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

Anton Strezhnev*

September 15, 2017

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 arbitration 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 of one important implication of the strategic model, that dissents reduce the re-appointment chances of arbitrators. 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. Unanimity in arbitration rulings is not evidence of legal consensus and is likely best explained by the adverse professional consequences of dissent.

*Harvard University, Department of Government astrezhnev@fas.harvard.edu. The author thanks Dustin Tingley, Beth A. Simmons, Dana Higgins, Connor Huff and participants at the Harvard University International Relations Research Workshop for helpful comments on previous versions of this draft.
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 against states almost for violations of property rights and investment treaty obligations 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 itself 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,

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1For 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 so few awards are accompanied by a dissenting opinion. Among disputes filed in ICSID, 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

![Observed dissent patterns in ICSID Final Awards](chart)

Figure 1: Relative frequency of dissent in ICSID final awards

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 remarkably small given the significant leeway arbitrators have in their

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²This figure only considers awards issued for original proceedings for ICSID disputes and excludes any subsequent arbitrations related to an initial award (such as annulment 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.

³Chilton and Tingley (2012) find that, among contentious cases, the share of cases with separate opinions was 95% for the International Court of Justice and 53% for the European Court of Human Rights.
decisions.\footnote{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.} 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. First, investment law is plagued by inconsistent decisions (Franck, 2004). 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 the arbitral institution itself. 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. In addition to selection effects, arbitrators may also face pressure to support the party that appointed them. Puig and Strezhnev (2017) show in an experimental setting that the source of an arbitrator’s appointment can meaningfully alter how they decide a potential case. Indeed, a number of legal commentators have frequently decried the undue influence that parties to a dispute have over their appointees (Paulsson, 2010). But if each arbitrator were a perfect agent of their appointer, then the typical outcome for an arbitration tribunal shuld 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 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 their collegial relationship with the other judges. 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 in the reasoning for their decision (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 may also 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 even in the face of more costly litigation in domestic courts.\(^5\) 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 or enforcement proceedings in domestic courts. While there is no formal appeal system within investment arbitration, awards can be annulled or set aside 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. Additionally, 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 informal social mechanisms affect the behavior of investment arbitrators and test prevailing theories of why arbitrators 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 obtains re-appointment. This paper explicitly tests this hypothesis by examining re-appointment rates to arbitrations under the International Centre for the Settlement of Investment Disputes (ICSID) 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 member of

\(^5\)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. (Wrangle, 2012)
an ICSID tribunal. However, this effect is strongest for re-appointments as the presiding or third “consensus” member and 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 consistent appointees by either claimants or respondents. The results provide clear evidence of career costs associated with dissent, but also show that there may exist a countervailing dissent “benefit” for a part of the arbitration pool. 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. The results provide strong evidence in favor of the strategic model of dissent in arbitration, in contrast to both legal and attitudinal models which predict high dissent rates. Moreover the results highlight ways in which the ad-hoc system through which arbitrators are selected has significant downstream implications for the way in which arbitrations themselves are decided and for the actual development of investment law. It suggests that recent proposals by some governments to move towards a more structured court system for adjudicating investor-state disputes, notably the “multilateral investment court” proposal incorporated into the recent Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada, are likely to substantially alter the way in which investment judges issue opinions.6

The subsequent sections of this article 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 model

One approach to understanding dissent among judges is to consider dissent as an inherent part of the functioning of a judicial body carrying out its role in interpreting the law. In many legal systems, particularly those based in the common law tradition, dissents are commonplace in multimember tribunals (Kirby, 2007). From the standpoint of legal scholars, dissents largely reflect substantive disagreements over interpretations how the facts of a particular case should be interpreted. Substantive dissensus regarding the proper application of law may be common 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 (Ginsburg, 2010).

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 individual opinions 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 decide 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. Investment arbitrations themselves are conducted under a variety of different institutional rules (e.g. ICSID rules v. UNCITRAL), and tribunals’ authority may be derived from many different types of international agreements – such as bilateral investment treaties or free trade agreements. 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 interpretation and aggregation procedures.

However, the existence of a doctrinal paradox should suggest that legal decisionmakers should be highly conducive to dissenting behavior. Reasonable disagreement with respect to proper interpretation is likely to result in arbitrators filing dissenting opinions when their reasoning diverges from that of the majority. Yet again, in contrast to other international courts that suffer from similar problems of doctrine and aggregation, 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 high dissent rates among arbitrators, the exact opposite of what is observed empirically.

**Attitudinal model**

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, it is necessary to understand arbitrators not simply as neutral interpreters of text, but also as political actors with preferences over outcomes. 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’ appointee 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. Moreover, recent experimental research by (Puig and Strezhnev, 2017) suggests that affiliation bias is not merely anecdotal or due only to selection, but also an inherent feature of how investment arbitrators view disputes. In a survey experiment conducted on international investment arbitration professionals, respondents randomly assigned to decide a brief arbitration vignette who were informed that they were appointed by one of the parties to the dispute tended to give that party a more favorable decision. Both selection and affiliation bias pressures should push arbitrators to act more as advocates for their appointing party’s position. Under a purely attitudinal account of investment arbitration, the two party appointees should be expected to aim to persuade the pivotal presiding member if possible and, if they fail to secure the majority, dissent in order to weaken the opinion of the court.

While the attitudinal approach to judicial behavior explains why dissents tend to be written primarily by appointees of the losing party, it does not explain why the observed rate is so low. 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.

**Strategic models**

A number of formal and informal institutional factors mitigate against arbitrators acting purely as agents of their appointers. Any attitudinal incentives to favor one party are also balanced against arbitrators’ embeddedness in a broader legal community. Formally, arbitration tribunals contain mechanisms that allow the parties to challenge arbitrators that exhibit clear evidence of partiality to one side. Informally, explicit biases are typically frowned upon within the norms of the legal profession. As Alter (2008) argues, these additional sources of social structure – professional and legal hierarchies – allow international courts to credibly resist overt pressure or
potential recontracting from the states that delegate authority to them. It is therefore essential to understand the ways in which these professional incentives operate to constrain judges.

“Strategic” models of judicial behavior 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). Building on the attitudinal model, the strategic model suggests that not only do judges care about policy outcomes, but they will behave in a strategic manner in order to achieve those outcomes – conditioning their behavior not only on their own preferences, but also on how they expect others will behave.

Indeed, many scholars of international law have noted strategic behavior in international law with respect to issues of compliance as judges tailor their decisions in order to ensure that otherwise hesitant governments carry out their decisions (Busch and Pelc, 2010; Steinberg, 2004; Voeten, 2008, e.g.). Since international courts do not have agents that can directly enforce their decisions (as do domestic courts), strategic behavior by policy-seeking international judges often seeks to ensure that a ruling is actually carried out. Strategic action to enhance compliance may be one explanation for low dissent rates as policy-seeking judges want to minimize dissent in order to ensure that the mandate of the court is clear. This type of behavior is also common in domestic courts. Even in common law systems where dissent is encouraged, judges do not issue dissents at will. Indeed, as Justice Ruth Bader Ginsburg noted, in some cases it is important that the court be able to speak with one voice and judges suppress their desire to dissent in order to preserve the institution of the court, citing Justice Louis Brandeis’ who wrote that “in most matters it is more important that the applicable rule of law be settled than that it be settled right.” (Ginsburg, 2010).

However, in the context of investment arbitration, it is not clear what strategic behavior with respect to policy implementation would mean. Because investment arbitration tribunals cannot force governments to change policies, only pay compensation, compliance with awards is not a means by which arbitrators can obtain some desired policy change or outcome. Strategic behavior over enforcement is unlikely to explain why investment arbitrators choose to primarily issue unanimous awards.

Instead of seeking policy implementation by governments, arbitrators can also behave strate-
ically in order to maximize their personal welfare. Legal professionals, like many professionals in many disciplines, care about advancing their careers. To do so, they may alter how they decided cases in order to obtain personal benefits in the future. Evidence of career-oriented strategic behavior is plentiful in the context of selection mechanisms in domestic courts. Retaining one’s position on a court or advancing to a more prestigious position is often a primary concern for judges in domestic court systems. 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. Likewise, Black and Owens (2016) argue that the desire for promotion to the Supreme Court appears to drive U.S. circuit court judges that are potential candidates to issue more dissents and to vote more often in favor of the government. Similar behavior has been observed in international institutions. Within the European Court of Human Rights, Voeten (2008) finds that judges close to re-appointment tend to favor their national governments. In investment arbitration, re-appointment is a constant pressure on arbitrators. Because tribunals are constituted on an ad-hoc basis and, unlike regular judges, arbitrators do not have fixed terms of appointment, investment arbitration professionals must compete in a “market” of arbitrators for each position.

I argue that re-appointment pressures push arbitrators to favor consensus over dissensus. Arbitrators guard their reputations as impartial adjudicators carefully as evidence of partiality can weaken one’s pool of potential re-appointments in the future. While some arbitrators may be able to secure consistent re-appointment by favoring a particular repeat litigant, the diversity of potential claimants and respondents means that such a career strategy would likely close off the vast majority of other potential appointments. Moreover, at least one position on each three-member tribunal requires the consent of all parties to the dispute, weakening one’s reputation by dissenting reduces the number of viable future arbitral appointments. Accountability to the broader legal community plays a central role in disciplining arbitrator behavior.

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 also move between serving as arbitrators and acting as counsel. Since an arbitrator in one dispute could very well be advising a litigant in another dispute, maintaining collegiality is invaluable for careers in investor-state arbitration.

Dissent is costly, not only for the arbitrator who actually chooses to write a dissent, but also on those 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 credibly justify the decision and to respond to the arguments of 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 explicitly encouraged the losing party to challenge the arbitration award in a national court, an act that ultimately forced all members of the tribunal to testify in a domestic court regarding the conduct of 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.
Under the career-centric model of arbitrator behavior, dissent rates remain low in investment arbitration because arbitrators rarely issue dissents that may jeopardize their future chances at being re-appointed. An important test of this model is examining whether the hypothesis that dissenters are less likely to be re-appointed is borne out by the data. I evaluate this hypothesis on a dataset of arbitrator appointments to ISDS disputes. I predict that the effect of dissent will vary depending on the type of re-appointment being 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 than for party appointments.

3 Data and Methods

I compile a dataset 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. 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. 632 end in any re-appointment event, 431 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 models focus on estimating the relationship between covariates and the probability that a unit experiences an event at some time \( t \), given that they have not experienced an event up until that time. This conditional probability is typically termed the “hazard” and denoted by \( \lambda(t) \). One popular survival model that makes no additional parametric

\footnote{I consider only appointments to original proceedings, excluding, for the purposes of this study, annulment proceedings.}
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 unknown baseline hazard rate $\lambda_0(t)$ multiplied by a rate that is a function of a linear combination of the covariates, that is:

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

Under the assumption of multiplicative effects or proportional hazards, estimation of the Cox model yields coefficients that correspond to differences in hazard rates. $exp\beta_1$ denotes the hazard ratio between two observations that differ in $X_1$ by 1 unit. For a binary treatment, this hazard ratio corresponds to the ratio of the instantaneous probability of an event in the treatment group (1) divided by the instantaneous probability for the control group (0). Hazard ratios greater than one denote that treatment increases the propensity for an event to occur while hazard ratios less than one correspond to a negative effect on the time-to-event.

However, the standard Cox model also makes assumptions that are untenable for the purposes of this particular design. 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 also 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 permitting 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 compar-
ing outcomes for arbitrators with identical numbers of previously 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, with supplementary information on published awards obtained from the *italaw* archive of investment awards. Where awards were not publicly available, data on dissenting opinions was coded from secondary news reports by the Investment Arbitration Reporter. 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, which concludes the period under which that arbitrator is under observation in the data.

Because of variation in the geographic distribution of claimants and respondents, arbitrator nationality is a likely confounder as well. While including indicators for each nationality in the model is possible, the number of unique nationalities is so large that this would dramatically increase the variance of the parameter 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

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8See https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/default.aspx
9See http://www.italaw.com/
10Available at https://www.iareporter.com/
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 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 regarding 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). I therefore code whether arbitrators are from a civil law or common law country using data from La Porta, Lopez-de Silanes and Shleifer (2008).

For professional background, I code four elements that vary across arbitrators and may also 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. Though 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.\footnote{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.} Finally, there is a notable divide between investor-state arbitrators who work primarily within private international law – especially in investor-investor arbitration –
Table 1: Observed confounders included in the survival analysis

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 as a linear combination of variables. I omit interactions with the indicators as fully interacting a large number of binary variables can quickly lead to instability and quasi-separation in the Cox partial likelihood. The central assumption of this analysis is that the observed confounders account for all possible common causes of arbitrator dissent and propensity to be re-appointed. In the subsequent section, I will discuss one likely violation of this assumption – arbitrator deterrence – and explain why this violation would generate estimated effects that are less extreme than the true effect and therefore make inferences from the analysis 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 relative to those who did not dissent. 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 in part by the benefit of signalling that one is a credible advocate for one’s 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 have attempted to control for all possible elements of arbitrator background that might affect re-appointment and also correlate with propensity to dissent. Still, I cannot entirely rule out the possibility that the association between dissent and low re-appointment rates is due to generally unpopular arbitrators being more prone to dissent and less likely to be re-appointed by their peers.
However, confounding in this manner would imply a negative effect for all types of appointments, as generally unpopular arbitrators are unattractive for both joint and party appointments). That I find an effect only for presiding member appointments suggests that reputation costs are a plausible explanation for the result.

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 proposed 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 assess 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 implies that observed dissents are 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 because the truly career-ending dissents are never issued. This strategic selection into dissent may also explain the zero effect on 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 with little accountability. Van Harten (2008) makes the case that 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 would enhance the legitimacy of the investment arbitration system. It
is clear that the investment court proposal is gaining increased traction and the European Union in particular is leading the push for a more formalized investment dispute resolution court. As discussed earlier in this paper, the new Canada-EU trade agreement will be one of the first to establish a permanent investment dispute court and the European Commission has endorsed the investment court proposal as the template for all future agreements negotiated by the EU.\footnote{“Commission proposes new Investment Court System for TTIP and other EU trade and investment negotiations” September 16, 2015. \textit{European Commission Press Release} \url{http://europa.eu/rapid/press-release_IP-15-5651_en.htm}.}

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 feature of jurisprudence and evidence of quality deliberation and legal reasoning, this would be an overall improvement to legal practice in investment. However, for those who see dissent as a threat to a unified court and as an opening for non-compliance by the parties and increased rates of annulment, the existing informal system may, paradoxically, be more effective at compelling states to comply with international law. Indeed, the same reformers who advocate elimination of party appointments because they allegedly incentivize negative dissents also often advocate for more security in arbitrator tenure. The results of this paper suggest that these two policy proposals may be somewhat at odds with one another as job security permits arbitrators to be more liberal with their dissents while insecurity compels arbitrators to comply more strongly with the social norms of the community of arbitrators.

In general, as arbitration becomes more and more common as a means of settling disputes 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. These incentives are often structured by informal as well as formal institutions. This paper provides some initial evidence that behaviors and practices of investment arbitrators, an increasingly influential set of actors, is directly influenced by their career objectives.
References


