You Only Dissent Once: Re-Appointment and Legal Practices in Investment Arbitration

Anton Strezhnev*

Research Note

November 8, 2015

Abstract

This paper explains the unexpected frequency of unanimous opinions in international investment arbitration. It argues that legal and attitudinal models are insufficient to account for the apparent "dissent aversion" in arbitrations and that the strategic behavior of career-oriented arbitrators is likely the cause. Arbitrators in international tribunals, unlike judges in international courts, do not have a fixed tenure and must compete for re-appointment by disputing parties. Scholars of judicial politics in domestic legal systems have long noted that selection pressures can affect the behavior of judges. The paper develops an empirical test one important implication of the strategic model, that dissents reduce the re-appointment chances of arbitrators. outcomes. I examine appointments made to tribunals registered at the International Centre for the Settlement of Investment Disputes (ICSID) and estimate the effect of dissent on re-appointment using event history models. I find that arbitrators who issued dissenting opinions were on average about three times less likely to be re-appointed as presiding members in subsequent disputes compared to arbitrators who did not. Far from evidence of legal consensus, unanimity in arbitration rulings can be best explained by the adverse professional consequences of dissent.

*Harvard University, Department of Government astrezhnev@fas.harvard.edu

1 Introduction

How do international arbitration tribunals make decisions? This question is not merely a curiosity for legal scholars, but has meaningful implications for modern day international relations. As states operate within an increasingly judicialized international system (Alter, 2014), explaining how these judicial institutions function is essential to understanding how states are affected by and react to judgements rendered by international legal bodies. While a substantial amount of scholarship has been dedicated to the study of formal international courts and the political/strategic considerations of sitting international judges (Posner and de Figueiredo, 2005; Voeten, 2008, e.g.), there has been little research in political science on international arbitration. However, in a growing number of issue areas, arbitration, rather than formal adjudication, is quickly becoming the preferred method of resolving disputes involving states. This is particularly true of international investment where the rapid growth in the use of Bilateral Investment Treaties (BITs) as a tool by states to promote foreign direct investment has opened up states to formal legal claims from investors. Firms alleging violations of property rights by host countries litigate their claims before ad-hoc arbitration tribunals outside of the jurisdiction of domestic courts. Moreover, decisions rendered by these tribunals have meaningful consequences for both parties involved. Awards in favor of firms – the claimants – against states – almost always respondents – for expropriation of property can amount to sizeable portions of state budgets. One notable decision, *Occidental v. Republic of Ecuador*, awarded claimants $1.76 billion USD plus interest in damages – the largest award in ICSID history (Sabahi and Duggal, 2013).[1]

The turn by states to judicial mechanisms of dispute settlement in the investment sphere makes the study of the investment arbitration community an important topic of study. While there is no central "investment court," the investment arbitration system is not unstructured. International organizations, such as the International Centre for Investment Disputes (ICSID), help to facilitate the conduct of arbitrations, by providing predictable rules and pools of qualified arbitrators. Moreover, the community of investment arbitration professionals is small and highly professionalized (Rogers, 2004) with a small group of elite arbitrators accounting for the vast majority of appointments to investment tribunals. International arbitrators exist within a broad,

[1]For comparison, according to the World Bank's World Development Indicators, Ecuador's nominal GDP in $USD in the year of the award – 2012 – was $87.6 billion.

yet largely informal, social and professional structure.

This paper examines the connection between the professional incentives of arbitrators and the ad-hoc institutional structure of arbitration. It focuses on one particularly puzzling aspect of investment arbitration – why are there so few dissenting opinions? Among disputes filed before the International Centre for the Settlement of Investment Disputes, the largest single forum for international investor-state arbitrations, between January, 1972 and April, 2015, roughly 80% of final awards were unanimous and only about 14.5% of decisions came with a dissenting opinion attached (see figure 1).[2]

Relative to other major international courts, this is a rather low dissent rate. [3] Indeed, as Rogers (2013) notes, for a legal system that is relatively new and without formal rules of precedent, this dissent rate is rather low.[4] The relative infrequency of dissents is surprising given the highly contentious nature of investment arbitration. Not only are the questions addressed by international arbitrators often highly contentious and implicate core issues of state sovereignty, but the way in which arbitrations are conducted would, on face, seem highly conducive to dissent. Specifically, each party to a dispute typically appoints one of the arbitrators of a standard three member panel. The third arbitrator, who serves as president of the tribunal, is selected by agreement of the parties, the co-arbitrators or by institutional appointment. Because parties exert some control over the composition of the panel, they can be expected to choose arbitrators whose perspectives are favorable to their own legal position. Indeed, legal commentators have often decried the undue influence that parties to a dispute have over their appointees (Paulsson, 2010). But if each arbitrator was a perfect agent of their appointer, then the typical outcome for an arbitration tribunal would be a 2-1 decision driven by the swing vote of the presiding arbitrator. However, this does not appear to be the case. Some countervailing tendency must be generating pressure towards unanimity.

Scholars of national legal systems have noted the existence of "dissent aversion" among judges

[2]This figure only considers awards issued for original proceedings for ICSID disputes and excludes any subsequent arbitrations related to an initial award (such as annullment proceedings). Additionally, it excludes awards issued in the context of a settlement by the parties. The total number of awards considered is 199, with 29 total dissents counted.

[3]Chilton and Tingley (2012) find that, of contentious cases, the separate opinion rate was 95% for the International Court of Justice and 53% for the European Court of Human Rights.

[4]Brower and Rosenberg (2013) further argue that an appropriate baseline would be national judicial systems, which tend to exhibit higher dissent rates ranging from a very high 62% in the U.S. Supreme Court to 25% in the Supreme Court of Canada.

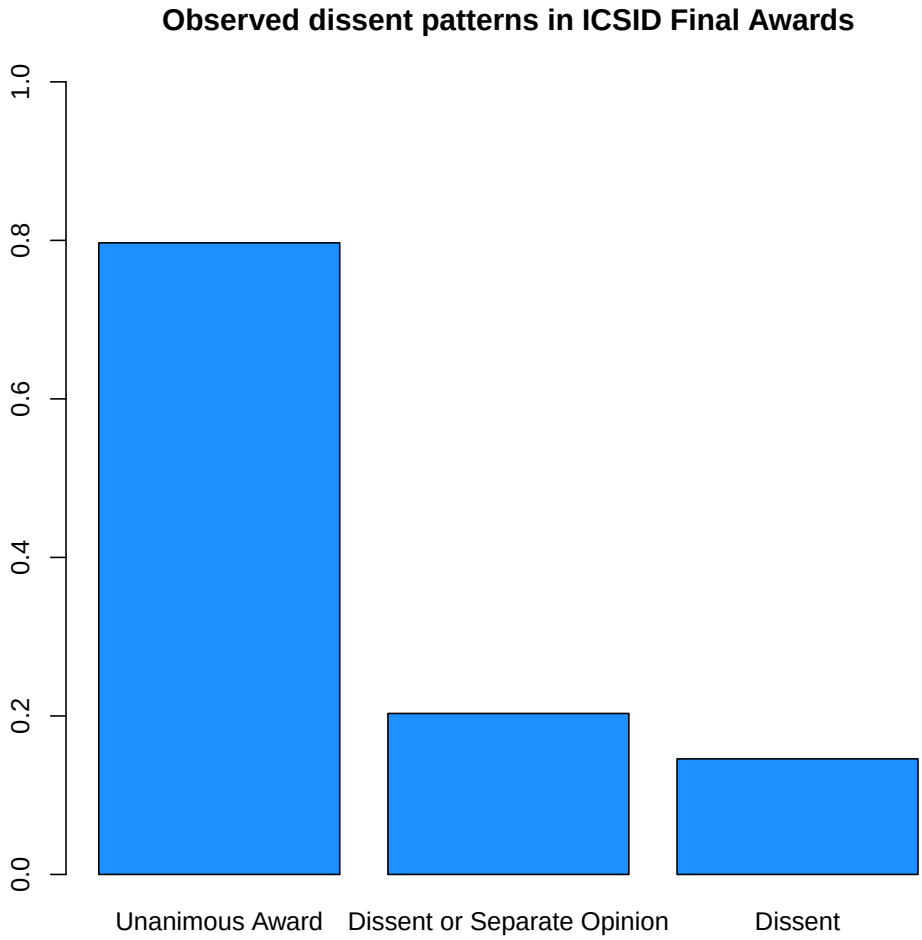


Figure 1: Relative frequency of dissent in ICSID final awards

on multi-member panels (Epstein, Landes and Posner, 2011). Even when a judge disagrees with the majority opinion, on ideological or legal grounds, they may nevertheless choose to go along with the majority in order to preserve the collegiality of the court. Because law is a social system, judges rely on collegial relationships with one another in order to facilitate effective functioning of the court. Aversion to conflict and bitter disagreement incentivizes judges to find some form of common ground and, for many legal scholars, ultimately results in more well-reasoned decisions (Edwards, 2003). Dissents, by forcing the majority to directly respond to an open attack on its reasoning and potentially weakening the overall precedential value of a decision, imposes social costs on the dissenter (Epstein, Landes and Posner, 2011).

Moreover, dissents themselves matter for the enforcement of arbitral awards. Because compliance with the decisions of international courts is never certain, international courts rely on a variety of mechanisms to persuade states to implement their decisions. Many recalcitrant states willing to tolerate the costs of non-compliance, have simply refused to pay awards rendered against them by investor-state arbitration tribunals.[5] Aware of this, international courts often seek to bolster their legitimacy in order to enhance state compliance. Lewis (2006) argues that this was the case during the development of the World Trade Organization Dispute Settlement System. Members of the WTO Appellate Body actively discouraged formal dissents in the interest of presenting a single unanimous voice before member states. There is evidence that dissents affect enforcement in investment arbitration as well. Dissents often provide the losing party with leverage in subsequent annulment proceedings. While there is no formal appeal system within investment arbitration, awards can be annulled under a limited set of grounds. Van Den Berg (2010) notes that dissents have often been a springboard for dissatisfied parties to develop an argument for an annulment tribunal. Annulment tribunals in ICSID have explicitly cited dissents in their reasons for annulling the previous award, notably in the early case Klöckner v. Cameroon. Even when annulments are not pursued, dissents may still make enforcement in subsequent legal proceedings more difficult as well. Understanding legal practices like dissent is an essential component of explaining compliance more generally with the decisions of international courts.

The goal of this paper is to shed light on how these informal social mechanisms affect the be-

[5]See, for example, the famous case of Franz Sedelmayer, a German investor who has filed numerous claims against Russian property abroad in order to enforce a still-unpaid 1998 arbitration award against the Russian government.(Wrange, 2012)

havior of investment arbitrators and test prevailing theories of why judges refrain from dissenting. Specifically I test a crucial implication of the strategic model of dissent – that judges refrain from dissenting because dissents are costly for their careers. In an ad-hoc system of arbitration, where arbitrators must rely on the approval of others in the community for continued tenure, controversial dissents can be expected to reduce the chances that the arbitrator gets re-appointed. This paper explicitly tests this hypothesis by examining re-appointment rates to arbitrations under the International Centre for the Settlement of Investment Disputes to estimate the effect that dissents have on arbitrators' career outcomes. I find some evidence that writing a dissenting opinion reduces the likelihood that an arbitrator will be subsequently re-appointed as a presiding member of an ICSID tribunal. However, this effect does not hold for re-appointments by individual parties, suggesting that dissents may be less costly for arbitrators that are able to cultivate a reputation as advocates for either claimants or respondents. This can be explained by the existence of a possible countervailing dissent "benefit." By bearing the social costs of dissent, arbitrators credibly signalling their support for a party's position and increase their chances of being re-appointed by that party in the future even as they forego more prestigious appointments as presiding member. Notably, the evidence of some career costs to dissenting provides a coherent explanation for low dissent rates in arbitration, in contrast to purely legal or attitudinal accounts of arbitrator behavior which predict the opposite.

The subsequent sections are laid out as follows: Section 2 develops three theories of dissent from existing models of arbitrator decision-making – legal, attitudinal, and strategic. Section 3 describes the empirical strategy for estimating the effect of dissent on re-appointment using a Cox proportional hazards model. Section 4 describes the results and Section 5 concludes with a discussion of what the findings imply for proposed institutional reforms of the investment arbitration system.

2 Models of Dissent

Legal and Attitudinal Models

Dissents may simply be the result of disagreements between arbitrators with regards to how the facts of a particular case should be interpreted. Substantive dissensus regarding the proper

application of law may be frequent in nascent legal systems dealing with complex questions with little precedent or formal stare decisis as guidance. Indeed, in common law systems, dissent is often celebrated as evidence of vigorous legal reasoning and debate among judges.

Moreover, even when judges see the same facts and have similar interpretations, they may nevertheless differ over the final decision due to differences in how their decisions are aggregated. Because judges must rule on a series of separate questions when deciding a particular case, the method of combining and weighing these decisions may arbitrarily differ among judges with different backgrounds or approaches to interpretation. Chilton and Tingley (2012) note that this problem of the 'doctrinal paradox" has long puzzled legal scholars. As decades of formal theoretical work on collective decision-making has illustrated, the same set of individual preferences can yield different outcomes under different, but nevertheless logically coherent, aggregation methods. For example, judges may choose to vote on sub-issues separately or on the entire case as a whole.

International courts, Chilton and Tingley (2012) note, do not have clearly defined rules of interpretation for aggregating judgements. This is particularly true of investment arbitration where arbitrators come from both private and public international law backgrounds, each with different approaches to jurisprudence. Coupled with the relative novelty of investment arbitration and the absence of a formal institutional structure to guide the development of investment arbitration law and it is very likely that arbitration should be susceptible to the "doctrinal paradox" – variation in outcome as a consequence of variation in aggregation procedures.

The conditions under which the doctrinal paradox is likely to occur are also those that are conducive to dissent - reasonable disagreement with respect to proper interpretation is likely to result in arbitrators filing dissenting opinions. Yet in contrast to other international courts that suffer from similar problems, dissent rates remain relatively low in investment arbitration. Indeed, a purely legal account of arbitration as a relatively new and informal legal structure would predict the exact opposite of what we observe empirically.

Moreover, a purely legal explanation cannot explain why it is also true that the vast majority of dissents in investment arbitration are written by the appointee of the losing party Van Den Berg (2010). If dissents were merely a result of legal disagreements, such disagreements should not be correlated with the source of the arbitrator's appointment. To resolve this puzzle, we need to understand arbitrators not simply as neutral interpreters of text, but as political actors with

preferences. Scholars of the United States Supreme Court point to attitudinal preferences as an important driver of how justices ultimately decide cases.Segal and Spaeth (2002). Indeed, a significant component of research on courts focuses primarily on unpacking the degree to which law or politics influences judicial decisionmaking.(Bailey and Maltzman, 2008, e.g.)

Within international arbitration, there is strong reason to believe that litigants are strategic about whom they appoint to a tribunal. Parties have *every incentive* to appoint arbitrators whose attitudes towards legal interpretation are favorable to their position. While overt displays of bias are rare, anecdotal evidence from arbitrators suggests that arbitrators are uniquely conscious of the preferences of the party that appointed them. One particularly explicit example where a party's promise of extra-legal costs was acknowledged to have influenced an arbitrator comes from a story from Judge Abner Mikva who served as the United States' apointee on the *Loewen v. United States* arbitration described in Schneiderman (2010). The arbitration was one of the first to arise out of non-discrimination provisions contained in the North American Free Trade Agreement (NAFTA). Mikva recounted that after his appointment, he was told by United States Department of Justice (DOJ) officials that "You know, judge, if we lose this case, we could lose NAFTA." Mikva replied "Well, if you want to put pressure on me, then that does it." While Mikva's co-arbitrators were described as leaning in favor of the claimant, the case was ultimately decided in favor of the United States on jurisdictional grounds.

While this model explains why dissents tend to be written by the losers, it does not explain the relative absence of dissents. If parties select arbitrators who are perfect agents for their respective positions – either by coercion or by choosing arbitrators whose views already agree with theirs, then we would still predict high rates of dissent in investment arbitration because the vast majority of tribunals are three-member panels. This is likely because any attitudinal incentives are also balanced against the judges' embededness in a broader legal community. Explicit biases in decisions are frowned upon and for professional reasons, judges must also tailor their behavior to professional norms. Alter (2008) argues that international courts are not merely puppets of their constituent states and that international judges, by virtue of their position in professional and legal hierarchies can avoid recontracting threats from below. In this sense, a model that views arbitrators as simply expressing the views of their appointers is not enough to explain what we observe about judicial behavior.

Strategic Models

In order to explain arbitrator behavior, we must deviate from the model of arbitrators as pure advocates for their party's position and appeal to strategic concerns. Within many models of judicial behavior "strategic" models emphasize judges as policy-seekers who act in order to maximize their desired policy outcome even if it leads to behavior inconsistent with their attitudes. For scholars of domestic courts, strategic behavior entails attentiveness to audiences outside of the courts such as the legislature or the public (Epstein, Knight and Martin, 2001). Indeed, many scholars of international law have noted similar dynamics in international law as judges tailor their decisions in order to maximize compliance by otherwise hesitant governments (Busch and Pelc, 2010; Steinberg, 2004; Voeten, 2008, e.g) However, it is not clear what such strategy over policy implementation entails in the investment arbitration context as tribunals cannot force governments to change policies, only pay compensation. It is not clear what strategic behavior over policy would entail for arbitrators.

However, arbitrators can also be strategic in maximizing their overall *personal* welfare. Evidence of career-oriented strategic behavior is plentiful in the context of selection mechanisms in domestic courts. Huber and Gordon (2004) find that trial court judges facing re-election tend to issue harsher sentences in order to avoid the electoral consequences of appearing insufficiently tough on crime. In the European Court of Human Rights, Voeten (2008) finds that judges close to re-appointment tend to favor their national governments.

Why would re-appointment drive consensus rather dissensus? After all, it is the parties that appoint most of the members of these tribunals and could ostensibly. Unlike international courts, where judges confront re-appointment by a single state, international arbitrators can be re-appointed by a variety of parties – claimant firms and respondents. Given the wide array of states and firms party to disputes, a threat by one litigant to punish an arbitrator who does not vote their way is unlikely to be credible. To whom then, are arbitrators accountable? I argue that arbitrators are strategic in avoiding costs imposed by the overall *legal community* of arbitrators.

The behavior of judges and adjudicators in international investment dispute settlement is particularly likely to require a balance between pro-appointer bias and wider professional and social concerns because the investment law community is remarkably close-knit. Puig (2014) finds that the ICSID arbitration community is dominated by a handful of highly prominent and

influential individuals. Arbitrators tend to be Europeans or Americans and a small minority of individuals receive most of the appointments. Indeed, Ginsburg (2003) argues that professional barriers to entry - notably the requirements of legal experience - keep the arbitration community very closed. Rogers (2004) likens the arbitration network to a "governing cartel."

Arbitrators therefore face "social costs" to their decisions. One dimension of these costs is that of collegiality. When comity amongst arbitrators is valued, dissenting against one's co-arbitrators can be a costly action. Epstein, Landes and Posner (2011) model judges as having an aversion to exerting additional effort to justify one's opinion when in the minority of a ruling. This "dissent aversion" takes the form of an additional cost to voting against the majority opinion. Dissents can be costly both due to effort – having to exert additional mental work to write a defensible dissent – and also due to reputational concerns. Kapeliuk (2012) notes that because arbitrators operate in what could be considered "market" and must be re-appointed to each tribunal, they have incentives to not cultivate animosity among their peers who may be considering. Since an arbitrator in one dispute could very well be advising a litigant in another dispute, maintaining collegiality is likely very valuable in investor-state arbitration.

Dissent costs are not merely borne by the dissenting individual – dissents impose costs on arbitrators in the majority. Epstein, Landes and Posner (2011) find that majority opinions in U.S. circuit courts are longer when one member of the panel dissents, suggesting that dissents force majority opinion writers to work harder to credible justify the decision and respond to the dissenter. In arbitration, anecdotes of "ugly" dissents show how arbitrators on non-unanimous panels must sometimes confront rather vicious criticisms of partiality and bias, ultimately weakening the acceptance of an award by both parties and increasing the possibility of subsequent challenges. Such dissents may be thought to ultimately weaken the efficacy of the overall arbitration proceedings and as a consequence have been decried by a number of prominent arbitration experts (e.g. Van Den Berg, 2010). Redfern (2004) highlights one such "ugly" dissent in a commercial arbitration case in which the dissenting arbitrator encouraged the losing party to challenge the arbitration award in a national court, ultimately forcing all members of the tribunal to testify in court regarding the tribunal – going far beyond what is typically demanded of arbitrators. Dissent costs are ultimately reputational in nature, both in terms of the individual reputation of the arbitrator, the reputation of the tribunal, and the overall reputation of the arbitration system.

The central test of the strategic model in this paper is evaluating whether dissenters face costs in the form of reduced propensity to be re-appointed. I hypothesize that dissents reduce the likelihood of re-appointment to an arbitration tribunal. I also hypothesize that this effect may vary depending on the type of re-appointment considered. Because tribunal presidents must ultimately be accepted by both parties, the social costs of dissent may be more relevant for re-appointment as presiding member. Maintaining a reputation for collegiality is most valuable for those appointments where the competing parties must agree on a candidate, whereas party-appointees may be more valued for their ability to sway the outcome. I therefore hypothesize that the effect is stronger for re-appointments to tribunal presidencies.

3 Data and Methods

The dataset consists of observations of 289 arbitrators who have served on investment arbitration tribunals conducted under the rules of the International Centre for the Settlement of Investment Disputes (ICSID) and written awards. I obtained data on the status of all original arbitration proceedings filed with ICSID prior to April of 2015. For each arbitrator I observe a sequence of appointment events. I define each arbitrator-level observation to be the time period between the date of publication of an award by the arbitrator to the next date of appointment to another ICSID tribunal.[6] Observations are censored either by the passing away of an arbitrator or by the end date of data collection (April 11, 2015). In total, the dataset consists of 953 awards and 632 of which end in any re-appointment event, 431 that end in a re-appointment as presiding member and 542 of which end in re-appointment as a party-appointed arbitrator.

Survival models are the most common method of estimating effects of variables on the time to the occurrence of some event. These approaches attempt to model the probability of a unit experiencing an event at time t, given that they have not experienced an event up until that time – the hazard or $\lambda(t)$. One popular survival model that makes no additional parametric assumptions about the shape of the underlying hazard function is the Cox Proportional Hazards model. It assumes that $\lambda(t)$ is the product of some baseline hazard rate $\lambda_0(t)$ multiplied by a rate that is a

[6] I consider only appointments to original proceedings, excluding, for the purposes of this study, annulment proceedings.

function of a linear combination of the covariates, that is:

$$\lambda(t) = \lambda_0(t)e^{\beta_1 X_1 + \beta_2 X_2 + ... + \beta_n X_n}$$

Under the assumption of multiplicative effects or *proportional hazards*, estimation of the Cox model yields coefficients that correspond to hazard rates. $exp\beta_1$ denotes the hazard ratio between two observations that differ in X_1 by 1 unit. For a binary treatment, the hazard ratio corresponds to the ratio of the instantaneous probability of an event in the treatment group divided by the instantaneous probability for the control group. Hazard ratios greater than one correspond to a positive effect of treatment on event occurrence while hazard ratios less than one correspond to a negative one.

However, the standard Cox model also makes assumptions that are untenable for the purposes of this set-up. Event times are assumed to be independent of one another conditional on the covariates. This is unlikely to hold in this particular case as arbitrators experience repeated re-appointment events. Unobserved heterogeneity among arbitrators makes some arbitrators more likely to be appointed than others. When this heterogeneity is also correlated with dissent, effect estimates will be biased, but even in the absence of such confounding, heterogeneity leads to violations of the independence assumption necessary for accurate estimates of standard errors. Moreover, because the majority of appointments tend to cluster among a small minority of elite arbitrators (Puig, 2014), prior appointments make subsequent events more likely. This event dependence also generates within-arbitrator correlations between events. Box-Steffensmeier, De Boef and Joyce (2007) note two commonly suggested solutions for adjusting the standard Cox model are estimating a variance correction or including a random-effect or "frailty" parameter that accounts for unobserved heterogeneity in the baseline hazard function among units under observation. Intuitively, the frailty model allows for partial pooling across arbitrators, in contrast to a fixed-effect approach that estimates separate hazards for each arbitrator, while still allowing the model to adjust for unobserved variation in the hazard rate across observations. They find that a frailty model that stratifies the risk set based on event number (essentially, only comparing outcomes for arbitrators with identical numbers of issued awards) performs best in terms of reducing bias and mean squared error under both event dependence and unobserved heterogeneity. I estimate both

sets of models, a variance-correction model that estimates cluster robust standard errors clustered on arbitrator along with a Gaussian frailty model. Both models stratify the risk set on number of previous awards issued, assuming separate baseline hazards for each event number.

The primary independent variable of interest is whether an arbitrator issued a dissenting opinion in an award (either an intermediate award on jurisdiction or a final award). In addition, I obtain data on potential confounding factors measured at the case level – the party that appointed the arbitrator, whether the arbitrator was the presiding member, the issue area/economic sector of the dispute, and the date of the award. Most of the case-level data comes directly from the ICSID website[7], with supplementary information on published awards obtained from the *italaw* archive of investment awards.[8]. Where awards were not publicly available, data on dissenting opinions was coded from secondary news reports by the Investment Arbitration Reporter.[9] Appointment data was also supplemented by data collected by Puig (2014).

In addition to case-level data, I obtain information on background characteristics of arbitrators that could potentially confound the relationship between dissent and re-appointment. I gathered data on arbitrator nationality, gender and professional background using publicly available information, starting with arbitrators' online Curricula Vitae and website. If a CV could not be found (as is often the case for older arbitrators), I draw on articles written about the arbitrator or, in some cases, obituaries. For arbitrators that have passed away I also obtain data on date of passing,

From arbitrator nationality, while including indicators for each nationality in the model is possible, the number of unique nationalities is sufficiently large that this would lead to very high variance estimates. I therefore coarsen each arbitrator's nationality into groupings based on geographic region. As Trakman (2013) notes, poorer, capital-importing states have often criticized investor-state arbitration for being ideologically skewed towards the interests of wealthy capital-exporters and foreign investors. There is a notable lack of diversity on ICSID panels with arbitrators originating predominantly from Western Europe and North America with developing countries relatively under-represented (Nathan, 2000). One might reasonably expect arbitrators from non-Western countries to take a different approach to legal interpretation, that might make them more likely to dissent from their co-arbitrators *and* less likely to receive appointments in

[7]See `https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/default.aspx`
[8]See `http://www.italaw.com/`
[9]Available at `https://www.iareporter.com/`

the future. Indeed, one of the major competing explanations for the absence of dissent may be the relative homogeneity of the arbitration pool. Similar criticisms have been made of the lack of gender diversity in investment arbitration as well (Greenwood and Baker, 2012).

However, while coarsening nationality by geographic region captures some of the West/non-West divide in arbitrator origin, it does not capture another important component of nationality – legal origin. Dissent practices differ significantly between countries with common law legal systems and those with civil law systems. Dissent on multi-member panels is a frequent occurrence in common law systems and incredibly rare within civil law systems (Kirby, 2007).

For professional background, I code four elements that vary across arbitrators and may covary with both the social incentives affecting arbitrators *and* likelihood of re-appointment. While essentially all arbitrators have some legal background and training, they vary in the type of career experience they have held. While many arbitrators act solely as experts in international investment law, others have more experience at the national level. I code for two common elements of national-level experience: whether an arbitrator held a position as a judge in a national court, and whether an arbitrator has experience working within a national government (either as a politician, or, more commonly, an official in a foreign ministry). Additionally, many arbitrators have their origins in legal academia, in contrast to those who work primarily as professionals within elite law firms (though the line is often blurred). I code an arbitrator as having a professional academic background if their CV mentions holding a previous position as a tenure-track faculty member at a university.[10] Finally, there is a notable divide between investor-state arbitrators who work primarily within private international law – especially in investor-investor arbitration – and arbitrators with more public international law experience, such as former ICJ judges. I code arbitrators as having public international law expertise if they have previously worked within a purely public international legal context (such as litigating before the International Court of Justice, or state-to-state arbitration under the UN Convention on the Law of the Sea).

Table 1 describes the full set of pre-treatment confounders included in the survival models. The central assumption of this analysis is that the observed confounders account for all possible common causes of arbitrator dissent and re-appointment hazard. In the subsequent section, I will discuss one likely violation of this assumption – arbitrator deterrence – and explain why this

[10]Note that this excludes adjunct, lecturer and visiting positions as many purely professional arbitrators will often receive university appointments as practitioners rather than as legal academics.

Arbitrator Experience	**Arbitrator Background**	**Case-level characteristics**
- Previous ICSID appointments - Previous ICSID appointments as presiding member - Previous ICSID appointments by claimant - Previous ICSID appointments by respondent	- Gender - Nationality (region) - Legal origin - Domestic courts background - Government background - Public international law background - Academic background	- Date of Award - Economic sector of dispute - Appointing party of arbitrator - Whether arbitrator is presiding member

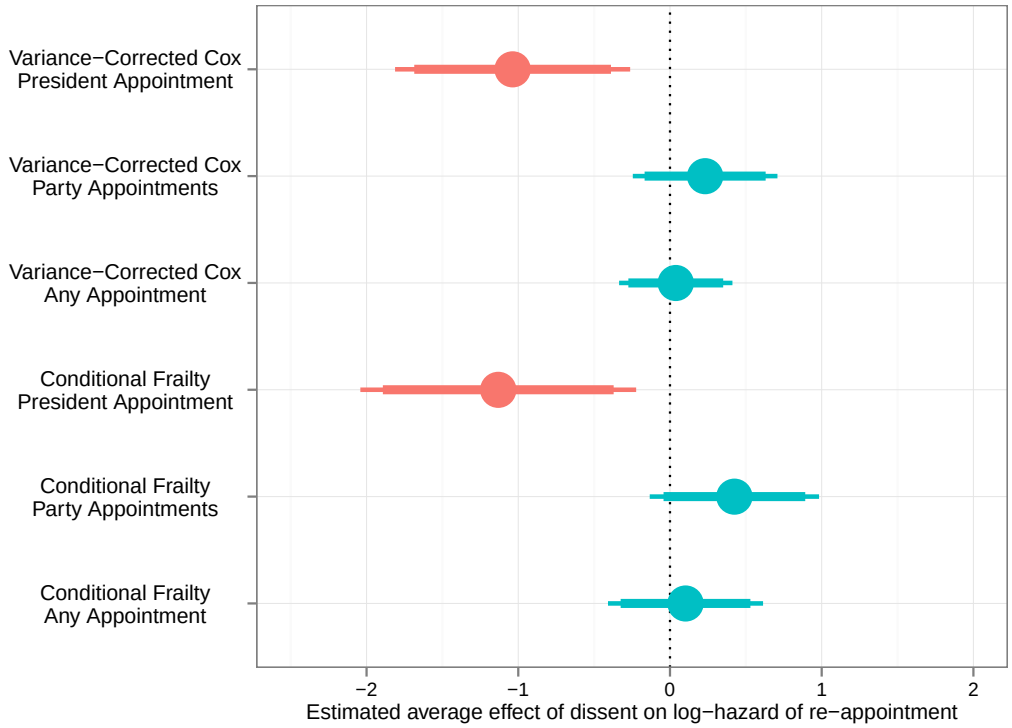
Table 1: Observed confounders included in the survival analysis

violation would generate estimated effects that are *less extreme* than the true effect and therefore make inferences conservative.

Results

Figure 2 displays the estimated log-hazard ratio of re-appointment for arbitrators who dissented relative to those who did not across both variance-corrected and frailty models. Negative estimates indicate a reduced likelihood of re-appointment. Converting the log-hazards to hazard ratio scale, I estimate that arbitrators who dissented were roughly three times less likely to be re-appointed as presiding members to a subsequent arbitration tribunal. This effect is statistically significant across both model specifications at the $\alpha = .05$ level. However, I did not find an effect for re-appointment in general or to party-appointed positions, suggesting that while dissenters may be less acceptable as mutual appointees, they may still be favored for unilateral appointments as parties may perceive dissenters as reliable advocates for their position. Dissent costs to the broader legal community may be offset by the benefit of signalling that one is a credible advocate for one party.

The two primary threats to causal inference are confounding by arbitrator-level background characteristics and strategic selection into dissent by arbitrators. With respect to the first, I



Thick and thin lines denote cluster-robust 90% and 95% confidence intervals respectively.

Figure 2: Estimated effects of dissent on log-hazard of re-appointment

have attempted to control for all possible elements of arbitrator background that might affect re-appointment and also correlate with propensity to dissent. Still, it is not completely possible to rule out the possibility that what appears as individual-level consequences to dissent is simply due to generally unpopular arbitrators being more prone to dissent and less likely to be re-appointed by their peers. However, this appears unlikely to be the case.

The second factor is much more difficult to adjust for. Arbitrators, knowing that there are consequences to dissenting, will choose to dissent only when they expect these consequences to be minimal or even positive. This is consistent with an account of arbitrators as strategic and career-oriented actors – the very model advanced by this paper. Since dissents are not random, anticipatory behavior by arbitrators may generate an observed distribution of dissent effects that differ substantially from the "true" distribution if a dissent were exogenously assigned. In other words, if one imagines some population distribution of effect sizes, the in-sample distribution of dissents will tend to have effect sizes that are more positive on average. There is little a researcher can do to adjust for this as we cannot know what is going on in the heads of arbitrators when they

made their decisions. However, it is possible to sign the direction of the bias that this strategic behavior would generate. The fact that there is still a negative effect on average even when selection would cause observed dissents to be made under the most favorable conditions, suggests that the effect estimates are *conservative*. That is, they are under-estimating the true magnitude of the career impact that dissenting opinions cause. This may in fact explain the absence of an effect for appointments in general as arbitrators may be willing to forego the loss of presidential appointments in order to gain the benefit of consistent unilateral party appointments in the future.

Conclusion

In recent years, legal scholars have proposed reforms to international investment arbitration in order to respond to criticisms that arbitration is a highly opaque form of dispute resolution that infringes upon state sovereignty within the economic realm. Van Harten (2008) makes the case for a more formal investment court along the lines of the WTO's dispute settlement system where judges retain more secure tenure and do not have to compete for re-appointment by the parties.[11] While proponents argue that such an institution would enhance transparency and reduce the possibility for conflicts of interest by enhancing the independence of judges, it would also very likely alter the practices of international investment judges. While judges would have less incentive to dissent in favor of an appointing party, the costs to dissent would also be significantly lowered. If disagreement over legal interpretation remains among judges, then the rate of dissent under a formal investment court will likely increase. For lawyers who see dissent as a positive – evidence of quality deliberation and legal reasoning, this would be an overall improvement to investment law. However, for those who see dissent as a threat to a unified court and as an opening to non-compliance and annulment, the existing informal system may, paradoxically, encourage greater unanimity in decisions. Indeed, the same reformers who advocate elimination of party appointments due to their effect on engendering dissent also often advocate for more secure tenure. These results suggest that the two policy proposals may be somewhat at odds with one another.

In general, as arbitration becomes more and more common as a means of settling disputes

[11]This proposal was also recently endorsed by the European Commission for all future investment agreements negotiated by the EU. See `http://europa.eu/rapid/press-release_IP-15-5651_en.htm`

between states and private actors, scholars of international political economy and of international economic law need to pay more attention to what is driving the behavior of international arbitrators. This paper provides some initial evidence that behaviors and practices of arbitrators – an understudied but increasingly influential set of actors – is directly connected to their career objectives.

References

Alter, Karen. 2014. *The New Terrain of International Law: Courts, Politics, Rights.* Princeton University Press.

Alter, Karen J. 2008. "Agents or trustees? International courts in their political context." *European Journal of International Relations* 14(1):33–63.

Bailey, Michael A and Forrest Maltzman. 2008. "Does legal doctrine matter? Unpacking law and policy preferences on the US Supreme Court." *American Political Science Review* 102(03):369–384.

Box-Steffensmeier, Janet M, Suzanna De Boef and Kyle A Joyce. 2007. "Event dependence and heterogeneity in duration models: the conditional frailty model." *Political Analysis* 15(3):237–256.

Brower, Charles N and Charles B Rosenberg. 2013. "The Death of the Two-Headed Nightingale: Why the Paulssonvan den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded." *Arbitration International* 29(1):7–44.

Busch, Marc L and Krzysztof J Pelc. 2010. "The politics of judicial economy at the world trade organization." *International Organization* pp. 257–279.

Chilton, Adam S. 2015. "The Politics of the United States Bilateral Investment Treaty Program." *University of Chicago Coase-Sandor Institute for Law & Economics Research Paper* (722).

Chilton, Adam S and Dustin H Tingley. 2012. "The Doctrinal Paradox & International Law." *University of Pennsylvania Journal of International Law* 7(1).

Edwards, Harry T. 2003. "The effects of collegiality on judicial decision making." *University of Pennsylvania Law Review* pp. 1639–1690.

Epstein, Lee, Jack Knight and Andrew D Martin. 2001. "Supreme Court as a Strategic National Policymaker, The." *Emory LJ* 50:583.

Epstein, Lee, William M Landes and Richard A Posner. 2011. "Why (and when) judges dissent: A theoretical and empirical analysis." *J. Legal Analysis* 3:101.

Ginsburg, Tom. 2003. "Culture of Arbitration, The." *Vand. J. Transnat'l L.* 36:1335.

Greenwood, Lucy and C Mark Baker. 2012. "Getting a Better Balance on International Arbitration Tribunals." *Arbitration International* 28(4):653–668.

Huber, Gregory and Sanford Gordon. 2004. "Accountability and coercion: Is justice blind when it runs for office?" *American Journal of Political Science* 48(2):247–263.

Kapeliuk, Daphna. 2012. "Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration." *Rev. Litig.* 31:267.

Kirby, Michael D. 2007. "Judicial dissent–common law and civil law traditions." *Law Quarterly Review* 123:379–420.

Lewis, Meredith Kolsky. 2006. "The lack of dissent in WTO dispute settlement." *Journal of International Economic Law* 9(4):895–931.

Nathan, K.V.S.K. 2000. "Well, Why Did You Not Get the Right Arbitrator?" *Mealey's Intl. Arb. Rep.* 15(24).

Paulsson, Jan. 2010. "Moral Hazard in International Dispute Resolution." *ICSID Review* 25(2):339–355.

Posner, Eric A and Miguel FP de Figueiredo. 2005. "Is the International Court of Justice Biased?" *The Journal of Legal Studies* 34(2):599–630.

Puig, Sergio. 2014. "Social Capital in the Arbitration Market." *European Journal of International Law* 25(2):387–424.

Redfern, Alan. 2004. "Dissenting Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly." *Arbitration International* 20(3):223–242.

Rogers, Catherine A. 2004. "Vocation of the International Arbitrator, The." *Am. U. Int'l L. Rev.* 20:957.

Rogers, Catherine A. 2013. "Politics of International Investment Arbitrators, The." *Santa Clara J. Int'l L.* 12:223.

Sabahi, Borzu and Kabir Duggal. 2013. "Occidental Petroleum v Ecuador (2012) Observations on Proportionality, Assessment of Damages and Contributory Fault." *ICSID Review* .

Schneiderman, David. 2010. "Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes." *Nw. J. Int'l L. & Bus.* 30:383.

Segal, Jeffrey A and Harold J Spaeth. 2002. *The Supreme Court and the attitudinal model revisited*. Cambridge University Press.

Steinberg, Richard H. 2004. "Judicial lawmaking at the WTO: Discursive, constitutional, and political constraints." *Am. J. Int'l L.* 98:247.

Trakman, Leon E. 2013. "ICSID Under Siege, The." *Cornell Int'l LJ* 45:603.

Van Den Berg, Albert Jan. 2010. Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration. In *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman*. pp. 821–843.

Van Harten, Gus. 2008. A case for an international investment court. In *Society of International Economic Law (SIEL) Inaugural Conference*.

Voeten, Erik. 2008. "The impartiality of international judges: Evidence from the European Court of Human Rights." *American Political Science Review* 102(04):417–433.

Wrange, Pal. 2012. "Sedelmayer v. Russian Federation." *Am. J. Int'l L.* 106:347.