *Ethics, Elitism, Eligibility*, 15 J. Int'l Arb. 19 (1998) (arguing against the term "mafia").

170. Joshua Karton, *International Arbitration Culture and Global Governance*, *in* International Arbitration and Global Governance 74, 79 (Walter Mattli & Thomas Dietz eds., 2014) ("Within the small, notoriously close-knit international arbitration community, a distinct and cohesive legal culture has emerged."); *see also* Puig, *supra* note 123, at 403–23 (describing "dense core of the network" who sit as investment arbitrators); Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 Cornell L. Rev. 47, 49 n.4 (2010). R

171. Report of the Cross-Institutional Task Force On Gender Diversity In Arbitral Appointments And Proceedings, 8 The ICCA Reports 16 (2020) ("The data collected by the Task Force show that, since 2015, the proportion of female arbitrators has almost doubled (from 12.2% in 2015 to 21.3% in 2019). This trend of increasing diversity in arbitral tribunals is reflected in the caseload of individual institutions, as well as when averaged across institutions.").

172. W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 Wm. & Mary L. Rev. 1895, 1923 (2010) (indicating that international commercial arbitration has until recently been dominated by an "elite" and "relatively homogenous group of arbitrators" who operated as "repeat players" within the profession).

173. William W. Park, *National Legal Systems and Private Dispute Resolution*, 82 Am. J. Int'l L. 616, 623–24 (noting as an example of "unfortunate dimensions" of arbitration experience that may undermine independent decisionmaking "a junior arbitrator may defer to a more senior member of the international arbitration mafia in the hope of being recommended in another case); *see also* Puig, *supra* note 123, at 398. R

174. *See* Daphna Kapeliuk, *Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration*, 31 Rev. Litig. 267, 285–86 (2012).

175. Kapeliuk, *supra* note 170, at 85 (acknowledging that "prospective arbitrators who compete in the market for appointments might wish to behave in a way that increases their chances of appointment"). R

176. Dezalay & Garth, *supra* note 169, at 49 ("The principal players . . . acquire a great familiarity with each other. . . . The extraordinary flexibility of [their] rotation of roles [between counsel and R

explain, are amplified when arbitrators re-encounter each other serving on different tribunals or exchanging appointments and roles.[177] Building on Dezalay and Garth's work, Puig identifies a range of factors that may affect arbitrator appointments including "reputation, persuasion, collegiality, and deference" and notes that "conformity pressures are also probably common."[178]

Arbitrators have been described as "deliberat[ing] in an intellectual zone of shared confidence."[179] Political scientist Jason Yackee describes a "small, relatively closed" investment arbitration community that "is more likely to be relatively ideologically cohesive" able to "coordinate its policymaking efforts" in particular cases.[180]

In a more empirical vein, Daphna Kapeliuk's research examines how "[t]he more these arbitrators serve on arbitration tribunals and the more intermingled they are in arbitration panels, the more one may expect collegiality between them."[181] And finally, empirical studies by van den Berg, Puig, and others (cited above) confirm that the vast majority of international arbitral awards are unanimous. This degree of unanimity in turn suggests that collegiality on tribunals encourages cohesive decisionmaking and discourages dissent.[182]

arbitrator] contributes greatly to the smooth running of these mechanisms of arbitration. It promotes the reaching of acceptable awards under a regime where the players do not speak of contradictions and antagonisms that, if formulated explicitly and disclosed, would create some difficulties of legitimation.").

177. *See id.*

178. Puig, *supra* note 123, at 400 (quoting a prominent lawyer in investor-State arbitration as saying that "arbitrators have a tendency to compromise [and] the arbitration community seem to place a premium on unanimity"). R

179. *See* Mourre, *supra* note 13.

180. Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 391, 407 (2012).

181. Kapeliuk, *supra* note 170, at 68. Kapeliuk also notes that collegiality limits dissent on judicial panels in the United States. *See id.* at 66. *See also* RICHARD A. POSNER, HOW JUDGES THINK 32 (2008) (discussing why there is little dissent within judicial panels); Stefanie A. Lindquist, *Bureaucratization and Balkanization: The Origins and Effects of Decision-Making Norms in the Federal Appellate Courts*, 41 U. RICH. L. REV. 659, 695–96 (2007) (finding that, the more judges a federal court of appeals has, the more frequent dissenting opinions are and suggesting that this phenomenon occurs because judges on larger courts are more likely to experience diminished collegiality and thus be less sensitive to maintaining relationships with other judges); Russell Smyth, *Do Judges Behave as Homo Economicus, and if so, Can We Measure Their Performance? An Antipodean Perspective on a Tournament of Judges*, 32 FLA. ST. U. L. REV. 1299, 1319 (2005) (identifying collegiality as a "generally agreed useful qualit[y]" in judicial performance). *But see* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1656 (2003) (arguing against trying to quantify judicial performance because collegiality is a qualitative variable that "involves mostly private personal interactions that are not readily susceptible to empirical study."). R

182. *See supra*, notes 94–99 and accompanying text. This degree of unanimity suggests, but does not conclusively prove, collegiality on arbitral tribunals. For an extended discussion of how rates of unanimity on arbitral tribunals compare with unanimous decisionmaking on other courts and tribunals. See Rogers, *supra* note 73, at 243–45. R R

2. *Other Risk Factors for Groupthink*

Several other features of international arbitration amplify the potential effects of the highly consensus-oriented panel of arbitrators. These features make Groupthink an even greater risk on international arbitration tribunals.

For example, arbitrators necessarily rely on other members of the tribunal for future appointments. Co-arbitrators often directly appoint chairpersons. Co-arbitrators also indirectly affect future appointments through recommendations to their own clients, to other counsel who make inquiries, or to ratings agencies that collect feedback.[183] Given these practices, the consequences for defying the group (*i.e.*, the majority of a tribunal) may not be limited to the kind of vague "social punishment" among colleagues that Sunstein and Hastie identify.[184] Instead, the punishment may be a more palpable (if indirect) reduction in future appointments, which would hit arbitrators' pocketbooks.

Some scholars have sought to empirically confirm the effects of professional consequences. For example, extrapolating from research that finds strong collegiality norms and "dissent aversion" on judicial tribunals, Daphna Kapeliuk posits that international arbitration decisionmaking is similarly "a cooperative enterprise."[185] As a result, she reasons, arbitrators may also have an aversion from dissenting to avoid "disturbing the collegiality among the tribunal's members" which might then "affect that arbitrator's reputation and selection in future disputes."[186]

In a similar vein, Strezhnev's research, revealingly titled *You Only Dissent Once*, similarly suggests that arbitrators have professional incentives to avoid dissenting.[187] In sum, various sources suggest that the professional consequences of dissent may not only be a strong deterrent to the worst forms of overt partisanship, but also to potentially healthy dissent.

Apart from indirect costs, arbitrators may also have more direct financial disincentives to dissent. Increasingly, arbitrators may be penalized for awards that are "delayed."[188] There are many potential causes for delay in

183. *See* Malcolm Langford et al., *The Revolving Door in International Investment Arbitration*, 20 J. INT'L ECON. L. 301, 301 (2017). Some argue that arbitrators have an incentive to issue compromise awards that split the proverbial baby in order to maximize the potential for future appointments. *See* John V. O'Hara, *The New Jersey Alternative Procedure for Dispute Resolution Act: Vanguard of a Better Way?,* 136 U. PA. L. REV. 1723, 1743 (1988) (reasoning that arbitrators have "a strong interest in keeping everyone as happy as possible"). This theory has demonstrated to be more of a myth than a reality. Christopher Drahozal, *Busting Arbitration Myths*, 56 U. KAN. L. REV. 663, 673–74 (2008) (arguing existing studies suggest arbitrators do not appear to issue compromise awards).

184. SUNSTEIN & HASTIE, *supra* note 157, at 36. R

185. Kapeliuk, *supra* note 170, at 49 (discussing the incentive for reappointment). R

186. *See id.*

187. Anton Strezhnev, *You Only Dissent Once: Reappointment and Legal Practices in Investment Arbitration* 1 (Nov. 8, 2015) (unpublished manuscript) (on file with Harvard University).

188. *See* Michael McIlwrath, *ICC To Name Sitting Arbitrators And Penalize Delay In Issuing Awards*, (June 1, 2016), http://arbitrationblog.kluwerarbitration.com/2016/01/06/icc-to-name-sitting-arbitrators-and-penalize-delay-in-issuing-awards/ [https://perma.cc/YG7J-XRMJ].

rendering an award. One known cause, however, might reasonably be extended tribunal deliberations and award drafting to accommodate dissenting views or avoid separate awards. To the extent dissent increases the overall length of an arbitration, it may increase the risk of both reputational and financial penalties.

On the other hand, arbitrators have little financial gain from policing tribunal decisionmaking or insisting that a tribunal second-guess its intuitive decisionmaking.[189] Under some arbitral rules, arbitrators are compensated based on a pro rata share of the amount in dispute.[190] Under this type of compensatory regime, arbitrators receive the same remuneration whether they acquiesce to other tribunal members early in deliberations or push for a "better" outcome through extended deliberations.

Even when arbitrators are compensated on an hourly basis, they may still not be financially incentivized to push back against a tribunal majority. Hourly rates for arbitrators are usually less, sometimes significantly less, than the compensation for their work as partners in law firms.[191] As a result, an arbitrator spends time serving on a tribunal at the expense of higher earnings they could be receiving as counsel.

Under either compensation regime, arbitrators may have more to gain from the reputational value of cultivating good relationships with co-arbitrators than from arguing with them or authoring a dissenting opinion criticizing them.

3. *Absence of Constraints*

While arbitrators may be at greater risk of Groupthink, they are also less constrained by structural deterrents that could potentially reduce Groupthink. For example, national law and clearly established national court procedures constrain national judicial decisionmaking.[192] "Public scrutiny of judicial opinions"[193] and "a range of social and cultural factors"[194] also operate in national court systems to deter the negative effects of Groupthink.

189. *Cf.* William W. Park, *Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 19, 50 (1999) ("Presumably arbitrators will be more likely than courts to find jurisdiction, since arbitrators get paid if they hear a dispute.").

190. For example, in an ICC arbitration with $200 million in dispute (an average-sized arbitration among the leading 30 law firms), an arbitrator would receive an average of $400,000 in fees. *See* ICC Cost Calculator, https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator/ [https://perma.cc/S93H-3HES] (last visited Sept. 6, 2020).

191. Puig, *supra* note 14, at 673 (noting that the hourly rate for ICSID arbitrators translate to $375 hourly, compared to $600 hourly, the average rate of a partner in major law firms).

192. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (2d ed. 1986) (requiring the Court to base its decisions upon neutral principles of law would constrain judicial tendencies to engage in counter-majoritarian actions); Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 U. COLO. L. REV. 923 (2001).

193. Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341, 415 n.355 (2002) (hereinafter "Rogers, *Fit & Function*").

194. *See* BICKEL, *supra* note 192, at 69–70 (describing informal constraints on courts). R

Where national court judges have constraining rules and pressures, arbitrators have virtually unconstrained discretion and freedom.[195] Few procedural rules exist in international arbitration. Instead, arbitrators' discretion in establishing procedures is limited by concepts of due process and any express agreement by the parties.

Meanwhile, when law is filtered through multiple legal translations, methodologies, and cultures, it is inherently less determinative and therefore less constraining on arbitrators. Finally, because the vast majority of arbitral awards are confidential and there is no substantive appellate review, neither institutional nor public scrutiny are effective constraints on arbitral decisionmaking.[196]

In sum, the preconditions for Groupthink are not only present in international arbitration, but amplified and free from constraints that operate in judicial contexts. Such constraints against Groupthink might otherwise reduce the potential that a final award misconstrues the facts or misinterprets law simply because a majority quickly formed mistaken views on those topics.

The good news is that Janis not only identified the phenomenon of Groupthink. He also developed a solution.

C. *The Devil's Advocate as a Solution to Groupthink*

Janis proposed a potential safeguard against Groupthink, which he called the *Devil's Advocate*.[197] The most effective way to reduce the prevalence of Groupthink, Janis proposed, is to systematize challenge within a tight-knit group of decisionmakers whenever consensus emerges within that group. This proposal was in part inspired by President Kennedy's assignment to his brother, Attorney General Robert Kennedy, "the unambiguous mission of playing devil's advocate, with seemingly excellent results in breaking up a premature consensus[.]"[198]

1. *The Role of the Devil's Advocate*

In formalizing the role of the Devil's Advocate, Janis proposed designating a specific person in a decisionmaking body to serve in that role. The designation would be "rotate[d] among group members at each meeting."[199] In this rotation, the Devil's Advocate would systematically and in-

195. *See* Catherine A. Rogers, *Context and Institutional Structure in Attorney Discipline: Developing an Enforcement Regime for Ethics in International Arbitration*, 39 STAN. J. INT'L L. 1, 14 (2002).

196. In investment arbitration, critiques of awards by civil society and other stakeholders may be responsible for some changes that have occurred over time. *See* Malcolm Langford & Daniel Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator?*, 29 EUR. J. INT'L L. 551, 551 (2018) (arguing that arbitrators are sensitive to both negative and positive signals from states and civil society).

197. JANIS, *supra* note 148, at 268. R

198. *See id.*

199. O'Connor, *supra* note 160, at 1239 n.30. The incidence of Groupthink on corporate boards of R directors has been the subject of extensive scholarly commentary. *See* James D. Cox and Harry L.

tentionally argue for a position contrary to whatever position is being advocated or contemplated by a majority within the group.

Sunstein and Hastie agree with Janis that the Devil's Advocate can be a potentially meaningful tool for reducing dysfunction in group decisionmaking.[200] They explain that with presidents or leaders of organizations, advisors "have a tendency to offer happy talk" and a reluctance to "trouble [the leader] or to create internal disagreement."[201] The main reasons for this reluctance is to avoid the negative social consequences associated with being an outsider or pushing back against consensus in a collegial decision-making body.[202]

The Devil's Advocate, Sunstein and Hastie explain, is a means of ensuring that dissenting viewpoints are expressed:

> [T]hose assuming the role of devil's advocate are able to avoid the social pressure that comes from rejecting the dominant position within the group. After all, they are charged with doing precisely that. And because they are specifically asked to take a contrary position, they are freed from the informational influences that can lead to self-silencing.

The Devil's Advocate, in other words, forces consideration of issues and concerns that might otherwise go unheeded.

The use of a Devil's Advocate to challenge defective group decisionmaking explains "both the 2005 Senate committee reporting on intelligence failures in connection with the Iraq War and the 2007 review board that investigated a series of blunders at the National Aeronautics and Space Administration (NASA)."[203] A Devil's Advocate model is also used to justify shareholder-nominated directors. Proponents of shareholder-nominated directors argue that they can break through Groupthink because they have different interests and alliances than the other corporate officers on the board.[204]

As with Janis's larger theories, however, there are some concerns about the effectiveness of the Devil's Advocate.

Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 J.L. & CONTEMP. PROBS. 83, 99 (1985). One particularly cynical view expressed the concern this way: "It's always been interesting to me that you take these intelligent, accomplished, honorable people, and somehow you put them around a boardroom table and their IQ points drop 50 percent and their spines fly out the room." O'Connor, *supra* (citing *All Things Considered: Nell Minow Discusses How Companies Can Restore Investor Confidence* (NPR radio broadcast, July 2, 2002)).

200. *See* SUNSTEIN & HASTIE, *supra* note 157, at 115–17.

201. *Id.* at 116.

202. *See id.*

203. *Id.* at 115.

204. Lucian Arye Bebchuk, *The Case for Shareholder Access to the Ballot*, 59 BUS. L. 43, 63 (2003).

2. *Questioning the Effectiveness of the Devil's Advocate*

Sunstein and Hastie acknowledge that in theory a Devil's Advocate "should help a great deal" to avoid Groupthink and "would seem sensible to appoint[.]"[205] They do not, however, "give a strong endorsement."[206] Sunstein and Hastie explain that in practice research is mixed regarding the efficacy of the Devil's Advocate in small group settings. Some experiments find that genuine dissenting views can enhance group performance,[207] but other research raises questions about their effectiveness.

The reason for the questionable effectiveness of the technique, Sunstein and Hastie explain, is that assignment of the role "is artificial—a kind of exercise or game—and group members are aware of that fact."[208] The risk is that the Devil's Advocate may "seem to be just going through the motions" and challenges may be regarded as "insincere" and, as a result, be discounted by members of the group.[209]

Meanwhile, the Devil's Advocate "has no real incentive to sway the group's members to their side" because "they succeed in their assigned role even if they allow the consensus view to refute their unpopular arguments."[210] Because they are not "genuine dissenter[s]," they have "little to gain by zealously challenging the dominant view" and therefore they "often fail to vigorously challenge the consensus."[211]

The qualities that traditional Devil's Advocates lack, however, party-appointed arbitrators have in abundance.

3. *The Party-Appointed Arbitrator as Devil's Advocate*

The party-appointed arbitrator functions akin to Janis's proposed Devil's Advocate, but with a few important differences. One important difference is that Janis proposes administratively assigning a person on a rotating basis for each group meeting. A party-appointed arbitrator, on the other hand, is not rotated in based on an artificial and random sequence. Party-appointed arbitrators are triggered to act only when a majority of the tribunal is weighing a decision that is contrary to the interests of their appointing party. They rotate, in other words, in reaction to a shifting majority's decisional leanings.

Second, party-appointed arbitrators are not subject to the critique that the Devil's Advocate is required to shift positions constantly and make argu-

205. SUNSTEIN & HASTIE, *supra* note 157, at 117.
206. *See id.*
207. *Id.* (citing Gary Katzenstein, *The Debate on Structured Debate: Toward a Unified Theory*, 66 ORG. BEHAV. & HUM. DECISION PROCESSES 316, 316–18 (1996)).
208. *Id.*
209. *Id.*
210. *Id.* at 118 (citing Alexander L. George and Eric K. Stern, *Harnessing Conflict in Foreign Policy Making: From Devil's to Multiple Advocacy*, 32 PRES. STUD. Q. 484, 486 (2002)).
211. *Id.*

ments that are devoid of any personal interest, knowledge, or perspective. These conditions led Sunstein and Hastie to conclude that the Devil's Advocate, as conceived by Janis, is not a particularly potent solution to Groupthink.

The party-appointed arbitrator, by contrast, is appointed specifically because a party believes that the arbitrator's inherent predilections (*i.e.*, cognitive biases based on education, experience, legal culture and the like) are aligned with those of the party's position. The result is an ironic twist: the primary criticisms of party-appointed arbitrators are what make them uniquely well-suited to function as a Devil's Advocate on the tribunal.

Party-appointed arbitrators are most likely to be "sincere" and "have real incentives" to push back (as Sunstein and Hastie argue are essential)[212] if they have an affiliation bias,[213] a selection bias, or an incentive to please the appointing party,[214] as various scholars have argued. When these conditions are satisfied, party-appointed arbitrators would—as Sunstein and Hastie prescribe—*sincerely* and *substantively* challenge the tribunal majority when it leans toward an outcome that is unfavorable to the party who appointed them.

Sincere commitment in opposing the majority, however, should not be mistaken for an abandonment of impartiality norms,[215] or an endorsement of virulent, disruptive, or hyper-partisan conduct. To the contrary, Janis believed that to be effective in the role, a Devil's Advocate needed to be subtle and have a deft touch. To that end, Janis offers what might be regarded as "professionalism norms" for how Devil's Advocates should conduct themselves in order to be most effective.

Janis suggests that, in fulfilling its role, the Devil's Advocate should "present arguments as cleverly and convincingly as [the person] can, like a good lawyer, challenging the testimony of those advocating the majority position."[216] The Devil's Advocate, according to Janis, should ask tough questions and encourage suggestions, but in a low-key style, all while withholding his or her own opinion to avoid being too confrontational.[217]

Janis's professional style norms for the Devil's Advocate map perfectly onto existing professionalism standards for party-appointed arbitrators. As discussed above, overtly partisan conduct by party-appointed arbitrators ends up alienating other members of the tribunal, thus undermining the party-appointed arbitrator's ability to influence the tribunal's decisionmaking. The ideal party-appointed arbitrator, like the ideal Devil's Advocate,

212. *See id.*
213. *See supra* notes 106–107 and accompanying text. R
214. *See supra* note 67 and accompanying text. R
215. *See infra* Part IV.
216. Janis, *supra* note 148, at 267–68. R
217. *Id.*

should systematically check the majority's positions, but in a "low key," non-confrontational, and professional manner.

Under this view, a properly incentivized, but self-restrained party-appointed arbitrator can provide real-time, on-site, constructive quality control in tribunal decisionmaking. Anecdotal evidence confirms this theory with examples of party-appointed arbitrators, and their actual or threatened dissents, compelling more careful deliberations and awards that are more thorough in addressing all issues.[218]

Under this reconceptualization of the functional role of the party-appointed arbitrator, they serve as a check when various other types of bias, including Groupthink, may interfere with or undermine careful and thorough analysis. In this role, party-appointed arbitrators also serve as a structural counterbalance to the opposing party's appointed arbitrator—whenever the one party-appointed arbitrator is aligned with the chairperson, the other is charged with assessing and challenging the validity of the reasons for that alignment.

This differentiated role is not inconsistent with impartiality. It does, however, require more careful consideration of the meaning of the term impartiality, particularly as applied to party-appointed arbitrators.

IV. Taking the Devilishness out of Party-Appointed Arbitrators

No matter how rational or pragmatic it may be, super-imposing the Devil's Advocate onto traditional notions of the party-appointed arbitrator seems like a linguistic, conceptual, and perhaps even political provocation. How can a "devil" render justice? How can an "advocate" be impartial? Won't conjoining "devil" and "advocate" further delegitimate party-appointed arbitrators or international arbitration itself? This Part takes up these and related objections to the Devil's Arbitrator.

To answer these questions, Section A examines the conceptual and linguistic contortions that practitioners and scholars employ (unsuccessfully) to make party-appointed arbitrators fit into traditional notions of impartiality. Section B analyzes the main causes for these contortions. Finally, Section C considers how the new conception of party-appointed arbitrators portends the impartiality obligations that flow from it.

Ultimately, each of these Sections underscore that the Devil's Arbitrator is not a proposed *change* in the role of the party-appointed arbitrator. It is instead a *reconceptualization* of their existing role so that it is more normatively appealing, conceptually coherent, and consistent with actual practice and expectations. These sections also aim to dispel some of the obstacles that

218. Rogers, *supra* note 73, at 247–48. R

have led to the current misconception about the role of party-appointed arbitrators.

A. *The "Farce" of Party-Appointed Arbitrators' Impartiality*

The term Devil's Arbitrator is, in some respects, an intentional provocation. It is intended to force attention on the contortions and contradictions employed by both defenders and critics of party appointment. This Section examines the nature and causes of those contradictions.

1. *Contorted Denials*

Whether arguing for or against party-appointed arbitrators, commentators frequently tie themselves up in verbal knots.

On the one hand, commentators, arbitral rules, and most national arbitration laws insist that party-appointed arbitrators must be "as impartial as" their non-party-appointed colleagues. However, these same sources—implicitly or explicitly—concede that party-appointed arbitrators neither behave in practice, nor are expected to be, "as impartial as" non-party-appointed arbitrators.

One of the most striking examples of a commentator struggling to resolve this contradiction is a now-famous quip by renowned arbitrator Martin Hunter. He stated, "[w]hat I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client but with the minimum appearance of bias."[219] Hunter was criticized for this comment and is reported to have attempted a retraction. But as we will see later, his only sin was embracing an apparent contradiction that others disingenuously decry as heresy.

To avoid acknowledging the contradiction described above, some commentators engage in hair-splitting definitional distinctions. For example, it has been suggested that while party-appointed arbitrators may be subject to different standards of "neutrality," they must all be equally "impartial" and "independent."[220] A similar analysis proposes that party-appointed arbitrators maintain a mental duality:

> [W]hile the party-appointed arbitrator understands well that a party selected him or her with a desire that he or she render a

219. Martin Hunter, *Ethics of the International Arbitrator*, 53 Arb. 219, 223 (1987).

220. *Compare* A. A. de Fina, *The Party Appointed Arbitrator in International Arbitrations—Role and Selection*, 15 Arb. Int'l 381, 386 (1999) ("[T]here is some leniency in arbitrations as to the *neutrality* of a party appointed arbitrator but there is no such leniency in the *absolute requirement of impartiality and independence* whatever the circumstances.") (alteration in original), *with* W. Michael Tupman, *Challenge and Disqualification of Arbitrators in International Commercial Arbitration*, 38 Int'l & Comp. L.Q. 26, 49 (1989) ("Unquestionably all members of the tribunal in international arbitration should be held to the *same standard of independence*, whether appointed by a party or not. The concept of a *non-neutral* arbitrator as it exists in some common law systems simply has no place [in international arbitration].") (alteration in original).

> decision favorable to that party's claim, the arbitrator ultimately acts under the duties of integrity, independence, and impartiality.[221]

These various formulations seem less like efforts at conceptual clarity and more like dance lessons for angels atop pinheads.

Other less-subtle commentators simply state that the party-appointed emperor has nothing to clothe their lack of impartiality. For example, some U.S. courts have repudiated the very notion of party-appointed impartiality altogether. As one court reasoned, "[a]n arbitrator appointed by a party is a partisan only one step removed from the controversy and *need not be impartial*."[222]

Other commentators have gone further, not only acknowledging the supposed limits of party-appointed arbitrators' impartiality, but fully acknowledging the contradiction. For example, in his thoughtful book on the subject, Alfonso Gomez-Acebo reasons that an impartial and independent party-appointed arbitrator is "somehow a paradox: someone who must act without any favoritism towards either party but who is chosen by one party."[223] Juan Fernández-Armesto, a leading arbitrator most frequently appointed as a chairperson, explains that "[f]ormally, all three arbitrators must have the same level of impartiality and independence. But this is a farce."[224]

Finally, Fabien Gélinas has collected disparaging assessments of "[c]laim[s] that the independence of a party-nominated arbitrator can be equated to that of a domestic judge, or that of a presiding arbitrator."[225] As Gélinas summarizes, these assessments variously refer to party-appointed arbitrator pretentions to impartiality as a "'hypocrisy,' an 'ideological façade,' a 'fiction,' a 'mythology,' and a 'triumph of rhetoric' for the 'naïve.'"[226]

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221. Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 85 (2010). Some commentators distinguish between "independent" and "impartial." *See, e.g.*, Hans Smit, *The New International Arbitration Rules of the AAA*, 2 AM. REV. INT'L ARB. REV. 1, 9 (1991); Hong-Lin Yu & Laurence Shore, *Independence, Impartiality and Immunity of Arbitrators — U.S. and English Perspectives*, 52 INT'L&COMP. L.Q. 935, 962 (2003). For the purposes of analysis in this Article, these distinctions are irrelevant.

222. *See Lorzano v Maryland Casualty Co.,* 850 F.2d 1470 (11th Cir. 1988). This and similar views are a product of historical practices in the United States, from when *non-neutral* party-appointed arbitrators could be appointed. *See* James H. Carter, *Improving Life with the Party-Appointed Arbitrator: Clearer Conduct Guidelines for "Nonneutrals"*, 11 AM. REV. INT'L ARB. 295, 298–99 (2000). Although still permitted in the United States, this practice has been firmly rejected in international arbitration and is prohibited by almost all other national arbitration laws. *See* Lowenfeld, *supra* note 35, at 65 (identifying international norms that seek to neutralize perceived partisanship in the U.S.-tradition of party-appointed arbitrators). R

223. ALFONSO GOMEZ-ACEBO, PARTY APPOINTED ARBITRATORS IN INTERNATIONAL COMMERCIAL ARBITRATION 101 (2016).

224. Fernández-Armesto, *supra* note 63, at 724. R

225. Fabien Gélinas, *The Independence of International Arbitrators and Judges: Tampered With or Well Tempered?*, 24 N.Y. INT'L L. REV. 1, 27 (2011). *See also* Robert Coulson, *An American Critique of the IBA's Ethics for International Arbitrators*, 4 J. INT'L ARB. 103, 107 (1984); Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 508 (1997); Christopher M. Fairman, *Ethics and Collaborative Lawyering: Why Put Old Hats on New Heads?*, 18 OHIO ST. J. DISP. RESOL. 505, 515 (2003).

226. *See* Gélinas, *supra* note 2255, at 25. R

The dissonance reflected in these descriptions is not only a difference between theory and practice.[227] This dissonance is inherent in the very language of our ethics discourse.

2. *Rhetoric versus Practice*

There is a fundamental disconnect between the vague language we use in ethical regulation and the concrete expectations we attach to specific conduct. These differences are denied rhetorically, even if intentionally woven into regulatory frameworks.

Virtually all codes of conduct, national arbitration laws, and international arbitral rules insist that all arbitrators are subject to identical obligations of impartiality. Most of those very same sources, however, also expressly authorize impartiality-related exceptions that apply only to party-appointed arbitrators.

For example, Article 11(1) of the International Chamber of Commerce ("ICC") Arbitration Rules provides that "Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration."[228] But Article 13(5) of the ICC Rules differentiates between the *nationality-related* impartiality that applies to party-appointed arbitrators and chairpersons (or sole arbitrators). Under the ICC Rules, co-arbitrators can share the same nationality of the party who appoints them, but a sole arbitrator or arbitral chairperson must "be of a nationality other than those of the parties" except "in suitable circumstances and provided that none of the parties objects."[229]

The only natural inference from these rules is that, despite the provisions of Article 11(1), shared nationality with a party hampers impartiality among chairpersons, but shared nationality is acceptable (and perhaps even expected) among party-appointed arbitrators. Ilhyung Lee captures this tension well, noting that "[i]t is both the peculiarity and the essence of the arbitration method that allow[s]—in the very same setting—national commonality to perpetuate and nationalistic favoritism to be neutralized."[230]

Other ethical rules that address arbitrator impartiality similarly differentiate between party-appointed arbitrators and chairpersons while simultaneously denying that differentiation. For example, a 2004 "Note on

227. The ideas of written ethical rules often differ from actual practice. *See* Nancy J. Moore, *Regulating Law Firm Conflicts in the 21st Century: Implications of the Globalization of Legal Services and the Growth of the "Mega Firm,"* 18 GEO. J. LEGAL ETHICS 521 (2005) (reviewing empirical studies that compare practical compliance with national written ethical rules regarding attorney-client conflicts of interest).

228. INT'L CHAMBER OF COM., RULES OF ARBITRATION art. 11(1) (2021), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ [https://perma.cc/BR79-32JF].

229. *Id.*, art. 13(5).

230. Ilhyung Lee, *Practice and Predicament: The Nationality of the International Arbitrator (With Survey Results)*, 31 FORDHAM INT'L L.J. 603 (2007). Increasingly, however, "[d]efining a person's nationality can be difficult because arbitrators can be dual nationals, born one place, live in another, practice in another, and have law degrees from different countries." Susan Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 75–82 (2007).

Neutrality" addressing changes to the American Arbitration Association ("AAA") / American Bar Association ("ABA") Code of Ethics for Arbitrators in Commercial Disputes explains:

> [I]t is preferable for all arbitrators including any party-appointed arbitrators to be neutral, that is independent and impartial, and to comply with the same ethical standards [as arbitral chairpersons].[231]

Similarly, General Standard 5 of the 2004 International Bar Association ("IBA") Guidelines on the Conflicts of Interest states that the "Guidelines apply *equally* to tribunal chairs, sole arbitrators and party-appointed arbitrators."[232] Many sources take a more emphatic approach. For example, the Society of Maritime Arbitrators' Code of Ethics states that "each member *shall* exercise care to remain absolutely impartial and always abide by principles of honesty and fair dealing."[233]

Despite consistent affirmations that impartiality obligations apply equally to all arbitrators, these same sources—to a one—also allow party-appointed arbitrators to engage in some conduct that would violate the impartiality obligations of chairpersons.

One form of differentiation that reveals differing impartiality expectations is that arbitral chairpersons are consistently granted powers that are considered off-limits to party-appointed arbitrators. Meanwhile, party-appointed arbitrators are permitted to engage in activities that are prohibited for chairpersons. For example, *ex parte* communications with parties are generally prohibited for all arbitrators. These ethics rules exist to protect arbitrators' impartiality—an arbitrator who communicates separately with one party may compromise their actual or perceived impartiality.

Notwithstanding these general prohibitions, the AAA/ABA Code, the IBA Guidelines on Conflicts of Interest,[234] IBA Guidelines on Party Repre-

231. American Arb. Assoc. & A.B.A., The Code of Ethics for Arbitrators in Commercial Disputes 2 (2004) https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf [https://perma.cc/C672-3G5P]. Historically, having "non-neutral" co-arbitrators was a common practice in domestic U.S. arbitration. While still permitted, it is only practiced today in a few industries. The practice has been acknowledged in international arbitration to the extent it is "permitted by some arbitration rules of national laws" the practice is disfavored in the United States prior to the 2004 changes to the AAA/ABA Code. Non-neutral arbitrators are not consistent with the concept of the Devil's Arbitrator proposed in this Article.

232. Int'l Bar Assoc., *supra* note 65, art. 5 (emphasis added).

233. Soc. of Maritime Arb., Inc., Code of Ethics § 7 (emphasis added), https://smany.org/pdf/sma-arbitrators-code-of-ethics.pdf [https://perma.cc/26QJ-Y8SL].

234. The IBA Guidelines provide: "[T]he arbitrator [is not disqualified by, or required to disclose, the fact that he or she] has had an initial contact with the appointing party or an affiliate of the appointing party (or the respective counsels) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute." Int'l Bar Assoc., *supra* note 65, art.4, para. 4.4.1, at 26–27. *See also* Int'l Bar Assoc., Rules of Ethics for International Arbitrators art. 5(1) (1987); American Arb. Assoc. & A.B.A., *supra* note 231, canon III(B). R

sentation in International Arbitration, and the Guidelines of the Chartered Institute of International Arbitrators[235] (among others) all expressly permit *ex parte* communication for the purpose of pre-appointment interviews with *party-appointed* arbitrators,[236] but not chairpersons. Amplifying the import of this exception, one of the few topics permitted in pre-appointment interviews is chairperson selection.

Another exception to prohibitions against *ex parte* communications, acknowledged in both the IBA Rules of Ethics for International Arbitrators[237] and the IBA Guidelines on Party Representation in International Arbitration, is that appointing parties are permitted to communicate with their appointed arbitrator *during* the process of selecting the chairperson.[238] By contrast there is unanimous agreement that one-sided *ex parte* interviews or communications with chairpersons after their appointment are absolutely prohibited.[239]

3. *The Exception as the Rule*

Some commentators, like van den Berg, dismiss the distinct rules described above regarding party-appointed arbitrators as just a "few exceptions" in the ethical rules that govern arbitral chairpersons. They argue that these differentiated rules do not alter the fact that party-appointed arbitrators are otherwise bound by the same impartiality obligations as chairpersons.[240] Attempts to dismiss these examples as only a few exceptions, however, ignore a host of other powers and procedures that differentiate

235. Chartered Inst. of Arbs., International Practice Guideline: Interviews for Prospective Arbitrators, Art. 1(6) (establishing guidelines regarding how and under what conditions pre-appointment interviews are appropriate, which include requirements for note-keeping recording the interviews).

236. *See* Charles H. Resnick, *To Arbitrate or Not to Arbitrate*, Bus. L. Today 37, 38 (2002). (advocating interviews of arbitrator candidates, but cautioning that parties 'should do so only jointly with opposing counsel'); *but see* Francis O. Spalding, *Selecting the Arbitrator: What Counsel Can Do*, *in* What the Business Lawyer Needs to Know About ADR 351, 356 (stating summarily that interviews "can be undertaken appropriately only if done jointly by counsel for all parties").

237. Int'l Bar Assoc., Rules of Ethics, *supra* note 234, art. 5.2 ("If a party-nominated arbitrator is required to participate in the selection of a third or presiding arbitrator, it is acceptable for him (although he is not so required) to obtain the views of the party who nominated him as to the acceptability of candidates being considered."). R

238. *Id.*, art. 5(1); American Arb. Assoc. & A.B.A., *supra* note 231, canon III(B); Int'l Bar Assoc., *supra* note 65, § 4.4.1, at 26–27; Int'l Bar Assoc., Guidelines on Party Representation in International Arbitration guideline 8(a), at 7 (2013), https://www.ibanet.org/MediaHandler?id=6F0C57D7-E7A0-43AF-B76E-714D9FE74D7F [https://perma.cc/6SZS-WUU4]; Chartered Inst. of Arbs., *supra* note 235, art.13(7). *See also* Born, *supra* note 34, at §12.03[B][3] ("It is common and ordinarily unobjectionable practice for parties, or their counsel, to contact potential choices for a co-arbitrator, to ascertain their suitability, availability, and interest, and, where appropriate, to discuss the selection of a presiding arbitrator."). R R

239. It is possible, but exceptionally rare, that the parties could decide to interview jointly proposed chairpersons. It is also possible, and according to some desirable, to have both parties present at interviews of proposed party-appointed arbitrators. Again, however, parties rarely ever avail themselves of this option. Anecdotal reports suggest what seems to be obvious—the parties regard interviews useful only if they can do them unilaterally, without the risk of revealing case strategy to an opposing party.

240. Van den Berg, *Dissenting Opinions*, *supra* note 2, at 42. R

chairpersons' and party-appointed arbitrators' roles, and hence their impartiality obligations.

Chairpersons enjoy unique procedural powers, which are endowed by arbitral rules, national laws, and industry best practices. These powers can often be exercised unilaterally by a presiding arbitrator, even on tripartite tribunals.[241] These powers include:

- Issuing interlocutory orders;
- Fixing time limits and granting extensions;
- Signing awards on behalf of the entire tribunal;
- Preparing initial drafts of orders to be decided by the full tribunal;[242]
- Hosting or making arrangements for physical hearings;[243]
- Presiding over hearings;[244]
- Preparing an initial draft of the final award or delegating that task to one of the party-appointed arbitrators;
- Monitoring the balance between the two party-appointed arbitrators;[245]
- Managing financial matters in ad hoc arbitrations.[246]

These chairperson powers would generally be considered inappropriate if exercised unilaterally by party-appointed arbitrators. As one source summarized, "for better or worse, international arbitral proceedings are generally governed, both from a planning point of view and on a day-to-day basis, by the chairperson."[247]

These powers are assigned to chairpersons (and generally off-limits to party-appointed arbitrators) because they ensure equality between the parties and impartiality of the chairperson. The obvious implication from several of these rules is a suspicion that, given the opportunity, party-appointed arbitrators could seek to secure a procedural advantage for the party who appointed them. For example, if a party-appointed arbitrator were to host or make arrangements for the physical hearings, the arbitrator might arrange some "home court" advantage for her appointing party.

241. *See* Robert Briner, *"The Role of the Chairman," in* THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 49, 51 (2nd ed. 2008). *See also* Born, *supra* note 34, §13.07 (A)(2) (describing how arbitral rules and national laws endow arbitral chairpersons with "very substantial authority, different from that possessed by the co-arbitrators"). R

242. *See* Briner, *supra* note 241, at 58, 65. R

243. *Id.* at 59 ("[I]t is up to the chairman to initiate the necessary logistical steps" for physical hearings, but "[i]t is not recommended that hearings take place in the offices of . . . one of the co-arbitrators, unless the parties and the co-arbitrators have expressly agreed.").

244. *Id.*

245. Philipp Peters, *Chapter II: The Arbitrator and the Arbitration Procedure - Presiding Arbitrator, Deciding Arbitrator: Decision-Making in Arbitral Tribunals*, *in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 2011 120, 140 (Nikolaus Pitkowitz et al. eds., 2011).

246. *Id.* at 61.

247. Lawrence W. Newman & Michael Burrows, *Chairperson' Role in International Arbitration Is Often Misunderstood*, *in* THE PRACTICE OF INTERNATIONAL LITIGATION V-277, V-278 (2d ed. 2014).

Among the best-practice standards for arbitral chairpersons, the most express admission of role-differentiation comes in the suggestion that chairpersons have an obligation to "maintain the balance" between the two party-appointed arbitrators. If chairpersons and party-appointed arbitrators were actually expected to abide by identical impartiality obligations, as various sources insist, why would the chairperson need to maintain *balance*?

Express denials that party-appointed arbitrators have differentiated roles and impartiality obligations presumably developed to protect the perceived legitimacy of party-appointed arbitrators. The effect, however, has been quite the opposite.

Instead of insulating party-appointed arbitrators from critique, the contradiction between formal standards and actual practice has delegitimated them. The result of this delegitimization is claims that party-appointed arbitrators are a farce[248] and related proposals to eliminate them.[249]

Legitimating party-appointed arbitrators requires justification of—not denial of—their differentiated impartiality obligations, as well as more clear delineation of what those differences are.[250] This need, in turn, requires a reassessment of the meaning of impartiality itself.

B. *Getting Real about Impartiality*

Critiques about party-appointed arbitrators' impartiality, or lack thereof, are but a surface reflection of the deeper skepticism about the very concept of impartiality regarding all adjudicators. This skepticism was introduced by Legal Realists last century but continues today. This Section engages insights from Legal Realism to situate critiques of party-appointed arbitrators within rule-of-law frameworks and the conceptual limitations that our language imposes on ethical discourse.

1. *The Challenge of Legal Realism*

Legal Realism is a movement that developed in the United States in the 1920s and continues to animate legal discourse today.[251] Put simply, Legal Realists are "skeptical that court rulings [are] derived solely from legal principles and they insist[ ] instead that the true origins of judicial decisions [are] to be found in a tangled set of social pressures and political preferences."[252]

The underlying premise of the Legal Realist critique is that law is indeterminate and therefore cannot by itself fully explain adjudicatory out-

248. *See supra* Section IV.A.
249. *See supra* Section II.B.
250. *See* Gélinas, *supra* note 2255, at 27 and accompanying sources. R
251. David B. Wilkins, *Legal Realism for Lawyers*, 104 Harv. L. Rev. 468, 470 (1990).
252. Keith J. Bybee, *All Judges are Political Except When They are Not: A Response*, 38 L. & Soc. Inquiry 215, 215 (2013).

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comes.[253] Given this indeterminacy, adherents of Legal Realism contend, judges can never simply "declare" or "find" the law; their decisionmaking necessarily involves a choice among competing interpretations and assessments, which in turn derive from their personal and professional background and ideals.[254]

The Legal Realism movement has had its excesses[255] and is not necessarily well accepted around the globe.[256] But Legal Realism has helped usher in a more nuanced understanding of law and the concept of impartiality in judicial decisionmaking. Legal Realism is also a primary impetus for the slew of empirical research that seeks to identify and quantify extra-legal influences on judges.[257]

Paradoxically, the central premise of Legal Realism provides a serious methodological limitation on the empirical research that Legal Realism spawned. If law is indeterminate, as Realists contend, there is no single "'correct' legal outcome in a particular case" that can be used as a baseline against which to measure the impact of extra-legal variables.[258] In other words, the variable that is central to empirical inquiries in law cannot be accurately or independently isolated.

Despite this and several other methodological challenges,[259] empirical research on judicial decisionmaking has confirmed some of Legal Realism's most essential claims. Empirical research has effectively disproven the myth that judicial outcomes are entirely determined by neutral application of facts to law. Long before Legal Realism and empirical studies "revealed" this truism, however, it was tacitly understood and accepted. Why else would parties engage in forum-shopping if judicial outcomes were uniformly determined by simply applying facts to law?[260]

Once it is accepted that individual characteristics of a judge (including their breakfasting and luncheon habits)[261] can affect legal outcomes, the essential question posed by Legal Realism becomes "how [can] a judicial process infused with politics. . .be consistent with conventional justifications

253. Wilkins, *supra* note 251, at 470. R

254. *See, e.g.*, Hans Kelsen, General Theory of Law & State 153–54 (Anders Wedberg trans., 1945). *See also* Mary L. Volcansek, *Appointing Judges the European Way*, 34 Fordham Urb. L.J. 363 (2007).

255. Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 Cornell L. Rev. 61, 122 (2009) (arguing that extremist versions of Legal Realism "reduce law to politics, defining politics as ideology" and produce "a nihilistic streak in critical legal studies," which "grossly exaggerated idea that law could be reduced to politics").

256. *See infra* note 271. R

257. *See supra* Section II.C.

258. Rogers, *supra* note 73, at 227. R

259. *See id.* at 227–32. For example, researchers are hypothesizing about causal relationships, but empirical data can only prove correlation, not causation. Meanwhile, researchers are seeking to measure the effect of judicial ideologies and preferences, but those factors "are nearly impossible to measure directly." *Id.*

260. *See infra* notes 350–52. R

261. *See supra* note 138 and accompanying text. R

for court authority?"[262] As dire as this question is, it has never been satisfactorily answered.

Instead of resolving the essential question raised by Legal Realists, the effect of politics and other extra-legal variables on judicial decisionmaking is maintained as "a kind of open secret."[263] There is "a set of tensions between principle and preference that virtually everyone knows to be inherent in the [legal] system" but which "everyone also implicitly ignores as courts formally go about their business."[264]

The treatment of these tensions as an "open secret" is perhaps best illustrated in the process for appointing U.S. Supreme Court justices and federal judges more generally. In the judicial appointment process, Democratic and Republican senators jockey to secure judges who are aligned with their own political perspectives or block appointment of judges who are not aligned. The clear and sometimes express intent of the political actors involved is to affect, through judicial selection, the outcomes of particular cases or specific issues (such as abortion, health care, or transgender rights).[265]

During the appointment process, judicial candidates engage in a ritualistic performance that often includes expressly refusing to answer any questions on the grounds that answering questions on substantive legal issues would affect their impartiality once they are on the bench.[266] Their real motivation, however, is to avoid being attacked or rejected because enough senators oppose their substantive views on that issue.

While this gamesmanship is most well-known in appointing U.S. Supreme Court justices, the phenomenon also occurs in international courts. As examined elsewhere, a similar don't-ask-don't-tell game exists in the process for appointing members of the World Trade Organization ("WTO") Appellate Body:

> [The] AB vetting process [is] aimed at sublimating candidate's views, not ensuring that they are neutral. . . To avoid being nixed, candidates were intensely coached to avoid saying anything that

262. *See* Bybee, *supra* note 252, at 216. R

263. *Id.*

264. *Id.*

265. David Orentlicher, *Politics and the Supreme Court: The Need for Ideological Balance*, 79 U. PITT. L. REV. 411, 412 (2018) ("[T]he judicial appointment process has become highly politicized as each side fights for a Court majority, and we increase the risk of ill-advised decisions."). *See also* Peter Baker & Maggie Haberman, *Trump Selects Amy Coney Barrett to Fill Ginsburg's Seat on the Supreme Court,* N.Y. TIMES (Oct. 15, 2020), https://www.nytimes.com/2020/09/25/us/politics/amy-coney-barrett-supreme-court.html [https://perma.cc/F8ZD-XFS8]. For an interesting proposal that international law be used to diffuse or reduce partisanship in appointment of U.S. Supreme Court justices, see S.I. Strong, *Judging Judicial Appointment Procedures*, 53 VAND. J. TRANSNAT'L L. 615, 617 (2020).

266. Jennifer Braceras, *Following the 'Ginsburg Rule': Why Barrett Can't Comment on the Issues*, LAW.COM (Oct. 14. 2020, 2:20 PM), https://www.law.com/nationallawjournal/2020/10/14/following-the-ginsburg-rule-why-barrett-cant-comment-on-the-issues/ [https://perma.cc/KM59-SCZB]. *Cf.* Lori Ringhand & Paul M. Collins Jr, *The 'Ginsburg Rule' Is Not an Excuse to Avoid Answering the Senate's Questions*, WASH. POST (July 9, 2018), https://www.washingtonpost.com/opinions/answer-the-senates-questions-judge/2018/07/09/31cfb24c-83b0-11e8-8589-5bb6b89e3772_story.html [https://perma.cc/D5FZ-6LY4].

> might be at odds with a state's views and to "give selective information to the nominating principals."[267]

Gamesmanship in appointments has also been well-documented in appointing judges to the International Court of Justice.[268]

Even if everyone, including the viewing public, knows that judicial candidates "negotiat[e] highly political appointment processes" to secure a place on the bench, everyone also tacitly agrees to collectively forget the politicized process and instead treat judges "as impartial arbiters once they are on the bench."[269] Under this view, judges at every level are treated "as being both impartial and partisan at the same time."[270]

The tension between individual motivations and the impartiality ideal also applies to arbitrators, whether or not they are party-appointed. Unlike judges in national legal systems, however, in international arbitration (and international law more generally) the tension is retained more as a closed secret than an open secret. There are several reasons why Legal Realism's hold on international arbitration and international law is more tenuous than it is in the U.S. legal system.

On the one hand, as already noted, Legal Realism has a weaker hold in legal debates outside of the United States.[271] It naturally follows that the doctrine is less likely to have the same degree of acceptance in a multinational forum like international arbitration.

On the other hand, international tribunals and particularly international arbitral tribunals arguably have a greater stake in denying Legal Realism. A legal system in which decisions are made by governmentally-appointed judges can accommodate the contradictions revealed by Legal Realism without losing the foundations of its perceived legitimacy.[272] Those same contra-

267. Catherine A. Rogers, *Apparent Dichotomies, Covert Similarities: A Response to Joost Pauwelyn*, 109 AJIL UNBOUND 294, 296 (2016).

268. *See* Adam M. Smith, *Judicial Nationalism in International Law: National Identity and Judicial Autonomy at the ICJ*, 40 TEX. INT'L L.J. 197, 208 (2004).

269. Bybee, *supra* note 252, at 216. R

270. Susan Silbey & Patricia Ewick describe the nature of this "open secret" as a much starker duality, with law and judicial impartiality embodying "both sacred and profane, God and gimmick, interested and disinterested" all at once. Susan S. Silbey & Patricia Ewick, *The Rule of Law—Sacred and Profane*, SOCIETY 37, 55 (2000). The willingness to forget the politicized process for appointment may be breaking down in the United States as politicization of the process has become so unrelenting and emotive.

271. Legal Realism may be less acknowledged outside the United States perhaps because express political influences in judicial selection are structurally reduced and less tolerated, at least formally and publicly, in many other legal systems. *See* John Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757, 1757 (1998); *see also* David S. Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, 61 S. CAL. L. REV. 1795, 1818 (1998) (noting that France's selection of judges is based upon "the needs of a particular type of judicial function" and that Germany's law schools focus on preparing students to become judges and that selection "contemplates . . . emphasizing democratic legitimation and neutral administration of justice").

272. Of course, excessive political jockeying can also threaten the legitimacy of judges, as we have seen in recent years with the U.S. Supreme Court. *See* Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 974 (2007) ("[A] highly ideological or

dictions, however, may pose a more existential threat to the legitimacy of international law, whose status as "law" is still debated.[273] These contradictions may also pose a greater threat to international courts, whose efficacy is still questioned.[274] Those contradictions may also pose an even greater threat to an informal, decentralized private regime like international arbitration.[275]

These insights from Legal Realism shed a different light on both empirical research about and critiques of party-appointed arbitrators.

Empirical research about party-appointed arbitrators begins with an assumption that the "correct" legal outcome is necessarily the one issued by the majority and a dissent by a party-appointed arbitrator is the biased outcome. Legal Realism, however, suggests that legal indeterminacy creates the possibility of more than one legally justifiable outcome in any particular case. For example, a losing party, a court, or another tribunal might justifiably believe that a dissenting party-appointed arbitrator's view is in fact the correct one.

In light of this observation, it may be reasonable (and accurate) to believe that, had other arbitrators been appointed to the tribunal, a dissent would have been the majority opinion. In other words, the entire debate over who appoints arbitrators is an implicit acknowledgement of Legal Realism and the reality that arbitrator identity necessarily affects outcomes. Empirical research, however, seems to assume that reality away by seeking to measure deviation from the "correct" legal outcome.

Perceptions about the correctness of a particular legal outcome are influenced by the perceived legitimacy of the decisionmaking institution. Two features, in turn, affect the perceived legitimacy of a decisionmaking institution: the degree of representativeness among the actual decisionmakers in the institution and the fairness of the process by which they are appointed.[276] As examined above, parties enjoy more representativeness on a tribunal when they can affect its constitution. Parties may also perceive the ability to participate in shaping the tribunal as more fair than other appoint-

partisan selection process might convey the expectation that decisions should be in accord with political ideology, affecting the norms of judging according to law and also adversely affecting public views of the courts' legitimacy. . . .").

273. The status of international law as law is an old debate that has long-occupied leading scholars from both outside and within the international law community. *See, e.g.*, Louis Henkin, How Nations Behave (2d ed. 1970); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599 (1997); Anthony D'Amato, *Is International Law Really 'Law'?*, Nw. Univ. L. Rev. 79 (2019).

274. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 Calif. L. Rev. 899, 910 (2005); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 Calif. L. Rev. 1, 8, 27 (2005).

275. This phenomenon is not limited to domestic judicial appointment procedures. As I have examined elsewhere, a similar "don't-ask-don't-tell game" exists in the process for appointing members of the WTO Appellate Body: [T]he AB vetting process [is] aimed at sublimating candidate's views, not ensuring that they are neutral. . . To avoid being nixed, candidates were intensely coached to avoid saying anything that might be at odds with a state's views and to "give selective information to the nominating principals." Rogers, *supra* note 267, at 296. R

276. *See* Tyler, *supra* note 18, at 52–54. R

ment processes given that the party-appointment method is more transparent than other methods.

Despite their potential to promote representativeness and fairness, party-appointed arbitrators also embody the same uncomfortable tension that all adjudicators do, between the individual motivations of a particular decisionmaker and the impartiality obligations of all judges and arbitrators. If that tension exists for all adjudicators, it cannot itself be a basis for condemning party-appointed arbitrators.

Put another way, the sin of party-appointed arbitrators may not be that their impartiality obligations are a farce. Instead, their offense might be that, rather than discreetly obscuring the uncomfortable tension underlying the expectation of impartiality of all adjudicators, party-appointed arbitrators openly personify it. Their embodiment of this awkward tension is exacerbated by the language we use to obscure that tension.

2. *The Language of Impartiality*

Legal Realism identifies nuanced inconsistencies in ostensibly impartial legal decisionmaking. The language we use to discuss this phenomenon, however, obscures and even denies those same inconsistencies. Instead discussing the complexity of legal decisionmaking, we speak in linguistic dichotomies, which are themselves distortive cognitive shortcuts. This shortcutting is particularly disruptive in discourse about impartiality, where "the meaning of one thing is defined by its opposite."[277]

We continue to use these simple pairings of opposites (*biased* or *unbiased*, *partial* or *impartial*, *dependent* or *independent*) despite the fact that psychology, neurology, biology, anthropology, political theory, and plain old common sense all teach us that absolute impartiality (and its various synonyms) is neither possible nor desirable in an adjudicator.[278] "[I]t literally makes no sense to think that a human being can ever be devoid of prejudices."[279] Yet we continue to insist adjudicators must be unconditionally unbiased and impartial.

This cognitive shortcut, sometimes known as *binary opposition*, reduces complex multi-variant issues into seemingly straightforward choices be-

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277. Jacques Derrida argued not only that Western thought "has always been structured in terms of dichotomies or polarities" but also that one term in each pair (he claimed consistently the latter) "is considered the negative, corrupt, undesirable version of the first." JACQUES DERRIDA, DISSEMINATION viii (B. Johnson trans., 1981).

278. *See* Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 839, 841 (1984); Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1201 (1992); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 460 (2000).

279. RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS 129 (1983). *See also* Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 504–05 (2013) (arguing that because society now accepts the premises of legal realism and the inevitable role of personal and political interests in judging, it is illogical to argue that judges are entirely impartial).

tween a compelling alternative (impartiality) and a weak one (partiality).[280] Ethical discourse often defaults to this kind of cognitive shortcut,[281] relying on value-laden, yet vague and overly simplistic terminology.[282]

While binary opposition is especially prevalent in ethical discourse, it is also especially problematic. Ethical judgment involves not simply choosing between contrasting alternatives. Ethical judgment, instead, requires conceptualizing the nature of the contrast among alternatives and the inter-relationships that exist between the seeming opposites.[283] This task requires the identification of the moral agent's role and its inter-relationship with other actors.

Inter-relational role differentiation and its implications for ethical obligations have long been a focus for moral philosophers, such as Alasdair MacIntyre and Bernard Gert. MacIntyre observed that moral agency "is embodied in roles" assigned to actors, who are "mutually interdefined in terms of types of relationship."[284] Under this view, situation-specific moral and ethical obligations cannot be analyzed outside the context of a defined role for the moral agent in relation to other actors.

To illustrate this point, MacIntyre considers the question of whether a person has a moral obligation to feed a certain child. This query, he argues, cannot be answered in the abstract. The answer depends on whether the person is the child's parent, neighbor, babysitter, or a complete stranger (and perhaps even whether the child is on the street in front of the person's house or in a far-off land).[285]

Applying this insight about moral obligation to the concept of impartiality, Gert explains that it is not enough to ask whether a given agent is or is not impartial. Instead, Gert's analysis suggests that we must "specify with

280. *See supra* notes 139–142 and accompanying text. R

281. Minow, *supra* note 278, at 1201.

282. As Judith Resnik has explained, "the 'buzzwords' in discussions of judicial ethics are simplistic: '[i]mpartiality' is required; 'bias' is forbidden." Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspiration for Our Judges*, 61 S.C. L. Rev. 1877, 1882 (1988). *See* Richard E. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges 14–15 (1996) ("[I]t is generally agreed, at least in principle, that [the parties] are entitled to nothing less than a calm and dispassionate decisionmaker who operates in an atmosphere of absolute neutrality."); Jeffrey M. Shaman, *The Impartial Judge: Detachment or Passion?*, 45 DePaul L. Rev. 605, 606 (1996) ("[W]e demand that [judges] adhere to the highest degree of impartiality that is mortally possible.").

283. This is the essential insight that Jonathan Swift examines in his "*Digression on Madness*." For a thoughtful discussion, see James Boyd White, When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character and Community 114–17 (1984).

284. Alasdair MacIntyre, After Virtue: A Study in Moral Theory 23 (2d ed. 1984) ("[E]very moral philosophy offers explicitly or implicitly at least a partial conceptual analysis of the relationship of an agent to his or her reasons, motives, intentions, and actions, and in so doing generally presupposes some claim that these concepts are embodied or at least can be in the real social world."). For an extended discussion of how role definition helps determine lawyer ethics in international arbitration, see Rogers, *supra* note 193, at 341.

285. *See* Larissa MacFarquhar, Strangers Drowning: Grappling With Impossible Idealism, Drastic Choices, and the Overpowering Urge to Help 7–8 (2015).

regard to whom she is impartial, and in what respect."[286] This added definitional context "permits and indeed requires that we make fairly fine-grained distinctions between various sorts of impartiality."[287]

The example used to illustrate Gert's view is a university professor who is both a mother of five children and a member of the university's hiring committee. She is required to be *impartial* both as among her children and as among the individual job candidates. The nature of the impartiality demanded in each situation, however, is quite different.[288]

As among her children, the professor must be impartial with respect to the care she gives them, meaning she must attend their needs equally without regard to their relative accomplishments or personal merit. As among job candidates, however, she must start from a position of neutrality as among candidates, but ultimately, she must expressly prefer one over another based on their relative accomplishments or "merit."[289]

Role-differentiated distinctions are used in discourse about professional duties, but seemingly by accident and without formal acknowledgment. For example, the same term *impartiality* is used both to describe the obligations of judges and the obligations of arbitrators, even though those obligations are generally understood as being distinct to each category.[290] Both adjudicators—judges and arbitrators—are assigned distinctive inter-relational roles in relation to other actors within the legal regimes in which they operate.[291] In the absence of clearer role differentiation, when the same term *impartiality* is used to describe duties of both arbitrators and judges,[292] arbitrators necessarily suffer by comparison. Arbitrator impartiality is often described as "lesser" or "less rigorous" than that of judges.[293]

286. Gert's actual formulation is "A is impartial in respect R with regard to group G if and only if A's actions in respect R are not influenced at all by which member(s) of G benefit or are harmed by these actions." Bernard Gert, *Moral Impartiality*, 20 MIDWEST STUD. PHIL. 102, 104 (1995). This example and other analysis by Gert are discussed in Troy Jollimore, *Impartiality*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2022), https://plato.stanford.edu/archives/sum2022/entries/impartiality/ [https://perma.cc/4B8L-54BZ].

287. *See id.*

288. *Id.* These different types of impartiality, however, are not entirely unrelated; they share some core features. *See infra* Section V.D.

289. The meaning of "merit" is itself contested and standard accounts of merit have been subject to criticisms of inherent bias. Rachel Davis & George Williams, *Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia*, 27 MELB. U. L. REV. 819, 830–31 (2003) (arguing that "'[m]erit', without more, cannot be a neutral standard" and often means default to "reflect attributes and concerns stereotypically seen as 'male'"). *See also* STEPHEN J. MCNAMEE & ROBERT K. MILLER, JR., THE MERITOCRACY MYTH (2004).

290. In a similar vein, the word "independence" is used to describe the professional duties of judges, arbitrators, attorneys, and expert witnesses. *See* Rogers, *supra* note 195, at 7. **R**

291. Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U. L. REV. 153, 153 n.49 (1999).

292. Judicial impartiality suffers from its own contradictions and forms of incoherence. *See* John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 238–39 (1987) for an insightful parsing of some of these contradictions.

293. *See* Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. INT'L L. REV. 53, 83 (2005).

Arbitrators and judges are both adjudicators. That fact, however, does not imply that their impartiality obligations are on the same linear scale with partiality at one end and impartiality on the other. In Gert's view, arbitrators and judges are subject to "various sorts of impartiality"[294] appropriate to the legal regime in which they operate.

Similarly, just because party-appointed arbitrators and chairpersons are both arbitrators, it does not necessarily follow that they share the exact same impartiality obligations or that their obligations are points along the same linear scale. This latter observation is often obscured because the role of party-appointed arbitrators is neither well-defined nor generally understood. The result is linguistic gymnastics and the denials, outlined above,[295] that have turned their impartiality obligations into farce.

Reconceptualizing the party-appointed arbitrator as a sort of *Devil's Arbitrator* facilitates a more accurate understanding of their role, both in relation to the parties and the arbitral tribunal. Clearer role definition, combined with Legal Realism's insights about the limits of impartiality in legal decisionmaking, allows us to develop a more coherent conception of party-appointed arbitrators' impartiality obligations. Role definition is taken up in the next Section and the related implications for impartiality are taken up in the final Section of this Part.

C. *The Role of the Devil's Arbitrator*

Existing rules and practices implicitly assign to party-appointed arbitrators a distinct role,[296] despite the rhetorical denials described above. Conceding that party-appointed arbitrators have a differentiated role does not mean that they have no impartiality obligations any more than acknowledging the indeterminacy of law means that law has no meaning.[297]

Instead, a clearer and more accurate role definition will enable, to borrow analysis based on Gert's view, "mak[ing] fairly fine-grained distinctions between various sorts of impartiality" that are more attuned to their inter-relational role and more consistent with the insights of Legal Realism.[298] A more precise and more accurate definition of their impartiality obligations, meanwhile, will avoid the critique that party-appointed arbitrators' impartiality is a farce.[299]

Three aspects of the party-appointed arbitrator's role distinguish them from chairpersons and facilitate their function as a Devil's Arbitrator. First,

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294. *See* Gert, *supra* note 286, at 104; Jollimore, *supra* note 286. R

295. *See supra* Section IV.A.1.

296. *See supra* Section IV.A.2.

297. *See, e.g.*, Kenneth J. Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 284–85 (1989) (arguing that indeterminacy does not undermine law's legitimacy or status as law).

298. *See* Gert, *supra* note 286 at 128. R

299. *See* Todd Tucker, *Inside the Black Box: Collegial Patterns on Investment Tribunals*, 19 J. OF INT'L DISP. SETTLEMENT 190, 195 (2016).

the ability of parties to appoint an arbitrator ensures *representativeness* on the tribunal. Second, the party-appointed arbitrator serves as a *check against* decisionmaking shortcuts by the tribunal as a result of their individual and collective cognitive biases (including Groupthink). And third, the party-appointed arbitrator serves as a *counterbalance* to the opposing party-appointed arbitrator, ensuring structural impartiality on the tribunal. Each of these features of the party-appointed arbitrator's role is taken in turn below.

1. *Representativeness*

By acknowledging that all legal decisionmakers carry some forms of bias, Legal Realism raises serious questions about how and by whom legal decisionmakers are appointed. The power to appoint comes with the power to determine which extra-legal factors will affect legal decisionmaking.[300] In a democratic system, as discussed above, constitutionally ordered power-sharing and judicial appointment procedures determine who decides which extra-legal factors will be represented in the judiciary.[301] In the absence of separate, government-sanctioned selection processes, there are no obvious criteria for designating who decides which extra-legal factors will be represented.

Many if not most extra-legal factors that might affect judges are specific to individual legal cultures. International arbitration aims to transcend many aspects of national legal culture,[302] but significant cultural divides remain, even among the elite echelons of international arbitration practice.[303] In the absence of a prevailing or default international legal culture, how should culturally laden expectations about law, legal methodology, and procedural fairness be represented on tribunals? And who should decide how those factors are represented?

While many are familiar with the enduring, though often overly simplistic, divide between civil-law- and common-law-based legal traditions,[304]

300. Johnny Veeder made a similar observation when he explained that one reason for arbitration's popularity is "the sense of ownership by a party over the arbitral process because it has participated in the formation of the tribunal as to which all parties have consented." Veeder, *supra* note 12, at 148. R

301. *See* Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 837 (2008).

302. M. Bernardo Cremades, *Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration*, *in* CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION 165 (Stefan Frommel & Barry Rider eds., 1999) ("[T]he truly international arbitrator is one whose . . . professionalism leads his decision to be independent from the 'bag and baggage' of the system or national systems from which he originates.").

303. Julian D.M. Lew & Laurence Shore, *International Commercial Arbitration: Harmonizing Cultural Differences*, 54 DISP. RESOL. J. 33, 34 (1999). Even debates over party-appointed arbitrators and the legitimacy of dissenting opinions are themselves examples of cultural differences. *See* Manuel Arroyo, *Dealing with Dissenting Opinions in the Award: Some Options for the Tribunal*, 26 ASA BULLETIN 437, 438 (2018).

304. The civil-law oriented Prague Rules of Evidence were recently promulgated to rival the ever-popular International Bar Association's (IBA's) Rules on the Taking of Evidence in International Arbitration, which are sometimes critiqued too "common law centric." BORN, *supra* note 34, at § 15.01 [A]. R
Meanwhile, vociferous objections to the IBA's Guidelines on Party Representation in International Arbi-

Kun Fan[305] and Won Kidane[306] have forced us to expand analysis of legal culture beyond this traditional binary. Both Kun and Kidane demonstrate how cultures from outside of North America and Europe bring different assumptions to fact-finding and procedural arrangements. Differences in legal culture are, in other words, multilateral not binary.

Historically, party appointment was more clearly regarded a means of ensuring each party's preferred legal culture and procedures were represented on the tribunal, which is why parties frequently appointed arbitrators who shared their nationality.[307] As nationality has receded in importance and other extra-legal factors have ascended in our understanding about their effects on adjudicatory decisionmaking, parties today seek to have other features represented on the tribunal. These features include legal perspective, procedural preferences, and shared regional or historical experiences or business practices.

For example, a Lebanese party that needs extensive document production to prove its case might focus on appointment of an arbitrator from the United States, where such procedures are relatively commonplace. By contrast, a U.S. party who has a trove of dirty documents may instead prefer a Brazilian arbitrator who is generally unaccustomed and perhaps even adverse to document production.

These tradeoffs illustrate how a party can, through the appointment process, ensure that their perspectives about what constitutes fair procedures and a meaningful opportunity to present their case is represented on the tribunal. By expressly acknowledging that party-appointed arbitrators function as a form of representativeness, we legitimate differentiations, such as one arbitrator's view that document production is an important resource and another's view that it is inherently unfair.

Representativeness, as used here, is distinct from the notion of *representation*. The *Devil's Arbitrator* is neither the appointing party's advocate on the tribunal nor a substitute for a party's legal counsel (despite potential confusion from the name). Representativeness, instead, means that the tribunal includes among its members arbitrators who are influenced by those extra-

tration express also based on similar concerns. For an extended discussion and empirical analysis of different types of legal authorities relied in on by civil and common law judges and arbitrators on both substantive and procedural issues, see S.I. Strong, *Legal Reasoning in International Commercial Disputes: Empirically Testing the Common Law-Civil Law Divide*, *in* EXPLAINING WHY YOU LOST – REASONING IN ARBITRATION 41, 41 (Antonio Crivellaro, Melida N. Hodgson eds., 2020).

305. FAN KUN, ARBITRATION IN CHINA: A LEGAL AND CULTURAL ANALYSIS 189 (2013) (noting that a Roman-civil law system did not develop in a similar way in China, despite the large body of codified law).

306. WON KIDANE, THE CULTURE OF INTERNATIONAL ARBITRATION 3 (2017) (providing a "cultural critique" of international arbitration and criticizing discussions of "cultural diversity" as being limited to the "two most important Western legal traditions: the common law and the civil law").

307. *See supra* notes 41–42 and accompanying text. R

legal factors that are aligned with extra-legal factors considered most important by the parties.[308]

Representativeness issues have become increasingly important in international arbitration as the lack of diversity among arbitrators has raised questions of institutional legitimacy, both real and perceived. Under the glare of Legal Realism, national judiciaries are increasingly challenged to ensure that a range of backgrounds are represented on the bench.[309] Democratic principles also raise questions about the real and perceived legitimacy of a judiciary that is exclusively or predominately composed of white men.[310]

Diversity is more difficult to define in an inherently multi-national, multicultural context like international dispute resolution. Gender, racial, ethnic, political, and economic diversity combine with complex differences among national legal cultures, geopolitical interests, and political orientations.[311] Meanwhile, international law is often articulated at higher levels of abstraction and less able to be clarified by legislative bodies. As a result, as discussed above,[312] international law can be even more indeterminate than national law and thus even less of a constraining force on international adjudicators.

All these variables lend an even greater importance to intersectionality and inclusion on international tribunals, particularly in a field like interna-

308. *See generally* Tom Tyler & Steven Blader, Cooperation in Groups: Procedural Justice, Social Identity and Behavioral Engagement 74, 74–75 (2000) (emphasizing how participation and representativeness encourage confidence in decisionmaking processes and promote a sense of procedural justice).

309. *See* Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Wash. & Lee L. Rev. 405 (2000); Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decision-making*, 85 S. Cal. L. Rev. 313, 351 (2012) (analyzing how judges' diverse backgrounds inform their judicial decisionmaking); *see also* Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 Calif. L. Rev. 1109, 1117–19 (2003). *Cf.* Allison P. Harris & Maya Sen, *Bias in Judging*, 22 Ann. Rev. Pol. Sci. 241, 246 (reviewing the literature regarding the effects of "characteristics such as race, ethnicity, and gender" on judicial decisionmaking, but concluding that ideology or partisanship may be more important predictors, even if they often also correlate closely with gender, race, and ethnicity).

310. Chen, *supra* note 309, at 1117 ("A diverse judiciary . . . enhances courts' credibility among affected communities who would otherwise feel they have no voice within the institution."); Ifill, *supra* note 309, at 410 ("Because they can bring important and traditionally excluded perspectives to the bench, minority judges can play a key role in giving legitimacy to the narratives and values of racial minorities."). **R** **R**

311. *See* Franck et al., *supra* note 104, at 452 ("[I]t is difficult, if not impossible, to generate a unitary definition of diversity and inclusiveness in international arbitration."). *See also* Valentina Sara Vadi, *Cultural Diversity Disputes and The Judicial Functions in International Investment Law*, 39 Syracuse J. Int'l. L. & Com. 89, 105 (2011); Stavros Brekoulakis, *Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making*, 4 J. Int'l Disp. Settlement 553, 585 (2013) (discussing the link between perceived arbitrator bias and legitimacy of investment arbitration); Joost Pauwelyn, *The Rule of Law Without the Rule of Lawyers: Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus*, 109 Am. J. Int'l L. 761, 768–80, 783 (2015) (positing that investment arbitrators and their lack of diversity account for some concerns about investment arbitration's legitimacy). **R**

312. *See supra* notes 271–72 and accompanying text.

tional arbitration.[313] The amplified potential effect of these variables also gives extra importance to who appoints the arbitrators.

These insights about representativeness are implicitly recognized in debates over whether to eliminate party-appointed arbitrators in investment arbitration. It is no accident that some developing states express reservations about proposed reforms to replace investment arbitration with an international investment court.[314] They point out that a court with limited members, most likely appointed through processes in which these states have a minor role, necessarily implies less representativeness on tribunals than if those states are free to select their own party-appointed arbitrators for each dispute.[315]

2. *Check on the Majority*

One consequence of the representativeness ensured by party-appointed arbitrators is that it enables them to serve as an effective check on the tribunal majority. As explored above in Part II, all adjudicators are subject to a range of cognitive and individual biases that affect their legal decisionmaking.[316] These personal biases combine with group biases, such as Groupthink, to increase the potential for sub-par legal decisionmaking.

Janis proposed the Devil's Advocate to reduce decisionmaking shortcuts in group settings.[317] Sunstein and Hastie questioned the effectiveness of the Devil's Advocate as a bulwark against the majority.[318] Their hesitation, however, was based on empirical research that suggests that when Devil's Advocates' arguments are not (or are perceived as not) sincere or informed, they do not have the intended effect.[319]

An arbitrator who is appointed because they understand and, in some measure share, the appointing party's perspectives is more likely to be effective in countering consensus among the other two arbitrators. In a particularly colorful illustration based on an example provided by Kidane, consider a case in which two out of three arbitrators from Europe are inclined to discount a witness's testimony because he identified as "yellow" an ID card

313. Ksenia Polonskaya, *Diversity in the Investor-State Arbitration: Intersectionality Must Be a Part of the Conversation*, 19 MELB. J. INT'L L. 259, 259 (2018).

314. *See* Special Correspondent, *India rejects attempts by EU, Canada for global investment agreement,* The Hindu (JANUARY 24, 2017 01:58 IST), https://www.thehindu.com/business/India-rejects-attempts-by-EU-Canada-for-global-investment-agreement/article17083034.ece [https://perma.cc/R5CV-WLMK]. *See also* Trishna Menon & Gladwin Issac, *Developing Country Opposition to an Investment Court: Could State-State Dispute Settlement be an Alternative?*, http://arbitrationblog.kluwerarbitration.com/2018/02/17/developing-country-opposition-investment-court-state-state-dispute-settlement-alternative/ [https://perma.cc/86HM-LKAF].

315. U.N. Comm'n on Int'l Trade Law, Rep. of Working Grp. III (Investor-State Dispute Settlement Reform) on the Work of Its Fortieth Session (Vienna, February 8–12 2021), U.N. Doc A/CN.9/1050, at 5–10 (2021).

316. *See supra* Section III.C.3.

317. *See supra* Section II.C.1.

318. *See supra* Section II.C.2.

319. *See supra* notes 207–15 and accompanying text.

that the pleadings described as "orange."[320] A party-appointed arbitrator from Africa who shares the same background as the party who presented the witness could intervene if the tribunal's majority doubted the witness' credibility based on this discrepancy. The party-appointed arbitrator could explain that in many African cultures yellow represents a range of colors, including orange.[321] While this example about colors is relatively simple and easy to identify, other cultural differences are more subtle.

In another example based on insights from Fan's scholarship,[322] consider a procedural proposal from a Hong Kong party that the tribunal undertake efforts to promote settlement. Assume that proposal is vehemently rejected by the opposing U.S. party, who argues that the proposal is nothing more than a delay tactic that the tribunal should disregard out of hand. If a majority on the tribunal seems inclined to accept the U.S. party's position, a party-appointed arbitrator from Singapore could highlight that hybrid med-arb procedures are generally expected in many parts of Asia.[323]

The draw toward consensus, as examined above, is particularly strong given the bonds of collegiality that prevail in international arbitration.[324] The pull of these bonds means a strong-form of representativeness (that is unilateral selection of an arbitrator) ensures sufficient counterincentive for party-appointed arbitrators to serve as an effective check. This check against the majority necessarily swings back and forth depending on which side of an issue is garnering a majority on the tribunal and is constantly counterbalanced by the opposing party-appointed arbitrator.

3. *Counterbalance*

Impartiality is not only an ethical obligation or mental disposition of individual tribunal members. Impartiality is also an essential element in any adjudicatory procedure and in the outcome of an arbitration. Structural commitments to impartiality must take account of the inherent limitations on the impartiality of individual arbitrators.

As examined above, the chairperson enjoys certain unique procedural powers to ensure balance between the two party-appointed arbitrators.[325] In this respect, the chairperson is a fulcrum between the two party-appointed arbitrators who serve as counterweights. To draw out the engineering metaphor, the purpose of a counterweight is to apply an opposite force to an existing load to ensure balance and stability in a mechanical system.[326] The effect of a proper counterbalance is that the load may be lifted faster and

320. *See* Kidane, *supra* note 306, at 4–5. R
321. *See id.* at 5.
322. *See* FAN, *supra* note 305, at 155. R
323. *See id.*
324. *See* Section III.A.
325. *See supra* notes 242–49, and accompanying text. R
326. *See* UNIVERSITY OF SOUTH AUSTRALIA, *Mechanical Engineering Concepts*, https://lo.unisa.edu.au/mod/book/view.php?id=424248&chapterid=69956 [https://perma.cc/JT7R-RAJN].

more efficiently, which saves energy and is less taxing on the lifting machine.

By analogy, a tribunal can function more efficiently when the chairperson serves as a fulcrum between two opposing party-appointed arbitrators who serve as counterweights that prevent tribunal decisionmaking from being unduly weighed down by the cognitive limitations of the group or its individual members.

Using the same example from above,[327] a U.S. party-appointed arbitrator may, in keeping with the views of her appointing party, be particularly persuaded that a proposal for mediation is a delay tactic and urge that the tribunal dismiss it out of hand. The party-appointed arbitrator from Singapore, by contrast, would encourage more thoughtful consideration by highlighting that hybrid med-arb procedures are generally expected in many parts of Asia.[328] Rather than seeking to maintain a position of studied neutrality that navigates between the two positions, the party-appointed arbitrators apply equal but opposite forces to push a more robust examination of both sides by the chairperson.

The party-appointed arbitrator's role as counterweight combines with their functions as a check against the majority and as an assurance of representativeness on the tribunal. Together, these three functions define the party-appointed arbitrator's inter-relational role on the arbitral tribunal and in the arbitration process. This functional role, in turn, enables more careful delineation of the impartiality obligations that are consistent with that role.

D. The Impartiality of the Party-Appointed Arbitrator

Clearer role definition helps explain why party-appointed arbitrators' claim to impartiality is neither a farce nor an inferior form of impartiality.[329] Looking back to the example of a mother who is also the head of a hiring committee, her impartiality in one context is not *inferior* to her impartiality in the other.[330] Her impartiality obligations in each context are different in *kind*. The impartiality she must exercise in each context is based on her inter-relational functional role with respect to other actors in each context (*that is* children and spouse versus candidates, the university, and the academy more broadly).[331]

Using the same word "impartiality" makes it difficult to distinguish obligations that differ in kind and instead makes it seem like the only difference is one of measure or intensity. In other words, the binary nature of the

327. *See* FAN, *supra* note 305, at 155. R
328. *See id.*
329. *See supra* Section IV.A.
330. *See* Gert, *supra* note 286, at 104. R
331. For an extended discussion of how the inter-relational role definition aids in defining professional ethics, see Rogers, *Fit and Function*, *supra* note 1933, at 381–87; Rogers, *Regulating International Arbitrators*, *supra* note 2933, at 165–218. R

term impartiality contributes to the notion that there is only a single scale.[332] For these reasons, the term impartiality itself is a significant obstacle to more careful delineation of the different *kinds* of impartiality that might apply to party-appointed arbitrators.

The ability to carefully differentiate between the impartiality obligations of party-appointed arbitrators, on the one hand, and the impartiality obligations of chair or sole arbitrators, on the other hand, is further complicated by the fact that they are all "arbitrators." Gert is more easily able to distinguish among kinds of impartiality because they are applied to roles that have different names, such as "mother" and "faculty member." By contrast, the shared name "arbitrator" makes it difficult to conceive that all three members of a tribunal may not necessarily have exactly the same role.

Despite overlapping language, party-appointed arbitrators have consistently been permitted to engage in certain practices that are expressly prohibited for chairpersons. These practices have been dismissed as anachronistic exceptions to, or condemned as violations of, the impartiality obligations of party-appointed arbitrators.[333] A careful parsing of the nature of the impartiality obligations, however, provides a meaningful justification for these practices and a response to those who challenge the legitimacy of party-appointed arbitrators.[334]

Acknowledging that party-appointed arbitrators have a differentiated role does not mean they have no obligations of impartiality. It simply means they are not subject to *all* the same impartiality obligations as chair or sole arbitrators. The remainder of this Section examines which practices are consistent with the reconceived role of party-appointed arbitrators, and which may be rightly criticized as unethical violations of party-appointed arbitrators' duty of impartiality.

1. *Separate Opinions*

Returning to the issue of dissenting opinions,[335] the reconceptualized role of the party-appointed arbitrator provides a legitimate basis for challenging conclusions by van den Berg and Puig. Even accepting that dissenting (and separate) opinions are disproportionately authored by party-appointed arbitrators, that phenomenon is not necessarily a sign of inappropriate bias.[336]

One reason dissents are considered wrong, according to van den Berg and other civil law scholars, is that they create an improper "appearance of there being two judgments."[337] This view is an implicit refutation of Legal Realism, which is premised on an assumption that more than one outcome is

332. *See supra* Section IV.B.2.
333. *See* van den Berg, *supra* note 74, at 831.
334. *See* Fernández-Armesto, *supra* note 63, at 724; *see also* Gélinas, *supra* note 225, at 27. R
335. *See supra* Section II.C.1.
336. *See supra* notes 81–82 and accompanying text.
337. Van den Berg, *supra* note 74, at 828.

possible because law is indeterminate. This indeterminacy leaves room for extra-legal factors to exert some influence on legal decisionmakers, regardless of their integrity or intentions.[338] Prohibitions against separate and dissenting opinions can obscure, but not eliminate, the influence that extra-legal factors have on adjudicatory outcomes.

The reconceptualized role of the party-appointed arbitrator acknowledges this reality and drafts it into service to preserve impartiality in arbitral decisionmaking. Under this view, the dissenting opinion becomes a form of decisionmaking transparency that reveals the extent and nature of law's indeterminacy. This view of dissenting opinions as a form of decisionmaking transparency also suggests some limits on what constitutes an ethical dissent.

Separate opinions can serve as checks against tribunal biases and potential errors, as well as a reassurance to parties. As examined above, the threat and possibility of a dissent empowers arbitrators to refocus the attention of an otherwise distracted or lackadaisical tribunal.[339] Concurring opinions, meanwhile, can assure losing parties that their views were represented on and fully vetted by the tribunal.[340] Separate opinions, even those that ostensibly "favor" a losing party, arguably make challenging the award more difficult as a practical matter.[341] As a result, these separate opinions reify, not undermine, the legitimacy of international arbitration outcomes. Party-appointed arbitrators have the greatest incentive to write (or threaten to write) these opinions.

While the reconceptualized role of party-appointed arbitrators can justify dissenting opinions, it does not justify *all* dissents.[342] Purely self-serving dissents intended only to aggrandize the reputation of the arbitrator or to rack up additional arbitrator fees are inconsistent with legitimate separate opinions that assure decisionmaking transparency and verify representativeness on the tribunal.

In a similar vein, dissents that are drafted solely to appease an appointing party,[343] that are devoid of any evidentiary support, that engage in a nihilistic effort to undermine the arbitral process,[344] or that provide a roadmap for

338. Legal Realism has consistently embraced the tradition of judicial dissent. *See* Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 760–61 (2009).

339. *See supra* notes 90–93 and accompanying text.

340. *See supra* notes 84–85 and accompanying text.

341. *See supra* notes 87–89 and accompanying text.

342. This analysis does not imply that only party-appointed arbitrators can dissent or that party-appointed arbitrators can or should never dissent on an issue that may be perceived as favoring the party that did not appoint the arbitrator. These kinds of dissents exist, but as demonstrated in van den Berg and Puig's research, they are relatively rare. *See supra* notes 95–99 and accompanying text.

343. NATHALIE BERNASCONI-OSTERWALDER & DIANA ROSERT, INT'L INST. FOR SUSTAINABLE DEV., INVESTMENT TREATY ARBITRATION: OPPORTUNITIES TO REFORM ARBITRAL RULES AND PROCESSES 12 (2014), https://www.iisd.org/system/files/publications/investment_treaty_arbitration.pdf [https://perma.cc/7BQE-JPSJ].

344. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION § 23.05 [B] (3rd ed. 2021). ("Circumstances sometimes arise in practice where an arbitrator (often the co-arbitrator appointed by the

challenging the award would all also be ethically indefensible. Each of these types of dissent can rightly be condemned as inconsistent with the legitimating functions of separate opinions and therefore inappropriate.[345]

Notably, the form and purpose of these dissents is relevant, not their existence or (necessarily) their substantive conclusions. Given the range of legal cultures and inherent indeterminacy in international arbitration, it could be difficult to identify when a separate opinion is frivolous—one party's "frivolity" is another party's sincerely-held belief about the "right" outcome in the case. The propriety of a separate opinion, therefore, is better assessed based on its form and its author's intent. A dissenting arbitrator's intent may be inferred from the substance of an award and at some point, purpose and substance merge—an indefensibly frivolous argument expressed with internally inconsistent logic may reveal the author's improper intent.

All this discussion about dissents is not to deny that there may be risks to the perceived legitimacy of international arbitration, particularly if, as van den Berg hypothesizes, a dissent in favor of an appointing party is considered a mandatory feature. To date, however, all empirical evidence is to the contrary. Party-appointed arbitrators only dissent in a relatively small fraction of investment cases and an even smaller fraction of commercial cases. Consensus, not partisanship, seems to be the norm.

2. *Unilateral* Ex Parte *Appointment*

The differentiated role of party-appointed arbitrators also helps explain and justify other practices, such as their unilateral appointment without consent from the opposing party. Although used derisively by Paulsson,[346] this apparently lop-sided practice of unilateral appointments is instead the greatest assurance of mutual representativeness on the tribunal.

If a party's choice of arbitrator were instead dependent on the opposing party's consent, neither party is likely to secure their desired representativeness. Each party has an incentive to prevent the other party from maximizing their desired representativeness on the tribunal.[347] The ability to check an opposing party's preferences is essential to ensure fairness in chairperson selection. If applied to all arbitrators, however, this check would otherwise reduce overall representativeness on the tribunal.

party whose claims or defenses are about to be rejected by the majority) seeks to delay the process of finalizing the award. This tactic is improper and a breach of the arbitrator's obligations of impartiality and diligence.").

345. The fact that these limits may rest on arbitrators' subjective intent can raise practical questions about how improper dissents can be identified other than on a case-by-case basis. These challenges, however, are no more complex than other ethical line-drawing for judicial or attorney ethics, which often rely on questions about the moral agent's good faith.

346. Paulsson, *supra* note 1, at 348. R

347. Unilateral appointment also avoids unequal bargaining power that may end up distorting the balance on a tribunal. *Cf.* Peter B. Rutledge, *Toward a Contractual Approach to Arbitral Immunity* 39 GA. L. REV. 151, 209 (2004).

Those who object to the notion of parties picking their "own" arbitrator tend to dismiss the value of representativeness. This dismissal effectively denies the insights of Legal Realism by assuming that the absence of representativeness on the tribunal necessarily means neutrality or impartiality. Because every decisionmaker holds innate cognitive biases that are an inevitable feature of the human condition, every decisionmaker necessarily has predilections that will "favor" one side or the other.[348] Outside the arbitration context, the inescapability of these predilections explains the well-known practices of forum shopping and jury selection.

In many respects, arbitrator selection is the ultimate kind of forum shopping. In litigation, parties shop for the *physical forum* that would be most favorable to their case. In arbitration, parties shop for the *arbitrator* who would be most favorable to their case.

Traditional forum shopping is often decried because the choice of forum can be outcome-determinative but is rarely tied to the merits of the dispute.[349] As a result, for reasons unrelated to the merits, one party gets to enjoy the strategic advantages of their preferred forum, while the other party resents being stuck there. Arbitrator shopping balances out the risk that only one party might enjoy strategic advantages. Party appointment of arbitrators by both parties eliminates (or at least significantly reduces) the risk that one party may be unfairly "stuck" with a tribunal that favors the strategic advantages for the opposing party.

The consequences for the party who gets "stuck" with an undesirable arbitral tribunal are potentially much worse than for a litigant stuck in an undesirable judicial forum. Arbitrators enjoy much broader discretion than judges and that discretion is largely unreviewable.[350] Established rules of procedure and evidence constrain the extent to which extra-legal factors can affect outcomes, while appellate review can correct outcomes that are unduly influenced by these extra-legal influences. Allowing both parties to maximize representativeness on the tribunal serves as an alternative means of *ex ante* corralling the effect of extra-legal influences.

Jury selection is another useful example of the value of party control over the identity of decisionmakers. The Seventh Amendment of the U.S. Consti-

348. Again, it is essential to stress that these kinds of cognitive biases or predilections are not the same kind of biases that are considered impermissible and a basis for challenging arbitrators for an alleged conflict of interest. *See supra* note 19. R

349. *See, e.g.*, John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 712 (1974) (arguing against forum shopping between state and federal courts on the grounds of the "simple unfairness" of "affording a nonresident plaintiff suing a resident defendant a unilateral choice of the rules by which the lawsuit was to be determined").

350. As explained by some scholars, arbitration awards escape meaningful review because an arbitrator's discretion is exceedingly broad. Arbitration proceedings are . . . more flexible than conventional litigation. Unlike judges, an arbitrator need not follow the law. . . . Instead, an arbitrator may base his decision on practice insight, business customs, or broad principles of equity and justice. Brent O.E. Clinkscale et al., *Nonjudicial Appeals of Arbitral Awards: An Underutilized Tool in Alternative Dispute Resolution*, FED. L., Oct.-Nov. 2016, at 38.

tution ensures that, even in civil cases, parties enjoy representativeness on the jury. In the U.S. jury selection process, parties can exercise two kinds of objections to appointment of a juror. They can challenge *for cause* as a defensive strategy to prevent unacceptable bias, akin to a challenge to disqualify an arbitrator based on impermissible conflicts of interest.

Parties can also, however, exercise their *preemptory challenges* as an offensive strategy to prevent the opposing party from securing over-representativeness on the jury. Importantly, each party is limited to only a few preemptory challenges. Thus, a party's ability to block appointment of the opposing party's preferred jurors is limited. In this sense, each party has at least some opportunity to make "unilateral" appointments of their preferred jurors.

Gamesmanship in juror selection is at times uncomfortable or even ugly. But the process ensures that *both* parties have an opportunity to assure representativeness on the jury.[351] Like jury selection, arbitrator appointment effectively requires a certain degree of unilateralism to ensure representativeness on the tribunal.

3. *Improperly Partial Behavior*

Acknowledging that party-appointed arbitrators may have impartiality obligations that differ from those of the chairperson does not imply an ethical free-for-all. Instead, this acknowledgement necessitates the kind fine-grained analysis about the meaning of impartiality that Gert exhorts. This fine-grained analysis facilitates the delineation of boundaries between conduct that is or is not proper among arbitrators.

For example, the party-appointed arbitrator conduct that Armesto described (an arbitrator who sent "emails to the party who appointed him, describing the minutiae of [tribunal] deliberations")[352] and the ongoing communications between Roosevelt and members of the *Alaska Boundary* tribunal[353] have nothing to do with representativeness or checking the tribunal. Instead, such conduct is aimed at intentionally creating an informational imbalance that disproportionately favors one party. This conduct is thus rightly condemned as improper for a party-appointed arbitrator. It can easily be condemned as an inappropriate violation of party-appointed arbitrators' impartiality obligations.

In a similar vein, a party-appointed arbitrator's unilateral issuance of procedural rulings, grant of interlocutory orders, or creation of home-court advantage in selecting the hearing location could create unfounded procedural advantages for one party. Such unilateral creation of procedural advantages

351. Wendy Hind, *Is It Really a Jury of Your Peers?: A Quantitative Analysis of Racial Composition on Juries in New York State*, 60 HOW. L.J. 519, 520 (2017) (tracing the origins of "judgment of his peers" to the Magna Carta and analyzing the quantitative unrepresentativeness of African-Americans on New York juries).

352. *See supra* note 63 and accompanying text.

353. *See supra* notes 48–50 and accompanying text. R

would convert legitimate *representativeness* into illegitimate *championing* and transform legitimate *counterbalance* into illegitimate *imbalance*. Unilateral procedural actions by a party-appointed arbitrator have nothing to do with legitimately serving as a check on the tribunal's decisionmaking. Such actions, therefore, are easy to prohibit or condemn as inconsistent with party-appointed arbitrators' duties of impartiality and therefore best left to the chairperson.

In sum, developing role-differentiated ethics for party-appointed arbitrators does not mean abandoning the idea of ethical boundaries. The purpose of this role-differentiation is to avoid the irrational insistence that party-appointed arbitrators are bound by the same obligations as chairpersons and the inevitable condemnation for their failure to conform to those obligations. Acknowledging role-differentiated ethics for party-appointed arbitrators, in other words, facilitates the drawing and policing of more rational and appropriate ethical boundaries for them.

V. Conclusion

Proposals to eliminate party-appointed arbitrators are premised on the false assumption that, because they serve on the same tribunal, all arbitrators have the same role and therefore the same impartiality obligations. From this assumption, critics conclude that party appointment itself prevents arbitrators from fulfilling their impartiality obligations. Any claim to the contrary, critics contend, is nothing but a farce.

The risk of bias from the party-appointment process, however, may be less concerning compared to various other forms of cognitive bias, particularly Groupthink. These various biases have been proven to distort both the decisionmaking process and final outcomes. When outcomes cannot be corrected on appeal, structural counterbalance and representativeness on tribunals are essential to ensure fairness and predictability in the decisionmaking process.

Party appointment may not be ideal in every international adjudicatory context. A reconceptualization of the party-appointed arbitrator's inter-relational role, however, facilitates a more meaningful framework for evaluating the tradeoffs in permitting or prohibiting party appointment. This new framework compels us to move beyond simplistic binary logic and platitudes about impartiality that deny the force of Legal Realism and ignore the actual practices of party-appointed arbitrators.

Today, the nature of impartiality and the legitimacy of party appointment on international tribunals are under increasing scrutiny. Some claim that we are seeing a shift away from the era in which international courts

and tribunals proliferated,[354] and towards an era in which those courts and tribunals are in decline or at least subject to reevaluation.[355] At the heart of all these reform efforts are concerns about the legitimacy of such tribunals, as determined by perceptions about both the representativeness and the impartiality of their adjudicators.[356] These reform efforts deserve a more rational understanding of party appointment and a more precise understanding of the impartiality obligations that flow from it.

354. The proliferation of international courts and tribunals has been well-documented. *See, e.g.*, Andrea Bjorklund, *Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals Is Not Working*, 59 HASTINGS L.J. 241 (2007); THE PROLIFERATION OF INTERNATIONAL COURTS AND TRIBUNALS: FINDING YOUR WAY THROUGH THE MAZE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS (Philippe Sands, Ruth Mackenzie & Yuval Shany eds., 1999).

355. *See generally* Daniel Abebe & Tom Ginsburg, *The Dejudicialization of International Politics?*, 63 INT'L STUD. Q. 521, 522 (2019) (arguing that international judicialization is not a one-way street); Tom Ginsberg, *Authoritarian International Law?*, 114 AM. J. INT'L L. 221, 225 (2020) (suggesting that a rise in international authoritarianism may result in a decline of international adjudication).

356. Chiara Giorgetti, *Between Legitimacy and Control: Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals*, 49 GEO. WASH. INT'L L. REV. 205, 206–07 (2016) ("Scrutiny has highlighted concerns related to the procedures applied to select and remove judges and arbitrators as a fundamental principle of due process that contributes to the independence and perceived legitimacy of members of any bench or arbitral tribunal.").

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