

Michigan Journal of International Law

Volume 43 | Issue 1

2022

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Recommended Citation

Thomas D. Grant & F. S. Kieff, *Appointing Arbitrators: Tenure, Public Confidence, and a Middle Road for ISDS Reform*, 43 MICH. J. INT'L L. 171 (2022).

Available at: <https://repository.law.umich.edu/mjil/vol43/iss1/5>

<https://doi.org/10.36642/mjil.43.1.appointing>

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APPOINTING ARBITRATORS: TENURE, PUBLIC CONFIDENCE, AND A MIDDLE ROAD FOR ISDS REFORM

Thomas D. Grant and F. Scott Kieff***

INTRODUCTION

When parties bring claims under investor-state dispute settlement (“ISDS”) procedures,¹ who should serve as decision-maker? Relevant parties ask the question in different settings and with different criteria in mind. A party in a dispute, contemplating ISDS proceedings, whether by it or against it, likely will focus on the qualities of particular individuals available to serve as arbitrators. Party-appointed panelists charged under the applicable instrument with choosing a neutral or chair,² and institutional appointing authorities charged with that task or with choosing arbitrators in default of party choice,³ will also turn their minds to candidate assessment. Different individuals or institutions might look for somewhat different qual-

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1. Investor-state Dispute Settlement (“ISDS”) denotes the regime “developed to allow a foreign national (whether an individual or a company) to bring a claim directly against a sovereign State where its investment was made,” this approach being “a significant break from traditional mechanisms which essentially relied on diplomatic means of protection to resolve disputes relating to investments.”, U.N. Comm’n. on Int’l Trade L. [“UNCITRAL”] Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS), Note by the Secretariat, ¶ 5, U.N. Doc. A/CN.9/WG.III/WP.209 (Nov. 29, 2019). The expression is in widespread use by courts and writers. *See, e.g.*, Case C-612/18 P, ClientEarth v. Eur. Comm’n, ECLI:EU:C:2020:223 (Mar. 19, 2020); Andrea K. Bjorklund, *Introductory Remarks: Does TTIP Need Investor-State Dispute Settlement?* 109 AM. SOC’Y INT’L L. PROC. 203, 203 (2015).

2. Examples abound, that method of neutral selection being one of long standing. *See, e.g.*, *In re Boyle*, an Overholding Tenant, 1854 CarswellOnt 255 (Can. Ont. QB) (WL); *Pao Tatneft v. Ukraine*, No. CV 17-582 (CKK), 2020 WL 4933621, at *3–4 (D.D.C. Aug. 24, 2020) (quoting the Russia-Ukraine BIT). There are also various permutations under which a separate appointing authority selects the chair and even the other members of the tribunal. *See, e.g.*, UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement: Selection and Appointment of ISDS Tribunal Members, Note By Secretariat ¶¶ 21–24, U.N. Doc. A/CN.9/WG.III/WP.203 (Nov. 16, 2020).

3. *See generally* David Gaukrodger, *Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview*, ORG. ECON. COOP. & DEV’T [OECD] (Mar. 2018).

ities, but all who are called upon to make the choice will think about how best to assess the candidates.⁴

Opening the lens wider, we remind ourselves that ISDS, like the man in John Donne's poem,⁵ is not an island, but instead belongs to a larger system of rules, as well as social, political, and economic structures.⁶ The community, or communities, of which ISDS is part, also take an interest in who is chosen to serve. In recent years, the wider public has cast a critical eye toward the arbitral panels that these appointees comprise and that, in many cases, decide matters of general community concern. Evidence suggests that public sentiment has turned against ISDS in its present form.⁷

Arbitral appointment is among the matters that policymakers, aware of the evident public turn against ISDS, are addressing at the international level. A session of the United Nations Commission on International Trade Law ("UNCITRAL")⁸ Working Group III, which focuses on ISDS, closed its fortieth session in February 2021 and published a number of working papers and government comments to address possible reforms in ISDS.⁹ Arbitral appointment procedure is one of the topics that Working Group III addressed.¹⁰ The International Centre for the Settlement of Investment

4. See, e.g., Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53, 80 (2005). As to contrasting approaches taken by courts, see *id.* at 80 n.153; see also RESTATEMENT (THIRD) U.S. LAW OF INT'L COM. ARB. § 3.2 (Am. L. Inst. 2018): (summarizing the U.S. approach in the commercial arbitration setting).

5. John Donne, *XVII. Meditation, reprinted in DEVOTIONS UPON EMERGENT OCCASIONS, TOGETHER WITH DEATH'S DUEL* 107, 108–09 (1959).

6. See Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 65–68 (2013) for the framework of "public interest theory" that Roberts proposed for locating ISDS in the larger system.

7. See *infra* Part II.

8. G.A. Res. 2205 (XXI) (Dec. 17, 1966) established UNCITRAL to co-ordinate international cooperation on efforts "towards the progressive harmonization and unification of the law of international trade by promoting the adoption of international conventions, uniform laws, standard contract provisions, general conditions of sale, standard trade terms and other measures." *Id.* at 2–3. UNCITRAL turned its attention to ISDS reform after 2015, spurred in part by a study that the UNCITRAL Secretariat conducted in "conjunction with interested organizations, including the Centre for International Dispute Settlement (CIDS)," a research center of the Graduate Institute of International and Development Studies and the University of Geneva Law School: UNCITRAL Working Grp. III, *Rep. on the Work of Its Thirty-Fourth Session*, ¶ 1, U.N. Doc. A/CN.9/930/Rev.1 (Dec. 19, 2017). The 40th session of Working Group III, outputs of which and of the several preceding sessions we consider below, had first on its agenda "the selection and appointment of ISDS tribunal members in the context of the creation of a standing mechanism." Chair of UNICITRAL, Letter dated Dec. 14, 2020 to Representatives of Member States of UNCITRAL, 2, LA/TL 133 (3-7) 72nd (Dec. 14, 2020).

9. See *Working Group III: Investor-State Dispute Settlement Reform*, UNCITRAL, https://uncitral.un.org/en/working_groups/3/investor-state (last visited Oct. 19, 2021) (aggregation of the outputs of the 40th session (Feb. 8–12, 2021)).

10. See UNCITRAL Working Grp. III, *Possible Reform of Investor-State Dispute Settlement: Selection and Appointment of ISDS Tribunal Members*, Note by Secretariat, ¶¶ 21–

Disputes (“ICSID”) has addressed the topic as well.¹¹ In both these settings and in academic writings,¹² proposals have been put forward to introduce standing international organs for ISDS to replace, or at least to overlay, the traditional institution of party-appointed arbitrator. The European Union (“EU”), as we will discuss below, is the most active advocate of permanent ISDS courts to replace arbitration.¹³ The EU advances the idea of courts not just in abstract discourse but in the arena of international trade negotiations and recent EU trade agreements implement the idea in concrete terms.¹⁴ We will address the EU’s ISDS court proposal in particular because no other proposal of this kind has the weight of one of the world’s preeminent trading powers behind it. Nor is any other proposal as revolutionary: If implemented, the EU’s proposal would create a cadre of tenured decision-makers replacing the long-prevailing procedure of appointing arbitrators *ad hoc*.

Let us make clear an assumption that we believe applies when considering the present ferment in and around ISDS: If a failure of confidence in an institution spreads widely and deeply enough, then the institution will not survive without changing. This proposition holds even if the technicians most skilled at operating the institution keep faith in it and in what they do.¹⁵ Issues of institutional failure and institutional reform are relevant here because behind the proposals for ISDS reform runs the now-decade-long

24, U.N. Doc. A/CN.9/WG.III/WP.203 (Nov. 16, 2020); UNCITRAL, *Rep. of Working Group III on the Work of its Resumed Thirty-Eighth Session*, 16–20, U.N. Doc. A/CN.9/1004/Add.1 (Jan. 28, 2020); U.N. Secretariat, *Possible Reform of Investor-State Dispute Settlement (ISDS) Selection and Appointment of ISDS Tribunal Members*, UNCITRAL, U.N. Doc. A/CN.9/WG.III/WP.169 (July 31, 2019).

11. See, e.g., SUMMARY COMMENTS TO THE PROPOSALS FOR AMENDMENTS OF THE ICSID ARBITRATION RULES, INT’L INST. FOR SUSTAINABLE DEV. 11 (2019); Yarik Kryvoi, *ICSID Arbitration Reform: Mapping Concerns of Users and How to Address Them*, KLUWER ARB. BLOG (Nov. 11, 2018), <http://arbitrationblog.kluwerarbitration.com/2018/11/11/icsid-arbitration-reform-mapping-concerns-of-users-and-how-to-address-them/>.

12. See, e.g., J. Benton Heath, *The New National Security Challenge to the Economic Order*, 129 YALE L.J. 1020, 1095–96 (2020); see also Peter K. Yu, *The Investment-Related Aspects of Intellectual Property Rights*, 66 AM. U. L. REV. 829, 900 n.323 (2017).

13. See *Possible Reform of Investor-State Dispute Settlement (ISDS) Selection and Appointment of ISDS Tribunal Members: Annotated Comments from the European Union and its Member States to the UNCITRAL Secretariat*, UNCITRAL (Oct. 19, 2020), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/selection_and_appointment_eu_and_ms_comments.pdf.

14. See *infra* pp. 182–84.

15. See Anna T. Katselas, *Exit, Voice, and Loyalty in Investment Treaty Arbitration*, 93 NEB. L. REV. 313, 335–47 (2014), for observations about “exit” from ISDS, and the tendency of arbitrators “not [to] perceive . . . potential sign[s] that the club is in trouble.”; see Malcolm Langford & Daniel Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator?*, 29 EUR. J. INT’L L. 551 (2018), as to the technicians responsible for arbitration in the ISDS frame and their response to the “legitimacy crisis.”

“backlash” against ISDS,¹⁶ which some say augers the end of that institution.¹⁷ To be sure, the effects of public sentiment are sometimes incremental. Critics of ISDS, however, suggest that public sentiment toward ISDS now approaches a “tipping point.”¹⁸

The classic account of arbitration—which, with some adjustments, is the account that practitioners and parties have given of arbitration in the ISDS setting—is that the parties make choices, and their act of choosing extends to choosing arbitrators.¹⁹ Party autonomy, in the classic account, is the touchstone of arbitration.²⁰ As the United Nations Commission on Interna-

16. Michael Waibel, Asha Kaushal, Kwo-Hwa Liz Chung, & Claire Balchin, *The Backlash Against Investment Arbitration: Perceptions and Reality*, in *THE BACKLASH AGAINST INVESTMENT ARBITRATION* XXXVII (2010).

17. Predictions about the “end of ISDS” have been cyclical, peaking, for example, when a number of state parties to the International Centre for Settlement of Investment Disputes (ICSID) declared their intention to quit the IMF/World Bank system entirely. See Emmanuel Gaillard, *The Denunciation of the ICSID Convention*, *TRANSNAT’L DISP. MGMT.* (2008). When Bolivia, Ecuador, and Venezuela denounced the ICSID Convention, it was still considered apposite to refer to a “crisis of ISDS in Latin American countries,” but talk of a chain reaction of denunciations subsided. See José Carlos Bernal Rivera & Mauricio Viscarra Azuga, *Life after ICSID: 10th Anniversary of Bolivia’s Withdrawal from ICSID*, *KLUWER ARB. BLOG* (Aug. 12, 2017), <http://arbitrationblog.kluwerarbitration.com/2017/08/12/life-icsid-10th-anniversary-bolivia-withdrawal-icsid/>.

18. In particular regions—Europe being the conspicuous example—public perception turned against ISDS some time ago. See, e.g., Nicolette Butler, *Treating the Symptoms Rather Than the Cause: A Critique of ICSID’s 2018 Rules Amendment Proposals*, 25 *INT’L TRADE L. & REG.* 117, 125 (2019) (referring to negotiations over the Transatlantic Trade and Investment Partnership (“TTIP”) in 2013 as bringing about a “major tipping point” in public perception that led the European Union to back off on proposals for an ISDS chapter in the treaty and to begin considering proposals for an investment court).

19. Thus, Chief Justice of Singapore Sundaresh Menon describes party-appointed arbitrators as “an expression of the principle of party autonomy” and says that “that principle is the cornerstone of arbitration. Party autonomy finds its expression in the parties’ voluntary submission and participation in arbitration in a form and manner of their choosing, which extends also to the manner of appointing and constituting the tribunal.” Sundaresh Menon, *Adjudicator, Advocate or Something in Between? Coming to Terms with the Role of the Party-Appointed Arbitrator*, 83 *ARB.* 185, 195 (2017), (citing GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 1639 (2d ed. 2014); see also Alan Redfern, Martin Hunter, Nigel Blackaby & Constantine Partasides QC, *Qualities Required in International Arbitrators*, in *REDFERN & HUNTER: LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* § 4.62, (6th ed. 2015) (referring to “the principle of party autonomy in the selection of arbitrators”).

20. “[T]he principle of party autonomy is a fundamental rule of procedure.” *Cont’l. Cas. Corp. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Application for Annulment of the Argentine Republic, ¶ 195 (July 30, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/c13/dc2291_en.pdf; “[I]n arbitration, party autonomy to a large extent reigns.” *Caratube Int’l Oil Co. v. Republic of Kaz.*, ICSID Case No. ARB/13/13, Award, ¶ 377 (Sept. 27, 2017), <https://www.italaw.com/sites/default/files/case-documents/italaw9324.pdf>; see also *Dallah Real Est. & Tourism Holding Co. v. Ministry of Religious Affs., Gov’t of Pak.*, [2010] UKSC 46, [123] (appeal taken from Eng.) (regarding primacy of party autonomy as to choice of law governing validity of arbitration agreement); Margaret L. Moses, *Legal Issues in International Commercial Arbitration*, *AM. L. INST.* (2013) (“Party

tional Trade Law (“UNCITRAL”) Secretariat has noted, “the disputing parties . . . play an important role in the selection of the members of the tribunal”;²¹ “[t]he existing mechanisms for constituting ISDS tribunals are based on party autonomy.”²² Individual states agree. China, for example, submits that it is “noteworthy that most other dispute settlement mechanisms in the fields of international public law or international economics and trade retain similar practices, allowing parties to disputes to choose trusted experts to hear cases.”²³ Though open to an ISDS “error-correcting mechanism,” that is, an appellate machinery, China evidently prefers to keep party autonomy intact.²⁴ Russia, too, is willing to entertain an appellate machinery but holds that “[t]he right of the parties to appoint arbitrators . . . is one of the key principles of the ISDS system that builds confidence in ISDS and makes international arbitration more attractive both to states and to investors.”²⁵ Judges and practitioners in rule of law countries acknowledge the role of party autonomy in ISDS as well.²⁶

Not everybody, however, accepts that party autonomy in choosing arbitrators for ISDS has had only beneficial effects. There is the objection that arbitrators, because they are in essence “judges for hire,” discharge the arbitral function not only with a view to the law and facts in the case at hand, but also with concern for the preferences of potential future appointing parties.²⁷ This is a critique that might be applied to any arbitral institution but that critics apply particularly in regard to arbitration in ISDS.²⁸ Critics also

consent is considered the touchstone of international arbitration”); Paul Michell, *Party Autonomy and Implied Choice in International Commercial Arbitration*, 14 AM. REV. INT’L ARB. 571, 584 (2003) (“[A] system that favors party autonomy as its touchstone”).

21. UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS) Selection and Appointment of ISDS Tribunal Members, Note by the Secretariat, ¶5, U.N. Doc. A/CN.9/WG.III/WP.169 (July 31, 2019).

22. *Id.* ¶ 6.

23. UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Government of China on Its Thirty-Eighth Session, at 4, U.N. Doc. A/CN.9/WG.III/WP.177 (July 31, 2019).

24. *See id.* at 4.

25. UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Government of the Russian Federation on Its Thirty-Eighth Session, at 3, U.N. Doc. A/CN.9/WG.III/WP.188 (Dec. 30, 2019).

26. *See Menon, supra* note 19, at 195.

27. THOMAS SCHULTZ & THOMAS D. GRANT, ARBITRATION: A VERY SHORT INTRODUCTION 38, 96 (2021); *cf.* Halliburton Co. v. Chubb Berm. Ins. Ltd. [2020] UKSC 48, [59] (appeal taken from Eng.) (suggesting that the preferences of current appointing parties may influence the arbitrator’s conduct during proceedings).

28. For Ecuador’s observation as an example, *see* UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Government of Ecuador on Its Thirty-Eighth Session, ¶ 19, U.N. Doc. A/CN.9/WG.III/WP.175 (July 17, 2019) (stating “[a]rbitrators might make a decision with a view to being appointed in future disputes or to benefiting parties they represent in other disputes.”). Bahrain has made a similar observation. *See* UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute

object that *ad hoc* tribunals, constituted of jurists with different understandings of the law, have produced conflicting outcomes.²⁹ For example, no principled explanation is evident as to why a most-favored nation (“MFN”) clause “imports” the jurisdiction clause from other treaties in one case but not in another;³⁰ why the umbrella clause extends arbitral jurisdiction to a private contract here but not there;³¹ or why fair and equitable treatment

Settlement (ISDS), Submission from the Government of Bahrain on Its Thirty-Eighth Session, ¶ 5, U.N. Doc.A/CN.9/WG.III/WP.180 (Aug. 29, 2019). It is not, however, only small states expressing concern over repeat appointments. *See infra* p. 53 (discussing methods used by the United States to alleviate conflict of interest and transparency problems). For recognition among academic writers, *see* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT’L L. 45, 89 (2013); *see also* Malcom Langford, Daniel Behn & Runar Hilleren Lie, *The Revolving Door in International Investment Arbitration*, 20 J. INT’L ECON. L. 301, 301-02 (2017); Cosmo Sanderson, *Expert ties under scrutiny in Guatemala Annulment*, GLOB. ARB. REV. (Feb. 24, 2021). As to arbitral appointees themselves, one study suggests that they are surprisingly candid about the matter. *See* Susan D. Franck, James Freda, Kellen Lavin, Tobias Lehmann & Anne van Aaken, *International Arbitration: Demographics, Precision, and Justice*, in ICCA CONGRESS SERIES NO. 18, LEGITIMACY: MYTHS, REALITIES, CHALLENGES 33, 87–88 (Albert Jan van den Berg ed., 2015). For a recent annulment involving repeat play by a frequent arbitral appointee in various ISDS roles, *see* Eiser Infrastructure Ltd. v. Spain, ICSID Case No. ARB/13/36, Annulment, ¶¶ 53, 253–55 (June 11, 2020), <https://www.italaw.com/sites/default/files/case-documents/italaw11591.pdf>.

29. *See* UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the European Union and its Member States on Its Thirty-Seventh Session, ¶ 6, U.N. Doc. A/CN.9/WG.III/WP.159/Add.1 (Jan. 24, 2019); UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS) on Its Thirty-Fourth Session, ¶ 9, U.N. Doc. A/CN.9/WG.III/WP.142 (Sept. 17, 2017). For an early academic take on the issue, *see* Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521 (2005).

30. *See* Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails*, 2 J. INT’L DISP. SETTLEMENT 97, 102 (2011).

31. For the archetypal competing interpretations of umbrella clauses, compare *Société Générale de Surveillance S.A. v. Islamic Republic of Pak.*, ICSID Case No. ARB/01/13, Objections to Jurisdiction, (Aug. 6, 2003), 16 World Trade & Arb. Materials 167, ¶¶ 161–62, 171–73 (Apr. 2004) (finding against an umbrella clause extending arbitral jurisdiction to a contract), with *Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, Objections to Jurisdiction (Jan. 29, 2004), 16 World Trade & Arb. Materials 91, ¶¶ 117, 125–28, 133–35 (Jan. 2004) (finding for an umbrella clause extending arbitral jurisdiction to a similar contract and disagreeing with the reasoning in the aforementioned case). For comments and citations to other relevant awards, *see generally* Beata Gessel-Kalinowska vel Kalisz & Konrad Czech, *The Role of Precedent in Investment Treaty Arbitration*, 85 INT’L J. ARB. MEDIATION & DISP. MGMT. 162, 167–68 (2019) (discussing the SGS cases and other relevant awards as examples of conflicting outcomes from tribunals). For early attempts to grapple with the umbrella clause, *see* Christoph Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. WORLD INV. & TRADE 231, 249–55 (2004); *see also* Thomas W. Wälde, *The Umbrella Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6 J. WORLD INV. & TRADE 183 (2005). For a discussion of the ambiguity regarding the effect of umbrella clauses on domestic “foreign investment laws” (“FILs”) instead, compare to Jarrod Hepburn, *Domestic Investment Statutes in International Law*, 112 AM. J. INT’L L. 658, 671, 694, 703–04 (2018).

might be tethered to a customary “international minimum standard” in one claim but is an “independent treaty standard” in another.³² It is true that some of the inconsistencies in ISDS have become muted over time,³³ but the difficulties of a fragmented jurisprudence have not disappeared.³⁴

A further objection, which equally motivates the critics of ISDS, is that a tribunal, constituted at least in part through private action, disposes of public questions.³⁵ The answers tribunals give to such questions may invalidate entire fields of national regulation,³⁶ impugn the credibility of a government,³⁷ and impose large money awards on the public treasury.³⁸ As Stephan Schill writes,

Investment treaty arbitration, unlike commercial arbitration, is not a purely private dispute settlement mechanism that is entirely subject to party autonomy and limited in its effects to the parties to the proceedings. Rather, it fulfils a public function in influencing the behaviour of foreign investors, states, and civil society more generally

32. Compare Hussein Haeri, *A Tale of Two Standards: “Fair and Equitable Treatment” and the Minimum Standard in International Law*, 27 *ARB. INT’L* 27, 34–35 (2011) (supporting an independent treaty standard of fair and equitable treatment) with *Mondev Int’l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, (Oct. 11, 2002), 15 *World Trade & Arb. Materials* 273, ¶¶ 111–12, 121–21, 125 (June 2003) (referring to customary international law as the source of the fair and equitable treatment standard).

33. See, e.g., CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION. SUBSTANTIVE PRINCIPLES* ¶ 7.175 (2d ed. 2017) (suggesting that the distinction between fair and equitable treatment as a “treaty standard” and as “general or customary international law” might not matter so much).

34. See Julian Arato, *The Private Law Critique of International Investment Law*, 113 *AM. J. INT’L L.* 1, 7 (2019) (citing UNCITRAL Working Group III, Investor-State Dispute Settlement Reform on the Work of its Thirty-Fifth Session, ¶¶ 31–38, U.N. Doc. A/CN.9/935 (May 14, 2018)).

35. See, e.g., Simon Lester, *The Sad State of the Investor-State Debate*, HUFFINGTON POST (Dec. 22, 2014, 4:12 PM), https://www.huffpost.com/entry/the-sad-state-of-the-inve_b_6023444.html. The criticism is not new, nor are attempts to address it. Thus, the United States 2004 Model BIT stated, in ¶ 4(b) of its Annex B on expropriation, “[e]xcept in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.” U.S. 2004 MODEL BILATERAL INVESTMENT TREATY, U.S. TRADE REPRESENTATIVE (2004), <https://ustr.gov/sites/default/files/U.S.%20model%20BIT.pdf>.

36. As to the treatment in ISDS decisions of national regulatory priorities, see Diego Zannoni, *The Legitimate Expectation of Regulatory Stability Under the Energy Charter Treaty*, 33 *LEIDEN J. INT’L L.* 451, 457, 460–63 (2020); Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 *AM. J. INT’L L.* 361, 370, 370 n.58 (2018).

37. See SCHULTZ & GRANT, *supra* note 27, at 84–85 (noting evidence of reputational impact of arbitral claims against governments).

38. See Maria Laura Marceddu & Pietro Ortolani, *What Is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments*, 31 *EUR. J. INT’L L.* 405, 410 (2020).

by crafting and concretizing international standards of investment protection . . . Arbitrators . . . incur obligations not only towards the parties to the proceedings, but vis-à-vis the whole system of investment protection.³⁹

The objections, then, are of diverse kinds, but they point to a general proposition espoused by ISDS's critics. A panel of *ad hoc* appointees, the critics say, is not the right place to vest decision-making power over the issues of public policy that ISDS has come routinely to address. Spurred by this proposition, governments are now considering far-reaching proposals for reform.

We will argue in this article that the furthest reaching proposal, replacing arbitration with standing international judicial organs, is not the best way that ISDS, as an institution, might address the concerns its critics voice. As we will further argue, a middle road—preserving party autonomy but leading to greater public confidence in ISDS decisions—may be achievable.

We will start by touching on some of the proposals that call for ISDS courts and appellate bodies, in particular the proposals advanced by the EU over the past few years and discussed at UNCITRAL in early 2021.⁴⁰ We will then turn to a recent empirical study by Maria Laura Marceddu and Pietro Ortolani, scholars at the University of Edinburgh in the United Kingdom and Radboud University in the Netherlands, respectively, who offer new evidence about what motivates the critics of ISDS. Marceddu and Ortolani's study seems to show that the critics do not accept that important matters of public concern should be submitted to decision by private persons convened in *ad hoc* formats. We will set out a synopsis of Marceddu and Ortolani's method, which they draw from the field of behavioral economics, and of the evidence derived from their study, which they say shows that the public broadly rejects arbitration as a dispute settlement mechanism and broadly prefers courts (Part II).⁴¹

We will go on to suggest in Part III that (1) it is possible that public sentiment toward ISDS is more nuanced than Marceddu and Ortolani say, with the public responding more to the weaknesses of ISDS appointment procedures as they currently function than to the institutional architecture in which dispute settlement takes place;⁴² and (2) a better approach to securing public confidence in ISDS may involve a middle ground between the status quo and institution-building remedies such as the creation of a new ISDS court.⁴³ Instead of constituting a permanent ISDS court composed of tenured

39. Stephen W. Schill, *Crafting the International Economic Order: the Public Function of Investment Treaty Arbitration and Its Significance for the Role of the Arbitrator*, 23 LEIDEN J. INT'L L. 401, 401 (2010).

40. See *infra* Part I.

41. See *infra* Part II.

42. See *infra* Part III.

43. See *infra* Part III.

judges, as the EU proposes and Marceddu and Ortolani's research seems to recommend, the better approach, we suggest, would employ existing systems of public authority, public decision-making, and public vetting to identify individuals who are suitable from a technocratic standpoint for carrying out the functions of arbitrators—but who also have performed roles in the public eye and in systems of public law and procedure and thus will have earned the confidence of the wider communities whom ISDS affects. Finally, we offer some observations about how better to systematize arbitrator appointments in ISDS (Part IV),⁴⁴ before setting out our overall conclusions.⁴⁵

I. COURTS, CONTROL MACHINERY, AND ISDS REFORM

Governments, ISDS practitioners, and academics entertain a variety of proposals for ISDS reform. These include proposals to apply new codes of ethics,⁴⁶ to introduce preliminary review procedures to remove frivolous claims,⁴⁷ and to open ISDS proceedings to third parties if the proceedings implicate interests beyond those of the parties to the dispute.⁴⁸ In this larger frame of discussion, one set of proposals, however, stands out. Because they would add a fundamentally different structure to ISDS that would supervene

44. See *infra* Part IV. We mention, for purposes of disambiguation, that the question about arbitrator appointments that we consider in this article is the question of *who should serve as arbitrator*, not the question of whether the relevant parties have specified an appointment procedure or what, if any, procedure is to be applied in default of specification. Default procedures for arbitral appointment are significantly affected by applicable legislation. The legislature in some jurisdictions has responded to party default more robustly than in others. For one of the more robust procedures, see International Arbitration Act 1994, § 9A (Act No. 23) (Sing.), and the Amendment that entered into force Dec. 1, 2020 pertaining to default procedure for appointment in multi-party arbitrations. *Id.* § 9B. It has been held—but this is an idiosyncratic position—that failure to specify a mechanism for choosing an arbitrator amounts to absence of consent to arbitrate. See *Baten v. Mich. Logistics, Inc.*, 830 Fed. Appx. 808 (9th Cir. 2020). The more typical position is described in RESTATEMENT (THIRD) U.S. L. INT'L COM. ARB. §3.2 (AM. L. INST. 2018).

45. See *infra* pp. 230-32.

46. UNCITRAL, Note by the Secretariat on Possible Future Work in the Field of Dispute Settlement: Ethics in International Arbitration on its Fiftieth Session, U.N. Doc. A/CN.9/916, at 6 (Apr. 13, 2017).

47. See UNCITRAL Working Grp. III, Note by the Secretariat on Security for Cost and Frivolous Claims on its Thirty-Ninth Session, U.N. Doc. A/CN.9/WG.III/WP.192, at 7 (Jan. 16, 2020).

48. See, e.g., UNCITRAL, RULES ON TRANSPARENCY IN TREATY-BASED INVESTOR-STATE ARBITRATION art. 4 (2014). These Rules are applicable under the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, Dec. 10, 2014, 54 I.L.M. 747. The Convention as yet has only limited subscription (seven state parties, sixteen further states having signed but not ratified). For earlier academic treatment, see Tomoko Ishikawa, *Third Party Participation in Investment Treaty Arbitration*, 59 INT'L & COMPAR. L.Q. 373 (2010).

existing arbitral procedures, if not replace them altogether, proposals to create a standing ISDS court or an appeal body⁴⁹ merit a closer look.

How parties appoint arbitrators—our focus in this article—would fundamentally change if a permanent cadre of ISDS judges came to perform the function that the proponents of an ISDS court envisage. Most obviously, the relevance of party appointment would diminish; party appointment could end altogether, depending on how far “judicialization” of ISDS procedures went.⁵⁰ The appointment process is thus a central piece of the ISDS architecture that many reform-minded governments and writers propose to change.⁵¹

We start here with a brief reminder that today’s proposals for ISDS courts and a general control machinery for arbitration are not entirely novel.⁵² We then give a summary account of the present-day proposals for an ISDS court.⁵³ Finally, we locate the present-day proposals in the modern landscape of international dispute settlement: As we will recall, even with the growth of investment treaty jurisdiction since the 1990s, states so far have remained within traditional understandings of international jurisdiction; an ISDS court would go much further. An ISDS court would do no less than transform the landscape.⁵⁴

A. *Early Attempts at Control Machinery*

Reform in ISDS today is focused on institutional architecture, particularly courts and appellate mechanisms. Changing the institutional architecture by adding courts or appellate mechanisms can be understood as a particular means for placing controls on the conduct and results of arbitration.

49. For convenience, we will refer here to an “ISDS court,” to denote the variety of standing judicial bodies—both of first instance and of appeal—that proponents of the judicialization of ISDS have put forward, not to obscure the distinction between first instance decision-making and appellate review, but to reflect that our focus here is on how such judicial mechanisms have been proposed as a solution to the lack of public confidence in ISDS, not on the precise mechanics of possible future courts.

50. As to the term “judicialization,” see *infra* pp. 179-81.

51. The joining of proposals for institutional change—i.e., proposals for ISDS courts—with proposals for new approaches to appointing arbitrators is visible in the topic selection of UNCITRAL Working Group III, the topics selected for consideration being courts (i.e., “stand-alone review or appellate mechanism[s],” “standing multilateral investment court[s]”) and “selection and appointment of arbitrators and adjudicators.” UNCITRAL Working Group III, Possible Reform of Investor-State Dispute Settlement. Appellate and Multilateral Court Mechanisms on its Thirty-Eighth Session, ¶ 3, U.N. Doc. A/CN.9/WG.III/WP.185 (Nov. 29, 2019). See also the EU’s observation that the issues are “intertwined and . . . systematic.” UNCITRAL Working Group III, Submission from the European Union and Its Member States on Possible Reform of Investor-State Dispute Settlement (ISDS) on its Thirty-Seventh Session, ¶ 10, U.N. Doc. A/CN.9/WG.III/WP.159/Add.1 (Jan. 24, 2019).

52. See *infra* Part I.A.

53. See *infra* Part I.B.

54. See *infra* Part I.C.

This is not the first time that proposals have been made to adopt an arbitral control machinery, however.⁵⁵

The United Nations International Law Commission (“ILC”), as one of its first projects, drafted a set of Model Rules on Arbitral Procedure (“Model Rules”).⁵⁶ While the Model Rules, which the ILC submitted to the General Assembly in 1958,⁵⁷ did not propose a new court, they would have provided for compulsory recourse to an existing court, the International Court of Justice (“ICJ”). Under article 1, the Model Rules proposed that, if parties disagreed whether an arbitrable dispute existed, then the matter would go to the ICJ upon request of “any of the parties.”⁵⁸ If its jurisdiction were invoked in that way, then the ICJ would “have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.”⁵⁹ The draft Model Rules also proposed that the ICJ would have the power to interpret an award, where the arbitral tribunal is no longer available to provide an interpretation, the parties have “not agreed upon another solution,” and either party has referred the matter to the ICJ.⁶⁰ The Rules would also have vested competence in the ICJ to nullify an award⁶¹ and to revise an award.⁶²

One proposal in the draft Model Rules attracted later support in a different setting. The provisional measures procedure in article 290 of the United Nations Convention on the Law of the Sea (“UNCLOS”) uses the International Tribunal for the Law of the Sea (“ITLOS”)—a standing court—to address provisional measures requests in early phases of a case when an arbitral tribunal has yet to be constituted. This arrangement bears more than a passing resemblance to the provisional measures procedure in the Model Rules, which would have used the ICJ in similar fashion.⁶³ However, the interlacing of a permanent standing institution with arbitral procedures in UNCLOS only goes so far: It is not a general control machinery for

55. As to the use of the expression to describe a legal instrument, see W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION. BREAKDOWN AND REPAIR*, 107–41 (1992) (addressing the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (June 10, 1958) as a control mechanism in commercial arbitration).

56. *Model Rules on Arbitral Procedure with a General Commentary*, 2 Y.B. INT’L L. COMM’N 83, 83–88 (1958).

57. G.A. Res. 1262 (XIII), at 53 (Nov. 14, 1958).

58. *Model Rules on Arbitral Procedure with a General Commentary*, *supra* note 56, at 83.

59. *Id.* art. 1.2.

60. *Id.* at 86.

61. *See id.* art. 36.

62. *See id.* art. 38.

63. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, 511 (entered into force Nov. 16, 1994) [hereinafter UNCLOS]; *see also* Statute of the International Tribunal for the Law of the Sea art. 25, Dec. 10, 1982, 1833 U.N.T.S. 561 [hereinafter SITLOS].

nullification, revision, and enforcement. The early proposal by the ILC to employ a standing court for *that* purpose did not attract much support.⁶⁴

Present-day proposals for an ISDS control machinery, however, would be at least as far reaching as the ILC's Model Rules. Present-day proposals would empanel a permanent body of professional personnel, either to supplement or to replace arbitrators. We turn now to give a brief overview of present-day proposals to judicialize ISDS.

B. Judicialization of ISDS

ISDS, as suggested above, is a field in ferment, and nowhere are proposals for alternatives and reform more prolific in the field than regarding its judicialization. By “judicialization” we refer here to a process by which the arbitral mechanisms that long have been prevalent in ISDS are overlain with, or replaced by, permanent standing bodies with the characteristics of courts.⁶⁵ Such institution-building is now proposed and explored in a growing body of literature, and in governmental and intergovernmental papers.⁶⁶ The EU goes a step further: It is adding ISDS court provisions to its international agreements.

Writers, governments, and intergovernmental organizations distinguish between two types of judicialization: the introduction of courts to replace arbitral tribunals and the introduction of appellate mechanisms to review the awards of arbitral tribunals.⁶⁷ As is evident from this typology, the two could go hand-in-hand. A new institutional architecture could include both first-instance decision-making and a machinery to ensure quality control⁶⁸

64. In fact, from the General Assembly, it drew rebuke. See REISMAN, *supra* note 55, at 18; see also D.W. Greig, *Specific Exceptions to Immunity Under the International Law Commission's Draft Articles*, 38 INT'L & COMPAR. L.Q. 560, 588 (1989) (explaining that “[t]he failure of what was described as ‘a juridical and jurisdictional concept of arbitration’ could provide a valuable lesson in the present situation.”).

65. The term “judicialization” has been used for some time in connection with arbitration to denote the intrusion of litigation-like characteristics, including high cost, extensive evidentiary discovery, and delay. See, e.g., Sundaresh Menon, *The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions*, 108 AM. SOC'Y INT'L L. PROC. 219, 225–26, 226 n.45 (2015). In connection with international law, the term has been used to denote the vesting of jurisdiction in courts at the international level. See, e.g., Benedict Kingsbury, *International Courts: Uneven Judicialization in Global Order*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 203–27 (James Crawford & Martti Koskeniemi eds., 2012); Anthea Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 AM. J. INT'L L. 179, 225 (2010). We use the term to denote the introduction at the international level of judicial structures, in particular courts of first instance and appellate mechanisms. See Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9, 10 (2016).

66. For references, see UNCITRAL Working Group III, *supra* note 51, ¶ 5 n.3.

67. See *id.* ¶ 3.

68. Writers and jurists use the expression “quality control” to denote the range of mechanisms that may operate to prevent or limit error in arbitral awards. See, e.g., Vijay Bhatia, Christopher N. Candlin & Rajesh Sharma, 75 ARB. 2, 4 (2009); R. Doak Bishop, *A*

over the decisions made. It is our purpose here to consider judicialization as such, and, while the distinction between a standing court of first instance and an appellate mechanism is significant, as is the distinction between bilateral and multilateral courts,⁶⁹ we confine ourselves for present purposes to observations relevant to the phenomenon in general. It is the call for architectural change that we are examining here for its possible role in addressing the question of how to appoint decision-makers in ISDS.⁷⁰

A useful overview of recent proposals for ISDS courts is contained in the Note by the UNCITRAL Secretariat prepared for the thirty-eighth session of UNCITRAL Working Group III⁷¹ and the Working Group III Report from that session.⁷² Governments that submitted proposals to the Working Group to establish an appellate mechanism for ISDS include Morocco,⁷³ Ecuador,⁷⁴ China,⁷⁵ South Africa,⁷⁶ and Bahrain.⁷⁷ Chile, Israel, and Japan made a joint submission.⁷⁸ The EU and its Member States also made a submission.⁷⁹ The EU submission holds particular interest, in view of the inclu-

Practical Guide for Drafting International Arbitration Clauses, 1 INT'L ENERGY L. & TAX'N REV. 16, 25 (2000); cf. Matthew W. Swinehart, *Institutionalism, Legitimacy, and Fact-Finding in International Disputes*, 47 FLA. ST. U. L. REV. 279, 287–90, 299, 303–05 (2020).

69. See, e.g., Marc Bungenberg & August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court*, EUR. Y.B. INT'L ECON. L. (Special Ed. 2020).

70. See *supra* pp. 182–84 as to the linkage, logical and expressed, between the proposals to introduce ISDS courts and the appointment process of decision-makers.

71. See UNCITRAL Working Group III, *supra* note 21.

72. See UNCITRAL, *Rep. of Working Group III on the Work of its Resumed Thirty-Eighth Session*, *supra* note 10. For a list of the UNCITRAL member states that participated in the Working Group, see *id.* ¶ 6; for states that sent observers, see *id.* ¶ 7; and for observers from the UN system, intergovernmental organizations, and non-governmental organizations, see *id.* ¶ 9.

73. See UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Government of Morocco on its Thirty-Seventh Session, U.N. Doc. A/CN.9/WG.III/WP.161 (Mar. 4 2019).

74. See UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Government of Ecuador on its Thirty-Seventh Session, U.N. Doc. A/CN.9/WG.III/WP.175 (July 17, 2019).

75. See UNCITRAL Working Group III *supra* note 23.

76. See UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Government of South Africa on its Thirty-Seventh Session, U.N. Doc. A/CN.9/WG.III/WP.176 (July 17, 2019).

77. See UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Government of Bahrain on its Thirty-Seventh Session, U.N. Doc. A/CN.9/WG.III/WP.180 (Aug. 29, 2019).

78. See UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Governments of Chile, Israel and Japan on its Thirty-Seventh Session, U.N. Doc. A/CN.9/WG.III/WP.163 (Mar. 15, 2019).

79. See UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the European Union and its Member States on its Thirty-Seventh Session, U.N. Doc. A/CN.9/WG.III/WP.159/Add.1 (Jan. 24, 2019).

sion by the EU of ISDS courts in recent bilateral agreements, to the texts of which we will turn below.

It is still too early in the discourse surrounding ISDS reform to say that a *locus classicus* for ISDS judicialization yet exists, but the EU's submissions at UNCITRAL in this regard are a good starting point. The EU has usefully summarized its understanding of how a new judicial architecture for ISDS would be shaped and what it would do. The EU's summary of the proposal merits setting out here in full. As to a tribunal of first instance, the EU said as follows:

13. A standing mechanism should have two levels of adjudication. A first instance tribunal would hear disputes. It would conduct, as arbitral tribunals do today, fact finding and then apply the applicable law to the facts. It would also deal with cases remanded back to it by the appellate tribunal where the appellate tribunal could not dispose of the case. It would have its own rules of procedure.⁸⁰

As to the appellate tribunal, the EU stated as follows:

14. An appellate tribunal would hear appeals from the tribunal of first instance. Grounds of appeal should be error of law (including serious procedural shortcomings) or manifest errors in the appreciation of the facts. It should not undertake a *de novo* review of the facts.

15. Mechanisms for ensuring that the possibility of appeal is not abused should be included. These may include, for example, requiring security for cost to be paid.⁸¹

The EU stipulated that, in staffing these ISDS courts, “[a]djudicators would be employed full-time. They would not have any outside activities.”⁸² The choice of decision-makers thus, is closely associated here with the introduction of a new institutional architecture. The decision-makers, chosen as prescribed, would staff a two-tiered international judiciary for investment claims.

As noted, a number of recent EU treaties have embodied provisions implementing the EU's ISDS courts proposal. As of March 2021, the relevant examples are the Comprehensive Economic and Trade Agreement (“CETA”) between the EU and Canada;⁸³ the EU-Viet Nam Investment Protection Agreement;⁸⁴ and the EU-Singapore Investment Protection Agree-

80. *Id.* ¶ 13.

81. *Id.* ¶¶ 14–15.

82. *Id.* ¶ 16.

83. *See* Comprehensive Trade and Economic Agreement Between Canada and the European Union, Can.-Eur. Union, Oct. 30, 2016, 2017 O.J.L 11.

84. *See* Proposal for a Council Decision on the Conclusion of the Investment Protection Agreement Between the European Union and the Socialist Republic of Viet Nam, Annex, COM (2018) 693 final (Nov. 17, 2018).

ment.⁸⁵ Each of these three treaties has provisions to constitute ISDS courts. The EU has also advanced draft texts for additional investment treaties that would constitute ISDS courts. The EU-Mexico draft for an EU-Mexico Global Agreement provides for a tribunal to hear claims under the agreement (article 11) and an Appeals Tribunal to hear appeals from awards that the Tribunal issues (article 12).⁸⁶ Thus, the EU-Mexico draft would judicialize ISDS in both of the main ways that reform advocates identify—at the level of first instance procedure and at a superior level for appellate review. This broadly follows the approach already taken in the EU-Canada,⁸⁷ EU-Viet Nam,⁸⁸ and EU-Singapore⁸⁹ agreements.

A further provision in these EU instruments merits remark. They envisage a future multilateral mechanism to take the place of the bilateral courts. In the EU-Mexico draft text, for example, the parties would agree to cooperate “for the establishment of a multilateral mechanism for the resolution of investment disputes,” with the bilateral dispute resolution mechanisms of the Agreement (the Tribunal and the Appeals Tribunal) being “suspended” upon the entry into force of the multilateral mechanism.⁹⁰ While this is a bilateral draft and, so, if implemented, directly affects only two parties—Mexico and the EU—the ambition behind the draft is far-reaching. The provision calling for a multilateral mechanism suggests that the draft envisages, in the form of the future “establishment of a multilateral mechanism,” a worldwide approach replicating the judicialization that the draft would achieve between its two parties. The other EU treaties contain similar provisions. The EU-Viet Nam Investment Protection Agreement provides that the Parties “shall enter into negotiations for an international agreement providing for a multilateral investment tribunal in combination with, or separate from, a multilateral appellate mechanism” and that they “may consequently agree on the non-application of relevant parts” of the dispute settlement sec-

85. See Investment Protection Agreement Between the European Union and the Republic of Singapore, Sing-Eur. Union, Oct. 15, 2018, U.N. CONFERENCE ON TRADE AND DEVELOPMENT [“UNCTAD”]: INVESTMENT POLICY HUB (Oct. 15, 2018), <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3545/eu—singapore-investment-protection-agreement-2018>.

86. See *Modernisation of Trade Part of the EU-Mexico Global Agreement Without Prejudice*, EUR. COMM’N 1, 9–13 (Apr. 21, 2018), https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156814.pdf.

87. See Comprehensive Trade and Economic Agreement Between Canada and the European Union, *supra* note 83, arts. 8.27, 8.28.

88. See Proposal for a Council Decision on the Conclusion of the Investment Protection Agreement Between the European Union and the Socialist Republic of Viet Nam, *supra* note 84, arts. 3.38, 3.39.

89. See Investment Protection Agreement Between the European Union and the Republic of Singapore, *supra* note 85, arts. 3.9, 3.10.

90. See *Modernisation of Trade Part of the EU-Mexico Global Agreement Without Prejudice*, *supra* note 86, art. 14.

tion of the Agreement.⁹¹ CETA stipulates that the EU and Canada “shall pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of investment disputes” and, similarly, provides for sunseting of the bilateral mechanisms that it constitutes.⁹² The EU-Singapore Investment Protection Agreement obliges the Parties to “pursue with each other and other interested trading partners, the establishment of a multilateral investment tribunal and appellate mechanism for the resolution of international investment disputes”⁹³ and contains a similar provision for “appropriate transitional arrangements” away from its bilateral tribunal and appellate mechanism.⁹⁴ This is not the first time a proposal has been advanced for a multilateral treaty for investment,⁹⁵ but it is the most advanced effort to date in that direction. Thus, the EU is using bilateral agreements to pursue a multilateral investment court.

The Mexico-EU draft and the concluded EU treaties stipulate criteria for appointment of Members of the Tribunal and the Appeal Tribunal.⁹⁶ We will say more about these and other criteria in Part IV below.⁹⁷ Proponents of institutional reform say that the appointment process for decision-makers is in need of improvement and that judicialization will address that need. In particular, reform proponents call attention to the permanence of courts and tenure of the decision-makers (that is, judges) of whom courts are comprised, and they contrast those attributes against the transitory character of arbitral tribunals and case-by-case appointment of private persons as arbitrators. We will turn in Part II to consider the claim that opposition to ISDS would be alleviated if states were to establish ISDS courts.⁹⁸

91. Proposal for a Council Decision on the Conclusion of the Investment Protection Agreement Between the European Union and the Socialist Republic of Viet Nam, *supra* note 88, art. 3.41.

92. Comprehensive Trade and Economic Agreement Between Canada and the European Union, *supra* note 83, art. 8.29.

93. See Investment Protection Agreement Between the European Union and the Republic of Singapore, *supra* note 85, art. 3.12.

94. *Id.*

95. Jan Paulsson—in 1995—thought that a multilateral investment instrument “may be the next great advance” in the field of international arbitration: Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232, 256–57 (1995). For current state of play in discussions regarding a multilateral instrument, see UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS): Multilateral Instrument on ISDS Reform on Its Thirty-Ninth Session, Note by Secretariat U.N. Doc. A/CN.9/WG.III/WP.194 (Jan. 16, 2019).

96. See *Modernisation of Trade Part of the EU-Mexico Global Agreement Without Prejudice*, *supra* note 86, arts. 11–13; Comprehensive Trade and Economic Agreement Between Canada and the European Union, *supra* note 83, art. 8.27(4)–8.28(4); See Investment Protection Agreement Between the European Union and the Republic of Singapore, *supra* note 85, arts. 3.38(4), 3.39(4), 3.39(7); Proposal for a Council Decision on the Conclusion of the Investment Protection Agreement Between the European Union and the Socialist Republic of Viet Nam, *supra* note 88, art. 3.9(4), 3.10(4).

97. See *infra* Part IV.

98. See *infra* Part II.C.

The present-day proposals to establish an ISDS court, however, as we noted in brief at the opening of this part (Part I(A)),⁹⁹ are not without fore-runners. Past attempts to judicialize arbitration did not go far. To give judicialization a critical framing that may explain the reluctance of states to establish courts of the kind that the EU now advocates, it helps to recall the growth of international jurisdiction over the past century—and the limits that international jurisdiction continues to respect.

C. ISDS Judicialization in Context: A Critical Framing

1. The Cautious Consent

To frame the current proposals for an ISDS court, it helps to consider the institutional landscape in which an ISDS court would function. Just as today's proposals to reform *ad hoc* arbitration are not the first,¹⁰⁰ we are not in the early days of standing international courts and arbitral bodies. The oldest ones trace their origins to the late nineteenth century.¹⁰¹ The principal judicial organ of the United Nations (“UN”) and the main dispute settlement organ of its kind today, the ICJ, has a nearly century-long history if one measures from the creation of the Permanent Court of International Justice (“PCIJ”),¹⁰² which functioned under a practically identical statute¹⁰³ and

99. See *supra* Part I.A.

100. See *id.*

101. The 1899 Hague Convention provided for a Permanent Court of Arbitration (“PCA”), an organ which, under the 1907 Hague Convention, continues to this day. The PCA is not an organ with a cadre of professional judges, but, rather, a secretariat available to manage arbitrations, if parties to a dispute choose to use it. Its “members” were individuals inscribed for renewable six-year terms by states parties to the Convention on a roster in accordance with 1899 Hague Convention art. 23. Convention for the Pacific Settlement of International Disputes art. 23, July 9, 1899, 81 ADVOCATE PEACE (1894–1920) 363. For a further discussion of the PCA and other rosters, see *infra* pp. 53–54. The Members were to be “disposed to accept the duties of Arbitrators.” *Id.* Parties who chose to employ the PCA as secretariat for an arbitration were not obliged to limit their appointments to the arbitral tribunal to individuals on the PCA lists. *Id.* States, in their conversations surrounding the creation of the PCA in the late 19th and early 20th centuries, also entertained creating permanent standing judicial bodies but none were agreed before the outbreak of World War One (1914). See *The Permanent Court of International Justice 1922 to 2012*, REGISTRY P.C.I.J. 15–17 (1939) [hereinafter PCIJ Registry], https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_other/cpji-pcij.pdf.

102. So too does the International Court of Justice (“ICJ”), in both formal and informal ways. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevens 1153. (The most conspicuous formal link is Art. 36(5) of the ICJ Statute, under which declarations that states made under Art. 36 of the Permanent Court of International Justice (“PCIJ”) Statute and that remain in force “shall be deemed, as between the parties to the [ICJ] Statute, to be acceptances of the compulsory jurisdiction” of the ICJ “for the period which they still have to run and in accordance with their terms.”). Concerning the informal continuity, see PCIJ Registry, *supra* note 101, a work that the ICJ Registry re-published in 2012 to commemorate the 90th anniversary of the inauguration of the PCIJ. The ICJ is physically housed in the same premises, the Peace Palace at The Hague, as was the PCIJ. The PCA

which contributed with its decided cases to a line of jurisprudence that continues to this day.¹⁰⁴

The instruments by which states expressed consent to the jurisdiction of the PCIJ, and later, to the ICJ, were very much a piecemeal affair, and the substantive scope of the jurisdiction they created was modest.¹⁰⁵ An ISDS court, as the EU proposes it, would be very different. It would consolidate the consent to jurisdiction in a single instrument, and it would extend the substantive scope of jurisdiction: It would reach a wide category—investment disputes—instead of the narrow categories to which states under various tailor-made declarations and agreements traditionally have limited their consent. To place the proposed ISDS court in context, it is helpful to consider the overall contour of jurisdiction under the ICJ and jurisdiction under current investment treaties—and then to consider the transformative effect that an ISDS court would have.

To start with the ICJ, this organ is subject to a statute that invites states to give consent to jurisdiction. Article 36, paragraph 2, of the Statute of the ICJ provides as follows:

The states parties to the present Statute¹⁰⁶ may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;

Secretariat is located there as well, though it also has “international offices” in Buenos Aires, Mauritius, and Singapore. *The Court*, ICJ, <https://www.icj-cij.org/en/court> (last visited Oct 20, 2021).

103. For original text of the PCIJ Statute, see Statute of the Permanent Court of Justice, Dec. 16, 1920 art. 26, 6 L.N.T.S. 391; see also Brian McGarry, *Legacy of the Statute of the Permanent Court of International Justice, 100 Years Onward*, EJIL TALK! (Dec. 30, 2020), <https://www.ejiltalk.org/legacy-of-the-statute-of-the-permanent-court-of-international-justice-100-years-onward/>.

104. See generally SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–2005* (2006) (discussing the continuous practices of the PCIJ and ICJ). A further line of continuity is suggested in Art. 4(1) of the ICJ Statute which, as did Art. 4 of the PCIJ Statute, places exclusively in the PCA national groups the power to nominate candidates for election to the ICJ. See Remy Jorritsma, *National Groups: Permanent Court of Arbitration* ¶¶ 21–22 (PCA) (Max Planck Inst. Lux. Working Paper, Paper No. 8, 2018).

105. See Karen J. Alter, *The Evolving International Judiciary*, 7 ANN. REV. L. & SOC. SCI. 387, 391, 393–96 (2011); see also W. Michael Reisman, *Has the International Court Exceeded Its Jurisdiction?*, 80 AM. J. INT’L L. 128 (1986) (recalling that “[i]nternational tribunals are bodies of limited competence.”).

106. See U.N. Charter art. 93, ¶ 1 (“[a]ll Members of the United Nations are ipso facto parties to the Statute.”).

d. the nature or extent of the reparation to be made for the breach of an international obligation.¹⁰⁷

Paragraph 3 of article 36 provides that consent by a state party to jurisdiction under paragraph 2 “may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.”¹⁰⁸

States, in practice, have conferred jurisdiction on the ICJ with considerable caution. While all 193 Member States of the UN are parties to the Statute of the ICJ by operation of UN Charter article 93, as of March 2021 only seventy-four have a declaration in force accepting as compulsory the jurisdiction of the ICJ.¹⁰⁹ Of these, few accept ICJ jurisdiction unconditionally. The ICJ Yearbook for 2018-2019 (the most recent available when this article went to press) reported that as of July 31, 2019, fifty-five of the declarations then in force contained reservations.¹¹⁰ Many of the reservations are far-ranging.¹¹¹

As of July 31, 2019, 150 contentious cases had been instituted at the ICJ (that is, since 1945).¹¹² Eighteen of these had been submitted by special agreement.¹¹³ Fifty-eight were submitted under a compromissory clause

107. See Statute of the International Court of Justice, *supra* note 102.

108. *Id.*

109. *Charter of the United Nations and Statute of the International Court of Justice*, U.N. TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=1-4&chapter=1&clang=_en (last visited Oct. 20, 2021) (The UN Treaty Collection list does not bracket Bolivia, France, and Israel, as it does other states named on the list declarations of which have expired or been terminated (e.g., [Brazil]). However, those three states do not have declarations in effect at present). *Cf. Declarations Recognizing the Jurisdiction of the Court as Compulsory*, ICJ, <https://www.icj-cij.org/en/declarations> (last visited Oct. 20, 2021) (listing the states that have an article 35 declaration under the ICJ statute).

110. See *Jurisdiction of the Court and the Procedure Followed by It*, 2018-2019 ICJ Y.B. 74.

111. See, e.g., Barbados: Declaration Recognizing as Compulsory the Jurisdiction of the International Court of Justice, July 24, 1980, 1197 U.N.T.S. 7 (Barbados excludes, *inter alia*, disputes “in respect of the conservation, management or exploitation of the living resources of the Sea” and “disputes with regard to questions which by international law fall exclusively within the jurisdiction of Barbados”); Australia: Declaration Recognizing as Compulsory the Jurisdiction of the International Court of Justice, Mar. 21, 2002, 2175 U.N.T.S. 493 (Australia excludes, *inter alia*, “any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf”); *Declarations Recognizing the Jurisdiction of the Court as Compulsory*, *supra* note 109 (The United Kingdom excludes, *inter alia*, “any claim or dispute that arises from or is connected with or related to nuclear disarmament and/or nuclear weapons, unless all of the other nuclear-weapon states party to the Treaty on the Non-Proliferation of Nuclear Weapons have also consented to the jurisdiction of the Court and are party to the proceedings in question”). One writer has referred to such declarations as “evisceratory caveats.” Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT’L L. 815, 817 (2007).

112. *Jurisdiction of the Court and the Procedure Followed by it*, 2018-2019 ICJ Y.B. 75.

113. *Id.* at 72, 75.

(that is, a provision in a treaty by which parties to the treaty accede to the jurisdiction of the court for purposes of disputes arising under the treaty).¹¹⁴ Eleven were derivative cases relating to other cases (to wit, six requests for interpretation, four applications for revision, and one follow-on request based on a determination in an ICJ judgment).¹¹⁵ Only twenty-seven cases since 1945 have been submitted solely based on a declaration under article 36, paragraph 2 of the Statute recognizing the court's jurisdiction as compulsory.¹¹⁶ In principle, the jurisdiction of the ICJ is far-reaching as regards subject matter and state parties. In practice, its jurisdiction has remained confined to careful expressions of consent tailored by those states adopting them.

Thus, while suggestions have been put forward for a procedure of general application in arbitration as we noted in Part I(A) above,¹¹⁷ and while, as we note here, a court exists that is open to universal subscription, states have not adhered to the former and have made recourse to the latter only on selective terms.

2. Investment Treaties Change the Landscape

Investment treaties, under which much of ISDS takes place, changed the landscape of international claims enough that Gary Born spoke of them bringing about a “second generation of international adjudication.”¹¹⁸ Investment treaties were transformative in at least two ways. First, they typically expressed the consent of their state parties to arbitral jurisdiction in cases brought directly by private parties—that is, by investors—rather than by other states parties.¹¹⁹ Second, investment treaties came to be so numerous that, though every consent to jurisdiction under an investment treaty must be read on its own terms, they have created, in aggregate, a potential for international claims vastly exceeding that under the traditional instruments of state consent to jurisdiction such as those that invoke article 36 of the Statute of the ICJ.¹²⁰

114. *Id.* at 75.

115. *Id.* at 75, 94, 158–59.

116. *Id.* at 75.

117. *Supra* Part I.A.

118. *See* Gary Born, *Second Generation of International Adjudication*, 61 DUKE L.J. 775, 819–58 (2012).

119. *See* Republic of Ecuador v. Occidental Expl. & Prod. Co. [2005] EWHC (Comm) 774 [61] (Eng.); Republic of Ecuador v. Occidental Expl. & Prod. Co [2006] EWHC (Comm) 345 [8] (Eng.) (holding that the investors' rights are not merely derivative of the State's).

120. *See* Born, *supra* note 118, at 859. (“Over the past forty years, these tribunals have developed large and growing caseloads that substantially exceed those of most other forms of international adjudication, including, in particular, traditional first-generation tribunals.”) As with much of modern ISDS, however, one must take care about the history before declaring the investment treaties entirely novel. The treaty settlements adopted to bring the First World War to a juridical close opened the door to a very large number of investors' claims against

Investment treaties are now nearly ubiquitous. As of 2021, the United Nations Conference on Trade and Development (“UNCTAD”) lists 3,752 investment treaties concluded, of which 2,336 are bilateral investment treaties and a further 323 are “treaties with investment provisions” in force.¹²¹ These treaties typically each confer jurisdiction over several categories of claims, and each give standing to an open category of claimants to bring claims.¹²² Never before have there been so many opportunities for non-state actors to play a role in their own right in an international procedure.¹²³

To consider one example of how this works, India and Israel, in their 1996 agreement for the promotion and protection of investments, provided that any dispute between “an investor of one Contracting Party and the other Contracting Party in relation to an investment of the former under this Agreement” which “has not been amicably settled within a period of six months” and has not been settled by conciliation or judicial procedure, may be referred to arbitration.¹²⁴ It is thus open, in principle, to any national of either India or Israel who meets the treaty definition of an investor to bring a claim against the other state. As to the categories of claims, these include claims that one of those states has failed to accord fair and equitable treatment to investments of investors of the other state in its territory,¹²⁵ that it has failed to accord most-favored nation treatment to such an investment,¹²⁶ or that it has carried out an expropriation of such an investment without fair compensation, without independent review, or in an otherwise unlawful way.¹²⁷

the enemy Powers; and even earlier various claims settlements, e.g., between European States and Venezuela, included arbitral mechanisms to deal with relatively open categories of private claim against defaulting governments. See Marta Requejo Isidro & Burkhard Hess, *International Adjudication of Private Rights: The Mixed Arbitral Tribunals in the Peace Treaties of 1919–1922*, in PEACE THROUGH LAW. THE VERSAILLES PEACE TREATY AND DISPUTE SETTLEMENT AFTER WORLD WAR I 239 (Burkhard Hess & Hélène Ruiz Fabri eds., 2019). These antecedents prefigure the modern investment treaties. It is still defensible to describe the latter as an innovation, because, unlike the peace treaties and earlier settlements, they are not restricted to the winding up of a particular, defined state of affairs.

121. International Investment Agreements Navigator, UNCTAD (2021), <https://investmentpolicy.unctad.org/international-investment-agreements> (last visited Oct. 13, 2021).

122. That is, a category of potential claimants limited only by stipulations that the treaty expresses in general terms and that a large and varying number of individuals and entities now or in the future might satisfy, which is to say not a fixed list of presently identifiable potential claimants.

123. See Thomas D. Grant, *The “Open System” and its Gatekeepers*, J. INT’L DISPUTE SETTLEMENT (forthcoming) (on file with author).

124. Agreement for the Promotion and Protection of Investments art. 9, India-Isr., Jan. 29, 1996, 1997 U.N.T.S. 238 (entered into force Feb. 18, 1997) [hereinafter India-Israel BIT].

125. *Id.* art. 3(2).

126. See *id.* art 4(1), (2).

127. See *id.* art 5.

We give the example of the India-Israel bilateral investment treaty not to single out this one treaty, but to show in broad outline the form and scope of jurisdictional consent contained in many investment treaties. It is a form and scope that, in the ways described, goes well past the cautious jurisdictional instruments under which most ICJ cases have been litigated. As the EU noted in UNCITRAL Working Group III, investment treaty jurisdiction involves “[a] repeat function,” because “the treaties in question potentially will give rise to multiple disputes over a potentially extended period of time.”¹²⁸ In an observation that highlights the difference between investment treaties and narrow-cast expressions of consent, such as the typical *compromis* for ICJ jurisdiction,¹²⁹ the EU added that investment treaties are “to be distinguished from legal instruments establishing one-off contractual arrangements.”¹³⁰ The investment arbitration provisions that exist under treaties have established an international jurisdiction—or, more accurately described, a series of international jurisdictions—much broader than that to which states heretofore typically consented when submitting themselves to courts.

3. The Outer Limits of International Dispute Settlement

The thousands of investment treaties now in force have thus expanded the outer limits of international jurisdiction. It is true that the landscape has changed in other areas of international jurisdiction as well. However, the other areas where jurisdiction has expanded nevertheless continue to observe fairly narrow limits. For example, human rights adjudication continues to be limited to certain regional instruments. The European Convention on Human Rights stands out among them for the scope of jurisdiction and the depth of jurisprudence that its court has developed. Many states still are subject to little or no such jurisdiction. Trade dispute settlement under the World Trade Organization (“WTO”) is another area of important change. The Appellate Body established under article 17 of the WTO Dispute Settlement Understanding (“DSU”)¹³¹ is a standing judicial organ,¹³² arguably

128. UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS): Submissions from International Intergovernmental Organizations and Additional Information, Appointment of Arbitrators, at 3 ¶ 6., U.N. Doc. A/CN.9/WG.III/WP.145 (Feb. 19, 2018).

129. See *supra* pp. 184-87

130. UNCITRAL Working Grp. III, *supra* note 128, at 3 ¶ 6. To take ICSID, the institution that hosts the largest number of ISDS cases, jurisdiction in seventy-five percent of its cases (from 1966 to 2020) have been based on treaties; nine percent on blanket consents expressed in national law; and sixteen percent on contracts. See THE ICSID CASELOAD -STATISTICS (ISSUE 2020-2), ICSID 11 (2020), <https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.pdf>.

131. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU].

132. See generally Howse, *supra* note 65.

the most important addition to the jurisdictional landscape since the ICJ itself. However, the WTO panels, which adopt reports on disputes brought before them, are constituted by the parties to the dispute, who appoint nominees proposed by the WTO Secretariat.¹³³ The DSU stipulates that parties are to accept the Secretariat's nominees "except for compelling reasons,"¹³⁴ but parties in practice frequently object.¹³⁵ As a result, constituting WTO panels, while not fully subject to party choice, more closely resemble the traditional arbitral appointment process than the DSU on its face would suggest. Moreover, while the DSU does not restrict the right to institute panel proceedings to states that have a legal interest in a matter,¹³⁶ dispute settlement under the WTO is inter-state only. Therefore, the panels and Appellate Body are not a mechanism open to an indefinite category of investor-claimants.

The judicialized part of WTO dispute settlement has been under considerable stress. The U.S. concerns, which pre-date the Trump Administration but were articulated forcefully at that time,¹³⁷ now also find echo in the EU. The European Commission in February 2021 called on WTO "adjudicators . . . [to] exercise judicial economy" and agreed with the United States that "a meaningful reform is needed."¹³⁸ It remains unclear how the EU's call to caution on judicialization of the trade domain conciliates with its call to arms on judicialization of investment.

4. Pushing the Limits to Party Consent on Some Questionable Assumptions

Though states have consented under investment treaties to arbitral jurisdictions covering many potential disputes, they, so far, have hesitated to accept a much wider judicial machinery. The record of declarations under article 36 of the ICJ Statute illustrates, in fact, that consent to compulsory jurisdiction diminished during the same period that investment treaties and

133. See DSU, *supra* note 131, art. 8(6).

134. *Id.*

135. See *The Process-Stages in a Typical WTO Dispute Settlement Case*, WTO, https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p2_e.htm (last visited Oct. 2, 2021).

136. See Appellate Body Report, *EC—Bananas III*, ¶ 132, WTO Doc. WT/DS27/AB/R (adopted Sept. 9, 1997).

137. See REP. ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION, U.S. TRADE REPRESENTATIVE 37–46, 47–54, 55–68 (Feb. 2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf (last visited Oct. 2, 2021) (Concerns, *inter alia*, were that the Appellate Body intrudes on panels' fact-finding competence, issues advisory opinions, purports to develop a system of WTO "precedent").

138. See *European Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Trade Policy Review—An Open, Sustainable and Assertive Trade Policy*, at 7, COM (2021) 66 final (Feb. 18, 2021).

ISDS under those treaties proliferated.¹³⁹ In ISDS, as noted, jurisdiction is subject to express limiting terms and, moreover, to limiting effects of the architecture of ISDS. The architectural limits are important. Because ISDS is not concentrated in one treaty but, instead, dispersed across many treaties, it reflects sovereign choices reached through many bilateral encounters and preserves sovereign control in that way. It also preserves party autonomy, the keystone of arbitration, because the parties choose the decision-makers in each dispute.¹⁴⁰

A multilateral ISDS court along the lines proposed would centralize the selection of decision-makers. Such a court would require states to accept that an appointing authority makes tenured appointments to the ISDS court, and, conversely, that decision-makers no longer be arbitrators selected *ad hoc* by the parties to each dispute. The diminution in party autonomy that would result from the proposed reforms has drawn remark in UNCITRAL Working Group III: “These design choices have important implications for the ability of each State to control the appointment of one or more judges and in this way influence decision-making on the court.”¹⁴¹ The “design choices” entailed by the judicialization of ISDS indeed have “implications”: If accepted, those “choices” would remove party autonomy from the equation of decision-maker appointments, and the limits that inhere in the existing, decentralized architecture would no longer apply.

As in other areas of the law in which the EU has encountered common law jurisdictions and the professionals who populate them, the debate over judicialization of ISDS involves divergent understandings of how a legal system works.¹⁴² So far, ISDS has born resemblance to common law systems to the extent that a body of decided cases has emerged, case by case. Legal quandaries¹⁴³ and the occasional *cause célèbre*,¹⁴⁴ arise out of the decentralized decision-making of ISDS. However, the systemic effect of any

139. For empirical study of possible reasons why, see Eric A. Posner, *The Decline of the International Court of Justice* 8 (John M. Olin Law & Economic Working Paper, Paper No. 233, 2004), regarding decline in percentage of States accepting compulsory jurisdiction.

140. See discussion *supra* pp. 172-73, 176.

141. UNCITRAL Working Grp. III, *supra* note 2, ¶ 45.

142. See, e.g., Barnabas Reynolds, *Two Legal Systems—Two Cultures? Common Law v. European Civil Law*, POLITEIA (May 31, 2019), <https://www.politeia.co.uk/two-legal-systems-two-cultures-common-law-v-european-civil-law-by-barnabas-reynolds/> (contrasting the “common law’s bottom-up, case-by-case, factual situation-based method of accretive reasoning” with the civil law code-based method).

143. See *supra* pp. 173-77.

144. See, e.g., the response to ICSID proceedings against Uruguay in response to that country’s tobacco packaging and labelling law. Eric Crosbie, Patricia Sosa & Stanton A. Glantz, *Defending Strong Tobacco Packaging and Labelling Regulations in Uruguay: Transnational Tobacco Control Network Versus Philip Morris International*, 27 TOBACCO CONTROL 185 (2018); see also Leon E. Trakman, *Investor-State Arbitration or Local Courts: Will Australia Set a New Trend?* 46 J. WORLD TRADE 83 (2012) (regarding Australia). Cf. Daniel Gervais, *Intellectual Property: A Beacon for Reform of Investor-State Dispute Settlement*, 40 MICH. J. INT’L L. 289, 313 (2019).

one decision is limited, not only because the consent-basis of arbitration limits the binding force of each award to the parties to the dispute, but also because the decision-making organs—the arbitral tribunals—vary in composition and are not subject to a compulsory and binding mechanism of review.¹⁴⁵ The effects of a bad decision thus are not felt system-wide.

Advocates of centralized review of arbitral awards say that decentralization has led to incoherence—the contradictory outcomes that we mentioned in the introduction.¹⁴⁶ However, it is not clear that the creation of a supervening appellate instance necessarily would lead to a more coherent jurisprudence. The strange contrast between the ICJ’s recent judgments in *Iran v. United States*¹⁴⁷ and *Qatar v. UAE*,¹⁴⁸ where the court used very different, and arguably self-contradicting, methods of interpretation to judge whether the claims fit within the applicable jurisdictional instruments,¹⁴⁹ should give pause to proponents who assume that a new international court will bring consistency to the law it applies.

Our purpose in this article is not to consider the entire range of ISDS reform proposals or the considerations, *pro* and *contra*, regarding ISDS reform. We instead have focused on judicialization, one of the main components of the reform agenda. Our focus there is for several reasons. First, judicialization is pertinent to how ISDS decision-makers are appointed. Judicialization goes hand-in-hand with the ongoing discussions among governments, among academics, and among investors who bring claims about how to appoint and whom to appoint. To replace arbitration with courts is to shift the issue of appointments to different terrain. Second, we have considered judicialization for the related reason that, as we will explore next in

145. By contrast, a procedure (including a review procedure) that is “compulsory and binding” is one that the parties *must* resort to and adherence to the results of which is not optional. For example, properly-formed ICJ jurisdictional agreements—*compromis*—establish that it is compulsory for the parties to submit to the jurisdiction of the ICJ; and a judgment of that court under such an agreement is binding on the parties. See Statute of the International Court of Justice, *supra* note 102, art. 59; Rules of Court, 2007 I.C.J. Acts & Docs. 47, art. 94(2). To give an example of a procedure the results of which are *not* binding, there is the conciliation procedure under Annex V of the UN Convention on the Law of the Sea. See UNCLOS, *supra* note 63, at 172. To the extent that a conciliation commission under that procedure serves to “draw the attention of the parties to any measures which might facilitate an amicable settlement of the dispute,” UNCLOS, *supra* note 63, at 176, resort to that conciliation procedure is *not* compulsory in regard to matters arising under UNCLOS in general (see UNCLOS Art. 284: 1833 U.N.T.S. 509)—but it *is* compulsory in regard to specific matters as stipulated in the Convention. See, e.g., UNCLOS, *supra* note 63, arts. 284, 297(2)(b).

146. See *supra*, p. 174.

147. See *Rep. of the ICJ*, at 32, U.N. Doc. A/76/4 (2021).

148. See *id.* at 31.

149. As to the contradictions, see Diane Desierto, *A Study in Contrasting Jurisdictional Methodologies: The International Court of Justice’s February 2021 Judgments in Iran v. USA and Qatar v. UAE*, EJIL TALK! (Feb. 15, 2021), https://www.ejiltalk.org/a-study-in-contrasting-jurisdictional-methodologies-the-international-court-of-justices-february-2021-judgments-in-iran-v-usa-and-qatar-v-uae/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2.

Part II, important recent empirical work suggests that judicialization will resolve, or at least ameliorate, the crisis of legitimacy said to have beset ISDS. If the crisis has to do with the people appointed as ISDS decision-makers, then advocates of judicialization should be precise and rigorous about why appointments matter—and about *whether* it matters that the people appointed serve as judges or as arbitrators. Third, as we will suggest, the recent empirical work opens the door to further study, inviting investigators to develop a more granular understanding of what, precisely, the communities concerned with the legitimacy of ISDS mean when they express a preference for courts.

II. AN EMPIRICAL CASE FOR DECISION-MAKER TENURE AS CURE FOR ISDS DISCONTENT

Jurists and policymakers who favor creating ISDS courts adduce several considerations that they say support that step. They argue, for example, that courts of first instance staffed by a professional corps of judges would impart a sense of shared enterprise to ISDS decisions, and an appellate instance would bring clarity to post-award procedure, a domain in which doubts subsist as to the dividing line between annulment and appellate review.¹⁵⁰ As we indicated in the introduction, however, our purpose here is to examine one particular line of argument that champions of ISDS courts advance. That is the argument that a permanent, standing ISDS court, including a control machinery for appellate review, would improve the public perception of ISDS.

Marceddu and Ortolani, writing recently in the *European Journal of International Law*,¹⁵¹ have presented a novel empirical study that seemingly lends support to ISDS courts. Marceddu and Ortolani's conclusion from their study was that public sentiment toward ISDS improves, "if the adjudicators are tenured and not appointed by the disputing parties on a case-by-case basis" and, so, the proposal for an investment court system "appears to move toward the right direction."¹⁵² More generally, Marceddu and Ortolani concluded that "the [public] acceptance of ISDS can be improved by altering the institutional design of the adjudicative body."¹⁵³ We now turn to Marceddu and Ortolani's study and their suggestions for ISDS reform.

150. See Noemi Gal-Or, *The Concept of Appeal in International Dispute Settlement*, 19 EUR. J. INT'L L. 43, 58–65 (2008); see also Armin Von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 LEIDEN J. INT'L L. 49, 71 (2013) (noting "expansion of what annulment committees [in ICSID] actually do"); Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals – An Empirical Analysis*, 19 EUR. J. INT'L L. 301, 306 (2008) (noting the uncertain relation between annulment under art. 52 of the ICSID Convention and bilateral agreement establishing appeals procedures).

151. Marceddu & Ortolani, *supra* note 38, at 427 (2020).

152. *Id.* at 427.

153. *Id.* at 416.

A. *The Marceddu and Ortolani Study: Goals and Design*

Describing their study as “the first-ever set of behavioural experiments concerning ISDS and public opinion,”¹⁵⁴ Marceddu and Ortolani explored “four factors” that they speculate might account for opposition to ISDS:

- (i) the international nature of ISDS;
- (ii) the type of rights protected by investment arbitration;
- (iii) the institutional design of investment arbitration; and
- (iv) the different legal standing that investment arbitration accords foreign, but not domestic, investors.¹⁵⁵

Marceddu and Ortolani carried out experiments to test hypotheses related to each of these factors. They designed the experiments around a survey in which they asked respondents to react to variant fact patterns describing fictive dispute settlement scenarios. The authors described their empirical approach in detail;¹⁵⁶ we summarize it here.

Marceddu and Ortolani’s survey cohort consisted of 684 adults who belong to “[t]he ISDS front”—that is people who are skeptical of ISDS but who are not ISDS experts.¹⁵⁷ The survey consisted of two versions each of four short fact patterns, all concluding with a description of a dispute settlement outcome. The people in the survey cohort were given one or the other version (but not both) of all four fact patterns. They were asked to read the fact patterns and rate their agreement or disagreement with the dispute settlement outcome.¹⁵⁸ Marceddu and Ortolani assigned people randomly, half to one version of each fact pattern, half to the other.¹⁵⁹

The dispute settlement outcomes in each version of the four fact patterns were the same. The variables between the versions were jurisdictional locus of the decision (domestic or international) (Experiment 1);¹⁶⁰ substantive rights at issue in the dispute (human rights or investor rights) (Experiment 2);¹⁶¹ dispute settlement mechanism (an international court or an arbitral tribunal) (Experiment 3);¹⁶² and standing *ratione personae* (procedure open to home country nationals and foreign nationals alike or procedure open only to foreigners) (Experiment 4).¹⁶³

154. *Id.* at 405. For an earlier exploration of the possible application of behavioral economics to international law in general, see Anne van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT’L L.J. 421 (2014).

155. Marceddu & Ortolani, *supra* note 38, at 416.

156. *Id.* at 412–18.

157. *Id.* at 416–17.

158. *Id.* at 418 (the rating was on a scale of zero to ten).

159. *Id.*

160. *Id.* at 419.

161. *Id.* at 420–21.

162. *Id.* at 423.

163. *Id.* at 424.

B. *Observations Gathered from the Study*

From observations that they gathered, Marceddu and Ortolani concluded that the factor that affects public sentiment the most is whether the decision-making body is an *ad hoc* arbitral tribunal or a standing court. Marceddu and Ortolani inferred this conclusion most confidently from their third experiment which they titled “mechanisms of appointment.”¹⁶⁴ They also inferred it from the observations gathered in their second and fourth experiments. Before we consider the inferences that Marceddu and Ortolani draw from their observations, a brief summary of those observations is in order.

Marceddu and Ortolani set out the results of each experiment numerically in tabular format.¹⁶⁵ For brevity and purposes of comparison, we summarize the observations together in both a table and in narrative form. The letter designations in our table below— ‘A’ and ‘B’—follow Marceddu and Ortolani’s notation, indicating the two groups into which the survey respondents were randomly assigned. Each group read and responded to one of the two variations on each dispute settlement scenario. The titles of each Experiment are Marceddu and Ortolani’s.

164. *Id.* at 423–24.

165. *Id.* at 420–21, 424–25.

Observations from Marceddu & Ortolani's Study*	
Experiment 1 <i>Aversion to International Adjudication</i>	
A. Investors bring a claim about de-nuclearization measures in the energy sector before the IEC (a fictive permanent international court)	B. Investors bring a claim about de-nuclearization measures in the energy sector before the GFCC (a permanent national court)
Result: No Significant Difference in Respondents' Sentiment	
Experiment 2 <i>Rights Protected by the System</i>	
A. An individual, described as an "investor," brings a habeas-like claim before an <i>ad hoc</i> arbitral tribunal	B. An individual brings a habeas-like claim before the European Court of Human Rights (a permanent international court)
Result: Respondents prefer 'B'	
Experiment 3 <i>Mechanisms of Appointment</i>	
A. Mining company complains before an <i>ad hoc</i> arbitral tribunal about Black Economic Empowerment measures	B. Mining company complains before the IEC (a fictive permanent international court) about Black Economic Empowerment measures
Result: Respondents prefer 'B'	
Experiment 4 <i>Access to International Justice and Discrimination on the Basis of Nationality</i>	
A. Investors bring claim before the IEC (a fictive permanent international court), which is described as affording standing to all claimants, regardless of whether they are domestic or foreign	B. Investors bring claim before an <i>ad hoc</i> arbitral tribunal, which is described as affording standing to foreign claimants only
Result: Respondents prefer 'A'	

*Summary, paraphrase, and tabular organization by Grant & Kieff.

C. Marceddu and Ortolani's Model

As with any data set, the observations that Marceddu and Ortolani obtained through their experiments say little in themselves. Necessary for making sense of a data set is a model to explain (or “predict”)¹⁶⁶ the observations that comprise it.

In their third experiment, the version of the fact pattern in which an arbitral tribunal was the decision-maker generated a more negative response than the version in which the decision-maker was a court. The authors concluded that “all other things being equal, a controversial outcome is perceived less negatively when a standing court with tenured judges (rather than an arbitral tribunal) is involved.”¹⁶⁷ They assessed the data from the third experiment to be that most strongly supporting the thesis that confidence in ISDS increases with courts and decreases with arbitral tribunals.¹⁶⁸

Marceddu and Ortolani also suggested that their second experiment, designed chiefly to test whether sentiment depends upon the substantive rights that a mechanism protects, also evinces public discontent toward *ad hoc* mechanisms. In both versions of the second experiment scenario, the substantive right was that which common law jurisdictions call habeas corpus—the right to plead to a court that the authorities have detained a person unlawfully.¹⁶⁹ The change between the two versions concerned the dispute settlement organs involved. Perhaps because the right involved is a widely-cherished one, it seemed noteworthy to Marceddu and Ortolani that sentiment was more negative when an arbitral tribunal addressed that right—evidence, one might say, to support the conclusion that arbitration is *so* unpopular that it turns even a silk purse of fundamental human rights into a sow's ear of arbitral illegitimacy. From the fourth experiment, Marceddu and Ortolani reported, similarly, that the respondents “reacted better to the [permanent court] version.”¹⁷⁰

Considering the broad outline of the data, the survey cohort appears to have been disquieted by privately selected private individuals deciding cases. Marceddu and Ortolani then suggested that the data, at least tentatively, support constituting a new, permanent court.¹⁷¹ In their view, judges will earn the confidence that now is lacking in arbitrators, and, in turn, ISDS will have a fresh start.

166. See THOMAS D. GRANT & DAMON J. WISCHIK, ON THE PATH TO AI: LAW'S PROPHECIES AND THE CONCEPTUAL FOUNDATIONS OF THE MACHINE LEARNING AGE 54–66 (2020).

167. Marceddu & Ortolani, *supra* note 38, at 424.

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

169. See Habeas Corpus Act 1679, 31 Car. 2 c. 2 (Eng.).

170. Marceddu & Ortolani, *supra* note 38, at 426.

171. *Id.* at 427–28.

Before we turn to interrogate Marceddu and Ortolani's empirical claim about public sentiment toward courts and arbitration in Part III,¹⁷² a few words are in order about what kinds of subject matter behavioral economics originally was fashioned to investigate, and about how Marceddu and Ortolani drew from their empirical claim a conclusion about *policy*.

D. *From Behavioral Economics . . . to ISDS Courts*

Marceddu and Ortolani are straightforward in their conclusion that the major institutional redesign of ISDS advanced today by the EU finds empirical support in the behavioral economics study that they conducted.¹⁷³ We believe that it is important to situate that conclusion, which is a conclusion about policy, in the experimental frame that Marceddu and Ortolani have employed. When investigators use an experiment to gather observations, they have the further task of proposing a model that explains the observations. The model that they propose should explain, or to use a term belonging to data science, “predict” the observations that they have obtained.¹⁷⁴ Marceddu and Ortolani's conclusion that their empirical evidence supports a specific policy proposal, however, by its nature, is a conclusion that goes one step further. Even the most convincing model does not lead ineluctably to a particular policy choice.¹⁷⁵

We will suggest below in Part III¹⁷⁶ what we believe to be an equally plausible—and arguably simpler—model to explain the observed results from Marceddu and Ortolani's experiments, and we will suggest that, as a policy choice, judicialization of ISDS does not necessarily follow.

Turning here to experimental method, we recall that Marceddu and Ortolani expressly locate their study in the field of behavioral economics.¹⁷⁷ They describe behavioral economics as concerned with situations in which “humans . . . depart from optimal decision-making” because of “different types of blinders that trigger biased judgment.”¹⁷⁸ They further describe the field as helping to identify “conclusive results whenever the ‘malfunction’

172. See *infra* Part III.

173. See Marceddu & Ortolani, *supra* note 38, at 420–21, 424–25.

174. For the particular sense in which data science uses the term “predict,” including its distinction from “forecasting,” see GRANT & WISCHIK, *supra* note 166, at 54–56.

175. Thus, to give an example from another area of policy, behavioral economics studies measuring consumer bias in regard to credit card surcharges and discounts have been used “to reach exactly the opposite policy implications” in proceedings before the U.S. Supreme Court, on the one hand, and in a study by the United Kingdom Office of Fair Trading (OFT), on the other hand: Todd J. Zywicki, Geoffrey A. Manne & Kristian Stout, *Behavioral Economics Goes to Court. The Fundamental Flaws in the Behavioral Law & Economics Arguments Against No-Surcharge Laws*, 82 MO. L. REV. 769, 783 (2017).

176. See *infra* Part III.A.

177. See Marceddu & Ortolani, *supra* note 38, at 412–13.

178. *Id.* at 413.

that the experiment seeks to verify is constituted by the failure to resolve a problem with only one correct solution.”¹⁷⁹

From its origins, behavioral economics indeed concerned choice modeling, but, in our view, the better reading of the work that founded the field is that behavioral economics did not concern situations in which there exist *a priori* definitions of “depart[ure] from optimal decision-making” or of a single “correct solution.” Its concern, instead, was to *forecast behavior*.

Daniel McFadden, an econometrician who received the Nobel Prize in economics, conducted the founding work in behavioral economics.¹⁸⁰ McFadden set out “four key elements” in the economic analyses that he developed. He summarized these briefly as follows:

1. The objective of market research is assumed to be *the forecasting of behavior* of consumers in economic markets.
2. The theory of the economically rational utility-maximizing consumer, interpreted broadly to admit the effects of perception, state of mind, and imperfect discrimination, provides a plausible, logically unified foundation for *the development of models of various aspects of market behavior*.
3. The core of a model of market behavior will be an equation, consistent with the theory of the economic consumer, which specifies *the probabilities of choices* (for example, brand, frequency, or volume of purchases) as a function of the objective market environment of the consumer.
4. The design of sample surveys, construction of questionnaires, specification of models of market behavior, and statistical methods for analysis should be integrated. In particular, survey design and statistical procedure should be jointly optimized to yield *consistent, maximally efficient forecasts*.¹⁸¹

As is visible in this summary description, each element connects to the forecasting task that was at the heart of McFadden’s conception of the method he developed. The research conducted using that method was about “forecasting of behavior” (the first element). It involved developing “models of various aspects of . . . behavior” (the second element). The equation at its core specifies “the probabilities of choices” (the third element).¹⁸² And its

179. *Id.*

180. See Expert Resume for Daniel McFadden, *Guitierrez v. Johnson & Johnson*, 269 F.R.D. 430 (D.N.J. 2006), 2006 WL 6887070.

181. Daniel McFadden, *Econometric Models for Probabilistic Choice Among Products*, 53 J. BUS. S13, S14 (1980) (emphasis added).

182. Choice models measure the propensity of a person to choose a given option—i.e., the probability that the person will so choose. They are the tool central to behavioral economics. By contrast, they do not make many appearances in judicial settings. A party witness in a case concerning the consumer-facing part of an electric utility provided the following description:

aim was to “yield consistent, maximally efficient forecasts” (the fourth element).

Subsequent researchers, including Marceddu and Ortolani, have applied the behavioral economics model for rather different aims, namely to assess *policy* choices and, sometimes, to advance policy prescriptions.¹⁸³ We are not the first to suggest caution before taking behavioral economics data “from the pages of scholarly journals to the forums of public policy formation.”¹⁸⁴ Policy choices are not choices that sellers in the market present to individual consumers but, instead, prescriptions that governments, or intergovernmental organizations as the case may be, adopt as law. Recalling McFadden’s “four key elements” that we quoted above from his pioneering

“[t]hese choice equations provide a measure of the attractiveness of each of the competing options. Changes in the variables within an equation cause the attractiveness of the various alternatives to change and thus alter the probability that a customer will choose a particular option.”

In the Matter of the Application of Potomac Electric Power Co., Case No. FC917-461 (D.C. Pub. Serv. Comm’n 1995). We turn *infra* pp. 214-15 to Laumann v. Nat’l Hockey League, 117 F.Supp. 3d 299, 310–11 (S.D.N.Y., 2015), in which McFadden presented expert testimony on choice modeling. See also, but with varying amounts of context, these other U.S. decisions: Oracle America, Inc. v. Google Inc., No. C 10-03561 WHA, 2016 WL 1743154, at *7 (N.D. Cal. May 2, 2016); Morales v. Kraft Foods, No. LACV1404387JAKPJWX, 2015 WL 10786035, at *8 (C.D. Cal. June 23, 2015); *In re* New Motor Vehicles Canadian Export Antitrust Litigation, 632 F.Supp.2d 42, 54, n.15 (D. Me. 2009); these Canadian Copyright Board decisions: *Re* Pub. Performance of Sound Recordings, 2012 CarswellNat 2331, ¶¶ 19–20 (Can. Copyright Bd.); *Re* Tariff of Levies to be Collected by CPCC, 1999 CarswellNat 3234, ¶ 108 (Can. Copyright Bd.); UK Competition Appeal Tribunal Ruling: British Telecommunications Plc v. Office of Communications, [2017] CAT 4; and, from Australian administrative proceedings, *Re Shane Ali v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2005] AATA 10, ¶ 63 (Aus.), http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/AATA/2005/10.html?context=1;query=Re%20Shane%20Ali%20;mask_path=.

183. The literature in “law and behavioral economics” is now substantial, and much of it is concerned with the design of public policy. For an earlier set of papers on the application of behavioral economics to law, see the Symposium in volume 51 of the *Vanderbilt Law Review*, Symposium, *The Legal Implications of Psychology: Human Behavior, Behavioral Economics, and the Law*, 51 VAND. L. REV. 1495–1788 (1998). There is practically no area of legal policy to which the method might not be applied. To give some examples for purposes of illustrating the scope, see Joshua D. Wright & Judd E. Stone II, *Misbehavioral Economics: The Case Against Behavioral Antitrust*, 33 CARDOZO L. REV. 1517 (2012); Oskari Juurikkala, *The Behavioral Paradox: Why Investor Irrationality Calls for Lighter and Simpler Financial Regulation*, 18 FORDHAM J. CORP. & FIN. L. 33 (2012); Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1 (2003). For a colloquy about probabilistic choice modeling in respect of contract law, see George S. Geis, *Automating Contract Law*, 83 N.Y.U. L. REV. 450, 460–463 (2008), (replying to Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?* 112 YALE L.J. 829 (2003)).

184. Thomas S. Ulen, *Behavioral Law and Economics: Law, Policy, and Science*, 21 SUP. CT. ECON. REV. 5, 7 (2013). Ulen, in addition to working on international and comparative law, received a PhD in economics. He was a member of the founding board of directors of the American Law and Economics Association and held the Swanlund Chair at the University of Illinois College of Law.

work in the field,¹⁸⁵ policy choices reached by public authorities who have the power to coerce society at large were not the choices with which behavioral economics was, in the main, originally concerned.

It is in this latter use of behavioral economics—that is, as a method of policy argument—that investigators have introduced, to use Marceddu and Ortolani’s language again, *a priori* definitions of “depart[ure] from optimal decision-making” or of a single “correct solution.”¹⁸⁶ Investigators introduce such definitions when they shift the focus of their experiments from forecasting individual behavior for purposes of helping formulate offerings in a market to evaluating policy choices.¹⁸⁷ It is not the purpose of the present article to examine in detail the emergence of behavioral economics and its subsequent application to various problems of public policy.¹⁸⁸ However, comparing the historical origins of this empirical method to its present-day applications in public policy helps, we believe, understand the investigation that Marceddu and Ortolani have performed. It is an investigation firmly located in the later development of behavioral economics, less so in its origins in essentially predictive tasks.

We will now take a closer look at Marceddu and Ortolani’s claim about decision-maker tenure, including at their experimental design and how it addresses McFadden’s original call for integration and “maximally efficient forecasts.”¹⁸⁹

III. INTERROGATING THE “TENURE” CLAIM

As we discussed above, the suggestions put forward by Marceddu and Ortolani broadly accord with the reform agenda of the EU and other actors that prescribe the judicialization of ISDS.¹⁹⁰ The EU and others call for a new architecture of ISDS in which a court of first instance and a control

185. See *supra*, p. 200.

186. Marceddu & Ortolani, *supra* note 38, at 412–13. The use of the language of error or mistake is widespread in the literature applying behavioral economics to legal policy. Thus, for example, even conservatives who are critics of behavioral economics describe it as a method that “documents common mistakes” by the public: Colin Camerer, Samuel Issacharoff, George Loewenstein, Ted O’Donoghue & Matthew Rabin, *Regulation for Conservatives: Behavioral Economics and the Case for ‘Asymmetric Paternalism,’* 151 U. PA. L. REV. 1211, 1214 (2003). Cf. Richard A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, 73 U. CHI. L. REV. 111, 111–12 (2006).

187. As we are not the first to suggest caution before applying behavioral economics to policy argument, so too we are not the first to suggest that using behavioral economics in policy argument has entailed shifting its focus from forecasting behavior to identifying “mistaken” behavior. See, e.g., Jeffrey J. Rachlinski, *The Psychological Foundations of Behavioral Law and Economics*, 2011 U. ILL. L. REV. 1675, 1683 (2011) (admonishing that the point of a behavioral economics study should “not [be] to demonstrate that people make mistakes. . . [but] to identify what cognitive process people rely on when making categorical judgments.”).

188. For examples, see *infra* note 199.

189. McFadden, *supra* note 181, at S14.

190. See discussion *supra* p. 196.

machinery for appeals be put in place, preferably in multilateral form.¹⁹¹ The change for ISDS would be comprehensive. It would transform this field of dispute settlement from one based, in large part, on party autonomy to a system of permanent international courts. In light of the transformative effects that the proposed reform would have and the support for that reform that Marceddu and Ortolani interpret their data to lend, we turn now to take a closer look at the model that they use to explain the data that they observed, the experimental design that they used to obtain the data, and the policy conclusion that they advance.

In Part III(A) we suggest an alternative model to explain the observations from Marceddu and Ortolani's experiments and we propose the elements of a further experimental design.¹⁹² In Part III(B)(1) we suggest a hypothesis to test the alternative model¹⁹³ and in Part III(B)(2) we present the method that behavioral economics would employ to interrogate more closely public belief about courts and arbitration.¹⁹⁴ We close Part III with a tentative proposal about the information that affects public sentiment toward ISDS.¹⁹⁵ In Part IV,¹⁹⁶ we will suggest that the process of constituting these decision-making bodies—that is to say, the process and criteria of appointment—is where policy makers may find a middle road between the status quo and a new dispute settlement architecture for ISDS.

A. *An Alternative Model*

Simplifying here for brevity, the model that Marceddu and Ortolani offer to explain the observed data holds that the public responds more positively when courts make decisions, and more negatively when it is arbitrators who decide. From their data, however, we believe there is an equally plausible model: The respondents trust people who have the characteristics of people whom they assume are appointed to courts. Accordingly, when presented with people whose characteristics are those that they assume people appointed to courts possess, respondents will express positive sentiments; presented, instead, with people either whose characteristics do not match that assumption or whose characteristics are unknown, respondents will express negative sentiments.

We think that our proposed model offers a simpler explanation of the observed data, and that it has as much explanatory/predictive value as Marceddu and Ortolani's. Put a slightly different way, our model is that respondents have positive sentiments toward signals of authority, and the term "court" emits those signals; but, so do other terms, in particular terms de-

191. See discussion *supra* pp. 182-83.

192. See discussion *infra* pp. 198-99.

193. See discussion *infra* pp. 199-200.

194. See discussion *infra* pp. 201-05.

195. See discussion *infra* pp. 207-09.

196. See discussion *infra* pp. 206-26.

scribing the characteristics of people who serve on courts, and of at least some people who might serve as arbitrators.

People, we posit, prefer to locate decision-making over important issues within a penumbra of formality associated with the establishment and standing of a court. The term “court,” in this explanation of the data, is a proxy for characteristics that people naturally associate with courts, but which are not necessarily confined to courts. We think, therefore, that future research should delve deeper into the question of what characteristics, precisely, people think make a court a trustworthy dispute settlement mechanism, with particular focus on the attributes of decision-makers.

As we noted earlier,¹⁹⁷ data sets are susceptible to more than one explanatory model. The goal in modeling is to explain the data completely and to do so efficiently. Incomplete explanations—models with gaps in which some of the data is not explained—and baroque explanations—models with special pleading to address different parts of the data—fall short of the goal. To recall Marceddu and Ortolani’s Experiment 2—the scenario involving the habeas-like procedure—the authors proposed that “the temporary nature of investment tribunals and the untenured character of the arbitrators have a negative impact” on public perception.¹⁹⁸ But one might just as well ask whether the respondents disliked the arbitral tribunal in this scenario, not because they dislike arbitration *per se*, but because the right involved is so well-known that they associated it with the general fabric of public law and civil liberties—in short, a right *par excellence* to keep in court and out of private decision-making hands. Indeed, an equally plausible assessment of the results from Experiment 2 might be that the respondents, following the judgment of public opinion in practically every nation that has an arbitration law, think that matters of criminal law and fundamental rights, at least after a point, should be reserved to the courts.¹⁹⁹ We think that this is a convincing explanation of the results of that *one* experiment. It is not, however, an explanation that would suffice for the rest of the data.

We will suggest further, below, that there *is* a relatively simple and complete explanation about the response of ISDS critics to arbitral tribunals and to courts, and it is an explanation that delves more deeply than Marceddu and Ortolani’s into the attributes of those institutions and the experiences of survey respondents in the world at large. Our proposed explanation is that the public are responding to the *attributes of people* whom they understand

197. See discussion *supra* p. 197.

198. Marceddu & Ortolani *supra* note 38, at 422; see also discussion *supra* p. 196.

199. Issues may well be arbitrated that involve criminal law, but widespread is the exclusion from arbitration of the *determination* of criminal liability and the *determination* of fundamental rights. “[A] distinction needs to be drawn between determinations of criminal liability and the imposition of criminal sanctions, and determinations of issues which may [merely] *involve* criminal liability.” London Steamship Owners Mutual Ins. Ass’n v. Kingdom of Spain & the French State [2013] EWHC (Comm) 3188 [101] (Hamblen, J.) (emphasis added) (Eng.); see also *id.* at [100–02] (quoting several of the main treatises and distinguishing arbitrable from non-arbitral claims based on national legislation).

to serve on decision-making bodies. As we will hypothesize below, the personal attributes of the decision-maker matter more than the formal title or structure of the institution in which she serves.²⁰⁰

B. Suggestions for Further Experimental Design

We believe that taking a closer look at the definitions of “court” and of “arbitral tribunal”—and at the prior assumptions that people hold regarding those terms—would enrich the line of study that Marceddu and Ortolani have opened. Moreover, constructing choice models that are tied to people’s experience and to the objective attributes of “courts” accords with the original understanding of behavioral economics.²⁰¹ We start, in Part B(1), by offering some preliminary thoughts toward a hypothesis to test the model that we propose. We then turn, in Part B(2), to the original understanding of behavioral economics and what it suggests for constructing a model to address public perception of courts and arbitration.

1. A Hypothesis About the People Who Serve as Arbitrators

We have suggested in Part III(A) above²⁰² that the terms “court” and “arbitral tribunal,” and the experience of survey respondents with them, merit further interrogation. “Court,” in particular, is a term in general usage. The public has a picture of what a court is. So, when a survey introduces “court” as a variable, it is relevant to ask what content the survey participants import into it. It appears from Marceddu and Ortolani’s study that the introduction of the term “court” has a salutary effect upon survey respondents’ response to dispute settlement.²⁰³ But the survey did not explore what associations the term triggers, or why the respondents might have had positive sentiments toward the judicial institution. We believe further research is called for to elucidate the public understanding of “courts” and how exactly that contrasts with the public understanding of *ad hoc* mechanisms, in particular arbitration in ISDS.

Marceddu and Ortolani suggest that their experiments, at least provisionally, recommend that *ad hoc* mechanisms be replaced by courts. Further research might point the same way. But it might point a different way: It might suggest that other attributes of these institutions, besides their names and tenure arrangements, affect how the public perceives them.

One set of attributes in particular stands out in this setting: the career backgrounds of permanent judges and *ad hoc* arbitrators. The *curricula vitae* of the people who staff an institution are objective attributes of the institution. Moreover, they are highly salient attributes for purposes of Mar-

200. See discussion *infra* pp. 207-08.

201. See discussion *infra* p. 209.

202. See discussion *supra* pp. 198-99.

203. See discussion *supra*, pp. 195-96.

ceddu and Ortolani's study—a study concerned with “the mechanism whereby adjudicators are appointed.”²⁰⁴ When you appoint people as decision-makers, whatever the institutional setting, you almost certainly consider what it is they did before. To say that judges appointed to courts have tenure and that arbitrators are appointed *ad hoc* might lend a layperson some insight, but as a description of the institutional apparatus it remains rather shallow. Given only that description, the layperson naturally wonders: Who precisely are the people serving as arbitrators and making such important decisions?

We hypothesize that the term “court,” without further specification, and especially when contrasted with the less familiar term “arbitration,” evokes relative confidence in the decision-makers. The term embraces a penumbra of formality—an emanation from “court” that affects public perception, both of the individuals who serve in that decision-making body and of the decisions they adopt.

We hypothesize that public antipathy toward ISDS is not about the absence of a standing, permanent court, as such; but, instead, about the absence of reliable signals of community confidence when the term that the investigators present to test subjects is “arbitration.” In the persons appointed to ISDS panels, respondents, if they have in mind any picture at all, see private individuals whose provenance, credentials, and intentions are obscure.

By contrast, the word “court” calls to mind a definite picture. “Court” evokes the characteristics of the people whom respondents assume serve on a court. The word is a shorthand or proxy for signals of community confidence *in the appointees* to that decision-making body. We hypothesize that public sentiment toward decisions that the body adopts correlates to those signals, *independently of other factors*, including the title that attaches to the body.

A further set of experiments might test this hypothesis about courts and arbitration. The experiments would consider which characteristics in a decision-maker lead respondents to express confidence in the decisions reached. If appointment to a permanent, standing international court is the *sole* characteristic that assuages respondents' concerns, then that would support the argument for a tenure-based system of ISDS review. By contrast, if it were to come to light that a “court” and tenure are *not* the features that best predict public sentiment, then alternatives to the current reform agenda would merit consideration.

Implicit in our proposed explanation is that signals of community confidence—the signals of authority that institutions called “courts” emit and that form a penumbra of formality around those institutions—attract popular approval toward their decision-making outcomes. To this extent, we read Marceddu and Ortolani as being in accord with our explanation. However,

204. Marceddu & Ortolani, *supra* note 38, at 423.

we suggest further that the attributes of the people understood to serve on courts are the underlying source of those signals and, moreover, that people with the same or similar attributes would instill the same or similar confidence, even if they served under different formal titles in different institutional formats.

We will elaborate in Part IV on what we mean by “signals of community confidence,” including giving some examples from arbitral practice and relating the idea to the current ISDS reform agenda.²⁰⁵ But first, we will elaborate on the experimental design that our hypothesis calls for—and why we think that the methodology of behavioral economics calls for a closer interrogation of Marceddu and Ortolani’s “tenure” claim.

2. Constructing Models Tied to Respondents’ Experience and the Attributes of “Courts”

Daniel McFadden, who, as we mentioned above,²⁰⁶ pioneered behavioral economics, did so by developing probabilistic-choice models and systematizing how to construct them. According to McFadden,

[P]sychological scales can be treated simply as attributes of alternatives in probabilistic-choice models, provided they are constructed so as to contribute to the explanation of behavior on one hand and to be tied to the experience of the consumer and the objective attributes of products on the other.²⁰⁷

McFadden’s concern was with market research and thus with the experience of *consumers* and the attributes of *products*. However, his insight about constructing models applies across the subject matter that investigators have come to examine through behavioral economics. According to that insight, when constructing models, it is necessary that the investigator, *inter alia*, consider closely what the characteristics are of the physical artefact or other phenomenon that is under investigation. As McFadden said, the scales or models must be constructed so as to “be tied to the experience of the consumer *and the objective attributes of products*.”²⁰⁸ These are models of forecasting people’s behavior *toward* some object (consumer products in the classic case), and, so, what the object *is* needs careful consideration. Models must also appreciate people’s “experience” concerning the object. It follows from McFadden’s description of how to construct models that a model that is *not* “tied” both to the “objective attributes” of the object concerned and to

205. See discussion *infra* pp. 206-26.

206. See discussion *supra* p. 197; see also Expert Resume for Daniel McFadden, *supra* note 180 and accompanying text.

207. Daniel McFadden, *Econometric Models for Probabilistic Choice Among Products*, 53 J. BUS. S13, S23 (1980).

208. *Id.* (emphasis added).

the “experience” of the people being surveyed will be less reliable as a predictor of behavior than one that is.

The respondents in Marceddu and Ortolani’s experiments equate to the “consumers” in McFadden’s description of the construction of models in behavioral economics. Courts and arbitration tribunals are the “products” that these experiments are concerned with. However, we suggest that the experiences of the respondents, and the objective attributes of courts and arbitral tribunals call for closer examination than Marceddu and Ortolani undertook.

First, let us consider the respondents’ *experiences* as relevant to dispute settlement mechanisms. The terms “court” and “arbitration tribunal” are centrally important to Marceddu and Ortolani’s study. The survey scenarios offered guidance as to what those terms mean, but the guidance was only basic.²⁰⁹ It is not clear to us that the respondents in the study were given enough guidance about the object toward which their sentiment was being measured for the study to show precisely what features of the object most affected their sentiment.

Moreover, it is not clear whether *other* features of the object, unnamed and not directly measured in the study, were not also affecting respondents’ sentiment. The word “court,” as we suggested above, has meaning extrinsic to Marceddu and Ortolani’s use of the term in their study. We surmise that respondents, though probably having heard little about “arbitration,” have heard a lot about courts. At least the word “court,” for the typical person, has content in addition to the stipulation that its appointees are full-time and permanent job-holders.

The guidance that Marceddu and Ortolani gave to their respondents as to the words “court” and “arbitration tribunal” related to mechanisms of appointment. To recall, Experiment 3 is the experiment that Marceddu and Ortolani suggested most strongly supports the policy conclusion that a permanent ISDS court would instill greater public confidence than *ad hoc* tribunals.²¹⁰ In Experiment 3, they formulated the null hypothesis to test public reaction to “*the mechanism whereby adjudicators are appointed.*”²¹¹ From Experiment 2, they inferred that a possible explanation of the observed data is that the participants did not like “*the temporary nature of investment tribunals and the untenured character of the arbitrators.*”²¹² In Experiment 4 Marceddu and Ortolani indicated that, from the observed data, the respondents “reacted better to the [*permanent court*] version of the story.”²¹³ That was the objective attribute of the objects on which the experi-

209. See Marceddu & Ortolani, *supra* note 38, at 408 (referring to the “impermanent nature” of arbitral tribunals); and *id.* at 419 (describing a court as a “permanent institution”).

210. See Marceddu & Ortolani, *supra* note 38, at 424–27; see also *supra* nn. 164–65 and accompanying text.

211. See Marceddu & Ortolani, *supra* note 38, at 423 (emphasis added).

212. *Id.* at 422 (emphasis added).

213. *Id.* at 425–26 (emphasis added).

ments were focused: they were focused on whether the dispute settlement mechanism was permanent or temporary.

Little or nothing more than that was said. A logician or a jurist would interpret these definitions as *stipulative*, meaning that she would understand that, once such definitions are given, extrinsic understandings of the terms so defined are excluded.²¹⁴ We are not aware that the survey respondents in Marceddu and Ortolani's study were instructed to apply the descriptions of *ad hoc* arbitral tribunals or of courts in a stipulative way. Even in a courtroom where members of a jury *are* instructed about what ideas they must leave at the door, the exercise is highly fraught;²¹⁵ a mass of literature and jurisprudence exists concerning how extrinsic information or bias influences (and misshapes) jury outcomes.²¹⁶

Experiments 2 and 4 seem to address, albeit indirectly, much the same question that Experiment 3 does. They all address the legitimacy of arbitration. However, we do not see that any of these experiments interrogate what, precisely, the survey respondents understood arbitration to be. All the experiments gave labels to two types of organs and set out basic features of both. The main feature that the investigators' experimental design addressed was the mechanism of appointment. The experimental design did not address *whom* the mechanism in practice has appointed. We think it would be fruitful to construct a slightly different experimental model, one that ties more closely to the respondents' experiences of "court," of "arbitration tribunal," *and of the people who serve on each*. By getting to a more granular understanding of that experience, a future experiment could test further hypotheses as to what characteristics instill public confidence in a dispute settlement institution.

Second, let us consider the other requirement that McFadden said the experimental model must meet—namely, that it be tied to the *objective attributes* of the things concerned.²¹⁷ This requirement is closely related to that concerning respondents' experience. Both must link to the experimental

214. As to logicians, see the contrast between stipulative and "lexical" or "descriptive" definitions in *Erickson v. Mun. of Anchorage*, 662 P.2d 963, 970 (Alaska Ct. App. 1990) (citing I.M. COPI, INTRODUCTION TO LOGIC 120 (4th ed. 1972)). As to jurists, see, e.g., *State v. Harris*, 311 Kan. 816, 832 (2020) (Biles, J., dissenting) (citing BRYAN A. GARNER, LEXICAL AND STIPULATIVE DEFINITIONS, DICTIONARY OF MODERN LEGAL USAGE 257–58 (2nd ed. 2001)).

215. See *Smith v. Phillips*, 455 U.S. 209, 234 (O'Connor, J., concurring) (1982) (noting state court judgment that juror bias could not be avoided "by admonitions from the court"); cf. *Easler v. State*, 131 N.E. 3d 584, 590 (Ind. 2019) (noting "the relative ease with which trial courts can correct potential improprieties *before* the jury is sworn in") (emphasis added)). From a Commonwealth jurisdiction see, e.g., *R v K*, [2003] 59 NSWLR 431, 443 (Austl.) (quoting *R v Booth* [1983] 1 VR 39 (Austl.)) (indicating that not all extrinsic knowledge that a juror might have in regard to a criminal defendant entails quashing a conviction).

216. Some jury outcomes are so extremely misshapen that even notoriously cold-blooded jurists do not countenance them. See *Moore v. Dempsey*, 261 U.S. 86 (1923) (Holmes, J.).

217. See McFadden, *supra* note 207.

model, and, because the purpose of experimentation here is to learn about the respondents' behavior *toward* certain things, their experiences that matter for this purpose are experiences *about* the objective attributes of those things. We query how much it really tells a survey respondent to describe arbitral tribunals as temporary and courts as permanent. Correspondingly, we query how much a survey limited to those basic descriptions really tells the investigator about the survey respondents' behavior. Written to include more detail, a survey could describe these bodies by reference to objective attributes in addition to the summary terms "temporary" and "*ad hoc*." An expanded construction of the experiment, in other words, would address further objective attributes and thus tie the experimental model more closely both to the objects and to the experience of the people whose behavior toward those objects it aims to measure.

So, have Marceddu and Ortolani addressed the objective attributes that lie beneath popular opinion about courts and arbitration, or do they not quite tie the relevant objects and human experience closely enough to produce a reliable map of the terrain concerned? Courtroom experience illustrates, both in classic skirmishes over the use of words, and in the relatively arcane field of behavioral economics, how an argument might fail to produce a map on which a judge is ready to rely.

In the courtroom, lawyers sometimes use Latin phrases because they sound important and their use might cover up gaps in reasoning. As Jerome Frank recalled when serving as a judge on the Second Circuit, even a jurist as learned as Sir Edward Coke "disingenuously invent[ed] or misappl[ied] sententious Latin phrases when he lacked good arguments or precedents."²¹⁸ The alert judge, no matter how impressive the verbiage, will ask for reasoning that makes plain sense and, where needed, for definitions of the concepts at issue.²¹⁹ This familiar courtroom experience is, at least in a general way, analogous to what McFadden was getting at when he called for models that are tied to the objective attributes of the subject matter being studied;²²⁰ A word can describe but can also obscure, and a model can invoke a term or concept while failing to reflect what lies beneath.

When parties and experts in courtroom settings have challenged choice models, they have applied a similar kind of scrutiny. Where models elide relevant details, protagonists have drawn attention to omissions of "a critical parameter," a good model being open to testing "in response to small changes."²²¹ A choice model, to be rigorous enough for a court to place reli-

218. Sperbeck v. A.L. Burbank & Co., 190 F.2d 449, 450 (2d Cir. 1951).

219. For a recent, and extreme, example, albeit one of a *pro se* litigant (i.e., a litigant proceeding without a lawyer), see *Benson-Staebler v. City of New York*, No. 17-CV-4519 (AMD) (ST), 2020 WL 3256289 (E.D.N.Y. June 16, 2020).

220. See McFadden, *supra* note 207.

221. Oracle Am., Inc. v. Google Inc., No. C 10-03561 WHA, 2016 WL 1743154, at *8 (N.D. Cal. May 2, 2016) (expert critique of choice model); see also *Advocs. for Transp. Alts., Inc. v. U.S. Army Corps of Eng'rs*, 453 F. Supp. 2d 289, 303 (D. Mass. 2006) ("The Federal

ance on it, has to take account of the details (“parameters”) of the object being modeled. Otherwise, the investigators will not have scrutinized the interplay between survey respondents and an object (that is, a product) closely enough to consider what signals are in fact affecting behavior (“response to small changes”).

There is also the related critique that the experiment did not interrogate the respondents closely enough. A critique along this line convinced a district court in *Laumann v. National Hockey League* to reject the plaintiffs’ choice model.²²² Briefly put, the plaintiffs alleged that the National Hockey League (“NHL”) and Major League Baseball (“MLB”) engaged in unlawful restraint of trade. They alleged that the leagues, by maintaining “territorial exclusivity” for sports broadcasts,²²³ restricted sports fans’ viewing options and, in turn, inflated prices.²²⁴ The plaintiffs’ expert prepared a study concerning sports fans’ behavior. The study concluded that the price that fans paid for broadcasts, if the leagues were to stop their alleged misconduct, would drop considerably.²²⁵ The court, however, did not buy it. The court determined that the plaintiffs’ expert’s choice model displayed a flaw that was “quite fundamental and fatal,” namely, that it “[did] not rely on sufficient data about consumer tastes and preferences” to support the conclusion that that expert had inferred from it.²²⁶

This was not simply a defect owing to the plaintiffs’ dataset containing too few people. The NHL and MLB called McFadden as an expert. According to McFadden, the plaintiffs’ expert’s model was unreliable, because it needed to “find out more about what [the consumers’] tastes are, [and] whether they would consider buying or not at various suggested prices.”²²⁷ The model, in short, did not ask enough about the consumers’ behavior. It did not adequately address how their behavior (“whether they would consider buying or not”) is affected by variations in the relevant feature of the product (“various [and thus variable] suggested prices”).

C. Information Affecting Public Perception of ISDS: A Tentative Proposal

Mapping a case about hockey fans onto a study about ISDS critics is necessarily inexact, but McFadden’s observations have general salience to any choice model. The better model is the one that more closely interrogates

Transit Administration . . . noted that the mode of choice model used by the MBTA to compare bus and commuter rail alternatives was ‘insensitive’ to important factors generally addressed in mode of choice models.”)

222. *Laumann v. Nat’l Hockey League*, 117 F. Supp. 3d 299 (S.D.N.Y. 2015).

223. *Id.* at 302.

224. *Id.*

225. *Id.* at 302–03.

226. *Id.* at 315.

227. *Id.* at 312 (quoting Daniel McFadden trial testimony).

the objective attributes of the thing concerned and the experience of the individuals surveyed toward it. We have argued above that the features of “court” and of “arbitration” and the *a priori* assumptions of the relevant public about those terms require closer examination if empirical claims about popular discontent toward ISDS are to justify the institutional transformation that advocates of ISDS courts pursue. We hypothesize that public discontent toward ISDS correlates more strongly to information about who serves in dispute settlement organs than to how those organs are named. A proposition that we believe should be tested is that, when respondents receive signals that the community has confidence in the appointees to a decision-making body, their sentiment toward decisions that the body adopts improves.

We turn now to consider in more detail the signals of community confidence that we hypothesize are the better predictors of popular sentiment toward a dispute settlement machinery; and how, if our hypothesis were to stand up to experimental testing, those signals might identify a middle road to ISDS reform.

IV. SIGNALS OF COMMUNITY CONFIDENCE AND THE MIDDLE ROAD

We noted earlier that the present discourse over ISDS reform does not take place in a historic vacuum.²²⁸ Over a half century has passed since the ILC put forward its proposal for a procedural code to regularize the conduct of international arbitration. Proposals today for ISDS reform go much further. Nevertheless, they share with that and other twentieth century antecedents²²⁹ an assumption that standardized rules, and in some situations standing public organs, better serve the needs of the parties and the wider public that international dispute settlement affects.

As we turn now to identify more precisely the signals of community confidence that we posit would improve public sentiment toward ISDS, we turn to another aspect of the history of international dispute settlement. States practicing international arbitration in its nascent stages in the nineteenth century displayed an unspoken consensus about whom to appoint as arbitrators. They appointed eminent persons whose public roles left little doubt that they would exercise the arbitral powers that disputing parties conferred on them with appropriate regard for the community concerns involved. We turn to that aspect of the history in Part IV(A).

States considering options for reform today wrestle with how to appoint decision-makers. Yet, in so doing, states (and ISDS technicians who take the crisis of public confidence seriously) gravitate toward criteria of public trust not altogether different from those that influenced appointments in the early days of international arbitration. Nobody, to our knowledge, has sys-

228. See discussion *infra* Part. I.A.

229. As to which, see discussion *infra*, Part I.C.

tematized an understanding of those criteria. The *desideratum* is often stated that decision-makers be people of “reputation,”²³⁰ but that is too general to serve as a guide. We will suggest in Part IV(B) that, while ideas about how to instill public confidence in ISDS decision-makers remain imperfectly articulated and diffuse, those ideas already hint at a consensus. We will propose in Part IV(C) some tentative steps toward systematization. It is by reaching a more explicit understanding of the characteristics that the public expect in the decision-makers who sit in judgment on matters of public concern that states and ISDS technicians may identify, between the unsatisfactory status quo and a transformation of ISDS into an international judiciary, a middle road of ISDS reform.

A. *The Eminent Arbitrator*

From its earliest days, inter-state arbitration drew upon eminent persons in whom the parties placed trust, not because the parties held the power of appointment (and re-appointment) over them, but because the station those persons occupied prior to appointment would attract public confidence to their eventual awards. Examples range from awards delivered by the Catholic Supreme Pontiff, such as that which Germany and Spain requested from Pope Leo XIII regarding the Caroline Islands,²³¹ to awards delivered by heads of state and government, such as that which Costa Rica and Nicaragua requested from U.S. President Grover Cleveland in the San Juan River dispute.²³²

230. See UNCITRAL Working Grp. III, *supra* note 21, ¶ 54 n.61, UNCITRAL Working Grp. III Possible Reform of Investor-State Dispute Settlement (ISDS) Arbitrators and Decision Makers: Appointment Mechanisms and Related Issues, Note by the Secretariat, ¶ 7, U.N. DOC. A/CN.9/WG.III/WP.152 (Aug. 30, 2018); UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS): Ensuring Independence and Impartiality on the Part of Arbitrators and Decision Makers in ISDS, ¶¶ 27, 40 U.N. DOC. A/CN.9/WG.III/WP.151 (Aug. 30, 2018).

231. See Arbitration Protocol Relative to the Caroline Islands (Ger-Spain), Oct. 22, 1885, *reprinted in* PASICRISIE INTERNATIONALE: HISTOIRE DOCUMENTAIRE DES ARBITRAGES INTERNATIONAUX 285–86 (Henri La Fontaine ed., 1902) (hereinafter “PASICRISIE INTERNATIONALE”); Convention Accepting the Proposals of the Pope, Dec. 17, 1885, *reprinted in* PASICRISIE INTERNATIONALE 285–86. *Cf.* Haiti-Dominican Republic Arbitration Convention, *reprinted in* PASICRISIE INTERNATIONALE 602–03 (July 3, 1895) indicating the Pope as arbitrator. Perhaps the most famous of the Papal Awards—that of May 4, 1493, dividing the extra-European world between Portugal and Spain—was given by a Pope, Alexander VI, whose personal qualities did not conduce to the sort of public confidence that concerns us in this article. For biographical details, see Lord Goff, *Lessons from the Past*, 54 *ARB.* 147, 150 (1989). For a list of nineteenth and twentieth century Papal arbitrations and mediations, see John A. Onorato, *Saving Grace or Saving Face: The Roman Catholic Church and Human Rights*, 8 *DICKINSON J. INT’L L.* 81, 81 n.1 (1989).

232. *Award of the President of the United States in Regard to the Validity of the Treaty of Limits between Costa Rica and Nicaragua of 15 July 1858*, 28 *REPS. INT’L ARB. AWARDS*, 2006, at 189, 189. Other contemporary examples may be given, for example, that of Britain and Portugal in regard to claims in Delagoa Bay, arbitrated by the President of the French Republic. See *PASICRISIE INTERNATIONALE*, *supra* note 231, at 172–73. Justice Menon’s sum-

States did not turn to Pope Leo or President Cleveland for their expertise as arbitral proceduralists, or for their knowledge of a particular substantive field. We are not aware that these individuals had any such expertise or knowledge. Tribunals constituted of kings, queens, emperors, popes, and presidents relied upon “commissions” or “committees” of jurists or, more typically, officials in their governments, who did the real fact-finding, jural puzzle-solving, and, if called for, procedural management.²³³

In at least one instance, the named arbitrator merely alluded to the personnel on whom he called for the real work of dispute settlement. Ulysses S. Grant, as President of the United States, served as arbitrator between Great Britain and Portugal in relation to claims to and near the Island of Bolama on the west coast of Africa.²³⁴ Article VI of the Protocol by which the disputing parties consented to arbitrate gave the sole arbitrator considerable discretion in the management of the proceedings. It provided that the arbitration shall proceed either by the sole arbitrator’s direction “in person or by a person or persons named by him for that purpose, either with closed doors or in public sitting, either in the presence or absence of either or both Agents and either *viva voce* or by written discussion or otherwise.”²³⁵ President Grant noted in the Award that neither party asked counsel or agent to speak in the matter; and that he appointed “a person” to handle the decision-

mary of the *Alabama Claims* tribunal under the Treaty of Washington of 1871, which consisted of three party-appointed arbitrators and three neutrals appointed, one each, by the Emperor of Brazil, the President of the Swiss Confederation, and the King of Italy. *See* Menon, *supra* note 19, at 188 (citing V.V. Veeder, *The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator—From Miami to Geneva*, 107 PROC. AM. SOC’Y INT’L L. 387, 392–93 (2013)). The *Alabama Claims* case is often mentioned as the origin-point of modern inter-State arbitration. *See, e.g.*, SCHULTZ & GRANT *supra* note 27, at 2–4, 14.

233. For example, in the Arbitral Award Made on 23 December 1906 by H.M. Alfonso XIII, King of Spain, in the Border Dispute between the Republics of Honduras and Nicaragua, a Royal Decree of April 17, 1905 constituted a Commission “to inquire into the said question of boundaries in order that it might clear up the points in dispute and draw up a report preparatory to the arbitral finding.” Boundary Case between Honduras & Nicaragua (Hond. v. Nicar.), Award, 11 Repts. Int’l Arb. Awards 2006, at 101, 111. Alfonso XIII’s forebear, Isabel II, arbitrated the dispute between the Netherlands and Venezuela over the Isle of Aves “*con la asistencia de nuestro Consejo de Ministros*” [“with the assistance of our Council of Ministers”]. *See* PASICRISIE INTERNATIONALE, *supra* note 231, at 152. Alain Pellet, at the time a Member of the ILC, served as consultant to the Badinter Commission. Peter Radan, *Post-Secession International Borders: A Critical Analysis of the Badinter Arbitration Commission*, 24 MELB. U. L. REV. 50, 55 n.24 (2000). President Cleveland in the San Juan river case “delegated his powers” to the Assistant Secretary of State, George L. Rives. *See* Boundary Case between Honduras & Nicaragua (Hond. v. Nicar.), Award, 11 Repts. Int’l Arb. Awards 2006, at 209.

234. Protocol of Conference between Great Britain and Portugal, Agreeing to Refer to Arbitration Their Respective Claims to the Island of Bulama (U.K.-Port.), Jan. 13, 1869, reprinted in PASICRISIE INTERNATIONALE, *supra* note 231, at 81–83.

235. *Id.* at 83.

making.²³⁶ It would be unusual for a party, governmental or private, in any dispute today to consent to such an open-ended procedure. However, the case illustrates the more general point. The disputing parties, and, we surmise, the relevant public, placed confidence in the outcome, not because of the formal attributes of the arbitral procedure, but because of the characteristics of the named decision-maker.

Nobody is likely to consider appointing popes or presidents to international tribunals today. However, the historical example is informative because of the principle parties may distill from it. A person of stature and attainment in the public eye enjoys a degree of public confidence that even the most highly accomplished lawyer whose field of endeavor is confined to private practice does not. If appointing authorities who seek arbitrators were to take a page from history, then they might adjust appointment practice in this direction. Instead of placing most or all the weight in arbitrator selection on whether an individual has previously served as an arbitrator, which data suggest is the prevalent method in ISDS,²³⁷ they would consider whether a candidate for appointment has served in a *public* decision-making role, service in which has required vetting by public decision-making processes and which has located the individual at least for a time on a more general community stage. By no means would the requirement be that a candidate has stood in the full glare of pontificate or palace. The requirement, instead, would be that candidates display a degree of involvement in the wider community and its governance commensurate with the matters that the parties to the dispute are calling on them to decide.

This would not be a system of tenure such as the advocates of a standing international ISDS court propose. However, we believe that it would partake of key advantages that advocates of judicialization posit a tenure system would confer. It would instill public confidence where it appears at present confidence is lacking.

To propose that ISDS draw lessons from the history of arbitration is not to prescribe retrograde motion. Appointing authorities must take care that appointees meet up-to-date technical standards as decision-makers, and the named appointee(s) should make the decisions that they are appointed to make.²³⁸ It would be surprising today to see an arbitral panel comprised of

236. Arbitral Award between Portugal & the United Kingdom, Regarding the Dispute About the Sovereignty over the Island of Bulama (U.K.-Port.), *reprinted in* PASICRISIE INTERNATIONALE, *supra* note 231, at 83–84.

237. See Langford et al., *supra* note 28, at 306.

238. Concern that named appointees are *not* making the appropriate decisions has, in fact, arisen under present arbitral arrangements. The Russian Federation, which had pressed a complaint in that regard after *Yukos*, submits that States should consider “[t]he elaboration of rules preventing secretaries of investment arbitration tribunals from taking decisions instead of arbitrators”: Working Grp. III on ISDS Reform, *supra* note 25, ¶ 7; see also OLE J. JENSEN, TRIBUNAL SECRETARIES IN INTERNATIONAL ARBITRATION (2019). As to the *Yukos* post-award proceedings in Dutch courts addressing the role of the secretary, see Omar Puertas & Borja Álvarez, *The Yukos Appeal Decision on the Role of Arbitral Tribunal’s Sec-*

symbolic “arbitrators” merely placing their names on awards actually written by behind-the-scenes committeemen or unnamed aides.

Nor is this to propose trying to bridge a chasm between earlier practice and the present. Traces of the earlier approach to arbitral appointment have arisen from time to time in recent practice. States, when convening high-level special commissions and the like, have appointed eminent persons. While the reasons for this practice have not, to our knowledge, been studied, we surmise that states support it because the participation of eminent persons earns the confidence of the public. The Badinter Commission, convened to consider the breakup of Yugoslavia,²³⁹ and EU Member States’ appointment of “three wise men” to evaluate allegations that Austria’s government had violated EU principles,²⁴⁰ are examples. Few if any ISDS tribunals need a composition as high-profile as these bodies had. And the precise attributes of decision-makers would need to be adjusted faithfully to reflect the values and expectations of the relevant community. The overall approach, however, is instructive. The appointees to these bodies were not drawn from a closed circle of individuals practically invisible to the wider public. Every one of them had a public profile independent of the service that they were appointed to perform.

Our proposal for how to select arbitral appointees also reflects insights drawn from international relations. Track II diplomacy, in particular, is relevant.²⁴¹ When diplomats meet in their capacity as government agents, they

retaries, INT’L BAR ASS’N (Nov. 25, 2020), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=B55CB7F1-01C6-4BDF-9383-90F567C17147>. For all the vaunted primacy of technical considerations that are said to determine appointments, a further aspect of the “crisis in ISDS” is that arbitrators seem sometimes to delegate the technical functions that they are supposed to be uniquely qualified to perform. For further discussion, see *infra* p. 216.

239. The Badinter Commission was comprised of Robert Badinter (President of the French Constitutional Council), (President of the German Constitutional Court), (President of the Italian Constitutional Court), (President of the Belgian Court of Arbitration), and (President of the Spanish Constitutional Tribunal). See Alain Pellet, *The Opinions of the Badinter Arbitration Committee. A Second Breath for the Self-Determination of Peoples*, 3 EUR. J. INT’L L. 178 (1992).

240. The individuals appointed were Martti Ahtisaari (former President of Finland), Jochen Frowein (Director of the Max-Planck Institute for Comparative Public Law and International Law and former Vice-President of the European Commission of Human Rights); and Marcelino Oreja (President of the Institute of European Studies and former Minister of Foreign Affairs of Spain and Secretary-General of the Council of Europe, etc.). See Alison Duxbury, *Austria and the European Union—The Report of the ‘Three Wise Men,’* 1 MELB. J. INT’L L. 10, 12 n.15 (2000); see also Matthew Happold, *Fourteen Against One: The EU Member States’ Response to Freedom Party Participation in the Austrian Government*, 49 INT’L & COMPAR. L.Q. 953, 958 (2000).

241. For history and definition of “Track II diplomacy,” see Alison Peck, *Identity-Based Conflicts in Public Policy: Hydraulic Fracturing in Pennsylvania*, 79 U. PITT. L. REV. 437, 478–79 (2018); David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 963, 1027 (2014) and works cited *infra* n.376. From the intellectual property setting, see Mark Schultz, Debra Waggoner, Roy Kamphausen & Kevin Madigan, *Using IP Best Practices Dialogues to Im-*

meet with formal mandates, and they speak for the public authority who appointed them. As Gillian Triggs noted (some years before the UN appointed her Assistant Secretary-General),²⁴² “[t]raditional diplomatic initiatives involve meetings between accredited representatives of sovereign states working with draft texts in an attempt to achieve agreement.”²⁴³ By contrast, Track II diplomacy, which may or may not have “official standing,” includes participants who “may in fact be experienced government officials.”²⁴⁴ The utility of Track II diplomacy owes, in part, to its informal character; here ISDS differs, for ISDS necessarily involves formal procedures to reach definite results. However, the utility of Track II diplomacy also owes to the engagement of individuals who enjoy a degree of public confidence earned from their service in public roles. The approach to appointments that we are proposing for ISDS borrows a page from Track II diplomacy in that respect. Our proposed approach calls on appointing authorities to seek indicia of public confidence in the decision-makers whom they appoint, and we posit that prior service in government roles that involve at least some degree of public exposure is one of the most effective among such indicia.

B. *Emerging Consensus on Arbitrator Criteria*

Some arbitration practitioners, focused on immediate commercial appeal, are likely to dismiss the discussion above as a mere academic excursus, a distraction from practical things. However, the evidence suggests that it would be a mistake to neglect public confidence as a criterion for arbitral appointment. Much of what states are saying today about ISDS reform, when considered closely, suggests an emerging consensus about the criteria that ISDS decision-makers should meet—and those criteria, we discern, are much the same as those that we hypothesize instill public confidence in ISDS results.

What does the reform discourse say about criteria for appointment of ISDS decision-makers? States, practitioners, and other participants concerned with ISDS reform, when they address decision-maker appointment, seem to coalesce around four criteria.

prove IP Systems Globally: The Example of the Trade Secrets Law Best Practices Dialogue, 26 GEO. MASON L. REV. 88, 107–08 (2018). The institution is sometimes denoted with other names, for example, “people’s diplomacy”: *Yunusova v. Azerbaijan* (No. 2), App. No. 68817/14, Eur. Ct. H.R. ¶¶ 11, 103 (July 10, 2020), <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-203562%22%7D>.

242. Gillian Triggs, *Assistant Secretary-General, Assistant High Commissioner for Protection*, U.N. SEC’Y GEN, <https://www.un.org/sg/en/content/profiles/gillian-triggs> (last visited Oct. 16, 2021).

243. Gillian Triggs, *Confucius and Consensus: International Law in the Asian Pacific*, 21 MELB. U. L. REV. 650, 667 (1997).

244. *Id.*

1. Ethics

With disturbing frequency, conflicts of interest are a matter of contention in arbitral proceedings. Skirmishes over ethics in arbitration have often stayed within the arbitral process,²⁴⁵ but at times these have crossed over into courts. For example, the Paris Court of Appeal recently held that a party may sue an arbitrator who failed to disclose a conflict of interest (which, in this case, had led to annulment of an ICC award).²⁴⁶ In an arbitration arising out of an Albanian government concession to an Italian power company to build a hydroelectric plant, one of the arbitrators had not disclosed that he had served as legal counsel to the power company. The European Court of Human Rights held that this circumstance amounted to a breach of article 6 of the European Convention—the provision that guarantees the right to a fair trial.²⁴⁷ If such incidents were few and far between, then they would not necessarily affect public confidence. The two cases just noted, however, were decided recently and in the space of five weeks. Ethics violations as frequent as that almost certainly cast doubt on the institution. Where they are as visible as that, they almost certainly affect public confidence.

The call for ethics rules for international arbitrators is not new. To take one aspect of ethics—disclosure of possible conflicts of interest—the ICSID Secretariat, in a Discussion Paper in 2004, suggested that disclosure requirements for arbitrators be strengthened.²⁴⁸ The Secretariat also acknowledged that narrow criteria regarding conflicts of interest may not suffice because confidence in an arbitration can be eroded by an arbitrator failing to disclose any factor “likely to give rise to justifiable doubts as to the arbitrator’s reliability for independent judgment.”²⁴⁹ Thus, both actual conflict and the *appearance* of conflict are recognized as problems that must be ad-

245. See, e.g., *Eiser Infrastructure Ltd. v. Spain*, ICSID Case No. ARB/13/36, Annulment (June 11, 2020), <https://www.italaw.com/sites/default/files/case-documents/italaw11591.pdf>. (annulling award on grounds of conflict of interest of one of the arbitrators). See also *Expert Ties under Scrutiny in Guatemala Annulment Bid*, GLOB. ARB. REV. (Feb. 24, 2021), <https://globalarbitrationreview.com/expert-ties-under-scrutiny-in-guatemala-annulment-bid> (noting Guatemala’s use of ICSID annulment procedure) For a notorious case, see *Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Argentine Republic’s Request for Annulment (Aug. 20, 2007) (arbitrator did not inform the respondent State that she served in a senior decision-making role in the bank that was largest single shareholder of investor-claimant; annulment committee however declined to annul).

246. Cosmo Sanderson, *German Arbitrator Can Be Sued in France for Non-disclosure*, GLOB. ARB. REV. (June 24, 2021), <https://globalarbitrationreview.com/german-arbitrator-can-be-sued-in-france-non-disclosure#:~:text=A%20German%20arbitrator%20whose%20failure,Court%20of%20Appeal%20has%20ruled.>

247. *B.E.G. SPA v. Italy*, App. No. 5312/11, Eur. Ct. H.R. (May 20, 2021), <http://hudoc.echr.coe.int/fre?i=002-13275>.

248. ICSID SECRETARIAT, POSSIBLE IMPROVEMENTS OF THE FRAMEWORK FOR ICSID ARBITRATION 11–13 (Oct. 22, 2004), <https://icsid.worldbank.org/sites/default/files/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>.

249. *Id.* at 12–13.

dressed in reforming appointment procedures. UNCITRAL Working Group III similarly has placed emphasis on assuring “that the selection and appointment methods of ISDS tribunal members should be such that they contribute to the quality and fairness of the justice rendered *as well as the appearance thereof*.”²⁵⁰ ICSID and UNCITRAL collaborated to prepare a Code of Conduct, the first draft of which they published on May 1, 2020,²⁵¹ with an updated draft on April 19, 2021.²⁵² The drafting was informed by a variety of instruments in force that specify qualifications for persons to serve on decision-making bodies.²⁵³ The Draft Code takes into account the possibility that states might establish a new appeals mechanism; it applies to “adjudicators,” a term that it intends to cover arbitrators, annulment committee members, appeals mechanism members, or judges on a permanent court.²⁵⁴ Thus, UNCITRAL and ICSID formulated the Draft Code to apply irrespective of the procedural framework—that is, it would apply both to arbitral panels and to courts. This feature of the drafting is consistent with our thesis that, for purposes of achieving public confidence in ISDS, the criteria for appointees—here, their adherence to ethics rules—matter more than the framework in which they conduct the dispute settlement function.

The understanding that ISDS requires ethics rules is reflected in recent treaty-making too. The draft Mexico-EU text, for example, sets down ethics criteria.²⁵⁵ Under draft article 13, Members of the Tribunal and of the Appeals Tribunal constituted by the treaty shall be “chosen from persons whose independence is beyond doubt.”²⁵⁶ Not just direct but “indirect” conflict of interest would preclude service as a Member.²⁵⁷ Appointment would preclude the appointee from acting as counsel or as party-appointed expert or witness in any pending or new investment protection dispute, not only under the Mexico-EU Agreement, but also under “any other agreement or domestic law.”²⁵⁸ In this respect, the other three EU bilateral texts that we have addressed in this article take much the same approach. Extensive ethics

250. UNCITRAL Working Grp. III, *supra* note 2, ¶ 5 (emphasis added).

251. *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement: Version One*, ICSID (May 1, 2020), https://icsid.worldbank.org/sites/default/files/amendments/Draft_Code_Conduct_Adjudicators_ISDS.pdf. For the draft text, see Working Grp. III on ISDS Reform, *Draft Code of Conduct*, U.N. DOC. A/CN.9/WG.III/WP.201 (Nov. 9, 2020).

252. DRAFT CODE OF CONDUCT FOR ADJUDICATORS IN INTERNATIONAL INVESTMENT DISPUTES: VERSION TWO, ICSID (Apr. 19, 2021), https://icsid.worldbank.org/sites/default/files/draft_code_of_conduct_v2_en_final.pdf.

253. UNCITRAL Working Grp. III, *supra* note 2, ¶ 7.

254. *Id.* ¶ 6.

255. NEW EU-MEXICO AGREEMENT: THE AGREEMENT IN PRINCIPLE, EUROPEAN COMM’N (Apr. 21, 2018), https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156814.pdf.

256. *Id.*

257. *Id.*

258. *Id.*

provisions are contained in the EU-Viet Nam Investment Protection Agreement,²⁵⁹ CETA,²⁶⁰ and the EU-Singapore Investment Protection Agreement.²⁶¹ The EU investment treaty texts are visibly oriented toward assuring the public that these are decision-makers in whom they may place confidence. While the EU ties these ethics provisions to a court, we see no reason that they would not function, *mutatis mutandis*, just as well in an arbitral setting.

2. Diversity

It appears that data as to diversity among arbitrators appointed to ISDS tribunals is at best incomplete,²⁶² but the data available suffice to show a strikingly non-diverse institution. Europe—Western Europe in particular—is the overwhelmingly dominant source of arbitral appointees.²⁶³ Arbitrations taking place under Stockholm Chamber of Commerce (“SCC”) rules are empaneled almost entirely by Europeans (ninety-four percent).²⁶⁴ Panelists in arbitrations hosted by the London Court of International Arbitration (“LCIA”) are slightly—but only slightly—more diverse, and this is only as measured by nationality: Some eighty-three percent of arbitral appointments to tribunals in LCIA cases are from Western Europe.²⁶⁵ The ICC counts a relatively modest fifty-four percent of persons appointed as arbitrator as hailing from North and Western Europe,²⁶⁶ but the ICC is a commercial arbitration body, and the vast majority of its cases are commercial matters,²⁶⁷ many of which involve claims that are small in comparison to typical ISDS cases.

ICSID has administered “the vast majority” of all ISDS proceedings.²⁶⁸ ICSID’s Secretariat records that, in 2020, thirty-seven percent of the arbitra-

259. Proposal for a Council Decision on the Conclusion of the Investment Protection Agreement Between the European Union and the Socialist Republic of Viet Nam, *supra* note 84.

260. Comprehensive Trade and Economic Agreement Between Canada and the European Union, *supra* note 83.

261. Investment Protection Agreement Between the European Union and the Republic of Singapore, *supra* note 85.

262. See UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Government of Bahrain on Its Thirty-Eighth Session, ¶ 12, U.N. Doc. A/CN.9/WG.III/WP.180 (Aug. 29, 2019).

263. *Id.* ¶ 12 n.18.

264. *Id.*

265. *Id.*

266. *Id.*

267. The ICC docket does, however, include the occasional investor-state case. See INT’L CHAMBER OF COM. (ICC), ICC COMMISSION REPORT: STATES, STATE ENTITIES, AND ICC ARBITRATION ¶11 (2012), <https://iccwbo.org/content/uploads/sites/3/2016/10/ICC-Arbitration-Commission-Report-on-Arbitration-Involving-States-and-State-Entities.pdf>.

268. ICSID, 2019 ICSID ANNUAL REPORT: EXCELLENCE IN INVESTMENT DISPUTE RESOLUTION 19 (2019); *cf.* Rep. of Working Group III, *supra* note 28, at 5 (reckoning from

tors, conciliators, and *ad hoc* committee members appointed in ICSID cases were from Western Europe, and twenty percent were from North America.²⁶⁹ Yet, only thirteen percent and five percent of the cases, respectively, were instituted against states from those regions.²⁷⁰ Though ten percent of ICSID cases in 2020 were instituted against states in sub-Saharan Africa,²⁷¹ only four percent of appointees were from that region.²⁷² Similarly, though ten percent of ICSID cases in 2020 were instituted against states in the Middle East and North Africa,²⁷³ only five percent of appointees were from that region.²⁷⁴ The asymmetry for Central America and the Caribbean was comparable: Seven percent of the cases were instituted against states from that region,²⁷⁵ and three percent of appointees were from that region.²⁷⁶ In addition, thirty-two percent of the cases were instituted against South American states,²⁷⁷ while sixteen percent of appointees were from South America.²⁷⁸

Recent work, addressing ISDS mechanisms in general, has addressed other dimensions of diversity, including gender.²⁷⁹ Only two of the twenty-

sources that ICSID administers “between 60 and 75 per cent of all known international investment proceedings”). See generally Andrea K. Bjorklund & Bryan H. Duzin, *Institutional Lock-in Within the Field of Investment Arbitration*, 39 U. PA. J. INT’L L. 707 (2018) (discussing the institutional lock-in of ICSID over ISDS).

269. ICSID, THE ICSID CASELOAD – STATISTICS 2020 19 (2020), <https://icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282020-2%20Edition%29%20ENG.pdf>.

270. *Id.* at 24.

271. *Id.*

272. *Id.* at 28.

273. *Id.* at 24.

274. *Id.* at 28.

275. *Id.* at 24.

276. *Id.* at 28. The failure to appoint jurists from that region is not plausibly attributed to the lack of technically qualified candidates. Central America has a long tradition of international dispute settlement. The Central American Court of Justice has functioned for over a century in different forms. *Central American Court of Justice*, INT’L J. RES. CTR., <https://ijrcenter.org/regional-communities/central-american-court-of-justice/> (last visited Oct. 16, 2021), The jurisdiction of the Inter-American Court of Human Rights has applied there for over forty years. *History of the Inter-American Court of Human Rights*, INTER-AM. CT. HUM. RTS., <https://www.corteidh.or.cr/historia.cfm?lang=en> (last visited Oct. 16, 2021). States in the region are among the most frequent participants in ICJ proceedings, several of them accepting ICJ jurisdiction under Art. XXXI of the Pact of Bogotá. See Antonio Remiro Brotons, *The Pact of Bogotá and the Jurisprudence of the International Court of Justice*, in NICARAGUA BEFORE THE INTERNATIONAL COURT OF JUSTICE 143–78 (Edgardo Sobenes Obregon & Benjamin Samson eds., 2018)

277. ICSID, *supra* note 269, at 24.

278. *Id.* at 28.

279. See generally IDENTITY AND DIVERSITY ON THE INTERNATIONAL BENCH. WHO IS THE JUDGE? (Freya Baetens ed., 2021) (discussing the lack of gender diversity on international arbitral tribunals).

five most prominent arbitrators are women.²⁸⁰ Since 1966, twelve percent of the appointees in ICSID cases have been women.²⁸¹ It is true that ICSID, in 2021, celebrated the first all-female arbitral panel,²⁸² but an institution comprised of lawyers in which only eight percent of its “top 25” are women is still stunningly unbalanced.²⁸³ Female lawyers make up thirty-six percent of the world’s lawyers.²⁸⁴ As for the asymmetries between place of origin of decision-makers and places subject to claims, these are sharp enough to justify assertions that ICSID is a body of developed world experts passing judgment on developing world states. The EU, in its submission in the frame of UNCITRAL Working Group III, identified “concerns about the lack of appropriate diversity amongst decision makers in ISDS” to be among the concerns that a reform of ISDS ought to address.²⁸⁵

It is beyond the scope of the present article to address the range of scholarship, practitioner materials, and intergovernmental outputs concerning diversity in ISDS. So, we confine ourselves to some brief observations.

Not every problem needs tracing back to its origins in order to discover a solution, but the origins of ISDS may shed light on the current lack of diversity among its decision-makers. The growth of ISDS into a politically and commercially significant phenomenon is recent. A small cadre of lawyers approximately a generation ago came to hold a commanding position in ISDS.²⁸⁶ Once having achieved that position, they retained it. Even if the precise social dynamics among arbitrators, experts, counsel, and tribunal secretaries is subject to nuanced evaluation, scholars aptly have noted a “revolving door” of ISDS. Langford et al. report that the top four percent of arbitrators (twenty-five individuals) account for over thirty-three percent of all arbitral appointments.²⁸⁷ Interconnected networks of arbitrators, counsel, and

280. Andrea K. Bjorklund, Daniel Behn, Susan Franck, Chiara Giorgetti, Won Kidane, Arnaud de Nanteuil & Emilia Onyema, *The Diversity Deficit in International Investment Arbitration*, 21 J. WORLD INV. & TRADE 410, 412 (2020).

281. ICSID, *supra* note 269, at 20.

282. See *Quanta Services Neth. B.V. v. Republic of Peru*, ICSID Case No. ARB/21/1 (2021), https://icsid.worldbank.org/cases/case-database/case-detail?CaseNo=ARB%2F21%2F1&fbclid=IwAR1VkJXx93ZyiaNtyH412LPszW-L_f6GDJeMqb8eLCO3_cFY4zNKPO6LCQ.

283. Langford et al., *supra* note 28, at 309–10; see also Ethan Michelson, *Women in the Legal Profession, 1970-2010: A Study of the Global Supply of Lawyers*, 18 IND. J. GLOB. LEG. STUD. 1071, 1115–19 (2013) (compiling data of female lawyers in 210 national jurisdictions).

284. *Id.* at 1119.

285. ICISD Working Grp. III, *supra* note 79, ¶3.

286. See generally Langford et al., *supra* note 28, at 307 (Figure 1). The increase in ISDS activity is traceable to the early 1990s or even 1980s, but the boom, as measured by cases instituted, is from the first years of the twenty-first century: Gabrielle Kaufmann-Kohler & Michele Potestà, *Why Investment Arbitration and Not Domestic Courts? The Origins of the Modern Investment Dispute Resolution System, Criticism, and Future Outlook*, EUR’N Y.B. INT’L ECON. L. 7, 12 (2020).

287. Langford et al., *supra* note 28, at 310.

party experts seem to intensify the concentration of the field in a small group of individuals.²⁸⁸

States have sometimes ascribed the prevalence of this small group of individuals to the technocratic demands of ISDS. According to Morocco in its submission on ISDS reform,

There have been instances of lack of transparency or conflict of interests, which jeopardize the investor-State dispute settlement regime. Such situations have arisen because there are relatively few specialists in investment dispute resolution, and therefore only a limited number of people who can be appointed as adjudicators.²⁸⁹

China's submission echoed this concern. It noted that the existence of "only a very small pool of experts" is a "phenomenon deserving of special attention."²⁹⁰ But it strikes us as hardly credible that only twenty-five people, out of approximately 7.9 billion, have such technical skill that they should decide over one-third of all ISDS cases.²⁹¹ These are not cases arising out of highly diverse causes of action; Investment treaties are parsimonious in the substantive rights they afford parties and the breaches of which they make actionable. To take U.S. federal jurisdiction as a comparison, it covers a significantly wider variety of subject matter than ISDS, supplying vastly more causes of action to vastly more diverse potential claimants. Yet, the federal appointing authority (the President, subject to advice and consent of the Senate) has managed to identify, out of a pool of 330 million people, some 870 individuals suitable to carrying out the functions of Article III judges.²⁹² While workload among U.S. federal judges varies, we venture that the disparities are nothing like in ISDS: It is not a mere four percent of federal judges who work on over one-third of the cases.²⁹³ Political polarization notwithstanding, U.S. federal judges conduct their functions effectively and enjoy levels of public confidence that compare favorably with many other national institutions.²⁹⁴ Nobody seriously considers removing the U.S. fed-

288. *Id.*

289. ICISD Working Grp. III, *supra* note 73, ¶ 8.

290. ICISD Working Grp. III, *supra* note 23, ¶ 3.

291. Langford et al., *supra* note 28, at 310 (Table 1, listing top 25 arbitrators by appointments); *id.* at 313 (Table 2, listing arbitrator network rankings based on centrality and influence).

292. See *United States Federal Courts*, BALLOTPEDIA (Oct. 4, 2021), https://ballotpedia.org/United_States_federal_courts (containing a chart with numbers of each category of Article III judge).

293. See *Which Judges Juggle the Most Civil Cases? New TRAC Update Reveals Answers*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE REPS. (Oct. 23, 2014), <https://trac.syr.edu/tracreports/judge/368/>.

294. While some social science researchers interpret public opinion data about courts in the United States as indicating lack of public confidence, the data seem to suggest a general skepticism about institutions rather than about courts in particular. The judiciary, including the Supreme Court, score above most other institutions as to which one recent study purported

eral judiciary root and branch. Similar observations may be made of the judiciaries of many other countries.²⁹⁵ Generalists populate the benches, and there is no chronic lament over a crisis of national judicial legitimacy—or of technical skill. At a minimum, we think people would find it absurd to resign ourselves to having our cases adjudicated by judges with ethics conflicts.²⁹⁶

More to the point, then, is the observation by some states, not that there is “only a limited number of people who *can* be appointed,” but, instead, that there is only a limited number of people who *are* appointed. Bahrain,²⁹⁷ in Working Group III, drew attention to the “relatively small pool” from which arbitrators in ISDS cases are in fact drawn.²⁹⁸ Bahrain thought it remarkable—and undesirable—that “some arbitration practitioners wear several hats . . . and regularly appoint each other as a matter of routine.”²⁹⁹

We believe that ISDS decision-maker appointments should be conditioned on criteria other than past service in ISDS cases. The circularity of

to measure public confidence. *See Do Americans Have Confidence in the Courts?*, WILLOW RSCH (Mar. 27, 2019), <https://willowresearch.com/american-confidence-courts/>. As Chief Justice Roberts wrote: “The concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling.” *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 447 (2015); *see also id.* at 457 (“Both methods [election and appointment] have given our Nation jurists of wisdom and rectitude who have devoted themselves to maintaining ‘the public’s respect . . . and a reserve of public goodwill, without becoming subservient to public opinion’” (quoting William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 596 (2004))).

295. *See generally* STEVEN VAN DE WALLE & JOHN W. RAINE, *EXPLAINING ATTITUDES TOWARDS THE JUSTICE SYSTEM IN THE UK AND EUROPE* (2008) (addressing public confidence in courts in the UK and a number of other countries).

296. As to cases involving conflicts of interest in arbitration, *see discussion supra*, pp. 216-17.

297. Bahrain has made detailed submissions in Working Group III. It might be queried whether Bahrain’s participation in Working Group III profited, in part, from input by Jan Paulsson, a longtime resident there and one of the most prominent figures in ISDS. Paulsson is, *inter alia*, a member of Bahrain’s PCA roster. *See Members of the Permanent Court of Arbitration*, PCA, https://docs.pca-cpa.org/2017/07/2017/07/bad837b0-pca-184006-v88-current_list_annex_1_members_of_the_court.pdf (last visited Oct. 16, 2021). As to Paulsson’s stature in ISDS, *see Langford et al., supra* note 28, at 310, 313, 315, 317, 320, 325.

298. *See* ICSID UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Government of Bahrain on Its Thirty-Eighth Session, ¶ 5, U.N. Doc. A/CN.9/WG.III/WP.180 (Aug. 29, 2019).

299. *Id.* ¶ 25. The practice known as “dual-hatting” has drawn widespread criticism: *see, e.g., UNCITRAL*, Working Group III, Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS. *See UNCITRAL Working Grp. III, supra* note 21, ¶ 54 n.61; UNCITRAL Working Grp. III Possible Reform of Investor-State Dispute Settlement (ISDS) Arbitrators and Decision Makers: Appointment Mechanisms and Related Issues, Note by the Secretariat, ¶ 25, U.N. Doc. A/CN.9/WG.III/WP.152 (Aug. 30, 2018); (“[A] counsel may agree to appoint a particular arbitrator in one case, and this arbitrator, when acting as counsel in another case, agrees to appoint the appointing counsel as arbitrator in that second case.”). As to empirical evidence of the scope of the practice, *see Langford et al., supra* note 28, at 321–26.

the current approach deprives it of any validation function that would resolve the observed crisis in public confidence. Public confidence is unlikely to grow unless appointees start to come from outside the arbitral loop.

Diversity is a critical feature for achieving public confidence in ISDS. It is not sufficient in itself that people from outside the existing coterie of repeat appointees be appointed. Appointing from outside that group, however, is *necessary* if ISDS is to achieve a more representative cross-section of the communities it affects.

3. Transparency

Transparency in appointing ISDS decision-makers would be necessary if changes in who are appointed, and how, are to affect public sentiment. Here, too, evidence suggests an emerging consensus.

China in UNCITRAL Working Group III submitted that the “procedures of arbitrator-appointing bodies are insufficiently transparent.”³⁰⁰ Australia favored “transparency regarding arbitrator appointments.”³⁰¹ Chile considered that “added transparency and greater insights into the adjudicators [sic] conduct and track record” would be helpful.³⁰² The United States said that “[g]reater transparency about arbitrator relationships and experience can dispel the perception that arbitrators may have ‘ulterior motives’ when accepting appointments.”³⁰³ The Western Balkans group (Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, and Serbia) lamented the “lack [of] arbitrator accountability and transparency in the arbitrator appointment process.”³⁰⁴ Private party representatives have voiced similar views.³⁰⁵ Thus, though no general binding rule requires transparency in regard to ISDS appointments,³⁰⁶ a range of participants have stated that transparency is to be desired.

Again, as with ethics and diversity, steps to improve transparency may be taken independently of whether it is a court or an *ad hoc* tribunal to which appointments are made.

300. UNCITRAL Working Grp. III, *supra* note 23, ¶ 3.

301. DRAFT CODE OF CONDUCT: COMMENTS BY STATE/COMMENTER, ICSID 6 (Jan. 14, 2021), <https://icsid.worldbank.org/sites/default/files/Code%20of%20Conduct%20-%20Comments%20by%20State-Commenter%20-%20Updated%2001.14.21.pdf>.

302. *Id.* at 25.

303. *Id.* at 70.

304. *Id.* at 78.

305. *See, e.g., id.* at 95 (comment of the Corporate Counsel International Arbitration Group (CCIAG)).

306. And even non-general, non-binding rules in this regard are at best incomplete. For example, the UNCITRAL Rules on Transparency, effective from Apr. 1, 2014, do not specify an obligation of transparency in regard to method of appointing arbitrators or in regard to identity of arbitrators. As to the Rule’s limited subscription, *see supra* note 48 and accompanying text.

4. Prior Service in a Position of Public Trust

Intriguingly, evidence in the reform discourse also points to consensus that service in positions of public trust is a criterion, or at least a *desideratum*, that parties should apply when appointing ISDS decision-makers.

The EU's recent treaty-making is a salient example. In the Mexico-EU draft,³⁰⁷ the criteria, in addition to the fairly typical criterion of nationality, are as follows:

The Members shall have demonstrated expertise in public international law and possess the qualifications required for appointment as a judge to the International Court of Justice, or be jurists of recognised competence. It is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements, or trade negotiations.³⁰⁸

Two observations may be made about these criteria. First, the application of the criteria is in the hands, not of private parties or states on a case-by-case basis, but, instead, a Joint Council constituted by the parties to the trade agreement (Mexico and the EU in this example).³⁰⁹ Once appointed, Members serve five-year terms.³¹⁰ The Appeal Tribunal is constituted in similar fashion—that is, by appointment of the Joint Council for five-year terms.³¹¹ Though not identical, the appointment mechanisms contained in the EU-Viet Nam and EU-Singapore agreements and in CETA are along broadly the same lines.³¹² In other words, any individual appointed to the new institutions will have participated in a public process—namely, the public process of appointment through the Joint Council.

307. See discussion *supra* pp. 181–182, 216.

308. *Modernisation of Trade Part of the EU-Mexico Global Agreement Without Prejudice*, *supra* note 86, art. 11(4). These criteria are set out, *mutatis mutandis*, for the Appeal Tribunal. *Id.* art. 12(7).

309. *Id.* art. 11(2).

310. *Id.* art. 11(5).

311. *Id.* arts. 12(3), 12(5).

312. Proposal for a Council Decision on the Conclusion of the Investment Protection Agreement Between the European Union and the Socialist Republic of Viet Nam, *supra* note 84, art. 3.38(2) (appointment of the nine Members of the Tribunal by the Committee established under art. 4.1); *id.* art. 3.39(3) (appointment of the six Members of the Appeal Tribunal by the Committee). Investment Protection Agreement Between the European Union and the Republic of Singapore, *supra* note 87, art. 3.9(2) (appointment of Members of Tribunal of First Instance by the Committee established under art. 4.1, but with EU and Singapore each nominating two Members and the EU and Singapore jointly nominating two Members); *id.* art. 3.10(2) (appointment of Members of Appeal Tribunal in similar fashion). Comprehensive Trade and Economic Agreement Between Canada and the European Union, *supra* note 83, art. 8.27(2) (appointment of fifteen Members of the Tribunal by CETA Joint Committee); *id.* art. 8.28(3) (appointment of the Members of the Appellate Tribunal by CETA Joint Committee).

Second, the criteria in the EU-Mexico draft suggest, though they do not require, that for some or all appointees this will not be their first experience of such a public process: they will have had prior experience in positions of public trust. To have “expertise in . . . trade negotiations” in particular suggests that appointees will have served in a public post (trade negotiations being a governmental function). Another branch of the criteria—that concerning “demonstrated experience in public international law”—expresses the requirement by reference to a public organ, the ICJ. To have practiced public international law, one need not have practiced before the ICJ (though that is the first organ to come to mind); it is unlikely, however, that one would never have been an officer of, or an advocate engaged by, a government or intergovernmental organization. Thus, the appointing criteria, while leaving the door open to service by individuals who have performed no prior public service and who have never been engaged by a government or other public body functioning on the international plane, lean in favor of individuals who have.

EU treaty texts in this respect are not all the same. For example, the EU-Singapore Investment Protection Agreement in its specification of criteria for Members both of the Tribunal of First Instance and the Appeal Tribunal does not mention the ICJ, instead specifying that Members “shall possess the qualifications required in their respective countries for appointment to the highest judicial offices, or be jurists of recognised competence.”³¹³ No clause indicates a preference for candidates who have served in trade negotiations. The EU-Viet Nam Investment Protection Agreement makes provision for candidates as Members of the Tribunal and the Appeal Tribunal in similar terms as the EU-Singapore agreement.³¹⁴ So the signal here is not constant, but it is readily discernible.

The question we pose is this: Is placing such appointees in a permanent standing organ the most meaningful signal of public confidence? Or does the signal come just as much from the characteristics that appointees possess, including prior public service? Testing the hypothesis that we sketched out above³¹⁵ would shed light on the question. Our proposed extension of the experimental agenda pioneered by Marceddu and Ortolani hypothesizes that the benefit of having vetted a candidate through a public process is visible when the vetting has taken place in connection with the candidate’s prior service in a decision-making institution. In other words, the vetting need not have been performed within a fixed institutional framework (such as the EU proposes in the form of an ISDS court) for a salutary effect to be observed in public sentiment. We think that applying a criterion of prior public ser-

313. Investment Protection Agreement Between the European Union and the Republic of Singapore, *supra* note 85, arts. 3.9(4), 3.10(4).

314. See Proposal for a Council Decision on the Conclusion of the Investment Protection Agreement Between the European Union and the Socialist Republic of Viet Nam, *supra* note 84, arts. 3.38(4), 3.39(7).

315. See discussion *supra* pp. 207-08.

vice may offer a middle road by which to preserve a very significant measure of party autonomy while increasing public confidence in arbitration. By no means is it inimical to party autonomy to apply some rules to the selection of arbitrators: some pro-arbitration jurisdictions already do so, for example in service to preventing conflict of interest.³¹⁶

We are not alone in suggesting that an independent signal of public confidence in ISDS is found in the attributes of appointees. The positions that states have adopted on the matter suggest as much. States advocating for ISDS courts—and the EU—place emphasis on the attributes of appointees, as do states opposed to ISDS courts. Indeed, though *some* advocates of reform say that public sentiment toward ISDS will most improve if courts and a permanent appeals machinery replace arbitration, practically *all* advocates agree that the criteria for appointment of ISDS decision-makers need a fresh look.³¹⁷ It is widely agreed in particular that appointees should have a public professional orientation. China, for example, which opposes ISDS courts, calls for improvements in the method of arbitral appointment: “As the existing investment arbitration system borrows from the practical experience of commercial arbitration, the appointment process for arbitrators fails to fully reflect the professional requirements of international public law required for investment arbitration.”³¹⁸ UNCITRAL Working Group III summarized the sense of all participants in the discussion in 2020 when it said that ISDS tri-

316. See, e.g., [Arbitration Law], Law No. 138 of 2003, art. 18(1)(ii) (Japan) (providing that parties may challenge an arbitrator if “there are reasonable grounds to doubt the impartiality or independence of the arbitrator.”). However, not all national arbitration laws have provisions to that effect. The English Arbitration Act 1996, as interpreted by the UK Supreme Court, does not. See *Halliburton Co. v. Chubb Bermuda Ins. Ltd.* [2020] UKSC 48 (Nov. 27, 2020), and for a cogent comment, Jayavardhan Singh, *Halliburton v. Chubb: Waiving a Mandatory Duty*, KLUWER ARB. BLOG (Apr. 28, 2021), <http://arbitrationblog.kluwerarbitration.com/2021/04/28/halliburton-v-chubb-waiving-a-mandatory-duty/>. The state of affairs under Section 43J of the Arbitration and Conciliation Act (India) evidently remains in flux as this article goes to press. See Gary Born, Steven P. Finizio, Dharshini Prasa & Shanelle Irani, *Recent Amendments to Arbitral Laws: India and Singapore*, WILMERHALE (Dec. 15, 2020), <https://www.wilmerhale.com/en/insights/client-alerts/20201215-recent-amendments-to-arbitral-laws-india-and-singapore>.

317. Thus, the European Union identified “[c]oncerns pertaining to arbitrators and decision makers,” ICSID Working Grp. III, *supra* note 29, ¶ 6, and “concerns with respect to the mechanisms for constituting ISDS tribunals in existing treaties and arbitration rules” ICSID Working Grp. III, *supra* note 29, ¶ 4. Among the main concerns that Chile, Israel, and Japan identified are concerns “pertaining to arbitrators and decision-makers.” ICSID Working Grp. III, *supra* note 79, ¶ 7. Ecuador, in its submission to Working Group III, referred to “the need... to address concerns about the appointment and integrity of arbitrators” and suggested that these are “issues that undermine the legitimacy of the current system.” UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Government of Ecuador on Its Thirty-Eighth Session, ¶ 1, U.N. Doc. A/CN.9/WG.III/WP.175 (July 17, 2019). In addition to “issues concerning the proper conduct” of arbitrators, Ecuador drew attention to issues concerning the “profile” of arbitrators. *Id.*

318. ICSID Working Grp. III, *supra* note 23, ¶ 3.

bunal members should “be cognizant of public international law, international trade and investment law.”³¹⁹ No doubt an individual might gain cognizance of those fields from a career exclusively in private practice, though the public international law branch of the *desideratum* would be hard to fulfill through a private practice exclusively for private clients. Working Group III also said that participants in its deliberations “further suggested that [tribunal members] should have an understanding of the different policies underlying investments, of issues of sustainable development, of how to handle ISDS cases and of how governments operated.”³²⁰ Such a multifaceted understanding—of public policy, development goals, case management, and government operations—suggests attributes that an individual might fulfill from a career in the private sector, but the more obvious path to having fulfilled them would be through service, at least for a time, in the public administration. States, though holding contrasting views as to the desirability of judicializing ISDS, coalesce around the proposition that the characteristics of ISDS decision-makers matter.

Not many states have articulated the above point plainly; South Africa is one that has. South Africa observed in UNCITRAL Working Group III that placing the dispute settlement mechanism in a new institutional frame might prove only to transport the same difficulties to a different place.³²¹ In other words, to declare that the decision-makers are “judges” does not in itself remedy the crisis of public confidence, if, instead, the crisis owes to the underlying characteristics of the individuals appointed. Establishing ISDS courts, South Africa said, only would mean that “[m]echanisms to appoint judges will be key.”³²²

Institutional re-design does not come without costs. In addition to whatever ongoing administrative expenditures the maintenance of standing ISDS courts might entail,³²³ courts would remove party autonomy in choice of decision-makers.³²⁴ And yet, it is not clear what courts would add. It is not clear that a court would be a better fact-finder than an *ad hoc* tribunal.³²⁵ Creating these bodies, in the way the reform advocates propose, would not add institutional support to ISDS; the courts would rely on institutional support from elsewhere.³²⁶ The retainer and fee structure for Members would

319. ICSID Working Grp. III, *supra* note 10, ¶ 97.

320. *Id.*

321. ICSID Working Grp. III, *supra* note 76, ¶¶ 89–90.

322. *Id.* ¶ 90.

323. For a skeptical state’s estimates, see, e.g., ICSID Working Grp. III, *supra* note 25, ¶¶ 26–28.

324. As to the central role of party autonomy in ISDS, see discussion *supra* pp. 172–76.

325. Matthew W. Swinehart, *Institutionalism, Legitimacy, and Fact-Finding in International Disputes*, 47 FLA. ST. U. L. REV. 279 (2020).

326. Under the European Union-Mexico draft, both the Tribunal and the Appeal Tribunal would rely on a pre-existing Secretariat, that of ICSID, to manage its cases. See *Modernisation of Trade Part of the EU-Mexico Global Agreement Without Prejudice*, *supra* note 86,

not be not radically different from that seen in arbitrators' engagements.³²⁷ Ethics rules of identical content could be applied just as effectively to arbitral panels as to standing bodies such as the Tribunal and Appeal Tribunal, as could further rules or guidance indicating the background and experience that candidates for appointment should possess.

Academic writers have noted that ISDS is not commercial arbitration, which is a dispute settlement mechanism concerned with purely private rights and obligations.³²⁸ ISDS, in many cases, directly affects the public interest. As demonstrated by the statements that we quote above from UNCITRAL, from the EU, and from other states, it is not only academics who call for ISDS decision-makers to have situational awareness of issues that concern the public. Looking at the various statements about appointment criteria, we are struck by the degree to which the historic practice of appointment—the practice that we discussed in subpart (A) above³²⁹—supplies a rough, but overall reliable, prediction (in the sense of an explanatory model) of the decision-maker attributes that satisfy public expectation about how matters of community interest should be decided.

There is, perhaps, more to judicialization than a label: Its proponents say it would improve public sentiment toward ISDS. However, as we argue above,³³⁰ the empirical inquiry to date has not identified, precisely, what it is about the label that affects public sentiment. We hypothesize that the four criteria above, if applied more reliably to arbitrators, would serve to improve public confidence as much or more than changing the arbitrator's title to "judge."

C. *Imparting Some System to the Signals*

In this last subsection before we proceed to general conclusions, we briefly sketch how ISDS might systematize the signals that we posit correlate to improved public regard for the outcomes that ISDS produces. We

arts. 11(17), 12(15). To similar effect, see Proposal for a Council Decision on the Conclusion of the Investment Protection Agreement Between the European Union and the Socialist Republic of Viet Nam, *supra* note 84, arts. 3.38(18), 3.39(18); Investment Protection Agreement Between the European Union and the Republic of Singapore, *supra* note 85, arts. 3.9(16), 3.10(14); Comprehensive Trade and Economic Agreement Between Canada and the European Union, *supra* note 83, art. 8.27(16).

327. See *Modernisation of Trade Part of the EU-Mexico Global Agreement Without Prejudice*, *supra* note 86, arts. 11(13), 12(13). To similar effect, see Proposal for a Council Decision on the Conclusion of the Investment Protection Agreement Between the European Union and the Socialist Republic of Viet Nam, *supra* note 84, arts. 3.38(15–17), 3.39(14–17); Investment Protection Agreement Between the European Union and the Republic of Singapore, *supra* note 85, arts. 3.9(12–15), 3.10(11–13); Comprehensive Trade and Economic Agreement Between Canada and the European Union, *supra* note 83, arts. 8.27(12), (13).

328. See, e.g., Schill, *supra* note 39, at 407–08.

329. See discussion *supra* pp. 210–14.

330. See discussion *supra* pp. 201–08.

consider, in turn, each of the four criteria that we addressed immediately above—ethics, diversity, transparency, and public trust.

Of the criteria that we have suggested should be examined for their effects on public sentiment, ethics may well be the most straightforward to implement. Rules of ethics, like ICSID and UNCITRAL propose in the draft Code of Conduct, are a well-tested approach. We are not claiming here that it is easy to codify the specific rules that all relevant parties will accept. We instead are observing that governments and legal practitioners already have well-known models for systematizing ethics. A broadly acceptable code of ethics may be applied, irrespective of whether the individuals to which it applies operate in a court or under *ad hoc* mechanisms.

Addressing the lack of diversity in arbitration is a more difficult task. The emergence of more data about the problem is welcome because there is little prospect of improvement without a clear picture of what needs to be improved. More detailed, and more regularized, reporting about diversity in arbitration would help systematize our understanding.³³¹ Moving away from the recurrent appointment of the same very small group of arbitrators would not in itself add social, geographic, racial, or gender diversity to ISDS, but continuing the existing approach can have no result other than to frustrate diversification.³³² Our final two suggestions here—about systematizing transparency and public trust—are not a complete answer to the lack of diversity in ISDS, but they are necessary steps.

Transparency could be systematized by states committing to a more open process of arbitral appointment. Those who make appointments would communicate more to the public about the individuals considered for service as ISDS decision-makers. It is true that a recalcitrant party or appointing authority might not adjust its strategies of appointment, even in the face of public complaint. However, if a practice took root of publicizing the backgrounds of the people who serve, then this would afford the public reader access to information with which to hold those who appoint to account. It might also boost public confidence in the decision-makers..

Lessons in this regard can be found in public settings. In at least the United States, the process of appointment to federal judgeships involves a high degree of transparency. The Questionnaire for Judicial Nominees currently in use by the U.S. Senate Committee on the Judiciary calls on the nominee *inter alia* to

331. See UNCITRAL Working Grp. III, Possible Reform of Investor-State Dispute Settlement (ISDS), Submission from the Government of Bahrain on Its Thirty-Eighth Session, ¶ 12, U.N. Doc. A/CN.9/WG.III/WP.180 (Aug. 29, 2019). (Submission from the Government of Bahrain observing that the data are “fare from exhaustive” even regarding nationality of arbitrators.

332. Some ISDS critics indeed have expressed doubts about the EU’s ISDS court proposal, on the ground that such a body would further entrench the features of the existing system. See Peter Tomka, *Seventh Annual Charles N. Brower Lecture: A Century of Dispute Settlement Through International Law (1919–2019): The Role of Multilateralism*, 113 AM. SOC’Y INT’L L. PROC. ANN. MEETING 299, 310 (2019).

describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). . . List the dates of all interviews or communications you had with the White House staff or the Justice Department regarding this nomination. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.³³³

Much the same approach may be applied to appointment to arbitral panels. The Redfern and Hunter treatise,³³⁴ which takes a deferential view toward party autonomy, nevertheless suggests a more formalized and careful practice as regards transparency and arbitrator selection. Citing an unnamed “distinguished US arbitrator,” Redfern and Hunter favor keeping disclosable notes of discussions between a potential arbitral appointee and a party seeking to make an appointment.³³⁵ As can be seen from the Judiciary Committee Questionnaire just quoted, this practice is familiar to nominees for U.S. federal judicial office. We see no reason of principle or practicality why, with appropriate modifications, ISDS could not adopt a similar practice.

Finally, we turn to prior public service and how that criterion might signal that an ISDS decision-maker deserves the public’s confidence. Signals that the public is justified in placing its trust in a given individual already are systematized in other settings. Public administration has developed systems to ascertain that given candidates are appropriate for appointment to given roles. For example, looking again to U.S. practice, certain positions of public trust require an appointee to undergo extensive background investigations. For example, the U.S. Office of Personnel Management Questionnaire for National Security Positions (Standard Form 86) runs to 133 pages in small type.³³⁶ Depending on the security clearance required for a given position, the investigation of an individual may extend to scores of interviews with associates, family, friends, and others; polygraph assessments; and periodic re-examination.

To be sure, satisfactory completion of a process such as national security vetting says nothing about the particular technical experience and skill needed to serve as an arbitrator. But the critics of ISDS do not, in the main,

333. S. COMM. ON THE JUDICIARY, QUESTIONNAIRE FOR JUDICIAL NOMINEES (as of 2012), 26(a), <https://www.judiciary.senate.gov/imo/media/doc/Talley%20SJQ.pdf>.

334. ALAN REDFERN, MARTIN HUNTER, NIGEL BLACKABY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 253 (Kluwer L. Int’l, 6th ed. 2015). Alan Redfern and Martin Hunter’s treatise has been described as a “modern classic” of international arbitration: Gordon Blanke, *Book Review: Redfern and Hunter on International Arbitration (6th ed. 2015)*, 82 ARB.: INT’L J. ARB., MEDIATION AND DISPUTE SETTLEMENT 475 (2016).

335. *Id.*, at 253.

336. U.S. OFF. PERSONNEL MGMT., QUESTIONNAIRE FOR NATIONAL SECURITY POSITIONS (2015), https://www.opm.gov/forms/pdf_fill/sf86.pdf.

say that the individuals appointed to ISDS panels are lacking in technical qualifications. The critique, as we have noted, is about legitimacy and public confidence. A record of service in positions of public trust, we submit, is relevant as part of a larger effort to address the critique. We do not call for ISDS to re-invent the wheel when it comes to background vetting. We, instead, suggest that, as governments and others consider the claim that ISDS courts will instill confidence in ISDS decisions, criteria already exist that may be equally or more reliable as predictors of public confidence in a decision-maker.

Another approach, or a supplemental one, would be to use formal rosters of vetted candidates for appointment. Treaty rosters, indicating persons whom each treaty party believes to be suitable for arbitral appointment, exist already.³³⁷

Rosters of arbitrators provided under existing treaty provisions are in most or all instances indicative only. That is to say, parties to the treaties inscribe the names of individuals on the rosters, but there is no obligation to appoint those individuals to any tribunal. The best-known roster of this kind, and the longest in existence, is that of the Permanent Court of Arbitration (“PCA”).³³⁸ The PCA Statute provides as follows: “Each Contracting Power selects four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrator.”³³⁹

Applied conscientiously, terms such as these might well satisfy the public confidence-building function. However, the terms are general enough to accommodate a less exacting approach to appointments than is likely to improve public confidence in ISDS.³⁴⁰ Practice in fact suggests that appointing authorities are less exacting.³⁴¹ Moreover, many states, where they are invited to name potential arbitrators to treaty lists, have not in fact named

337. See UNCITRAL Working Grp. III, *supra* note 2, ¶¶ 25, 28–39.

338. For examples of other rosters, see *id.* ¶ 30 n.24. As to the PCA’s “remarkable transformation” from nearly “moribund” to a busy host to both inter-governmental and mixed arbitrations, see Philippe Sands, *Reflections on International Judicialization*, 27 EUR. J. INT’L L. 885, 895 (2016).

339. Convention for the Pacific Settlement of International Disputes art. 44(1), July 9, 1899, 81 ADVOC. PEACE (1894–1920) 363.

340. Indeed, states have taken a cavalier approach even to the straightforward stipulation that their appointees to the PCA roster are for terms of six years. See Jorritsma, *supra* note 104, at ¶¶ 7, 52 (regarding premature withdrawal and the acquiescence of the PCA International Bureau. Further to ISDS rosters see generally, Bjorklund et al., *supra* note 280, at 14–17.

341. Jorritsma suggests that states seek, when appointing people to the PCA roster, leverage over the appointees, hardly a criterion calculated to instill public confidence in appointees’ suitability as third-party decision-makers. See Jorritsma, *supra* note 104, at ¶ 50.

them.³⁴² UNCITRAL Working Group III has addressed the use of rosters, in various forms and under various possible procedures.³⁴³ Though a treaty may indicate criteria as to whom states parties shall or should appoint to the treaty list, the criteria, in almost all treaties that indicate them, are very general. Seldom do treaties “contain detailed provisions on the selections of persons on the roster.”³⁴⁴ A possible approach toward systematizing the criterion of public trust would be to use more robust criteria for rosters, including relatively transparent procedures for appointment to rosters. States thereby might constitute a wider cadre of suitable candidates for future ISDS decision-making roles.³⁴⁵ Moreover, they would place these candidates on a publicly available list, appropriate to the public function that ISDS decision-makers are called on to perform.

CONCLUSION

Academics who study ISDS, and some of the governments that built the treaty framework on which most of ISDS is based, recently have drawn attention to certain characteristics of arbitration that they say call for replacement or reform. A novel empirical study by Marceddu and Ortolani, which we discussed in Part II above, suggests that one of the main causes of unease over arbitration of investment disputes is party appointment of arbitrators. It would follow that party appointment of arbitrators is one of the main characteristics of the institution that calls for change. A standing international court for ISDS, critics of arbitration say, will attract greater confidence, because tenured judges will compose it. On that view, to judicialize ISDS would be to cure ISDS of much that ails it. The logic here is not a matter for academic discussion alone: Proposals to judicialize ISDS are now being implemented by the EU in its international trade treaties—and judicialization is said to find support in the empirical evidence that Marceddu and Ortolani in their study have gathered.

Marceddu and Ortolani have admirably opened a new line of inquiry into ISDS, but we suggest that their findings might better be seen as an invitation than an endpoint. We have suggested here that a useful next step would be further to interrogate the evidence about discontent over arbitral appointment. Using behavioral economics methods, investigators should take

342. For example, as reported in 2015, some one third of ICSID States Parties have left slots vacant on the ICSID roster. Becky L. Jacobs, *A Perplexing Paradox: “De-Statification” of “Investor-State” Dispute Settlement?*, 30 EMORY INT’L L. REV. 17, 33 (2015).

343. UNCITRAL Working Grp. III, *supra* note 2, ¶¶ 28–40.

344. *Id.* ¶ 28.

345. Addressing recent Netherlands practice in this regard, see Remy Jorritsma, *The Nomination of International Judges by ‘the Enlightened Few’: A Comment on Royal Decree of 23 January 2020 Concerning the Establishment of a Dutch National Group of the Permanent Court of Arbitration*, 67 NETH. INT’L L. REV. 297–317 (2020). A model law on roster inscription might embody decision-maker criteria such as we have considered in this article.

a closer look at the personal and professional attributes that instill public confidence in decision-makers.

Reasons exist to heighten the scrutiny of arbitral appointment in ISDS. A small group of individuals some time ago attained something approaching an oligopoly as repeat appointees to ISDS tribunals.³⁴⁶ Such a concentration would not necessarily merit concern if it were in a field having little significance to the wider public. ISDS, however, has a great deal of significance to communities well beyond these technicians who operate it. The impact of investment awards on legislative autonomy, regulatory regimes, and the public purse rightly attracts scrutiny—and criticism of ISDS is persistent and widespread.³⁴⁷ As we suggested in the introduction, no institution can exist for long without taking into account the communities in which it exists and whose interests its activities affect. The bell may have started tolling for ISDS only in academic circles, but it is now sounded by a broad spectrum of politicians and the general public.³⁴⁸ Those who champion ISDS as an institution should now be alert to the signal and think seriously about how to respond.

We proposed in this article, in Part III, that wholesale revision of ISDS, however, is not necessarily the most promising way to respond. We suggested that indicia for arbitral appointment are available and, used judiciously, these could increase public confidence in ISDS tribunals, including by opening the door to more diverse appointees.³⁴⁹ Applying criteria of ethics, transparency, diversity, and prior public service, appointing authorities would take a middle road between the status quo and a new dispute settlement architecture. Criteria that meet the technical demands of ISDS but also foster confidence in the wider public would confirm some of the existing repeat arbitral appointees, but such criteria also would open the door to new entrants.

The prevailing approach has been to select candidates who, while no doubt having earned the confidence of the lawyers who have seen them on past arbitral panels, have not necessarily been vetted through any public institution or served in posts of public visibility. By contrast, focused on the

346. See discussion *supra* p. 220.

347. UNCITRAL Working Grp. III, *Rep. of Working Grp. III on the Work of its thirty-Seventh Session*, ¶¶ 36–37, U.N. DOC. A/CN.9/970 (Apr. 9, 2019).

348. SCHULTZ & GRANT, *supra* note 27, at 76, 99.

349. UNCITRAL Working Group III identifies “diversity and balanced representation (inclusiveness)” as a goal in regard to the “qualifications and other requirements” for service on ISDS tribunals. UNCITRAL Working Group III, *supra* note 2, ¶¶ 10–14; see also *Take the Pledge*, EQUAL REPRESENTATION IN ARB., <http://www.arbitrationpledge.com/take-the-pledge> (last visited Oct. 16, 2021) (pledge seeking to increase number of women appointed as arbitrators).

Academic writers have considered the relevance of diversity to legitimacy in international arbitration. See Susan D. Franck, James Freda, Kellen Lavin, Tobias Lehmann & Anne Van Aaken, *The Diversity Challenge: Exploring the “Invisible College” of International Arbitration*, 53 COLUM. J. TRANSNAT’L L. 429 (2015).

indicia that we discussed above (Part IV(B)), parties and appointing authorities would test for whether a given candidate is likely to attract public confidence. Parties and appointing authorities would apply definite criteria, in particular, past selection for positions of public trust that entailed both vetting before appointment and accountability for performance during public tenure. A key component of the approach that we propose, then, is to select appointees who have attributes that are intelligible to a wider public and thus who may earn wider trust. Appointments would, in time, trend away from individuals whose reputation is based mainly on their repeat appearances in the arbitral role.

Paradoxes of reputation-building have been observed in domains far removed from the arcane world of ISDS. It was Malcolm Muggeridge, the satirist, who wrote about the seeming circularity of fame in modern times. “In the past,” Muggeridge wrote,

if someone was famous or notorious, it was for something—as a writer or an actor or a criminal; for some talent or distinction or abomination. Today one is famous for being famous. People who come up to one in the street or in public places to claim recognition nearly always say: ‘I’ve seen you on the telly!’³⁵⁰

It would be baseless to say that the best-known investment arbitrators today are not known “for something.” Acumen and discernment—acumen as a legal thinker and discernment between competing accounts of fact—are a good basis for arbitral renown, and well-known investment arbitrators display these qualities. And, yet, the impression lingers that, in selection to arbitral panels, individuals are selected chiefly for having been selected before.³⁵¹ Members of the general public do not seek out arbitrators on the street, but party counsel whose advice is pivotal when parties appoint arbitrators most certainly rely on having seen a given potential arbitrator performing the arbitral role. Though party counsel probably hasn’t seen a given candidate-arbitrator “on the telly,” she almost certainly has seen that jurist on an arbitral panel.

We referred in historical retrospective in Part IV(A) to some eminent appointees. They were eminent not on grounds of previous service as arbitrators. They were eminent on grounds that they had been in the public eye in positions of authority or trust, and so their appointment was calculated to attract public confidence to the arbitral process and its outcome. Validation by means independent of the arbitral process—renown in the wider community—made them suitable for the arbitral function. It is, after all, in the wider community where the effects of so many arbitral awards are felt.

350. MALCOLM MUGGERIDGE, *MUGGERIDGE THROUGH THE MICROPHONE* 7 (1967).

351. We read Langford, et al., *supra* note 28, as adducing empirical evidence that this is more than mere impression. *Id.* at 319–21, 328 (regarding their conclusion about “a deep set of ‘power brokers’ across the field”).

We do not suggest that parties will cease to appoint arbitrators from an elite tier of jurists. Our suggestion, instead, is that a modification in approach to identifying candidates for arbitral appointment might address the concerns that are prevalent today. These are the concerns that have eroded confidence in the arbitral function and that have added momentum to proposals for the judicialization of ISDS.

Building wholly new institutions has its attraction. To be present at the creation of an ISDS court system is to witness an exciting, world-changing project. But we are not convinced that ISDS courts are the best way to restore confidence in ISDS. This is why we have suggested in Part III(A) an alternative to the model that Marceddu and Ortolani advanced, and, in Part III(B), a further experimental design to test a hypothesis about popular sentiment toward ISDS. Our hypothesis is that the underlying attributes of the individuals appointed to serve as ISDS decision-makers are a more reliable predictor of public sentiment than the formal frame in which ISDS decision-making takes place. This hypothesis, in turn, leads us to propose that signals of community confidence in the individual appointee should be the focal point for reform. Modifying ISDS in that way, states might take a middle road between the status quo and wholesale revision.

Our proposal assumes that a choice exists between creating new institutions and putting existing ones to better use. In making the choice, policymakers will wish to weigh the costs and benefits. Advocates of the judicialization of ISDS are likely to say that the best way to systematize a signal of public confidence in ISDS decision-makers would be to lodge them in a permanent, standing court, but few go so far as to say that an ISDS judiciary would be a panacea. Implicit here is that any improvement will be incremental. And, yet, creating an ISDS court is not an incremental change. The replacement of the present system and the eclipse of the principle of party autonomy thus are not symmetric with the gains that advocates of judicialization suggest that an ISDS court might achieve. Party autonomy, as we said at the outset, is the keystone of dispute settlement in this field.³⁵² Any reform that removes the keystone must give a better account of the equities that it proposes to gain.

352. See discussion *supra* pp. 172-75 and text accompanying nn.18-19.

