

THE REPEAT APPOINTMENT FACTOR: EXPLORING DECISION PATTERNS OF ELITE INVESTMENT ARBITRATORS

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This Article analyzes the judicial behavior of repeatedly appointed arbitrators. Focusing on repeat investment arbitrators, the research empirically controverts the conventional wisdom that arbitrators tend to render compromise awards and the perception that investment arbitrators are biased in favor of investors. The research explores the decision patterns of repeat investment arbitrators on three levels: the tribunal as a whole, the appointment status of arbitrators on the tribunal, and the individual level. By distinguishing repeat arbitrators as a group and differentiating between the roles that they play on a tribunal, this Article seeks to present a more nuanced understanding of arbitral decision making. The research shows that repeat arbitrators display no biases and no tendencies to “split the difference.” It further shows that repeat presiding arbitrators are less averse to extreme outcomes than are party-appointed arbitrators. Finally, the research shows that the arbitrators’ decision records, examined individually, do not always display a balanced decision pattern over time. This Article concludes that the arbitrators’ incentive to maintain their reputations as experienced and unbiased experts may lead them to grant an award uninfluenced by the purported need to satisfy both parties or either one of them.

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INTRODUCTION

Scholars have paid much attention to judicial decision making and behavior.¹ In exploring the theoretical aspects of judicial decisions, legal scholars and social scientists have offered diverse models that analyze and explain judicial decision making, focusing on various determining factors to assess patterns of judicial behavior.² In addition to this vast theoretical scholarship, empirical studies have explored judicial decision making across various types of judges and courts.³

In stark contrast to the abundance of scholarly writings on judicial behavior, scholars have paid limited theoretical and empirical at-

¹ See, e.g., LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* (1997); RICHARD A. POSNER, *HOW JUDGES THINK* 19–56 (2008) [hereinafter POSNER, *HOW JUDGES THINK*]; Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627 (1994); Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1260 (2005) [hereinafter Posner, *Judicial Behavior*].

² See *infra* Part II.

³ See, e.g., FRANK B. CROSS, *DECISION MAKING IN THE U.S. COURTS OF APPEALS* (2007) (providing a general sketch of the literature on empirical analyses of the Supreme Court and federal appellate courts); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998) (demonstrating empirically the conditions under which appellate court judges obey the legal doctrines set out by the Supreme Court); Michael A. Perino, *Law, Ideology, and Strategy in Judicial Decision Making: Evidence from Securities Fraud Actions*, 3 J. EMPIRICAL LEGAL STUD. 497 (2006) (examining federal district court decisions on securities fraud actions); Richard L. Revesz, *Congressional Influence on Judicial Behavior? An Empirical Examination of Challenges to Agency Action in the D.C. Circuit*, 76 N.Y.U. L. REV. 1100 (2001) (examining whether changes in the composition of the two chambers of Congress and the Presidency affect the ideological divisions on the D.C. Circuit); Rorie Spill Solberg & Stefanie A. Lindquist, *Activism, Ideology, and Federalism: Judicial Behavior in Constitutional Challenges Before the Rehnquist Court, 1986–2000*, 3 J. EMPIRICAL LEGAL STUD. 237 (2006) (evaluating the voting behavior of justices on the Rehnquist Court in cases raising constitutional challenges to federal, state, and local legislation).

tention to the decision making of private judges—namely, arbitrators. Most empirical studies, mainly in the field of employment and labor arbitration, have attempted to analyze arbitrators' judicial behavior primarily through economic spectacles. These studies have ultimately theorized that, as utility maximizers who wish to increase their chances of reappointment in future disputes, arbitrators will tend to satisfy both parties by rendering compromise awards.⁴ Although these studies have focused on the tendency to “split the difference,”⁵ they have largely overlooked whether repeat arbitrators or newcomers granted the awards in question.⁶ That is, while these studies analyze whether arbitrators tend to render compromise awards in order to

⁴ See, e.g., Robert D. Cooter, *The Objectives of Private and Public Judges*, 41 PUB. CHOICE 107, 107–08 (1983) (arguing that “income-maximizing private judges make decisions which are Pareto efficient with respect to the litigants” and that the competition between private judges compels them to consider the effects of their decisions upon the actual litigants exclusively rather than considering third parties); Karen Halverson Cross, *Arbitration as a Means of Resolving Sovereign Debt Disputes*, 17 AM. REV. INT'L ARB. 335, 366 (2006) (arguing that creditors are reluctant to submit disputes to arbitration because they risk “split the difference” awards); Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 34 (2008) (arguing that since “arbitrators are commonly chosen (directly or indirectly) and paid by the parties, giving the arbitrators an interest in rendering decisions that will maximize the chances that they will be chosen again in future disputes[,] . . . [arbitrators have] an incentive to render compromised judgments that do not badly offend either party”); Posner, *Judicial Behavior*, *supra* note 1, at 1260–61 (arguing that the demand for the services of an arbitrator who gets a reputation for favoring one side or the other will wither); Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 523 (1997) (claiming that, in collective bargaining cases, “[r]epeat business for the arbitrator is likely only if he is able to retain the future goodwill of both union and management; the desire to do so may give him an incentive (in the hallowed phrase) to ‘split the baby’”); Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 CALIF. L. REV. 1203, 1211 (2002) (arguing that “[u]nlike courts and juries, which are more likely to adhere to the law, arbitrators are more likely to split the difference”); G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 634 (1988) (“Arbitrators, unlike judges, often have an incentive to make disputants equally happy or unhappy because they are paid by the parties rather than by the state.”).

⁵ See, e.g., David E. Bloom, *Empirical Models of Arbitrator Behavior Under Conventional Arbitration*, 68 REV. ECON. & STAT. 578, 585 (1986) (finding a systematic tendency of conventional arbitrators to split the difference between parties' final offers); Henry S. Farber & Max H. Bazerman, *The General Basis of Arbitrator Behavior: An Empirical Analysis of Conventional and Final-Offer Arbitration*, 54 ECONOMETRICA 819, 822, 842 (1986) (arguing that arbitrators tend to avoid granting awards that are unacceptable to either party). For studies testing this myth on international arbitration awards, see Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do Not “Split the Baby”*: Empirical Evidence from International Business Arbitrations, 18 J. INT'L ARB. 573 (2001); *Splitting the Baby: A New AAA Study*, AM. ARBITRATION ASS'N (Mar. 9, 2007), <http://www.adr.org/sp.asp?id=32004>.

⁶ However, some studies of employment arbitration outcomes have explored the effect of disputing parties as repeat players on arbitral decision making. See, e.g., Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997) (examining employee win rates and outcomes when employers are repeat players); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998) (examining empirically whether there is a measurable repeat-player effect in employment arbitration).

increase their chances of being selected in future disputes, they have not considered whether the decisions were those of repeatedly appointed arbitrators or those of one-shot arbitrators. Further, the existing empirical studies have not focused on decision patterns of arbitrators as a function of their role as presiding arbitrators or as party-appointed arbitrators in three-member tribunals.

As I explain in this Article, a more complete evaluation of arbitral decision making requires a more nuanced understanding of the arbitrators' incentives, combined with an appreciation of interpanel dynamics. Even if all arbitrators desire to be selected for future cases, the interests that drive a first-time arbitrator appointed by a claimant might differ from the interests that drive a repeat presiding arbitrator. Thus, if the research treats all arbitrators as monotonous, calculating individuals in the elusive search for the middle ground, it may not yield the most accurate results. However, no systematic research has yet been undertaken on the decision patterns of repeat arbitrators.

Attempting to fill a gap in current empirical research, this Article offers an analytical study of the decision patterns of repeatedly appointed arbitrators. Using empirical tools, this Article systemically evaluates claims about arbitrators' judicial behavior. It offers an insight into the decision making of repeatedly appointed private judges, whom this Article calls "elite arbitrators," and explores their decision patterns as a function of their role in the arbitration tribunal (as party-appointed arbitrators or as presiding arbitrators).

As a modest step towards a comprehensive analysis of arbitrators' judicial decision-making patterns, and in line with the existing empirical research that has focused on specific groups of judges in specific courts,⁷ this Article explores arbitral decision making in investment-treaty arbitration—a highly lucrative type of arbitration that has gained much academic attention in the past decade.⁸ With the rapid growth of foreign investment,⁹ there has been a growing number of

⁷ See, e.g., Perino, *supra* note 3, at 516–21 (examining federal district court decisions on securities fraud actions); Solberg & Lindquist, *supra* note 3, at 246–59 (evaluating the voting behavior of justices on the Rehnquist Court in cases raising constitutional challenges to federal, state, and local legislation).

⁸ See generally GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 24–44 (2007).

⁹ According to the Economist Intelligence Unit, global foreign-direct-investment inflows amounted to US\$618.1 billion in 2002, US\$730.2 billion in 2004, and US\$1.3351 trillion in 2006. ECONOMIST INTELLIGENCE UNIT, WORLD INVESTMENT PROSPECTS TO 2011: FOREIGN DIRECT INVESTMENT AND THE CHALLENGE OF POLITICAL RISK 6 (2007), available at http://graphics.eiu.com/upload/WIP_2007_WEB.pdf. However, as a result of the financial and economic crisis, global foreign direct investments fell fourteen percent from US\$1.979 trillion in 2007 to US\$1.697 trillion in 2008. United Nations Conference on Trade and Development, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development*, at xix, U.N. Doc. UNCTAD/WIR/2009 (Sept. 17, 2009) [hereinafter UNCTAD, *World Investment Report*].

investment-treaty conflicts, with most claims consisting of tens and often hundreds of millions of dollars.¹⁰ As a result, investment-treaty arbitration has been on the rise.¹¹

In light of the substantial stakes involved in such arbitrations and their prominence, one might expect that there would be some systematic empirical research analyzing the decision patterns of investment arbitrators. Indeed, it stands to reason that researching the judicial behavior of those whose decisions affect billions of dollars is a worthwhile exercise. Nonetheless, there has been very little empirical research on investment-treaty arbitration,¹² and to date, no empirical work has offered a comprehensive analysis of the judicial behavior of elite investment arbitrators. This Article addresses this gap in the scholarly literature by identifying the major players in this high-profile field and evaluating their decision-making patterns.

This Article analyzes investment-arbitration awards rendered by repeatedly appointed arbitrators in arbitrations held under the auspices of the most dominant institution for the settlement of investment disputes—namely, the International Centre for the Settlement of Investment Disputes (ICSID).¹³ The reason for this method is two

¹⁰ See, e.g., Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 57–58 (2007) (finding that the average amount of damages claimed in the investment-treaty cases analyzed in her research was approximately US\$343.4 million).

¹¹ See, e.g., United Nations Conference on Trade and Development, *Latest Developments in Investor–State Dispute Settlement*, IIA MONITOR No. 1, U.N. Doc. UNCTAD/WEB/ITE/IIA/2008/3 (2008) (claiming that 2007 showed a marked increase in treaty-based investor–state arbitrations); United Nations Conference on Trade and Development, *Latest Developments in Investor–State Dispute Settlement*, IIA MONITOR No. 4, at 1, U.N. Doc. UNCTAD/WEB/ITE/IIT/2005/2 (2005) (stating that investor–state arbitrations continue to grow unabated); Franck, *supra* note 10, at 46 (claiming that the data “supports the assertion that there has been an increase in the use of investment treaty arbitration”); Barton Legum, *Investment Treaty Arbitration’s Contribution to International Commercial Arbitration*, DISP. RESOL. J., Aug./Oct. 2005, at 71, 72 (suggesting that “there seems to be a new award every week”).

¹² On current empirical research on investment arbitration, see *infra* Part III.

¹³ ICSID is an international institution established under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 1, Mar. 18, 1965, 17 U.S.T. 1270, 4 I.L.M. 524 [hereinafter ICSID Convention]. Its primary purpose is to provide dispute-resolution facilities for arbitration and conciliation of claims arising under Bilateral Investment Treaties (BITs), regional agreements such as the North American Free Trade Agreement (NAFTA), special treaty regimes such as the Energy Charter Treaty, and ad-hoc situations. See *ICSID Dispute Settlement Facilities*, ICSID, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=RightFrame&FromPage=DisputeSettlementFacilities&pageName=Disp_settl_facilities. The majority of investment-arbitration cases are brought under ICSID. See generally RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 222–25 (2008) (discussing the dominant role of ICSID and the ICSID Additional Facility in investment-treaty arbitration). Some arbitrations are brought under the United Nations Commission on International Trade Law (UNCITRAL) rules, the rules of the International Chamber of Commerce (ICC), or the rules of the Stockholm Chamber of Commerce (SCC).

fold: I aim to shed light on the judicial behavior of those elite international arbitrators who compete in an exclusive market involving high-stakes disputes. In addition, I aim to eliminate any claim concerning a possible divergence in decision patterns of arbitrators serving in tribunals held under the auspices of different institutions. Unlike other arbitration institutions—such as the International Chamber of Commerce (ICC) and the Stockholm Chamber of Commerce (SCC)—ICSID’s policy and practice is to publish arbitration awards,¹⁴ or at least to publish the relevant extracts of the legal reasoning of arbitration tribunals.¹⁵ The systematic publication of awards by ICSID enables reliable empirical research evaluating decision-making patterns of elite arbitrators.

This Article explores the decision patterns of elite arbitrators on three levels: the tribunal as a whole, the appointment status of arbitrators on the tribunal, and the individual level. On the tribunal level, this Article explores the decision patterns of all publicly available awards on the merits granted by arbitration tribunals consisting of at least one elite arbitrator. On the appointment-status level, this Article assesses the decision patterns of elite arbitrators as a function of their role in the arbitration tribunal (as presiding arbitrators or as party-nominated arbitrators). Given the unique role of presiding arbitrators in the arbitration process,¹⁶ this Article further analyzes the appointments of elite arbitrators as presiding arbitrators and the number of settlements that the disputing parties reach in cases over which these arbitrators preside. Finally, on the individual level, this Article explores the fluid decision patterns of individual elite arbitrators over time. This research presents a modest step in evaluating this intriguing issue by offering an insight into the decision making of elite arbitrators. As such, this Article contributes to the empirical literature on arbitrators’ judicial behavior in general and on investment arbitrators in particular.

Analyzing the behavior of elite investment arbitrators is not just an academic exercise. The analysis presented below may well have practical implications for both investors and states in designing their dispute-resolution strategies and behavior both before and after an investment dispute arises. Studying decision patterns of investment

¹⁴ However, ICSID “shall not publish the award without the consent of the parties.” ICSID Convention, *supra* note 13, art. 48(5).

¹⁵ See INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, ICSID CONVENTION, REGULATIONS AND RULES: RULES OF PROCEDURE FOR ARBITRATION PROCEEDINGS (ARBITRATION RULES) r. 48(4) (Jan. 2003), http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf [hereinafter ICSID ARBITRATION RULES] (“The Centre shall not publish the award without the consent of the parties. The Centre shall, however, promptly include in its publications excerpts of the legal reasoning of the Tribunal.”).

¹⁶ See *infra* Part II.

arbitrators may affect the *ex ante* choice of prospective investors whether to invest in foreign states who are parties to a bilateral investment treaty (BIT) that provides for ICSID arbitration.¹⁷ The analysis may also affect the *ex post* choice of investors whether to pursue ICSID arbitration or to opt for other channels of dispute resolution once a dispute arises. The implications of this research could be very useful, especially for BITs that offer investors the choice between various methods of dispute resolution.¹⁸ Moreover, the findings of this research could serve as guiding determinants for disputing parties in selecting an arbitrator to hear their case. Understanding the decision patterns of elite arbitrators could provide parties with insight into these arbitrators' judicial behavior and enable parties to assess the desirability of selecting elite arbitrators for the tribunal. In addition, the findings of this research may be of use to both investors and host states in assessing their propensity to succeed in arbitration and in reducing their error chances. Since investment arbitration may involve substantial legal fees and arbitration costs,¹⁹ both parties may benefit from understanding the pattern of behavior of those in whose hands they place the outcome of their disputes. These considerations are particularly important for capital-importing countries since their potential liabilities, including the cost of defending claims in investment arbitration, may be substantial and potentially affect their entire economy.²⁰

The Article proceeds as follows: Part I offers a brief introduction to investment treaties and investment-treaty arbitration. Part II analyzes the literature on the judicial behavior of arbitrators in general and on the judicial behavior of investment arbitrators in particular. The line of studies on arbitral behavior has focused on the arbitrators' purported tendency to split the difference, whereas the common narrative on investment arbitration has argued that arbitrators tend to rule in favor of investors. The discussion in this Part stresses that the

¹⁷ See *infra* Part I.

¹⁸ For example, some BITs provide alternative dispute-resolution mechanisms, such as ICSID arbitration, other institutional arbitration, ad-hoc arbitration, or court proceedings. See DOLZER & SCHREUER, *supra* note 13, at 242–43 (discussing the alternative dispute-resolution mechanisms in dispute-settlement clauses in BITs); see also *infra* Part I.

¹⁹ See Franck, *supra* note 10, at 66–70 (evaluating claims that arbitration costs are substantial and finding that “the parties made approximately equal contributions to the tribunal’s costs” and that “tribunals required investors to contribute nearly twice as much as governments to the opposing party’s legal expenses”).

²⁰ See Roberto Dañino, Sec’y-Gen. of ICSID, Opening Remarks at Symposium in Paris, France: Making the Most of International Investment Agreements: A Common Agenda (Dec. 12, 2005) (transcript available at <http://www.iatp.org/tradeobservatory/headlines.cfm?refID=78365>) (expressing concern over “the growing cost of arbitration” and suggesting that “[t]his is particularly true for the low-income countries, and for a few small companies, which cannot afford being represented by the most experienced and sophisticated law firms in the field, as claimants usually are”).

theories behind the decision-making patterns of arbitrators do not seem nuanced enough and, specifically, that they lack any consideration of the various types of arbitrations and the different roles that arbitrators play in three-member tribunals.

Part III explores the current empirical research and addresses its limitations. This Part advances the argument that the empirical studies on arbitral decision making have, so far, overlooked three elements: the relevance of repeat appointment to the analysis of arbitral behavior; the impact of the role of the arbitrators on the arbitration panel—as presiding arbitrators or as party-appointed arbitrators—on arbitral behavior; and the dichotomous coding of winners and losers in arbitration. With respect to this third element, empirical research has often coded outcomes on a binary scale, in which the claimant wins if the arbitrator awards him or her something, and the respondent wins only if the claimant receives nothing. This Article argues that a more nuanced categorization could provide more accurate information about arbitrators' decision making.

Part IV details the study's methodology. Part V provides information about the population of arbitration cases and elite arbitrators that this study explores. Part VI presents the findings of the research and analyzes its results. On the tribunal level, this research finds that elite arbitration awards do not show a tendency to split the difference or to favor investors. On the contrary, more than half of the awards dismissed all investors' claims. On the appointment-status level, this Article reveals that, contrary to what one might expect, elite presiding arbitrators dismiss all claims or accept all claims more often than elite party-appointed arbitrators and are, therefore, less averse to extreme outcomes than party-appointed arbitrators. The research also finds that elite arbitrators appointed by respondents display decision patterns that are more in line with those of elite presiding arbitrators than with those of elite arbitrators appointed by claimants. In fact, the research shows that claimant-appointed elite arbitrators are more inclined to award something to claimants than are respondent-appointed elite arbitrators or elite presiding arbitrators. On the individual level, this research finds that the elite arbitrators' decision records, examined individually on a timeline, do not always display a tendency towards a balanced decision pattern. A short conclusion follows.

I

FOREIGN INVESTMENT AND INVESTMENT ARBITRATION UNDER ICSID

Foreign investment has experienced a significant expansion in the past two decades, enabling global economic growth. With billions

of dollars already invested in countries throughout the world,²¹ the flow of foreign capital is slated to increase in the coming years.²² Accordingly, governments may take various steps to attract foreign investment and the influx of capital.²³ One major instrument affecting the investment climate around the world and enabling the rapid flow of foreign capital is the increased number of BITs for the promotion and protection of investment.²⁴

By the end of 2008, both capital-exporting and capital-importing countries had concluded more than 2,670 BITs.²⁵ Most BITs provide similar substantive provisions that create standards of protection for those who fall under the definition of “investors” within the treaty against the actions of the host state in which they invest.²⁶ Typical

²¹ See *supra* note 9.

²² Prior to the global financial crisis at the end of 2008, economists in 2007 projected that foreign direct investment flows over the next five years would increase, eventually reaching US\$1.604 trillion by 2011. ECONOMIST INTELLIGENCE UNIT, *supra* note 9. The United Nations Conference on Trade and Development’s (UNCTAD) more up-to-date report from 2009, which provides an outlook on future trends in foreign direct investment and accounts for the ongoing economic and financial crisis, expects that recovery will begin slowly in 2010 and gather momentum in 2011. See United Nations Conference on Trade and Development, *World Investment Prospects Survey 2009–2011*, at 16, U.N. Doc. UNCTAD/DIAE/IA/2009/8 (2009). UNCTAD explains that the economic crisis has severely affected foreign investment. It expects that investment flows will fall to below US\$1.2 trillion in 2009, with a slow recovery of up to US\$1.4 trillion in 2010 and US\$1.8 trillion in 2011. See UNCTAD, *World Investment Report*, *supra* note 9, at xxi.

²³ These steps may include legislative reforms that affect their policies on the costs, risks, and barriers to competition that firms face. See THE WORLD BANK, WORLD DEVELOPMENT REPORT 2005: A BETTER INVESTMENT CLIMATE FOR EVERYONE 4 (2004) (suggesting that governments can influence the investment climate through “the impact of their policies and behaviors on the costs, risks, and barriers to competition facing firms”). Governments may also affect the security of property rights, the regulation of taxation, the functioning of finance, and the regulation of other broad features of governance. *Id.* at 19; see also Susan D. Franck, *Integrating Investment Treaty Conflict and Dispute Systems Design*, 92 MINN. L. REV. 161, 171 (2007) (noting that signing investment treaties is a popular governmental tactic to promote foreign investment).

²⁴ Investment treaties are usually between two governments. By June 1, 2009, the United States had concluded forty-seven bilateral investment treaties. See *Country-Specific Lists of BITs*, UNITED NATIONS CONFERENCE ON TRADE & DEV., <http://www.unctad.org/Templates/Page.asp?intItemID=2344&lang=1> (select “United States of America” from drop-down menu) (last visited Sept. 20, 2010). Some treaties, however, involve a group of governments. See, e.g., North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 107 Stat. 2057, 32 I.L.M. 289 (1993); see also Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 2008 U. ILL. L. REV. 265, 299–300 (finding a decline in the signing of BITs in the period of 2000–2006 as compared to 1960–2000 but an increase in BITs among lower-income countries); Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 338 (2007) (suggesting that the number of investment treaties has tripled in the past two decades).

²⁵ United Nations Conference on Trade and Development, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, at 2, U.N. Doc. UNCTAD/DIAE/IA/2009/5 (Jan. 12, 2009).

²⁶ On the different substantive rights included in BITs, see, for example, Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International*

BITs offer a wide array of reciprocal undertakings by contracting countries towards investors,²⁷ such as general obligations toward investors,²⁸ general standards for expropriation,²⁹ and currency-transfer standards.³⁰ BITs also include dispute-resolution procedures that enable nonstate entities—corporate and individual investors—to seek redress against the host state for an alleged breach of its treaty obligations.

In turn, most investment treaties provide for an arbitration mechanism to resolve treaty disputes.³¹ This mechanism enables foreign investors to institute actions for arbitration against host governments for an alleged breach of the host government's substantive obligations under the BIT.³² The host government's consent to the jurisdiction of an international arbitration tribunal is granted *ex ante* in the form of an open offer in either the investment treaty or in its national law.³³

Law Through Inconsistent Decisions, 73 *FORDHAM L. REV.* 1521, 1529–33 (2005). On the issues that should be addressed in BITs, see Eli Lauterpacht, *The Drafting of Treaties for the Protection of Investment*, 3 *INT'L & COMP. L.Q.* (SUPPLEMENTARY PUBLICATION) 18 (1962).

²⁷ See, e.g., Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment (2004), <http://www.state.gov/documents/organization/117601.pdf> [hereinafter 2004 U.S. Model BIT].

²⁸ For example, BITs may require national treatment, most-favored-nation treatment, and minimum standard of treatment. See, e.g., *id.* arts. 3–5.

²⁹ See, e.g., *id.* art. 6.

³⁰ See, e.g., *id.* art. 7.

³¹ See, e.g., *id.* art. 24. On the inclusion of dispute-resolution provisions in international agreements, see generally Barbara Koremenos, *If Only Half of International Agreements Have Dispute Resolution Provisions, Which Half Needs Explaining?*, 36 *J. LEGAL STUD.* 189, 205–07 (2007) (showing that international agreements that address complex cooperation problems are more likely to include dispute-resolution provisions).

³² For example, an investor may claim that the host country did not afford him or her national treatment or that it expropriated his or her investment without compensation. See, e.g., 2004 U.S. Model BIT, *supra* note 27, arts. 3, 6.

³³ See, e.g., R. DOAK BISHOP ET AL., *FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY* 317 (2005) (“ICSID’s jurisdiction may now be secured by a unilateral statement on behalf of a contracting state party to the Washington Convention and may, also, be incorporated in BITs as well as NAFTA.”); DOLZER & SCHREUER, *supra* note 13, at 242 (“[T]he states [that are] parties to the BIT offer consent to arbitration to investors who are nationals of the other contracting party. The arbitration agreement is perfected through the acceptance of that offer by an eligible investor.”). Compare Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 *CHI. J. INT’L L.* 471, 490 (2009) (pointing out that the states’ consent to arbitration is “treaty-mandated arbitration without privity, comparable much more to a form of international administrative review than to purely commercial arbitration, in which the parties have full sovereignty over the proceeding” (footnote omitted)) and M. Sornarajah, *Power and Justice in Foreign Investment Arbitration*, *J. INT’L ARB.*, Sept. 1997, at 103, 129–30 (“Conventionally, one must regard a promise to settle disputes unilaterally made as an invitation to treat rather than as an agreement to arbitrate for no definite party was in contemplation at the time the unilateral guarantee was made.”), with Jan Paulsson, *Arbitration Without Privity*, 10 *ICSID REVIEW—FOREIGN INVESTMENT L.J.* 232, 232 (1995) (describing a “new world of arbitration” without privity arising through “investment laws, and in bilateral investment treaties”).

Most dispute-resolution provisions in BITs refer to arbitration at ICSID.³⁴ This fact accounts for the prevalence of ICSID arbitration for the resolution of investment disputes over other arbitration institutions.³⁵

ICSID has been the leading institution for the resolution of investor–state disputes over the past two decades.³⁶ It was established in 1966 as a division of the World Bank to administer disputes between a state party to the ICSID Convention and a national of another state that is also party to the Convention.³⁷ In addition, the ICSID Additional Facility administers disputes in cases where the Convention’s jurisdictional requirements are not met.³⁸

In light of the rapid growth in the number of BITs,³⁹ the number of investor–state arbitrations has escalated dramatically. While ICSID registered one or two cases each year in its first twenty years,⁴⁰ the number of registered cases has increased rapidly in the last two decades. Specifically, the current rate of growth for registered cases is about 25 per year.⁴¹ By December 2009, the total number of cases registered with ICSID amounted to 305.⁴² The growth of investment dispute under the auspices of ICSID creates the need for a thorough investigation of ICSID arbitration awards.

³⁴ See LUCY REED ET AL., GUIDE TO ICSID ARBITRATION 4 (2004) (arguing that many, if not most, BITs provide for ICSID dispute resolution); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 251 (2d ed. 2004) (stating that most dispute-settlement provisions in investment treaties point to ICSID arbitration); Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INVESTMENT & TRADE 231, 231 (2004) (pointing out that most BITs refer to ICSID); Dañino, *supra* note 20 (claiming that, by the end of 2005, there were more than 2,000 BITs, with more than 1,500 providing for ICSID as the forum for the settlement of investment disputes). The 2004 U.S. Model BIT also provides for arbitration under ICSID. See 2004 U.S. Model BIT, *supra* note 27, art. 24.

³⁵ Some BITs may provide for dispute resolution before other bodies, such as the ICC or, for ad-hoc arbitration, under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules. See, e.g., DOLZER & SCHREUER, *supra* note 13, at 225 (noting that, while “ICSID has become the main forum for the settlement of disputes between a foreign investor and the host state . . . it is not unusual that BITs leave the investor with a choice between ICSID and other types of arbitration”).

³⁶ See Matthew Wendlandt, *SGS v. Philippines and the Role of ICSID Tribunals in Investor-State Contract Disputes*, 43 TEX. INT’L L.J. 523, 531 (2008) (“[W]ith regard to investor-state disputes, ICSID is the premier arbitration forum.”).

³⁷ *Id.* at 523; see ICSID Convention, *supra* note 13, art. 25(1).

³⁸ See INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, ICSID ADDITIONAL FACILITY RULES 5 (Apr. 2006), http://icsid.worldbank.org/ICSID/StaticFiles/facility/AFR_English-final.pdf.

³⁹ See *supra* note 25 and accompanying text.

⁴⁰ See INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, THE ICSID CASELOAD—STATISTICS (Issue 2010-1), 7, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English>.

⁴¹ *Id.*

⁴² *Id.*

II

THE JUDICIAL BEHAVIOR OF ARBITRATORS

The judicial behavior of public judges has been the subject of much scholarly research. Scholars have proposed various theories and models that explain judicial decision making,⁴³ including the legal model,⁴⁴ the attitudinal model,⁴⁵ the strategic model,⁴⁶ and the economic model.⁴⁷ According to the economic model, every judge has a utility function that he or she tries to maximize through his or her behavior.⁴⁸ The economic approach to judicial decision making has offered a typology of various public judges and, by elucidating the specific characteristics of each and identifying their respective incen-

⁴³ For a description of the various theories, see, for example, POSNER, HOW JUDGES THINK, *supra* note 1, at 19–56 (mapping the positive theories developed for explaining judicial behavior); Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819, 832–49 (discussing empirical legal scholarship as a method for understanding judicial behavior).

⁴⁴ The legal model suggests that judges make decisions based on a reasoned analysis of sources of legal authority and free from ideological preferences. See, e.g., JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 84–85 (2d ed. 1921); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 544 (1988).

⁴⁵ The attitudinal model hypothesizes that judges' ideological and political preferences explain their judicial decisions. See, e.g., POSNER, HOW JUDGES THINK, *supra* note 1, at 19–29; JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* REVISITED 86–97 (2002); Tracey E. George, *Developing a Positive Theory of Decision-making on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1678 (1998); Andrew D. Martin et al., *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1283–96 (2005); Harold J. Spaeth, *The Attitudinal Model*, in CONTEMPLATING COURTS 296, 296–315 (Lee Epstein ed., 1995).

⁴⁶ The strategic model posits that judges are strategic actors who are dependent on choices of other actors and influenced by institutional settings. See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 9–18 (1998); Stephen J. Choi & G. Mitu Gulati, *Trading Votes for Reasoning: Covering in Judicial Opinions*, 81 S. CAL. L. REV. 735 (2008); Lee Epstein & Thomas G. Walker, *The Role of the Supreme Court in American Society: Playing the Reconstruction Game*, in CONTEMPLATING COURTS, *supra* note 45, at 315, 315–47; Forrest Maltzman et al., *Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 43, 43–65 (Cornell W. Clayton & Howard Gillman eds., 1999).

⁴⁷ The economic model considers judges as rational utility-maximizers. See, e.g., Cooter, *supra* note 4, at 129; Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469 (1998); Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129 (1980); Posner, *Judicial Behavior*, *supra* note 1; Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993) [hereinafter Posner, *What Do Judges Maximize*]; Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000).

⁴⁸ See, e.g., POSNER, HOW JUDGES THINK, *supra* note 1, at 36 (explaining that the elements of the judicial utility-function include “money income, leisure, power, prestige, reputation, self-respect, the intrinsic pleasure (challenge, stimulation) of the work, and the other satisfactions that people seek in a job”); Posner, *What Do Judges Maximize*, *supra* note 47, at 2. But see Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 946 (1995) (arguing that formal attributes of the judicial system are critical to understanding judicial incentives).

tives and constraints, has yielded a projection of how they would perform in rendering their decisions.⁴⁹

In contrast to the wide academic interest in the judicial behavior of public judges, arbitral decision making has received little attention.⁵⁰ What little scholarly research exists explores judicial behavior of arbitrators primarily through the economic lens.⁵¹ Further, in contrast to the economic approach to the behavior of public judges, the economic approach to arbitral behavior has considered arbitrators as a single class of private judges. That is, while the behavior of public judges has been thoroughly analyzed by accounting for the specific characteristics of each type of judge,⁵² arbitrators have been analyzed within a single, overarching category.⁵³ This Article takes the view that such uniform characterization of arbitrators is flawed and that arbitrators cannot be treated within one generic class.⁵⁴

The economic approach to arbitral decision making posits that arbitrators, like judges, are utility maximizers.⁵⁵ However, due to the particular characteristics of the arbitration process, the incentives and constraints of arbitrators differ from those of public judges. While judges are usually randomly assigned to hear cases and receive a secure income regardless of these assignments and irrespective of the number of cases they hear, in arbitration, parties generally select arbitrators, and arbitrators receive compensation from these parties only after their appointment.⁵⁶ Furthermore, unlike public judges, arbitrators often practice as private attorneys who counsel clients in matters subject to arbitration.⁵⁷ Thus, unlike judges who remain shielded

⁴⁹ See Posner, *Judicial Behavior*, *supra* note 1 (presenting a framework for analyzing the judicial behavior of private judges, judges in career judiciaries, elected judges, U.S. federal district judges, federal appellate judges, and Supreme Court Justices, offering predictions of likely judicial behavior at each level and comparing those predictions with observed judicial behavior).

⁵⁰ See, e.g., Christopher R. Drahozal, *Behavioral Analysis of Arbitral Decision Making*, in *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH* 319, 319–39 (Christopher R. Drahozal & Richard W. Naimark eds., 2005) (analyzing heuristics and cognitive biases in decision making by juries and judges and applying this analysis in arbitration); Posner, *Judicial Behavior*, *supra* note 1, at 1260–62 (analyzing arbitral behavior according to arbitrators' incentives and constraints).

⁵¹ See Posner, *Judicial Behavior*, *supra* note 1, at 1260–62 (analyzing arbitral behavior as part of a broader economic approach to judicial behavior and performance).

⁵² *Id.* at 1262–78 (separately analyzing the judicial behavior of career judges, elected judges, U.S. federal district judges, federal appellate judges, and Supreme Court Justices).

⁵³ *Id.* at 1260–62 (analyzing all arbitral behavior under the classification “private judges”).

⁵⁴ The results of the research that I present in this Article confirm this position.

⁵⁵ See, e.g., Posner, *Judicial Behavior*, *supra* note 1, at 1260–61.

⁵⁶ Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549, 559 (2003); Susan D. Franck, *The Role of International Arbitrators*, 12 ILSA J. INT'L & COMP. L. 499, 509 (2006).

⁵⁷ See, e.g., YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE* 21–22 (1996).

from market pressures, arbitrators compete in the arbitration market for business just like any other service provider.⁵⁸ As a consequence, judges and arbitrators may behave differently and display different decision-making patterns.

The opportunity for the disputing parties to select and appoint the members of their arbitral tribunal is one of the most attractive aspects of arbitration.⁵⁹ In fact, the quality of arbitration depends to a large extent on the quality of the arbitrator.⁶⁰ The selection of arbitrators is therefore an important, if not critical, element of any arbitration. This observation is especially true in large international disputes where hundreds of millions of dollars are at stake. When a tribunal consists of a sole arbitrator, the parties or an arbitral institution typically appoints that arbitrator.⁶¹ In situations where an arbitral tribunal consists of a panel of three arbitrators, most commonly, each party appoints one arbitrator,⁶² and either the parties, the two appointed arbitrators, an arbitral institution, or an appointing authority selects the presiding arbitrator.⁶³

Conventional wisdom regarding arbitral decision making holds that arbitrators, as private actors, know that their income generally depends on their selection by parties. Market information can affect their selection and reselection to arbitration tribunals and hence can impact their judicial behavior.⁶⁴ Since arbitrators act in a competitive

⁵⁸ See Cooter, *supra* note 4, at 107 (“[P]rivate judges have to attract business, so they are exposed to the same market pressures as anyone who sells a service.”).

⁵⁹ Christian Bühring-Uhle, *A Survey on Arbitration and Settlement in International Business Disputes: Advantages of Arbitration*, in *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH*, *supra* note 50, at 25, 33 (presenting results of a survey of participants in international commercial arbitration on the reasons to choose arbitration over litigation in which the most frequently cited reason was “the possibility for the parties to select the members of the tribunal themselves” (italization omitted)).

⁶⁰ Robert B. Von Mehren, *Concluding Remarks*, in *THE ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN: THE STATUS OF THE ARBITRATOR* 126, 129 (Spec. Supplement 1995) (noting that one commentator has said that “[t]he arbitrator is the *sine qua non* of the arbitral process” and that “[t]he process cannot rise above the quality of the arbitrator”).

⁶¹ Arbitration rules provide for the procedure for the appointment of arbitrators. See, e.g., ICSID Convention, *supra* note 13, arts. 37–40; UNCITRAL Arbitration Rules, G.A. Res. 31/98, arts. 6–8, U.N. Doc. A/RES/31/98 (Dec. 15, 1976); ARBITRATION INST. OF THE STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION RULES art. 13(1) (2010) [hereinafter SCC ARBITRATION RULES]; INT’L CHAMBER OF COMMERCE, RULES OF ARBITRATION arts. 8–9 (1998) [hereinafter ICC ARBITRATION RULES].

⁶² Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 *TEX. INT’L L.J.* 59, 65 (1995) (“[T]he 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.”).

⁶³ See, e.g., ICSID Convention, *supra* note 13, arts. 37–38; UNCITRAL Arbitration Rules, *supra* note 61, arts. 7–8; SCC ARBITRATION RULES, *supra* note 61, art. 13; ICC ARBITRATION RULES, *supra* note 61.

⁶⁴ Franck, *supra* note 56, at 516; Carole Silver, *Models of Quality for Third Parties in Alternative Dispute Resolution*, 12 *OHIO ST. J. ON DISP. RESOL.* 37, 83 (1996).

market, these market forces may lead them to behave in a way that increases the parties' satisfaction in the arbitration process.⁶⁵ Thus, arbitrators may tend to grant decisions that will keep both parties satisfied so as to increase their probability of being reappointed in future cases.⁶⁶ One such strategy is for arbitrators to "split the difference"—that is, to render compromise awards that give each party a partial victory.⁶⁷

According to this approach, the concepts of disputants' risk and loss aversion can explain the tendency by arbitrators to render compromise awards.⁶⁸ To satisfy both parties, arbitrators will tend to avoid

⁶⁵ The literature on procedural justice suggests that one of the goals of the process is the opportunity for parties to participate in the proceedings. A process before an impartial decision maker will increase the parties' satisfaction with the outcome. See, e.g., E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* *passim* (1988) (discussing empirical studies of procedural justice); JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 94 (1975) (arguing that the disputants' satisfaction with the outcome of the dispute is affected by their satisfaction with the dispute-resolution process); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 107–08 (1990) (claiming that people are more likely to obey the law when they are confident that the decision-making procedures are fair); Brower & Schill, *supra* note 33, at 494 (arguing that the fact that the parties can participate in the appointment of arbitrators ensures the legitimacy of investor–state arbitration); Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 273–305 (2004) (discussing the value of participation). But see Robert G. Bone, *Agreeing to Fair Process: The Problem With Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 504–18 (2003) (criticizing the various theories of procedural fairness).

⁶⁶ Farber & Bazerman, *supra* note 5, at 822 (“[O]ne possible motivation for arbitrators is that they attempt to make awards that maximize the probability they will be hired in subsequent cases . . .”).

⁶⁷ See, e.g., POSNER, *HOW JUDGES THINK*, *supra* note 1, at 127–29; Bloom, *supra* note 5, at 578 (discussing the belief that “conventional arbitration awards systematically tend to be compromises between the parties’ final positions” and noting that “it might be the case that arbitrators often make decisions by reaching a mechanical compromise between the parties’ final offers, without paying much attention to the merits of the case”); Dammann & Hansmann, *supra* note 4, at 34 (“[A]rbitrators are commonly chosen (directly or indirectly) and paid by the parties, giving the arbitrators an interest in rendering decisions that will maximize the chances that they will be chosen again in future disputes. The result is an incentive to render compromised judgments that do not badly offend either party.”); John V. O’Hara, Comment, *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. The best method of accomplishing this is compromise; thus, in the typical arbitration, neither side is as likely to prevail as in the ‘winner-take-all’ style of adjudication.” (footnote omitted)); Posner, *Judicial Behavior*, *supra* note 1, at 1261 (“We can expect, therefore, a tendency for arbitrators to ‘split the difference’ in their awards, that is, to try to give each side a partial victory (and therefore partial defeat).”); Richard A. Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1594 (2005) (stating that “arbitrators are believed to tend toward middle-of-the-road results (as otherwise they are unlikely to be selected for future arbitrations)”).

⁶⁸ See Rau, *supra* note 4, at 523 (arguing that arbitrator self-interest has “long been familiar in collective bargaining cases” as “one explanation for the apparently common practice of compromise awards” since “[r]epeat business for the arbitrator is likely only if he is able to retain the future goodwill of both union and management”); Cass R. Sunstein,

rendering “all or nothing” decisions and will instead prefer to grant awards that are closer to the “middle ground” of the parties’ contentions.⁶⁹ Since word-of-mouth information may influence the selection of arbitrators, arbitrators who develop a reputation for favoring one party or for granting extreme decisions will have a lower probability of being selected in future cases.⁷⁰

Academics have further linked compromise awards to cognitive biases,⁷¹ such as anchoring⁷² and extremeness aversion.⁷³ It has been

Behavioral Law and Economics: A Progress Report, 1 AM. L. & ECON. REV. 115, 131–35 (1999) (analyzing loss aversion and its implications).

⁶⁹ Posner, *Judicial Behavior*, *supra* note 1, at 1261.

⁷⁰ See DEZALAY & GARTH, *supra* note 57, at 18–32 (discussing the importance of building and exchanging symbolic capital to become a successful arbitrator).

⁷¹ See generally HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982) (presenting an overview of research regarding heuristics and biases used in everyday judgment); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (discussing how the assumptions of neo-classical economics that underlie economic analysis of law are flawed because they fail to fully consider cognitive and motivational problems); Sunstein, *supra* note 68, at 135 (pointing out that cognitive biases can lead to inaccurate perceptions of facts); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974) (describing three heuristics used to assess probabilities and to predict values, discussing the biases these heuristics may lead to, and presenting theoretical and as-applied implications of such biases). However, some scholars have argued that market forces have a corrective effect on heuristics and cognitive biases. See Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1494 (1999) (“The literature on [cognitive] illusions provides some basis for thinking that market settings tend to dispel or at least reduce them . . .”). But see Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROBS. 105, 126–28 (2004) (describing the different views on the effect of market pressures on cognitive biases and concluding that the available empirical studies on market incentives and arbitral decision making are inconclusive).

⁷² “Anchoring” means people’s tendency, when estimating a numerical amount, to use any number they begin with as an “anchor” or base rate that influences their final estimate. See Daniel T. Gilbert, *Inferential Correction*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 71, at 167 (pointing out that “anchoring . . . describes the process by which the human mind does virtually all of its inferential work”); Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 OHIO ST. J. ON DISP. RESOL. 597, 598 (2006) (conducting a meta-analysis of studies that have tested the impact of an opening figure in a negotiation experiment and finding that anchoring does have a powerful impact on negotiation outcomes); Tversky & Kahneman, *supra* note 71, at 1127–28 (describing the three basic heuristics as availability, representativeness, and anchoring). On anchoring in arbitration, see Bloom, *supra* note 5, at 578 (arguing that conventional arbitrators have a systematic tendency to mechanically compromise between the parties’ final offers with little additional systematic reference to the facts of the case). Some experiments have found an anchoring effect between the amount claimed and the amount awarded in mock juries. See, e.g., John Malouff & Nicola S. Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J. SOC. PSYCHOL. 491, 495 (1989) (finding that jurors awarded more money when the parties claimed more money); see also Verlin B. Hinsz & Kristin E. Indahl, *Assimilation to Anchors for Damage Awards in a Mock Civil Trial*, 25 J. APPLIED SOC. PSYCHOL. 991, 1016 (1995) (finding that awarded damages tend to be close to the damage limit); Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 LAW & HUM. BEHAV. 353, 361–66 (1999)

argued that the positions taken by the parties may serve as an anchor for the award rendered by the arbitrator.⁷⁴ Extremeness aversion refers to a decision maker's aversion to being associated with granting extreme decisions.⁷⁵ Thus, to avoid such reputations, arbitrators may tend to render compromise awards.

While some literature on arbitral awards has focused on the arbitrators' purported tendency to split the difference, another line of studies argues that investment-treaty arbitrators tend to rule in favor of investors.⁷⁶ This tendency has been linked to various factors. Some have claimed that, because ICSID arbitrators are predominantly nationals of capital-exporting countries, they may have a tendency to rule in favor of investors.⁷⁷ Others observe that this tendency is linked to the unique characteristics of investment-treaty arbitration.⁷⁸ Specifically, unlike commercial arbitrations where any of the parties is a po-

(finding that, as the level of the cap increased, the size and variability of punitive damage awards increased as well).

⁷³ See, e.g., Mark Kelman et al., *Context-Dependence in Legal Decision Making*, 25 J. LEGAL STUD. 287, 287–318 (1996) (finding that, in the legal decision-making context, a decision maker will evaluate the same option more favorably when it is intermediate rather than extreme in the offered set (compromise) and when it is paired with a similar option that is clearly inferior to it (contrast)); Sunstein, *supra* note 68, at 135 (“Extremeness aversion gives rise to compromise effects.” (italics omitted)).

⁷⁴ Bruce L. Benson, *Arbitration*, in 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 159, 176 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (stating that parties have incentives to misrepresent or overrepresent their positions because they expect arbitrators to “split the difference between their extreme demands”).

⁷⁵ See Sunstein, *supra* note 68, at 136 (discussing extremeness aversion and arguing that lawyers should think about presenting alternatives to the decision maker, because, all other things being equal, “juries and judges may well try to choose a compromise solution”).

⁷⁶ Nathalie Bernasconi-Osterwalder, *Who Wins and Who Loses in Investment Arbitration? Are Investors and Host States on a Level Playing Field?*, 6 J. WORLD INVESTMENT & TRADE 69, 69 (2005) (noting that, in one sense, “host States cannot be winners in investment arbitration” because host states have no rights, only obligations, under BITs and regional investment treaties); Dañino, *supra* note 20 (“As the number of cases has grown, some have developed a perception that there is not a level playing field between investors and States.”). *But see* Sandra L. Caruba, *Resolving International Investment Disputes in a Globalised World*, 13 N.Z. BUS. L.Q. 128, 150–51 (2007) (claiming that, while in the past claimants had a high degree of success in ICSID arbitration, “as the number of ICSID cases has increased, the awards in favour of respondents are also becoming more common”); William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 SAN DIEGO L. REV. 629, 658 (2009) (arguing that neither evidence nor logic supports the existence of arbitrators' incentives to rule in favor of investors).

⁷⁷ Dañino, *supra* note 20 (noting that “[a]nother concern which has been expressed by a few is that ICSID arbitrators are predominantly nationals from developed countries, the implication being that they may be more favorably inclined towards investors”). Franck has recently rebutted this claim with empirical research evaluating whether there is a statistically significant relationship between the development status of respondent states, the development status of presiding arbitrators, and the outcome of the dispute. *See* Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 473 (2009) (finding no statistically significant relationship).

⁷⁸ VAN HARTEN, *supra* note 8, at 168–69.

tential claimant, the process of investors filing claims and host states defending those claims characterizes investment-treaty arbitration.⁷⁹ One commentator argues that this special feature of investment-treaty arbitration makes arbitrators dependent on prospective claimants who initiate the arbitration process.⁸⁰ Thus, because arbitration proceedings will be activated only if claimants file claims, arbitrators, who know that their selection depends on cases being filed with ICSID, may have an inclination to favor investors.⁸¹

In addition, other scholars have expressed some concern regarding the method by which ICSID officials select arbitrators. While ICSID is an autonomous institution,⁸² some have questioned its independence.⁸³ For example, a special feature of ICSID arbitration is the Panel of Arbitrators.⁸⁴ Contracting states⁸⁵ and the Chairman of the ICSID Administrative Council⁸⁶ designate the persons who comprise the Panel. When the disputing parties fail to agree or fail to appoint an arbitrator to a tribunal, the Chairman has the authority to make the appointment.⁸⁷ In such cases, the Chairman is restricted to appointing arbitrators from the Panel.⁸⁸ Since the President of the World Bank is the *ex officio* Chairman of the ICSID Administrative Council,⁸⁹ and thus arguably owes his or her position to major capital-exporting states, the Chairman may be inclined to appoint arbitrators who share these states' ideologies.⁹⁰ Moreover, arbitrators who wish

⁷⁹ *Id.* at 3–6 (describing the system of investment-treaty arbitration).

⁸⁰ *Id.* at 5.

⁸¹ *Id.* at 172 (“The more investors see the system delivering benefits for them, the more claims will be brought, and the more contracts will be available for arbitrators.”).

⁸² *About ICSID*, INT’L CTR. FOR SETTLEMENT OF INV. DISPUTES, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home (last visited Sep. 20, 2010) (“ICSID is an autonomous international institution established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States . . .”).

⁸³ VAN HARTEN, *supra* note 8, at 169–70 (arguing that both the Chairman of the ICSID Administrative Council and the ICSID Secretary-General, both of whom are responsible for appointing ICSID arbitrators, owe their “position to the major capital-exporting states”); SARAH ANDERSON & SARA GRUSKY, CHALLENGING CORPORATE INVESTOR RULE: HOW THE WORLD BANK’S INVESTMENT COURT, FREE TRADE AGREEMENTS, AND BILATERAL INVESTMENT TREATIES HAVE UNLEASHED A NEW ERA OF CORPORATE POWER AND WHAT TO DO ABOUT IT 5 (2007), http://documents.foodandwaterwatch.org/ICSID_web.pdf (“ICSID is not an independent organization.”).

⁸⁴ ICSID Convention, *supra* note 13, art. 3 (“The Centre . . . shall maintain a Panel of Conciliators and a Panel of Arbitrators.”).

⁸⁵ Each contracting state may designate four persons to the panel. *Id.* art. 13(1). In this context, see Dañino *supra* note 20 (stressing the importance of the states’ responsibility “to ensure that only the best qualified and most experienced professionals are included in their lists”).

⁸⁶ ICSID Convention, *supra* note 13, art. 13(2).

⁸⁷ *Id.* art. 38.

⁸⁸ *Id.* art. 40(1).

⁸⁹ *Id.* art. 5.

⁹⁰ See VAN HARTEN, *supra* note 8, at 169–71.

to be selected by the Chairman in future disputes may behave in ways that safeguard their reputation within the institution.⁹¹ However, it is necessary to note that the Chairman may only exercise discretion in appointing an arbitrator when called upon to make such an appointment.⁹²

Another major concern about arbitrators' behavior is the lack of division in their roles as arbitrators in a given arbitration and as counsel in a different arbitration.⁹³ Because many elite arbitrators have established prestigious professional careers as practicing attorneys, it is not uncommon for them to serve as an arbitrator in one case while representing a disputing party as counsel in another case.⁹⁴ This mixing of roles may affect these individuals' decision-making patterns.⁹⁵

As convincing as these theories may seem, one could argue that, in the international-arbitration market place, parties appoint arbitrators because of their professional credibility, standing, and reputation.⁹⁶ While arbitrators who provide private adjudicative services might, in theory, display a proinvestor bias or project some image of fairness by choosing, strategically, to split the difference, they simply may also wish to fulfill the parties' expectations for a just and accurate decision.⁹⁷ According to this line of thought, the arbitrators' professional reputation could provide a key incentive for them to remain as impartial and fair as possible. It, thus, could be crucial not only to

⁹¹ *Id.* at 169 (“Lacking tenure, arbitrators who wish to win future appointments to tribunals have an interest in safeguarding their reputation among those who select arbitrators at the designated organizations.”); Sornarajah, *supra* note 33, at 104 (claiming that, in investment arbitration, “there has been a selective generation of principles that are geared to ensure the protection of the ideological commitment to globalization and the maintenance of the power of global capital and the States generating them to the detriment of the developing States of the world”).

⁹² ICSID Convention, *supra* note 13, art. 38.

⁹³ Dañino, *supra* note 20 (noting, in the context of expressing concerns about efficiency, that there are a relatively small number of arbitrators and that some arbitrators may be further pressed for time because they also provide services as counsel or experts in other cases).

⁹⁴ See, e.g., DEZALAY & GARTH, *supra* note 57, at 22–23 (discussing the career pattern of William D. Rogers, a partner at the Washington, D.C. law firm Arnold & Porter, as an example of one of the various paths to becoming and continuing to work as a successful arbitrator); see also REED ET AL., *supra* note 34, at 80 (noting that “in practice, most ICSID arbitrators are international lawyers”).

⁹⁵ See, e.g., Mahzarin R. Banaji et al., *How (Un)Ethical Are You?*, HARV. BUS. REV., Dec. 2003, at 56 (discussing how conflicts of interest can unintentionally and unconsciously skew decision making).

⁹⁶ Brower & Schill, *supra* note 33, at 492 (arguing that the crucial factor in appointing an arbitrator is the arbitrator’s “reputation for impartial and independent judgment”); see also DEZALAY & GARTH, *supra* note 57, at 18–32 (discussing the importance of symbolic capital for arbitrators).

⁹⁷ Drahozal & Hylton, *supra* note 56, at 559–60 (“[A]rbitrators compete for business and have an incentive to resolve disputes so as to enhance the governance benefits net of dispute resolution costs to the contracting parties.”).

their future selection as arbitrators but also to other spheres of their professional careers, whether as private counsel or as academics. In order to promote their reputation, arbitrators may choose not to render compromise awards but may choose to increase accuracy and counter any real or perceived biases. This observation is especially true for arbitrators who are repeat players in the arbitration market and for those arbitrators whose reputation as credible and independent decision makers is a key characteristic for their selection.⁹⁸

If the theories behind the decision-making patterns of international arbitrators do not seem nuanced enough already, a comprehensive analysis of these patterns must further consider the effect of interpanel dynamics and of the different roles played by arbitrators on panel arbitration tribunals. Indeed, in high-stakes international arbitrations, the tribunal is often composed of three arbitrators.⁹⁹ Scholarship on judicial decision making suggests that public judges sitting on panels may award compromise decisions to accommodate the varying ideologies of the members of the panel;¹⁰⁰ in fact, most judges do not like to dissent because dissent frays collegiality.¹⁰¹ Dissent aversion may also occur in an arbitration tribunal. Because an arbitration tribunal is a cooperative enterprise, an arbitrator disturbing the collegiality among the tribunal's members may affect that arbitrator's reputation and selection in future disputes.

⁹⁸ Franck, *supra* note 56, at 516–17.

⁹⁹ See, e.g., ICSID Convention, *supra* note 13, art. 37(2)(b) (setting the default number of arbitrators at three).

¹⁰⁰ See, e.g., Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997) (arguing that the party affiliation of other judges sitting on the panel significantly influences a judge's vote). On collegiality among judges and how that affects the decision-making process, see generally Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1335 (1998) (arguing that collegiality among appellate judges facilitates judicial decision making); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1640 (2003) [hereinafter Edwards, *Effects of Collegiality*] (arguing that collegiality is the process by which judges achieve greater value); Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 858 (suggesting that collegiality assists with principled decision making for judges in difficult cases).

¹⁰¹ See POSNER, HOW JUDGES THINK, *supra* note 1, at 32 (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* Edwards, *Effects of Collegiality*, *supra* note 100, at 1656 (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”).

Three-member arbitration panels exhibit another unique interpanel dynamic that stems from the varying roles that the arbitrators play on the panel. The party-appointed arbitrator is often selected due to his or her perceived predisposition to a party and its legal position. This arbitrator plays an especially important role, since he or she often serves as a translator of the legal culture of the appointing party.¹⁰² Indeed, by being able to select this arbitrator, the disputing parties obtain a sense of confidence in the arbitration tribunal,¹⁰³ for the arbitrator ensures that the case of the appointing party will receive the appropriate attention and that other members of the tribunal will understand that party's case.¹⁰⁴ Nevertheless, the party-appointed arbitrator is still expected to act independently and impartially.¹⁰⁵ Thus, while the party-appointed arbitrator understands well that a party selected him or her with a desire that he or she render a decision favorable to that party's claim, the arbitrator ultimately acts under the duties of integrity, independence, and impartiality.

The presiding arbitrator on the tribunal is appointed either by the parties, by the two party-appointed arbitrators, or by an arbitral institution and plays a crucial role in interpanel dynamics as he or she tries to encourage collegiality and build a consensus.¹⁰⁶ To avoid the fragmentation of the tribunal that dissenting opinions cause, the presiding arbitrator may try to persuade the party-appointed arbitrators to render an award that reflects some compromise between their differing opinions.¹⁰⁷

¹⁰² Lowenfeld, *supra* note 62, at 65 (claiming that, in international arbitrations, a party-appointed arbitrator serves as a translator of legal culture); see also Seth H. Lieberman, Note, *Something's Rotten in the State of Party-Appointed Arbitration: Healing ADR's Black Eye That Is "Nonneutral Neutrals,"* 5 CARDOZO J. CONFLICT RESOL. 215, 222 (2004) (arguing that an important feature of international (as opposed to domestic) arbitration is that "the party-appointed arbitrator can often serve as a translator for his nominating party").

¹⁰³ Doak Bishop & Lucy Reed, *Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration*, 14 ARB. INT'L 395, 395 (1998) ("[E]ach side's selection of 'its' arbitrator is perhaps the single most determinative step in the arbitration."); Lieberman, *supra* note 102, at 222 (stating that the party-appointed arbitrator can reinforce the counsel's confidence in the process).

¹⁰⁴ Lowenfeld, *supra* note 62, at 65 (pointing out that one of the functions of party-appointed arbitrators is to give confidence to the appointing party and "promising (if not assuring) a fair hearing and a considered decision"); Rau, *supra* note 4, at 498 (stating that party-appointed arbitrators "can provide assurance [to the panel chairman] that he fully understands the issues and background of the case, the contentions of each party, and the possible implications of the award before it is issued").

¹⁰⁵ M. Scott Donahey, *The Independence and Neutrality of Arbitrators*, J. INT'L ARB., Dec. 1992, at 31, 39.

¹⁰⁶ See Rau, *supra* note 4, at 501 (discussing how the "neutral" chairman must work to accommodate the positions of the parties' surrogates).

¹⁰⁷ Hans Smit, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice*, by Pieter Sanders, 11 AM. REV. INT'L ARB. 429, 429-30 (2000) (book review) (arguing that the chair of the tribunal may realize that the appointment of the party-appointed arbitrator was motivated by the desire that his or her selection would contribute to a favorable result for the ap-

In the market for arbitration services, arbitrators sitting on panels may adopt different behavioral patterns depending on their status in this market. Arbitrators who form a part of a close group of elite arbitrators who are repeatedly appointed to serve on arbitration tribunals may develop interpersonal dynamics that lead them to act collegially. The more these arbitrators serve on arbitration tribunals and the more intermingled they are in arbitration panels, the more one may expect collegiality between them. One-shot arbitrators, however, may display different behavioral patterns. The larger the pool of newcomers, the harder it is for these newcomers to be selected. Once these newcomers are appointed, market pressure may lead them to behave strategically by accentuating their uniqueness. In order to attract the attention of prospective disputing parties, they may try to stand out from the other members of the tribunal by rendering dissenting opinions. One could argue that the greater the market competition between newcomers, the greater the likelihood of variance in the opinions of arbitration panels. In general, this argument suggests that repeatedly appointed arbitrators are less likely to render dissenting opinions than newcomers.

While the number of arbitrators serving in international arbitrations has grown in the past decades,¹⁰⁸ some commentators have claimed that there is no real competitive and open arbitration market for arbitration services, thus making it more difficult for newcomers to enter the market.¹⁰⁹ Some have argued that an exclusive club of arbitrators dominates the international arbitration market.¹¹⁰ This purported group has a measure of influence over the appointment of other arbitrators, mainly presiding arbitrators.¹¹¹ Party-appointed arbitrators who are pegged to select the presiding arbitrator may tend to share the pie with other members of the club while expecting to be

pointing party and that it “may lead to an award that represents a compromise rather than a straightforward decision on the merits”). Scholars have put forth a similar argument with respect to chief judges. See Virginia A. Hettinger et al., *The Role and Impact of Chief Judges on the United States Courts of Appeals*, 24 JUST. SYS. J. 91, 100 (2003) (claiming that a chief judge can encourage collegiality among the members of his circuit).

¹⁰⁸ ICSID, in particular, has noted its efforts to enlarge and diversify the pool of arbitrators. See Dañino, *supra* note 20 (noting that “whenever possible we have also tried to enlarge and diversify the pool of arbitrators who are normally involved in our cases”).

¹⁰⁹ DEZALAY & GARTH, *supra* note 57, at 34–41 (claiming that the “key source of conflict” is between the influx of newcomers and the older arbitrators in international arbitration practice); Alan Scott Rau, “*The Arbitrability Question Itself*,” 10 AM. REV. INT’L ARB. 287, 365 n.218 (1999) (doubting the existence of strong competitive forces in the arbitration market); Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT’L L. REV. 957, 968 (2005) (“[T]he market for international arbitrators operates as a relatively closed system that is difficult for newcomers to penetrate.”).

¹¹⁰ Rogers, *supra* note 109, at 967 (stating that “the field continues to be dominated by an elite group of insiders who are variously, though not without objection, referred to as a ‘cartel,’ a ‘club,’ or a ‘mafia’” (footnote omitted)).

¹¹¹ See, e.g., ICSID Convention, *supra* note 13, art. 37(2)(b).

appointed by the selected arbitrator in future disputes.¹¹² Thus, interpersonal dynamics between the club members may influence arbitrators' behavior.¹¹³

III

EXISTING EMPIRICAL RESEARCH

The emergence of investment-treaty disputes has generated growing academic interest in investment-treaty arbitrations.¹¹⁴ However, empirical research remains quite limited.¹¹⁵

Specifically, existing empirical studies mainly offer blunt descriptive data on investment-treaty arbitration, such as the number of arbitration cases,¹¹⁶ the number of arbitrators,¹¹⁷ their nationality¹¹⁸ and gender,¹¹⁹ the nationality of the parties,¹²⁰ the amounts awarded,¹²¹ the costs of arbitration,¹²² and the use of precedents in arbitration.¹²³ In addition, one recent research project¹²⁴ explores whether there is a statistically significant¹²⁵ relationship between the development sta-

¹¹² DEZALAY & GARTH, *supra* note 57, at 50 (quoting one international-arbitration player: "Now why is it a mafia? It's a mafia because people appoint one another. You always appoint your friends—people you know;") quoting another international arbitrator: "They nominate one another. And sometimes you're counsel and sometimes you're arbitrator").

¹¹³ *Id.* at 49:

The principal players therefore acquire a great familiarity with each other, and they develop also, we suspect, a certain connivance with respect to the role held by the adversary of the moment. The extraordinary flexibility of this rotation of roles 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.

(footnote omitted).

¹¹⁴ See generally DOLZER & SCHREUER, *supra* note 13 (discussing how rulings of international investment tribunals shape, in part, international investment law); VAN HARTEN, *supra* note 8 (suggesting that some of the most important substantive developments in international law are taking place in arbitral tribunals adjudicating BIT claims).

¹¹⁵ Susan D. Franck, *Empiricism and International Law: Insights for Investment Treaty Dispute Resolution*, 48 VA. J. INT'L L. 767, 792–93 (2008) (suggesting that there is little empirical analysis of investment-treaty conflict).

¹¹⁶ Franck, *supra* note 10, at 44–47.

¹¹⁷ *Id.* at 77.

¹¹⁸ Franck, *supra* note 10, at 77–81; Noah Rubins et al., *ICSID Arbitrators: Is There a Club and Who Gets Invited?*, 1 GLOBAL ARB. REV. 31 (2006).

¹¹⁹ Franck, *supra* note 10, at 81–83.

¹²⁰ *Id.* at 26–33.

¹²¹ *Id.* at 55–66.

¹²² *Id.* at 66–70; Matthew Weiniger & Matthew Page, *Treaty Arbitration and Investment Disputes: Adding Up the Costs*, 1 GLOBAL ARB. REV. 44 (2006).

¹²³ Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L ARB. 129 (2007).

¹²⁴ Franck, *supra* note 77.

¹²⁵ For the definition of statistical significance, see *id.* at 438 n.15.

tus¹²⁶ and outcome. Another project explores investment-arbitration decisions on jurisdiction,¹²⁷ while a further research study analyzes the legal reasoning of ICSID tribunals.¹²⁸ While these studies offer valuable information about the parties and their underlying disputes, they lack the necessary particulars to assess and evaluate the *arbitrators'* behavior and decision making. In fact, the studies evaluating arbitration awards have overlooked three elements necessary to assess arbitral behavior and decision patterns.

The first element concerns the relevance of repeat appointment to the analysis of arbitral behavior. One study offers numerical data about the amount claimed and the amount awarded in each arbitration case under analysis.¹²⁹ However, it does not ask whether repeatedly appointed arbitrators or newcomers granted the awards, and this data is necessary for assessing claims about a possible connection between arbitrators' outcomes and their reselection. To make this point clear, suppose that a dataset consists of 100 awards. These awards could have been granted by 100 different arbitrators or by 10 arbitrators sitting in 10 arbitration cases each. As the previous Part explains, the arbitrators' decision making may vary depending on their status as repeat or one-shot arbitrators. For example, a one-shot arbitrator on a panel might be more concerned about distinguishing him or herself, whereas a repeat arbitrator might be more interested in maintaining his or her established reputation as an impartial and accurate decision maker. Ignoring such nuances and lumping all arbitrators together while trying to pinpoint the elusive phenomenon of splitting the difference may not lead to any conclusive results. In other words, accounting for the number of times each arbitrator has been appointed may impact the assessment of his or her judicial behavior. Thus, we should call into question the validity and credibility of the conclusions about arbitrators' behavior when the underlying research has not accounted for the repeat-appointment element.

The second element concerns the role of the arbitrators in three-member tribunals (as a presiding arbitrator or as one of the two party-appointed arbitrators). Current research does not explore whether the decision patterns of presiding arbitrators and party-appointed arbitrators differ. One study even limits its analysis to presiding arbitrators and ignores party-appointed arbitrators altogether.¹³⁰ Due to the

¹²⁶ For the definition of the development dimension, see *id.* at 437 n.11.

¹²⁷ Kathleen S. McArthur & Pablo A. Ormachea, *International Investor-State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction*, 28 REV. LITIG. 559 (2009).

¹²⁸ Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals—An Empirical Analysis*, 19 EUR. J. INT'L L. 301 (2008).

¹²⁹ Franck, *supra* note 10, at 55–66.

¹³⁰ Franck, *supra* note 77, at 438–39.

different roles that presiding arbitrators and party-appointed arbitrators are expected to perform, their judicial behaviors may differ.

The third flaw of current empirical research concerns the dichotomous coding of the outcomes of arbitration proceedings. Empirical research so far has coded the dependent variable of outcome according to a binary scale: either the claimant wins or the respondent wins.¹³¹ According to this scale, the claimant wins if the claimant receives some monetary award, and the respondent wins only if the claimant receives nothing. However, arbitration awards do not necessarily reflect dichotomous outcomes, as they do not always completely favor one party. This binary categorization of outcome fails to reflect the true range of outcomes in arbitration awards and cannot provide accurate information about the winners and losers in arbitrations or about arbitrators' judicial behavior. For instance, a recent study explored the potential association between the outcome, the development status of the respondent state, and the development status of the presiding arbitrator,¹³² ultimately finding no such association.¹³³ That research used a binary code for evaluating the outcome: the claimant "lost" when all of his claims were dismissed and he received no monetary award, and the claimant "won" if the tribunal awarded him some monetary award.¹³⁴ However, when millions of dollars are at stake, the concept of some monetary award fails to provide an accurate proxy for a winning result. The present Article presents a more nuanced outcome variable by dividing outcome into five categories.¹³⁵

To conclude, the missing elements in current empirical studies allow us to validly question their significance. The research in this Article fills in these gaps and offers a more nuanced evaluation of the judicial behavior of arbitrators that takes these elements into account.

IV

RESEARCH METHODOLOGY

The purpose of this research is to take the first step in evaluating the decision patterns of arbitrators who repeatedly serve in ICSID tribunals. This Article defines arbitrators who received at least four

¹³¹ See, e.g., *id.* at 456. For exceptions to this coding system outside the field of investment arbitration, see Stefanie A. Lindquist et al., *Splitting the Difference: Modeling Appellate Court Decisions with Mixed Outcomes*, 41 LAW & SOC'Y REV. 429, 430 (2007) (arguing that "court outcomes are not always structured so as to completely favor one party over the other"); *Splitting the Baby: A New AAA Study*, AM. ARBITRATION ASS'N (Mar. 9, 2007), <http://www.adr.org/sp.asp?id=32004> (dividing outcome into six categories).

¹³² Franck, *supra* note 77, at 454.

¹³³ *Id.* at 464.

¹³⁴ Thus, the study classified the outcome as in favor of the claimant when the claimant received more than 0% and less than 100% of the amount claimed, and it classified the outcome as in favor of the respondent when the claimant received nil.

¹³⁵ See *infra* Part IV.

appointments to arbitration cases registered with ICSID from January 1994 and concluded by September 30, 2009 as repeatedly appointed arbitrators.¹³⁶ The term *concluded cases* includes all arbitration cases that ended in one of the following ways: an award on the merits;¹³⁷ an award that embodied the parties' settlement pursuant to ICSID Arbitration Rule 43(2);¹³⁸ an order for the discontinuance of the proceedings following the parties' settlement pursuant to ICSID Arbitration Rule 43(1);¹³⁹ an award on jurisdiction;¹⁴⁰ an order for the discontinuance of the proceedings at the request of a party pursuant to ICSID Arbitration Rule 44;¹⁴¹ and an order for the discontinuance of the proceedings for failure of the parties to act pursuant to ICSID Arbitration Rule 45.¹⁴²

A. The Differentiation of Elite Arbitrators

This Article terms those arbitrators who received appointments at least four times to cases registered and concluded during the period under analysis as elite arbitrators. Arbitrators selected to serve on

¹³⁶ The list of cases is from the ICSID's official website, which I last visited on October 3, 2009. The dataset excludes any award rendered after September 30, 2009 and any award rendered before September 30, 2009 and not uploaded until after October 3, 2009. See *List of Concluded Cases*, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded> [hereinafter ICSID, *Concluded Cases*] (last visited Oct. 3, 2009).

¹³⁷ ICSID ARBITRATION RULES, *supra* note 15, at r. 47(1)(i) (stating that the award shall contain "the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based").

¹³⁸ *Id.* at r. 43(2) ("If the parties file with the Secretary-General the full and signed text of their settlement and in writing request the Tribunal to embody such settlement in an award, the Tribunal may record the settlement in the form of its award.").

¹³⁹ *Id.* at r. 43(1) ("If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding.").

¹⁴⁰ *Id.* at r. 41(6) ("If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect.").

¹⁴¹ *Id.* at r. 44:

If a party requests the discontinuance of the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal, or if appropriate the Secretary-General, shall in an order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue.

¹⁴² *Id.* at r. 45:

If the parties fail to take any steps in the proceeding during six consecutive months or such period as they may agree with the approval of the Tribunal, or of the Secretary-General if the Tribunal has not yet been constituted, they shall be deemed to have discontinued the proceeding and the Tribunal, or if appropriate the Secretary-General, shall, after notice to the parties, in an order take note of the discontinuance.

ICSID tribunals less than four times are termed *ordinary arbitrators*. The decision to distinguish arbitrators who served on at least four cases is based on the following reasons: During the period under analysis, there were 144 concluded arbitration cases. Of those 144 cases, 13 were discontinued before the arbitration tribunal was constituted.¹⁴³ A total of 175 arbitrators were appointed in the remaining 131 cases. Of these 175 arbitrators, 26 were appointed at least four times, 18 were appointed three times, 24 were appointed twice, and 107 were appointed once. Therefore, arbitrators appointed at least four times represent 14.9% of the arbitrator population. While this percentage seems low, these arbitrators' presence in the total number of concluded cases is impressive: at least one elite arbitrator was present in 105 of the 131 concluded cases—that is, in 80.2% of the concluded cases.

The decision to exclude arbitrators who were appointed only three times to cases registered and concluded during the period under analysis is due to their limited impact on the dataset. Adding the arbitrators who were appointed three times to serve on ICSID tribunals to the dataset raises the number of arbitrators by 69.2% (from 26 to 44). However, the increase in the number of cases due to their addition is marginal—only 10.5% (from 105 to 116). Of the 11 cases of arbitrators appointed three times, only four ended with an award on the merits, which is the subject of this research. In these four cases, there were only five arbitrators who were appointed three times—that is, of the 18 arbitrators appointed three times, only five would be added to the list of elite arbitrators. Therefore, this marginal addition does not justify including these arbitrators in the dataset.

This Article explores the decision patterns of elite arbitrators during a period of fifteen years, from the mid-1990's to 2009. I chose this period because in this time frame, the number of arbitration cases registered with ICSID increased dramatically¹⁴⁴ and because these cases will enable an appropriate updated evaluation of the decision patterns of those arbitrators who were active in the field of investment disputes during this critical period.

This Article explores decision patterns on three levels: the tribunal level, the appointment-status level, and the individual level. On the tribunal level, this research explores the decision patterns of all publicly available awards on the merits that arbitration tribunals consisting of at least one elite arbitrator granted. On the appointment-

¹⁴³ These cases were discontinued pursuant to ICSID Arbitration Rules 43(1) or 44. See *id.* at rs. 43(1), 44.

¹⁴⁴ Since the 1990's, there has been an increase in ICSID arbitration cases. See THE WORLD BANK, *supra* note 23, at 179; Franck, *supra* note 10, at 46; McArthur & Ormachea, *supra* note 127, at 569–70.

status level, this Article assesses the decision pattern of elite arbitrators as a function of their role on the arbitration tribunal (as presiding arbitrators or as party-appointed arbitrators). Given the unique role of presiding arbitrators in the arbitration process, this Article further considers the average number of settlements that the disputing parties reached in arbitration cases chaired by elite arbitrators. On the individual level, this Article analyzes the decision patterns of individual elite arbitrators over time.

B. The Unit of Analysis and the Coding Method

The findings of this research are based on a dataset generated from the concluded cases section of the official ICSID website¹⁴⁵ and from publicly available awards¹⁴⁶ rendered in cases registered with ICSID from January 1994 and concluded by September 2009. The research isolates variables linked with elite arbitrators and analyzes the impact of these variables on the outcome of the dispute. This research lists all arbitrators appointed in cases registered and concluded during the period under analysis. Upon the identification of all elite arbitrators, I generated a list of all concluded cases of tribunals comprised of at least one elite arbitrator (elite concluded cases). The research generated a dataset for elite concluded cases, and this dataset was presented in cross tabulation for independent and dependent variables using a coding method.

1. *Independent Variables*

The independent variables of this study are as follows:

- Name of elite arbitrator associated with concluded case number.
- Number of times each elite arbitrator was appointed.
- Role of the elite arbitrator: presiding arbitrator (=1), party-appointed arbitrator (=2), and sole arbitrator (=3).
- Public availability of awards on the merits: publicly available awards (=1) and publicly unavailable awards (=0).
- Status of party-appointed arbitrators in publicly available awards on the merits: arbitrator appointed by the claimant (=0) and arbitrator appointed by the respondent (=1).¹⁴⁷

¹⁴⁵ See ICSID, *Concluded Cases*, *supra* note 136.

¹⁴⁶ The dataset was finalized by October 3, 2009. The unit of analysis excludes any award published after that date. Awards were gathered from printed materials and from the following sources: *Awards and Decisions: 2009*, INV. CLAIMS, http://www.investmentclaims.com/Subscriber_Awards_by_Date?year=2009 (last visited Oct. 3, 2009); *Chronological Listing*, INV. TREATY ARBITRATION, http://ita.law.uvic.ca/chronological_list.htm (last visited Oct. 3, 2009); ICSID, *Concluded Cases*, *supra* note 136.

¹⁴⁷ Data was generated from descriptions of appointment procedures in all publicly available awards on the merits. In two cases, only excerpts of the award on the merits were

2. *Dependent Variables*

The dependent variables of this study are as follows:

- Manner of conclusion of the arbitration case, using the following coding method: award on the merits (=1); settlement of the parties, including awards embodying the parties' settlements (=2); award on jurisdiction (=3); order for the discontinuance of the proceeding not pursuant to settlement (=4).
- Outcome: the analysis differentiated publicly available awards on the merits by the percentage of the amount claimed that the claimant recovered (the ratio of the amount awarded divided by amount claimed and multiplied by 100).¹⁴⁸ This percentage generated a dependent variable termed "outcome" and coded as follows: award for 100% of amount claimed (=0); award for 0% of amount claimed (=1); award for less than 40% and more than 0% of the amount claimed (=2); award between 40% and 60% of the amount claimed (=3); award for more than 60% and less than 100% of the amount claimed (=4). The level of acceptance of the claim was based on the monetary award rendered as a percentage of the amount claimed.

V

DATABASE OVERVIEW

This Part provides descriptive quantitative information about the arbitration cases analyzed by this study. As the previous Part explains, 144 arbitration cases concluded during the period under analysis. Of the 144 cases, 13 were discontinued before the arbitration tribunal was constituted;¹⁴⁹ these cases were therefore excluded from the unit of analysis. Of the remaining 131 cases, 124 cases had a three-member tribunal and 7 cases had a sole arbitrator. In total, 175 arbitrators were appointed in these 131 cases. Of the 175 arbitrators, 26 were elite arbitrators and 149 were ordinary arbitrators (18 were appointed three times, 24 were appointed twice, and 107 were appointed once). Therefore, elite arbitrators represent 14.9% of the population of arbitrators.

As highlighted above, while the percentage of elite arbitrators seems low, their presence in the total number of cases is impressive; there was at least one elite arbitrator appointed in 105 of the 131 con-

publicly available. The excerpts did not provide information about the arbitrators' appointment procedures. In one case, a party-appointed elite arbitrator was kind enough to provide us with information about his role in the tribunal. In the other case, the cell was coded as unavailable. Cells in all other concluded cases were left unmarked.

¹⁴⁸ Postaward interest was discarded in this category.

¹⁴⁹ These were discontinued pursuant to ICSID Arbitration Rules 43(1) or 44. See *supra* notes 139 and 141.

cluded cases—that is, in 80.2% of the cases. Of these 105 cases, 103 had a three-member tribunal and 2 had a sole arbitrator. Interestingly, 9 cases comprised of a panel of three elite arbitrators, 47 cases had two elite arbitrators in the tribunal, and 47 cases had one elite arbitrator as a member of the tribunal. In sum, there were 170 appointments of elite arbitrators in all elite-arbitration cases. It is thus clear that there is indeed a general tendency towards repeat appointments of elite arbitrators.¹⁵⁰

Seventy-four of the 103 elite-arbitration cases that comprised of a three-member tribunal had an elite presiding arbitrator (71.8%), and 29 had an ordinary presiding arbitrator. This statistic clearly shows the prevalence of appointments of elite arbitrators as presiding arbitrators. Interestingly, this tendency reverses when examining the total number of arbitration cases chaired by a sole arbitrator. Of the 7 arbitration cases with a sole arbitrator, only 2 cases had sole elite arbitrators.

The notable presence of elite arbitrators in a large number of arbitration tribunals clearly illustrates the necessity to investigate their purported exclusive club and to draw conclusions about their judicial behavior and decision patterns.

A. Basic Distribution of Elite-Arbitration Cases

Of the 105 concluded elite-arbitration cases, 50 were finally resolved by an award on the merits (47.6%), 35 were settled (33.3%), 11 were concluded by an award on jurisdiction (10.5%), and 9 cases were discontinued pursuant to ICSID Arbitration Rule 44¹⁵¹ or 45¹⁵² (8.6%). Figure 1 displays the distribution of elite-arbitration cases.

¹⁵⁰ Rubins et al., *supra* note 118 (“There is a natural tendency towards the appointment of ‘repeat players’ arising from the need to justify a candidate in terms of experience and reputation.”).

¹⁵¹ See *supra* note 141.

¹⁵² See *supra* note 142.

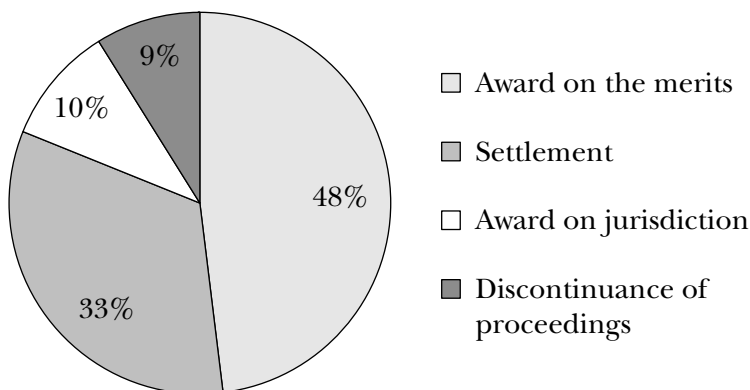


Figure 1: *Distribution of Elite-Arbitration Cases*

Of the 50 elite cases concluded by an award on the merits, 43 awards were publicly available (86% of final awards on the merits).¹⁵³ In general, analyzing the decision patterns in only published awards may be subject to a case-selection bias, as the awards available in the public domain may not be representative of all awards on the merits. However, given that the valid data represents such a high percentage of all awards on the merits rendered during the period under analysis and 100% of all publicly available awards on the merits at the time I finalized the dataset, the findings of this research likely provide a strong indication about the judicial behavior and decision patterns of elite arbitrators.

B. The Characteristics of Elite Arbitrators

Several commentators have made claims about the profile and characteristics of international arbitrators. They have argued that international arbitrators form part of a closed homogenous group comprised of “grand old men”¹⁵⁴ and nationals of developed countries.¹⁵⁵ They have been described as “blue chip men,”¹⁵⁶ part of a closely-knit

¹⁵³ Rule 48(4) of the ICSID Arbitration Rules provides that the parties’ consent is necessary for making an award public. The Rule adds, however, that ICSID shall “promptly include in its publications excerpts of the legal reasoning of the Tribunal.” ICSID ARBITRATION RULES, *supra* note 15, at r. 48(4).

¹⁵⁴ DEZALAY & GARTH, *supra* note 57, at 34; Rogers, *supra* note 109, at 963 (noting that “[t]he forefathers of the modern international arbitrator were a small, intimate group of European ‘grand notables’ or ‘Grand Old Men,’ as they were sometimes called”).

¹⁵⁵ K.V.S.K. Nathan, *Well, Why Did You Not Get the Right Arbitrator?*, MEALEY’S INT’L ARB. REP., July 2000, at 24, 24 (claiming that the international arbitral establishment is “white, male and English speaking,” “controlled by institutions based in the United States, England and mainland European Union,” and that the majority of arbitrators in a multimember international arbitration tribunal “[are] always white”).

¹⁵⁶ Michael D. Goldhaber, *Deciding Women*, AM. LAWYER (July 1, 2009), <http://www.law.com/jsp/PubArticle.jsp?id=1202431685880> (referring to male arbitrators who are repeatedly appointed to serve in international tribunals).

group,¹⁵⁷ or even an arbitration “mafia.”¹⁵⁸ A common claim is that there is a lack of female arbitrators¹⁵⁹ in this gentlemen’s club.¹⁶⁰

These hypotheses have not gone unchallenged. One author argued that the large number of appointed arbitrators in the investment-treaty arbitrations that she analyzed¹⁶¹ begins to rebut the claim that arbitration is a “mafia.”¹⁶² This claim, however, is based on a simple count of the number of arbitrators appointed to serve in the investment-arbitration tribunals at issue. This study does not examine a critical aspect necessary to evaluate the exclusivity of the arbitrators’ club—namely, the number of arbitrators who were repeatedly appointed to serve in more than one arbitration tribunal.¹⁶³ The high prevalence of elite arbitrators in the dataset under consideration in the present Article tends to support the “elite” status of such arbitrators.

Within the elite group of arbitrators, one arbitrator was appointed 11 times, three were appointed 10 times, four arbitrators were appointed 9 times, one arbitrator was appointed 8 times, two were appointed 7 times, four arbitrators were appointed 6 times, three were appointed 5 times, and eight arbitrators were appointed 4 times. Bearing in mind that 80.2% of all concluded cases included at least one elite arbitrator, there is clearly a solid group of elite arbitrators who receive repeated appointments to ICSID tribunals.

The claim that arbitrators form an exclusive club necessitates an examination of the major characteristics of its members. Of the 26 elite arbitrators, only 2 (7.7%) were women. However, on average,

¹⁵⁷ Christian Bühring-Uhle et al., *The Arbitrator as Mediator: Some Recent Empirical Insights*, 20 J. INT’L ARB. 81, 81–82 (2003) (claiming that there are between 100 and 200 practitioners worldwide with significant repeat experience who form “a closely-knit, discreet community of very busy people”).

¹⁵⁸ While the term “mafia” may imply criminal activity and corruption, it has been widely used to describe a closed, exclusive arbitrators’ club. On the use of the term, see DEZALAY & GARTH, *supra* note 57, at 10; Franck, *supra* note 10, at 75; William W. Park, *National Legal Systems and Private Dispute Resolution*, 82 AM. J. INT’L L. 616, 623–24 (1988) (reviewing three books by practitioners) (referring to the “international arbitration mafia”); Goldhaber, *supra* note 156.

¹⁵⁹ Louise Barrington, *Arbitral Women: A Study of Women in International Commercial Arbitration*, in THE COMMERCIAL WAY TO JUSTICE: THE 1996 INTERNATIONAL CONFERENCE OF THE CHARTERED INSTITUTE OF ARBITRATORS 229, 229–41 (Geoffrey M. Beresford Hartwell ed., 1997) (commenting on the lack of women in international arbitration); Nathan, *supra* note 155, at 24 (interpreting an arbitrator’s commentary as suggesting that “women simply do not or cannot satisfy” the criteria for selecting arbitrators); Goldhaber, *supra* note 156 (arguing that women arbitrators represent only four percent of all arbitrators).

¹⁶⁰ See Rubins et al., *supra* note 118 (describing claims and criticism about ICSID).

¹⁶¹ The author surveyed 145 arbitrators in 102 awards from 82 different arbitrations.

¹⁶² Franck, *supra* note 10, at 77.

¹⁶³ The article acknowledges this shortcoming, stating that “[t]he substantive impact of repeat appointments should be analyzed thoroughly in the future.” *Id.*

these women have been repeatedly appointed to more tribunals (9.5) than male elite arbitrators (6.29).

Elite arbitrators came from 16 countries.¹⁶⁴ Their typical professional profile includes a combination of private practice and academic positions. Some elite arbitrators are highly respected practitioners or academics, others combine academic positions and private practice, and some are retired judges with academic credentials. While the majority of elite male arbitrators are leading private practitioners, interestingly, the two elite female arbitrators are leading law professors.

As to the selection of arbitrators, three out of 26 elite arbitrators were only appointed as presiding arbitrators (number of appointments = 12) and four were never appointed as presiding arbitrators (number of appointments = 17). Three arbitrators were appointed as chairmen in more than 80% of the cases they were appointed to (number of appointments = 27), while seven arbitrators were selected as party-appointed arbitrators in more than 80% of the cases they were selected to (number of appointments = 45). Thus, more than half of elite arbitrators are either mainly appointed as party-appointed arbitrators or as presiding arbitrators.

VI

RESEARCH RESULTS—DECISION PATTERNS OF ELITE ARBITRATORS

The international arbitrators' marketplace has expanded alongside the increased number of international investment disputes.¹⁶⁵ As the number of arbitrators appointed to serve in arbitration tribunals has grown, competition between arbitrators has become more robust. The lucrative arbitrators' market attracts many newcomers who wish to have a share of the arbitration pie.¹⁶⁶ By serving on international tribunals, arbitrators gain personal and professional prestige as well as the reputation and credibility to improve their professional standing and financial state.¹⁶⁷ As a result of the increased competition between potential arbitrators, scholars argue that market forces may lead these arbitrators to display behavioral patterns that increase the

¹⁶⁴ The nationality of arbitrators was determined through information gathered from ICSID's official website and through Google Search. France (n=5), Canada (n=3), Switzerland (n=2), United States (n=2), India, United Kingdom, Chile, Spain, Philippines, Netherlands, Mexico, Italy, Germany, Australia, Egypt, and Costa Rica (each n=1). Twenty-one arbitrators came from OECD countries. For empirical research on the association between development status of presiding arbitrators, respondent states, and outcome, see Franck, *supra* note 77.

¹⁶⁵ See *supra* Part I.

¹⁶⁶ See, e.g., DEZALAY & GARTH, *supra* note 57, at 43 (discussing the expansion of the market and new arrivals into the market).

¹⁶⁷ *Id.* at 18–29 (discussing building and maintaining the symbolic capital required to succeed as an international arbitrator).

probability of their selection to future cases.¹⁶⁸ Some commentators claim that arbitrators may choose to grant decisions that will keep both parties satisfied—that is, to render compromise awards.¹⁶⁹ Some argue that arbitrators may be inclined to rule in favor of investors.¹⁷⁰ These commentators attribute this inclination to both the fact that international arbitrators are mostly nationals of capital-exporting states, who might be more inclined to favor investors coming from these countries,¹⁷¹ and to the peculiar characteristic of ICSID arbitration procedures whereby only investors can initiate arbitrations.¹⁷² As a consequence of these procedures, some claim that arbitrators who want to increase their chances of being reappointed may wish to make investors feel that their claims will be upheld.¹⁷³ Others express further concern over a possible tendency that investment arbitrators whom ICSID officials appoint may adopt a decision-making pattern that will be in line with the underlying ideology of capital-exporting states.¹⁷⁴

This Part presents the research results. As explained above, I conducted the analysis on three levels: the tribunal level, the appointment-status level, and the individual level.

A. The Tribunal Level: What is the Decision Pattern of Elite-Arbitration Awards on the Merits?

This subpart explores whether arbitration awards by tribunals that consist of at least one elite arbitrator display any particular decision pattern in ruling on the merits. For the purpose of this section, the awards dataset included 43 publicly available awards on the merits that emanate from 43 elite-arbitration cases.¹⁷⁵ Figure 2 displays the distribution of awards by ICSID elite tribunals as a percentage of the amount claimed.

¹⁶⁸ See *supra* Part II.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ See VAN HARTEN, *supra* note 8, at 172–73.

¹⁷⁴ *Id.* at 169–70.

¹⁷⁵ Of the 43 cases, 42 had a three-member tribunal and 1 had a sole elite arbitrator. Of the 42 three-member tribunals, 20 had one elite arbitrator in the tribunal, 18 cases had two elite members, and 4 cases had three elite arbitrators.

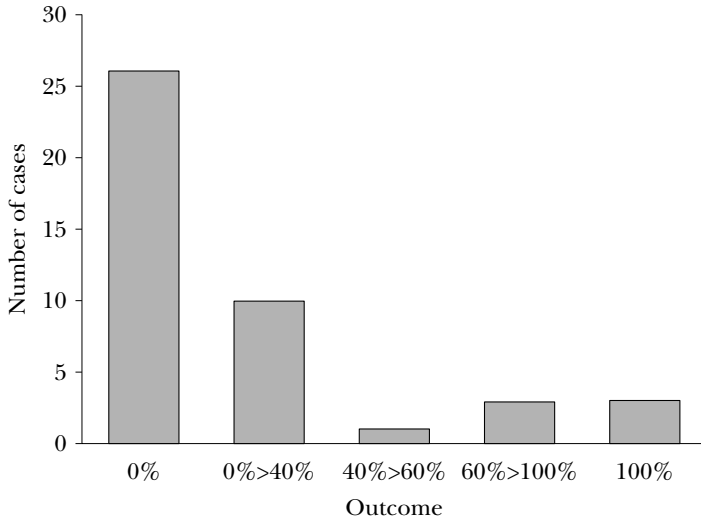


Figure 2: *Distribution of Awards on the Merits (n=43)*

Of the 43 publicly available awards, 26 (60.5%) denied the claimant any recovery and 3 (7%) awarded the claimant 100% of the amount claimed. The claimant received some monetary award in the remaining 14 awards. Interestingly, only one award split the difference by awarding the claimant a sum ranging between 40% and 60% of the claimed amount. The results thus show that arbitration tribunals involving elite arbitrators do not have a tendency to render compromise awards. Moreover, since most awards dismissed all investors' claims and more than 80% of all decisions rendered an award of less than 40% of the amount claimed, the results clearly do not support the claim that investment-arbitration tribunals display a tendency to rule in favor of investors.

B. The Appointment-Status Level: What Is the Decision Pattern of Elite Arbitrators as a Function of Their Role in the Tribunal?

Three-member tribunals generally hear ICSID arbitrations.¹⁷⁶ Of the 43 publicly available elite cases that were concluded by an award on the merits, a tribunal panel consisting of three arbitrators heard all but one of the cases. The common method for appointing arbitrators to such a tribunal calls upon each party to appoint an arbitrator and for the chair of the tribunal to be appointed either by the mutual agreement of the parties,¹⁷⁷ by the party-appointed arbitrators, or by the Chairman of the ICSID Administrative Council.¹⁷⁸ When the

¹⁷⁶ ICSID Convention, *supra* note 13, art. 37(2)(b).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* art. 38.

Chairman is called upon to appoint an arbitrator, he or she is restricted in his or her choice to the members of the ICSID Panel of Arbitrators.¹⁷⁹ However, when the parties select an arbitrator, they are free to appoint arbitrators from outside the Panel provided that these arbitrators possess the same qualities required of the arbitrators on the Panel: being of high moral character; recognized as competent in the fields of law, commerce, industry, or finance; and capable of exercising independent judgment.¹⁸⁰

In the 43 arbitration cases with publicly available awards on the merits, there were a total of 69 appointments of elite arbitrators: 16 appointments by claimants, 19 appointments by respondent states, 33 appointments of presiding arbitrators, and 1 appointment of a sole arbitrator. Of the 33 appointments of presiding arbitrators, the parties and party-appointed arbitrators each made 9 appointments, and ICSID made 15 appointments.

The following figure displays the distribution of awards as a function of the arbitrators' roles in the tribunal-presiding arbitrators (including one sole arbitrator), claimant-appointed arbitrators, and respondent-appointed arbitrators.

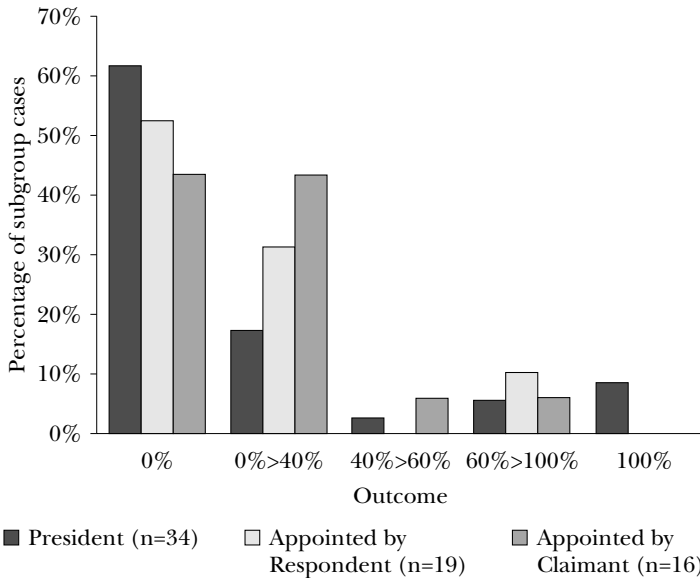


Figure 3: *Distribution of Elite-Arbitrator Awards by Appointment Status (n=69)*

¹⁷⁹ *Id.* art. 40(1). The panel of arbitrators consists of a list of individuals nominated by contracting states and by ICSID. Each contracting state may designate up to 4 arbitrators to the panel, while the chairman of ICSID may designate up to 10 individuals. *Id.* art. 13.

¹⁸⁰ *Id.* arts. 14(1), 40(2).

Figure 3 shows that elite presiding arbitrators tend to dismiss all claims (64.7%) more often than elite arbitrators appointed by claimants (43.7%) or by respondents (57.9%). It also shows that only elite presiding arbitrators have awarded claimants 100% of the amount claimed. As to the partially accepted claims, the figure shows that elite arbitrators appointed by claimants tend to accept part of the claims (56.3%) more than elite arbitrators appointed by respondents (42.1%) and more than elite presiding arbitrators (26.5%).

Interestingly, while one might expect that presiding arbitrators may be more inclined than party-appointed arbitrators to satisfy both parties by rendering compromise awards and by avoiding extreme decisions,¹⁸¹ the results show the opposite. Indeed, presiding arbitrators dismiss all claims or accept all claims more than party-appointed arbitrators and therefore appear less averse to extreme outcomes than party-appointed arbitrators. The party-appointed arbitrators' purposeful efforts to be perceived as no less impartial than the chairpersons may explain these puzzling results. Specifically, to avoid a reputation of favoritism towards any of the parties, party-appointed arbitrators might tend to render decisions that are on the middle ground more than presiding arbitrators. Following this line of thought, these arbitrators may have an incentive to craft awards that both parties will consider fair.¹⁸²

While presiding arbitrators are less averse to extreme decisions than party-appointed arbitrators, arbitrators appointed by respondents display decision patterns that more closely resemble those of presiding arbitrators than those of claimant-appointed arbitrators. In fact, claimant-appointed arbitrators are more inclined to award claimants something than are arbitrators appointed by respondents or presiding arbitrators. Although the differences in decision patterns as a function of the appointment status are apparent, it is clear that the results do not display a tendency by any group of arbitrators to grant compromise awards or to rule in favor of investors.¹⁸³

Not only do presiding arbitrators have an important role in trying to reconcile the opposing opinions of the party-appointed arbitrators, but they also may have an impact on the parties' tendency to settle. A presiding arbitrator's suggestion of settlement to the parties may affect the parties' perceptions regarding their probability of

¹⁸¹ For a discussion of compromise awards, anchoring, and extremeness aversion, see *supra* Part II. For an account of how presiding arbitrators may be more likely to favor compromise awards, see *supra* notes 106–07 and accompanying text.

¹⁸² For a discussion of the scholarship regarding arbitrators' perceived tendency to grant compromise awards, see *supra* Part I.

¹⁸³ For a discussion of the scholarship regarding arbitrators' perceived tendency to rule in favor of investors, see *supra* Part II.

prevailing. For example, such a suggestion may signal to the parties that the tribunal does not see the case to be as clear-cut as the parties may think and that, as a matter of efficiency, the parties should consider the option of settling their dispute before the tribunal renders its decision.¹⁸⁴ We have seen that of the 105 concluded elite-arbitration cases, the parties settled in 35 of these cases (33.3%). Elite arbitrators presided over 22 (62.9%) of these 35 settled cases. In order to further understand the phenomena of settlements, this research explored whether a correlation exists between the number of appointments of elite arbitrators as chairmen and the average number of settlements that disputing parties have reached in the cases in which these arbitrators have presided. Figure 4 displays the results.

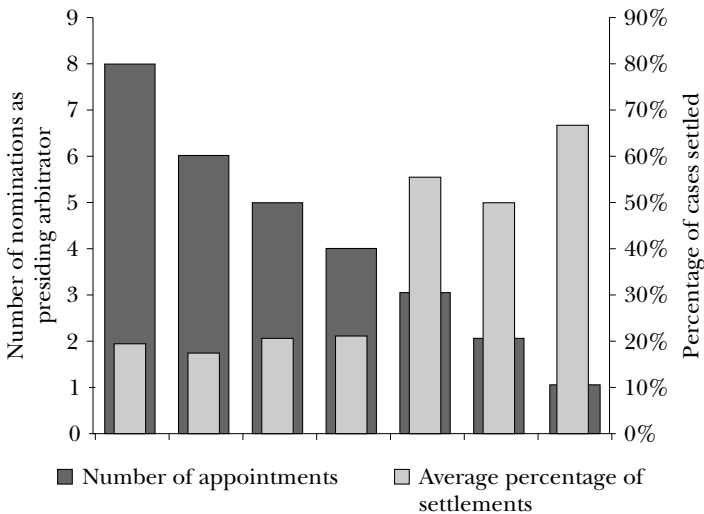


Figure 4: *Average Number of Settlements as Function of the Number of Appointments of Presiding Elite Arbitrators (n=22)*

Figure 4 presents an interesting pattern: the higher the number of appointments as presiding arbitrators, the lower the average number of settlements per cases. Put differently, as the number of tribunals chaired by an elite arbitrator rises, the average number of settlements in those cases falls.¹⁸⁵ This Article, however, could not identify a specific pattern of settlements in multiple appointments

¹⁸⁴ For a discussion of how procedure and judicial management of the procedure of a case may affect the parties' approaches and strategies, see, for example, LIND & TYLER, *supra* note 65, at 14–15 (discussing how various factors—for example, severe time pressure—may affect the parties' conception of the desirability of certain types of third-party intervention); THIBAUT & WALKER, *supra* note 65, at 6–21 (discussing choice of procedure and under what circumstances a decision might need to be externally imposed).

¹⁸⁵ These two variables are significantly negatively correlated ($r = -0.86$; $p < 0.05$).

pursuant to a timeline. For example, the research does not reveal whether most settlements have been reached in the first or last cases over which elite arbitrators have presided. No clear conclusions could therefore be made regarding a possible association between the number of appointments of elite arbitrators as chairmen and the number or rate of settlements that disputed parties reached.

C. The Individual Level: The Decision Pattern of Individual Arbitrators on a Timeline

Pursuing arbitration might pose a high risk for the disputing parties.¹⁸⁶ The selection of arbitrators, however, may endow the parties with a measure of confidence in the tribunal and in the arbitration process.¹⁸⁷ By opting for arbitration, the parties retain the opportunity to choose arbitrators to hear their case and decide its merits. This opportunity represents one of the great advantages of arbitration over litigation.¹⁸⁸ It is of even greater importance in high-stakes international disputes, which involve parties from different legal systems and cultures.¹⁸⁹

Since the parties receive the possibility of selecting the judges who will resolve their dispute, prospective arbitrators who compete in the market for appointments might wish to behave in a way that increases their chances of appointment. Arbitrators may therefore have an incentive to signal to prospective disputants that they would benefit from appointing these arbitrators.¹⁹⁰

When parties consider the selection of arbitrators, they gather information about each prospective candidate.¹⁹¹ This information assists the parties in their selection. Such information may include the arbitrators' professional background and affiliation, their experience as counsel in similar disputes,¹⁹² their professional and academic publications, their nationality, and, most importantly, their past expe-

¹⁸⁶ See *supra* note 19 and accompanying text.

¹⁸⁷ See, e.g., Brower & Schill, *supra* note 33, at 494 (suggesting that the parties' participation in appointing arbitrators helps ensure the legitimacy of investor-state arbitration).

¹⁸⁸ Bühring-Uhle, *supra* note 59, at 33 (presenting results of a survey of participants in international commercial arbitration on the reasons to choose arbitration over litigation in which the most frequently cited reason was "the possibility for the parties to select the members of the tribunal themselves" (italization omitted)).

¹⁸⁹ See *supra* note 102 and accompanying text.

¹⁹⁰ For a discussion of the scholarship regarding the judicial behavior of arbitrators, see *supra* Part II.

¹⁹¹ See DEZALAY & GARTH, *supra* note 57, at 18 (noting that international lawyers must constantly evaluate the statute and authority of potential arbitrators to "see who will have clout" with other arbitrators and with the parties).

¹⁹² The mixing of roles between arbitrator and counsel has raised some concern. See ANDERSON & GRUSKY, *supra* note 83, at 8-9 (arguing that the lack of separation between the role of judge and lawyer in arbitration creates the perception of conflict of interest and possibly an actual conflict of interest); Dañino *supra* note 20 ("Arbitrators are increasingly

rience in deciding similar cases.¹⁹³ Additionally, an arbitrator's long-term reputation will influence the parties' decision whether to appoint him or her.¹⁹⁴ By exploring the arbitrators' decision history, the parties gain more insight into each arbitrator's judicial behavior and decision patterns.

Arbitrators who compete in the arbitration market might act strategically by signaling their judicial attitudes to prospective parties. Awards are strong signals, and as such, they might affect the disputing parties' choice whether or not to select a specific arbitrator.¹⁹⁵ Furthermore, arbitrators do not limit their signals solely to published awards. Arbitrators may publish academic or professional papers and opinions, or they may also represent investors as counsel in similar arbitrations. Elite arbitrators, many of whom have prestigious professional careers as practicing attorneys, commonly serve as arbitrators in one case while representing a disputing party as counsel in another case.¹⁹⁶

Table 1 displays in chronological order a list of all awards on the merits rendered by each individual elite arbitrator whose first award was rendered during the period under analysis. The table enables us to explore each individual arbitrator's judicial behavior and decision pattern over time. Of the 26 elite arbitrators, 6 had rendered awards prior to January 1994 and were therefore excluded from the list. One elite arbitrator had never granted an award on the merits and was also not included in the list. There remain 19 elite arbitrators who had rendered their first award during the period under analysis. Of them, one had rendered 6 awards on the merits, one had rendered 5 awards, three had rendered 4 awards, five had rendered 3 awards, three had rendered 2 awards, and six had rendered just one award on the merits.

For each of the 19 arbitrators, the table displays his or her role in the tribunal for each arbitration concluded by an award on the merits

exposing themselves to challenges for potential conflicts arising from their roles as arbitrators and counsel in different cases before ICSID.”).

¹⁹³ Orley Ashenfelter, *Arbitration and the Negotiation Process: Arbitrator Behavior*, 77 AM. ECON. REV. 342, 342 (1987) (“The evidence suggests that a key determinant of the parties preferences for an arbitrator is usually the extent of the arbitrator’s ‘experience’ in deciding related arbitration cases.”).

¹⁹⁴ Emilia Onyema, *Empirically Determined Factors in Appointing Arbitrators in International Commercial Arbitration*, 73 ARBITRATION 199, 204–05 (2007) (describing results of a study requiring respondents to rank the factors affecting choice of arbitrators and finding that the most highly ranked factors, in order, are reputation, subject-matter expertise, recommendations of external counsel, knowledge of relevant language, and knowledge of applicable law).

¹⁹⁵ See Tonja Jacobi, *The Judicial Signaling Game: How Judges Shape Their Dockets*, 16 SUP. CT. ECON. REV. 1, 11 (2008) (noting, in the litigation context, that “[i]n the judicial signaling game, judges are like sellers, and litigants are like buyers”).

¹⁹⁶ See *supra* note 83 and accompanying text.

and also displays the outcome of the dispute as a percentage of the amount claimed. The coding used for the role of arbitrators in the tribunals is as follows: pr. = presiding arbitrator; cl. = arbitrator appointed by the claimant; and res. = arbitrator appointed by the respondent.

TABLE 1: CHRONOLOGICAL LISTING OF AWARDS ON THE MERITS PER INDIVIDUAL ARBITRATOR

	1		2		3		4		5		6	
	Role	%	Role	%	Role	%	Role	%	Role	%	Role	%
1	pr.	12.5	res.	77.3	Pr.	25.4	pr.	0	pr.	100	pr.	0
2	cl.	27.3	cl.	53.6	cl.	29.9	Res.	0	cl.	0		
3	pr.	100	pr.	100	Pr.	53.6	pr.	77.3				
4	pr.	0	pr.	0	cl.	10	pr.	0				
5	pr.	39.7	pr.	0	cl.	0	cl.	77.3				
6	pr.	0	pr.	0	pr.	66						
7	cl.	5.2	res.	61.5	res.	0						
8	pr.	0	pr.	0	pr.	0						
9	pr.	0	res.	27.3	pr.	0						
10	res.	0	res.	0	pr.	0						
11	res.	0	res.	0								
12	cl.	25.7	res.	0								
13	cl.	0	pr.	0								
14	res.	0										
15	res.	0										
16	pr.	0										
17	pr.	0										
18	res.	39.7										
19	res.	0										

Table 1 exhibits some compelling results. In 12 of the 19 first awards (63.1%), the claimant received nil. In these first awards, 6 of the 9 presiding arbitrators, 5 of the 6 respondent-appointed arbitrators, and 1 of the 4 claimant-appointed arbitrators dismissed all claims. Clearly, the tendency to dismiss all claims is stronger in presiding arbitrators and respondent-appointed arbitrators than in claimant-appointed arbitrators. In 6 of the 19 first awards (31.6%), the claimant received less than 40% than the amount claimed (presiding arbitrators granted 2 of these awards, claimant-appointed arbitrators granted 3, and a respondent-appointed arbitrator granted one). In the remaining award (5.3%) rendered by a presiding arbitrator, the claimant received 100% of the amount claimed.

The arbitrators' decision records, examined individually, do not always display a tendency towards a balanced decision pattern. For

example, when appointed by the claimant, arbitrator number 2 awarded the claimant a partial monetary award in the first three awards (27.3%, 53.6%, and 29.9%). In the fourth award, the same arbitrator dismissed all claims when acting as a respondent-appointed arbitrator. While this sequence of awards might suggest bias in favor of the appointing party, this arbitrator dismissed all claims in the fifth award when serving as a claimant-appointed arbitrator. Thus, if the first three awards insinuate favoritism towards the claimant, then the fourth award balances out such perceived favoritism.

Arbitrator number 3 acted as presiding arbitrator in all four cases concluded by an award on the merits and granted the claimant high monetary sums in each case (100%, 100%, 53.6% and 77.3%). In contrast, arbitrator number 8, who also acted as presiding arbitrator in the three cases concluded by an award on the merits, dismissed all claims in all three awards. It may be argued that the decision pattern of arbitrator number 3 might display a bias toward claimants, while the decision pattern of arbitrator number 8 might show a bias toward respondents.

Arbitrator number 6, who also rendered awards on the merits only as the presiding arbitrator, displays a more balanced decision pattern. Specifically, in the first two cases, the arbitrator dismissed all claims, while in the third case, that pattern was changed by an award of a high monetary sum (66%).

Arbitrator number 5 displays a balanced decision pattern on a timeline. In the first two awards, the arbitrator acted as the presiding arbitrator, awarding the claimant a partial compensation in one case (39.7%) and nothing in the second case (0%). In the third and fourth arbitrations, the arbitrator acted as the claimant-appointed arbitrator. In the third award, the arbitrator awarded the claimant nothing (0%) while granting the claimant a high monetary award (77.3%) in the fourth arbitration.

Arbitrator number 4 acted three times as the presiding arbitrator, awarding the claimant nothing in all three cases; however, when appointed by the claimant, the arbitrator awarded the claimant some monetary compensation (10%).

While in some cases the individual arbitrators' decisions may imply favoritism for one side over the other, the results above display different decision patterns for each individual elite arbitrator. However, the results clearly show that elite individual arbitrators do not tend to split the difference and that, with the exception of one arbitrator, they do not have a tendency to rule in favor of investors. Having said this, it is worth noting that this study explores the decision pattern of arbitrators based only on the monetary awards granted. The research does not explore the legal reasoning of the arbitrators'

awards. Future research should explore whether some elite arbitrators tend to adhere to specific legal positions or reasoning, thereby displaying a decision pattern that might affect the outcome.

CONCLUSION

In a field where disputing parties enjoy the possibility of selecting the judges who will resolve their dispute and where the selection of the arbitrators may be the most important single task the parties face,¹⁹⁷ the study of arbitrators' behavior is of great importance. This Article contributes to the empirical literature on arbitrators' judicial behavior in general and on investment arbitrators in particular by focusing on the decision-making patterns of a group of arbitrators who tend to dominate this field. By distinguishing elite arbitrators as a group and differentiating between the different roles that arbitrators play on a tribunal, this research has sought to present a more nuanced understanding of arbitral decision making. In the process, this research has undermined conventional wisdom regarding arbitrators' judicial behavior.

By serving on international tribunals, arbitrators gain personal and professional prestige and a favorable reputation and credibility. In addition, they improve their professional standing and, ultimately, their financial status. Arbitrators who compete in the arbitration market might act strategically by signaling their judicial attitudes to prospective parties. Conventional wisdom holds that, as competing private actors, arbitrators may behave in a way that increases the parties' satisfaction in the arbitration process and in the decision arbitrators render. In other words, they would tend to split the difference and award each party a partial victory. An alternative accepted view holds that investment-treaty arbitrators tend to rule in favor of investors. Because an arbitrator's public record of awards sends a powerful signal, one might expect that the types of decision making that these theories implicate would be most evident among those arbitrators who have served on multiple tribunals or that, as arbitrators' records grow, an average tendency would emerge to support these theories.

¹⁹⁷ See, e.g., Gerald Aksen, *The Tribunal's Appointment*, in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 31, 31 (Lawrence W. Newman & Richard D. Hill eds., 2004) ("That selecting the tribunal is the most important decision to be made in any international arbitration (apart from the rendering of the actual award) is, by now, a cliché. It also still happens to be true."); William W. Park, *Income Tax Treaty Arbitration*, 10 GEO. MASON L. REV. 803, 813 (2002) ("Just as in real estate the three key elements are 'location, location, location,' so in arbitration the applicable trinity is 'arbitrator, arbitrator, arbitrator.'"); Claude R. Thomson & Annie M.K. Finn, *Managing an International Arbitration: A Practical Perspective*, DISP. RESOL. J., May/July 2005, at 74, 77 ("[T]he selection of the 'right' arbitrator is absolutely essential.").

The research presented in this Article empirically and systematically controverts the conventional wisdom. It reveals that there is indeed a group of select arbitrators who serve repeatedly on tribunals. The research presents clear evidence that arbitration tribunals involving elite arbitrators do not have a tendency to render compromise awards. The results also clearly defy any claim that investment-arbitration tribunals tend to rule in favor of investors. The research also shows that, contrary to what one might expect, elite presiding arbitrators are less averse to extreme outcomes than party-appointed arbitrators. Then, having highlighted remarkable differences in decision patterns as a function of the appointment status, the research results still display no tendency by any group of arbitrators to grant compromise awards or to rule in favor of investors. Finally, the research shows that arbitrators' decision records, examined individually, do not always display a tendency towards a balanced decision pattern.

My claim is that the arbitrators' valuable professional reputation could be a key incentive for them to remain impartial. Impartiality critically affects not only their future selection as arbitrators but also other spheres of their professional careers, whether as private counsel or as academics. In order to promote their reputation, arbitrators may choose to increase accuracy and to counter any real or perceived biases rather than to cater to any particular interests. This tendency rings especially true for repeat arbitrators in the arbitration market, whose most valuable trait may be their reputation as credible and independent decision makers.