The International Centre for Settlement of Investment Disputes (ICSID): An Empirical Research on the Voting Behavior of Arbitrators

Rogério Carmona Bianco

I. Introduction

In the 1960’s the International Bank for Reconstruction and Development (World Bank) conceived an international center for settlement of investment disputes between foreign investors and states\(^1\). Along with the promotion of foreign direct investment (FDI), the establishment of an unbiased body was a cornerstone in this project\(^2\). Following years of debate and conferences, the “Convention on the Settlement of Investment Disputes between States and Nationals of Other States” (herein after Washington Convention or ICSID Convention) was finally concluded in 1965 and entered into force in 1966, within 20 initial ratifications\(^3\). After 145 ratifications and hundreds of disputes\(^4\), the present paper aims at testing whether the concept of an unbiased international centre was in fact achieved. While scholars have already focused on the outcome of


\(^{2}\)See Part II.

\(^{3}\)See ICSID website, where it is also stated that the “Convention sought to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement. ICSID was created by the Convention as an impartial international forum providing facilities for the resolution of legal disputes between eligible parties, through conciliation or arbitration procedures”. At http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home (last access on December 30, 2009).

\(^{4}\)Id.
international investment arbitration to address its independence and neutrality, the voting

The ICSID arbitration is particularly interesting to appraise because its default system avoids
the appointment of arbitrators of the same nationality of those of the parties and because it was
designed to deal with conflicts not directly involving two states, but a host state and a foreign
investor, unlike the traditional structure of international courts, as for example at the International
Court of Justice (ICJ) and at the Word Trade Organization (WTO).\footnote{See ICSID Convention, art. 37(2)(b) and ICSID Arbitration Procedure, rule 3.}

Additionally, an investigation on the judicial behavior at the ICSID might contribute to the
increasing debate about the creation of an Appellate Body at the ICSID\footnote{See Vale Columbia Center on Sustainable International Investment’s memo to the President of the United States, discussing, among other aspects, this issue. Available at http://www.vcc.columbia.edu/events/past.php#ObamaMemo (last access on April 27, 2009).} and\footnote{See also Christian J. Tams, An Appealing Option: The Debate about an ICSID Appellate Body (2006), available at http://www.wirtschaftsrecht.uni-halle.de/Heft57.pdf (last access on April 8, 2009), and W. Michael Reisman, on control mechanisms at ICSID, The Breakdown of the Control Mechanism in ICSID Arbitration, 4 Duke Law Journal 739 (1989).} It might also be of
some interest for reluctant developed and developing economies, such as Brazil, Canada, India
and Mexico, to better evaluate their political assessment whether or not to ratify the Washington
Convention, as well as to assist other economies whether to follow or not the example of Bolivia,
which was the first state to denounce the ICSID Convention on May of 2007 and to make severe
criticism about the lack of independence at the ICSID arbitration. Yet Ecuador has recently
The independence of international courts has been intensively debated over the years and past empirical scholars found the existence of judicial bias in certain levels\(^{11}\). As to the judicial behavior of international arbitrators, it has not yet been subject to the same level of scrutiny, due to the confidentiality of that type of procedure, constricting deeper evaluation\(^{12}\). However, unlike other centers, a great part of the ICSID awards has been published\(^{13}\).

This paper tests two main hypotheses. Firstly, whether or not arbitrators favor the interest of the parties that select them and, moreover, if the interests of the home-state of arbitrators influence their votes in order to favor parties with similar characteristics, as to wealth, culture (religion, language and legal system), region and democratic level. Secondly, whether or not arbitrators split the differences of the parties’ interest, reaching compromised awards.

For this purpose, Part II examines the history, the structure and the caseload of the arbitration system under the ICSID, particularly as to the selection of arbitrators and the formation of the panels.

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Part III addresses past studies regarding the two proposed hypotheses, while Part IV describes the process of data collection.

Part IV presents the results for the measures, seeking to test the hypotheses.

Part V concludes, firstly, pointing out that the ICSID arbitration has been shifting over the years. Therefore, this paper proposes an analysis of two periods at the ICSID, namely, the twentieth century awards and the twenty-first century awards. This shift has been perceived as to the characteristic of parties at the disputes, the outcome of the cases and the voting behavior of arbitrators, leading investors to win the great majority of claims in the first proposed period, when disputes were extremely polarized among wealthy democracies (as applicants) against developing states (as defendants) with worse governance practices. On the other hand, investors lost the majority of the cases in the second period, when this polarization was less salient, though still significant. Moreover, party-appointed arbitrators seem to demonstrate a particular sense of care for the interest of their selectors, especially in the first period of ICSID arbitration, though this selection effect is somewhat weaker when compared to the deference of national-judges toward their selectors and own states at the International Court of Justice. Also based on the raw data collected, the measures identify that cultural and regional effects were of some influence on the voting behavior of arbitrators in the twentieth century disputes, whereas a negative effect, as to the level of development and also democracy, seems to play some role on the voting behavior of arbitrators in the twenty-first century of the ICSID arbitration. However, a multiple regression analysis is essential to better assess those initial findings, as well as a broader poll of data. Eventually, the splitting-the-differences hypothesis fails to explain the voting behavior of arbitrators and is not supported at the ICSID arbitration. Still, the small number of observations should not be overlooked. Nevertheless, the methodology proposed to appraise this issue, trying
to conciliate the selection effect and the splitting-the-differences theory, might be of some interest for future research.

II. The ICSID Arbitration

A. Background and Jurisdiction

Traditionally, disputes between states and foreign investors were settled either by domestic courts or by diplomatic protection\textsuperscript{14}. While the latter method relies on the direct commitment and interrelation between states, which is not always feasible and might also lead to international frictions, foreign investors, on the other hand, have criticized the former method for the lack of transparency and partiality\textsuperscript{15}. The access to the International Court of Justice, for instance, depends on the involvement of states at the dispute, since the system was not designed to settle claims brought by private parties and investors\textsuperscript{16}. The well-known Barcelona Traction case is a good example of the difficulties faced by diplomatic protection regarding foreign direct investment and also nationality issues\textsuperscript{17}. Besides, although ad hoc or institutional arbitration between foreign investors and host states is an alternative to diplomatic protection and domestic adjudication, it utterly relies on international cooperation, either by previous agreement, under a treaty or a contract, or by post-conflict consent, which is not easily accomplished\textsuperscript{18}.

\textsuperscript{14} Christoph Schreuer, \textit{UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT} 7 (2003), available at www.unctad.org.
\textsuperscript{15} Id. at 7. See also R. Doak Bishop, James Crawford & W. Michael Reisman, \textit{FOREIGN INVESTMENT DISPUTES} 3, (Kluwer Law ed., 2005).
\textsuperscript{18} Eric A. Posner & John C. Yoo points out the hazards of different international dispute mechanisms. 93 Calif. L. Rev. 1 (2005).
The Washington Convention was conceived to reduce those frictions by, among other devices, the recognition by sovereign states that private individuals and corporations shall have direct access “to an international tribunal in the field of financial and economic disputes with governments”\(^\text{19}\).  

However, the ratification of the convention does not represent by itself consent to the ICSID jurisdiction, since contracting states also need to reach further consent, either by an international treaty (between two states) or by agreement\(^\text{20}\). The real difference between the ICSID jurisdiction and ad hoc or other institutional arbitration rests on the fact that the ICSID provides a stable set of rules, an institutionalized and specialized environment for conciliation and arbitration on “legal dispute[s], arising directly out of an investment”\(^\text{21}\), as well as a transparent system, with the availability of information about the proceedings, arbitrators and awards\(^\text{22}\). Likewise, consent to the ICSID jurisdiction cannot be unilaterally withdrawn\(^\text{23}\) and, eventually, excludes any other parallel remedy as to the adjudication of international investment disputes\(^\text{24}\). Indeed, the increasing number of Bilateral Investment Treaties (BIT) provides state’s consent to ICSID jurisdiction and, as a consequence, grants foreign investors direct access to the ICSID dispute resolution system.

\(^{19}\) See the Note by A. Broches, General Counsel of World Bank as of 1961, World Bank, 2 SETTLEMENT OF DISPUTES BETWEEN GOVERNMENTS AND PRIVATE PARTIES, DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION part. 1, 1-2 (1968).

\(^{20}\) See ICSID Convention, preamble and art. 25.

\(^{21}\) See Id., art. 25(1).

\(^{22}\) See Part II.D as to ICSID caseload.

\(^{23}\) See ICSID Convention, art. 25(1).

\(^{24}\) See Id., articles 26 and 27.
B. The Appointment of Arbitrators

A noteworthy characteristic at the ICSID arbitration remains on the parties’ (foreign investor and states alike) weight on the formation of the arbitral tribunal, a power that plays a material role on this model. The ICSID Arbitration seems to be a singular system on the international arena, where states are not judged by their nationals, except as otherwise agreed by the parties\textsuperscript{25}.

Unlike the ICSID, the International Court of Justice (Article 31) and the European Court of Human Rights (Article 27(2)) grant the parties with the right to a national judge\textsuperscript{26}. As to international arbitration, the International Chamber of Commerce (ICC), for instance, prescribes that only the presiding arbitrator shall be of a nationality other than those of the parties (Article 9(5))\textsuperscript{27}. Like ICC, the London Court of International Arbitration and the Stockholm Chamber of Commerce Arbitration Rules solely restrain the nationality of the presiding arbitrator (Article 6 and Article 13(5), respectively). The latter Chamber also takes into account the nationality of the controlling shareholders of the parties\textsuperscript{28}. Differently, the ICSID default system establishes a panel composed of three arbitrators, none of them of the same nationality of the parties\textsuperscript{29}.

As a matter of fact, since the very early creation of the ICSID, the formation of the tribunal has been subject to an intense debate. Contrasting its final version, the working papers of the ICSID Convention (1962) established a system where arbitrators would be selected from a “Panel of Arbitrators”, formed by members appointed by each contracting state, in advance of any

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\begin{itemize}
\item \textsuperscript{25}See Id., art. 37(2)(b) and rule 3 of Arbitration Procedure.
\item \textsuperscript{26}Available at \url{http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0}, \url{http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf} (last access on April 15, 2009).
\item \textsuperscript{27}Available at \url{http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf} (last access on April 8, 2009).
\item \textsuperscript{28}Available at \url{http://www.lcia-arbitration.com} (last access on April 15, 2009), \url{http://www.chamber.se/?id=23719} (last access on April 15, 2009).
\item \textsuperscript{29}Id. fn 25.
\end{itemize}
particular dispute and to serve fixed terms. A remarkable comment at the working papers of the aforementioned first draft indicated that the system was an attempt to “avoid some of the dangers of having ‘party arbitrators’”. At that moment, there was no requirement as to the nationality of the arbitrators to be appointed by the parties. However, future discussions yielded significant changes in this original structure.

In 1963, the requirement that arbitrators be of nationality other than those of the parties was firstly introduced in the draft of the Convention, “to minimize as far as possible the danger, inherent in conventional systems, of partisans arbitrators”. Interestingly, the risk of bias on the selection of arbitrators appeared to be material and of real worry. Later on, further modifications allowed the parties to appoint arbitrators from outside the Panel of Arbitrators, a shift that might be theorized as a counterbalance on the requirement of non-national arbitrators, which – by all

30 Article VI, Section 2 – “The Arbitral Tribunal shall consist of a sole arbitrator or several arbitrators appointed as the parties may have agreed. In the absence of agreement the Arbitral Tribunal shall consist of three arbitrators, all appointees to be selected from the Panel of Arbitrators”. World Bank, 2 DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION” part 1, 39-41, (1968).

31 Id.

32 Another comment at the working papers of the first draft, regarding the appointment of arbitrators by the Secretary-General, sustained that “in disputes of the type likely to be submitted to the Centre nationality does not have the same importance as in political disputes, that the President would presumably wherever possible appoint a tribunal on which the nationalities of the parties would be represented by two arbitrators with an umpire of a different nationality”, Id. at 39-41.

33 See Article IV(2) – “Where the parties have not so agreed, the Tribunal shall consist of three arbitrators who shall not be nationals of a State party to the dispute, or of a State whose national is a party to the dispute. Each party shall appoint one arbitrator and the third arbitrator shall be appointed by agreement of the parties. The arbitrators so appointed shall be selected from the Panel of Arbitrators. The explanation as to this modification points out that the “section introduces a significant innovation by specifying that none of the arbitrators shall be nationals of the State party to the dispute, thus seeking to minimize as far as possible the danger inherent in conventional systems of appointment of partisan arbitrators”. This comment also made reference to a noteworthy analysis: “It is a grave mistake to construct a tribunal out of national members and one neutral member. Few men are capable of holding the balance between two contending national commissioners. If the governments do not object to the possibility of decision by compromise rather than by adjudication, they should provide for two national commissioners with an umpire in case of disagreement. Otherwise they should provide either for one, or better still three, neutral commissioners (A. H. Feller, The Mexican Claims Commissions, 1923-1934 (New York 1935) at p. 317)” Id. at 155-156, 212-213, 568-569.
means – restrained the influence of the parties\textsuperscript{34}. As a consequence, states would freely select their arbitrators post-conflict, though not among their own nationals.

As a result, this peculiar system allows a private investor to bring a request for arbitration under the ICSID jurisdiction against a host state, and vice-versa, to be judged by a majority of nationals of states other than the parties, but freely selected by them, except if otherwise agreed.

Nevertheless, the ICSID maintains a Panel of Arbitrators, whose members are elected by the contracting states and by the President of the World Bank. The Secretary-General shall choose members from this panel whenever the parties fail to select their arbitrators or do not reach an agreement about the appointment of the presiding arbitrator\textsuperscript{35}.

\textbf{C. Recognition and Enforcement of Awards}

Another key issue to understanding the ICSID arbitration system is the recognition by the contracting states that the award “shall be binding on the parties and shall not be subject to any appeal” and that “each contracting State shall recognize an award […] as binding and enforce the pecuniary obligations imposed by that award within its territories as of it were a final judgment of a court in that State”\textsuperscript{36}. In parallel to the recognition and the enforceability of the award, the ICSID Arbitration provides proceedings as to (i.) the revision and interpretation of the award, which is judged by the same arbitrators that ruled the original dispute, and (ii.) the annulment of

\textsuperscript{34} Eric A. Posner & John C. Yoo classify arbitration as a more “dependent tribunal” when compared to a court. The authors also pointed out that “while a pool of arbitrators reduces the transaction costs of finding a generally able and reputable arbitrator, the states do not necessarily have a guarantee that any particular arbitrator will be able or willing to maximize the ex ante value of the agreement between them”. 93 Calif. L. Rev. 1, 4, 13 (2005).

\textsuperscript{35} See ICSID Convention, articles 12-16.

\textsuperscript{36} See ICSID Convention, articles 53-54.
the award, under stringent requirements and by selection of a new *ad hoc* committee, entirely appointed by the President of the World Bank\textsuperscript{37}.

**D. The ICSID Caseload**

At its first decades, the ICSID Arbitration was referred to as a “sleeping beauty”, with very few filings and awards\textsuperscript{38}. This situation utterly changed in the 1990’s, with an eruption of new cases. Chart I shows the progression of filings at the ICSID Arbitration, during 1987-2007:

**Chart I – Number of cases – International Investment Arbitration**\textsuperscript{39}.

The caseload of the ICSID Arbitration has certainly been affected by the growth of Foreign Direct Investment (FDI) and the increase of Bilateral International Treaties (BIT) in previous decades. Charts II and III illustrate this evolution. Whilst 3,278 BITs were signed during 1980-2006, there were only 185 BITs until 1986\textsuperscript{40}. Furthermore, the FDI flows in 1986 was of only $86,345 millions, in contrast with $1,833 trillions of FDI flows in 2007\textsuperscript{41}.

\textsuperscript{37} See ICSID Convention, articles 50-52.


\textsuperscript{40} Source of data: [http://stats.unctad.org/fdi](http://stats.unctad.org/fdi) (last access on April 10, 2009)

\textsuperscript{41} Id.
As noticed before, BITs usually result in consent towards the ICSID jurisdiction, and so a higher number of BITs increase the likelihood of new disputes at this center. As a result, a binding international system has been shaped among at least 145 states and their own investors. Another significant pattern of past years was the growth of BITs and FDI flow among developing
economies, which might have an impact over the ICSID disputes. Up to February 2009, the ICSID concluded 157 cases and more than 124 disputes were being processed. The present analysis involves all cases defined as “concluded” by the ICSID as of February 2009. Chart IV shows the increase on the number of concluded awards since 1977:

**Chart IV – Number of Awards per Year**

![Chart IV](chart.jpg)

E. The ICSID Additional Facility

Since 1978 the ICSID has established a set of Additional Facility rules, which authorizes the filing of certain types of arbitration and conciliation that fall outside the exact scope of the ICSID Convention. The jurisdiction of the ICSID Additional Facility includes cases brought between foreign nationals and host states (i.) arising directly out of an investment, where either the host state or the state of the investor is not a contracting state of the ICSID Convention, or (ii.)

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42 In 2007, 13 out of 44 new BITs were signed between developing countries, (more than 26% of the total number of BITs), according to UNCTAD international investor monitoring. Id.


disputes not directly arising out of an investment, whether at least one of the parties is a contracting State or a national of a contracting state.\textsuperscript{45}

Indeed, the Additional Facility contributes to the ICSID caseload, particularly because of North American Free Trade Agreement (NAFTA).\textsuperscript{46} Given that Mexico and Canada have not ratified the ICSID Convention, the settlement of investment disputes arising out of NAFTA shall be decided pursuant to the ICSID Additional Facility Rules. Besides, the Energy Charter Treaty (ECT), signed by 56 states, defined that investment disputes arising out of this treaty shall be settled, among other centers, pursuant to the ICSID Convention or the ICSID Additional Facilities, which further contributes to ICSID caseload.

III. Hypotheses

A. Hypothesis #1 – Voting Bias

While traditional legal theories try to understand the decision making process mainly as a product of law, several studies challenged this assumption, trying to understand how other endogenous and exogenous factors influence, constraint or even determine judicial behavior.\textsuperscript{48, 49}


\textsuperscript{46} NAFTA Rules, Chapter Eleven, elects ICSID as to the settlement of investment disputes– “art. 1120: Submission of a Claim to Arbitration– 1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under: (a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention; (b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or (c) the UNCITRAL Arbitration Rules. 2. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.”


\textsuperscript{48} Oliver Wendell Homes Jr. has ancienly stated: “The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more than the
More recently, the so-called “attitudinal model” sustains that judges are not really restrained by law – especially Justices at the U.S. Supreme Court – because they vote according to their own ideology. On the other hand, the “strategic account” assumes that Justices make their choices seeking not only their ideological preferences, but also their goals and interests, taking a course of action that satisfies their “desires most efficiently”, acting interdependently and strategically to achieve their goals. When choosing between two courses of action, a political actor will select the one she “thinks is most likely to help her attain her goals”, which makes it critical to define what the political actor’s motivations are. As a matter of fact, multiple theories have been advanced to explain domestic judicial behavior, particularly at the U.S. Supreme Court.

Empirical researches also have been conducted to explain judicial decision making at international courts, following the recent boom of international adjudication. Frequently, these

syllogism in determining the rules by which men should be governed”. THE COMMON LAW 1 (Dover ed. 1991, originally published by Boston: Little, Brown, 1881).

49 As the introductory remarks of Benjamin N. Cardoso recognized almost a century ago: “we may try to see things as objectively as we please. None the less, we can never see them with the eyes except our own ... I have little hope that I shall be able to state the formula which will rationalize this process for myself, much less for others. We must apply to the study of judge-made law that method of quantitative analysis which Mr. Wallas has applied with such fine results to the study of politics. A richer scholarship than mine is requisite to do the work aright. But until that scholarship is found and enlists itself in the task, there may be passing interest in an attempt to uncover the nature of the process by one who in himself an active agent, day by day, in keeping the process alive.” THE NATURE OF JUDICIAL PROCESS 9 (Dover ed., 2005, work originally published by Yale University Press, 1921).

50 Following these paths, Richard Posner sustains that ““Law” in a judicial setting is simply the material, in the broadest sense, out of which judges fashion their decisions. Because the materials of legalist decision making fail to generate acceptable answers to all the legal questions that American judges are required to decide, judges perforce have occasional – indeed rather frequent – recourse to other sources of judgment, including their own political opinions or policy judgments, even their idiosyncrasies. As a result, law is shot through with politics and with much else besides that does not fit a legalist model of decision making”. HOW JUDGES THINK 7-9, (Harvard ed., 2008).


53 Id. at 11.

54 Id. at 11-18.

55 Richard Posner describes nine different theories of judicial behavior, presenting a model for pragmatic adjudication, and asserting that “there is a pronounced political element in the decisions of American judges, including federal trial and intermediate appellate judges and the U.S. Supreme Court Justices”, although “judges themselves tend to brush it aside.” HOW JUDGES THINK 19, 369 (Harvard ed., 2008).
studies theorize that other interests, rather then the legal international framework, might influence international judges.

Eric A. Posner and Miguel F. P. Figueiredo point out that international judges might be influenced, not necessarily consciously, by national identity, whether psychologically, economically or via selection effects. Given the identification with their own countries, culture and previous experience – as diplomats, advisors or politicians – judges might be affected psychologically to favor their own countries. Besides, material incentives might play a significant role, if the judges expect to be reappointed or even seek future positions in the government. In addition, because the governments select judges, they can ensure they are not too “independent-minded”. Although the authors were not concerned to elucidate which of these factors were in fact true or not, they tried to access how the judges took their role, whether they are “committed to the development of international law, or think that they are more likely to be rewarded for impartiality than for bias, or are not selected on the basis of national bias”. In this sense, Eric A. Posner and Miguel F. P. Figueiredo tested if judges at the International Court of Justice vote not only in favor of their home states, but if they vote in favor of the interest of other states “whose strategic interest is more closely aligned with the strategic interest” of their home state. This research found that “bias has an important influence on the decision making of the International Court”, since judges favor their home state about 90% of the time and, additionally, they are more likely to vote in favor of states with the same language, religion or similar economic or democratic characteristics of their own countries.

57 Id.
58 Id.
59 Id., 609.
61 Id.
A more recent analogous empirical research conducted by Erik Voeten regarding the European Court of Human Rights (ECHR) found that ECHR judges seem to be biased when evaluating their own country, as well as when evaluating one of the three great European powers: Germany, France and the United Kingdom; although there was no evidence that ECHR judges were biased towards wealthy countries. Eric Voeten theorizes that judges at ECHR appear to be affected by career considerations rather than by cultural bias (language and legal system affinity).

Otherwise, the role of party-appointed arbitrator should not be overlooked, and it was, indeed, a main concern at the ICSID Convention drafting, as noticed before. Andreas F. Lowenfeld, though making clear the importance of impartiality, considers the party-appointed arbitrator, in some sense, “a contradiction in terms”. On this issue, Eric A. Posner & John C. Yoo affirm that “states expect their appointees to represent their interest and the third arbitrator to be neutral”. Christopher R. Drahozal indicates that parties seek to select a party-appointed arbitrator who will favor their own position, although “they are constrained in doing so by rules requiring international arbitrators to be independent of the parties and by rules restricting the ability of parties to discuss the merits of the case with prospective arbitrators”. As a result, Christopher R.

62 Il Ro Suh, in a past study, also found that the Judges at ICJ tend to favor their own countries. 63 American Journal of International Law 224, 235 (1969). Thomas R. Hensley reached a similar conclusion on national bias of ICJ judges and sustained that this result did not affect the impartiality of the court, particularly concerning permanent judges. 12 Midwest Journal of Political Science 568, 575 (1968).

63 According to Erik Voeten, “ECHR judges are not formally representatives of their governments, but have incentives to behave as such (e.g. six-year renewable terms), thus making a study of their actual behavior potentially revealing”. The cases at ECHR involve a judgment of an individual and private claim against a state, but a national judge will always participate, SSRN: http://ssrn.com/abstract=705363, 19-20 (2008).

64 Id.


Drahozal sustains that parties will consider general reputation, nationality, experience and training, professional qualification and linguistic ability in selecting a party-appointed arbitrator.\footnote{67 The author quoted Martin Hunter, an international lawyer, to illustrate his point: “what I am really looking for in a party nominated arbitrator is someone with maximum predisposition towards my client, but with the minimum appearance of bias” (ETHICS OF THE INTERNATIONAL ARBITRATOR 53 Arb. 219, 223 (1987)), Arbitrators Selection and Regulatory Competition in International Arbitration Law, in TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION, COLLECTED EMPIRICAL RESEARCH 167-172 (Kluwer Law International ed. 2005).}

The issues outlined by those past studies provide useful insights to test whether or not the ICSID is unbiased. Given that a national bias is not a main issue at the ICSID, because of its default rule, the first hypothesis to be tested focus on the influence of the appointment of arbitrators by the parties on the outcome of the cases, namely the “selection effect”. In other words, do arbitrators favor the interest of the parties that select them? Second, it is also worth examination whether the “strategic interests” of the home-states of arbitrators influence their votes, in order to favor parties with similar characteristics, as to wealth, culture (religion, language and legal system), regional interest and level of democracy.

**B. Hypothesis #2 – Splitting-the-differences**

Arbitrators have been subject to inquiries whether they attempt to split the difference of the parties’ interest, reaching an award that might satisfy, in some sense, both sides, with a twin partial victory and partial defeat.\footnote{68 See Richard Posner, HOW JUDGES THINK 127-129 (Harvard. ed. 2008).} This behavior has been defined as self-protective, as arbitrators possibly tend to avoid extreme rulings in favor of one of the parties to expand prospects of upcoming appointments.\footnote{69 See Alan Scott Rau, Integrity in Private Judging, 38 S. Tex. L. Rev. 485, 522-524 (1997).}

This hypothesis might be also affected if decision-markers seek legitimization of their own systems, particularly at international adjudication. If it is true that international judges are influenced by the legitimacy of their courts through unanimous rulings, as discussed by previous
studies, this factor, theoretically, can exercise by itself some pressure as to avoid dissenting opinions and, therefore, favoring split awards. Hence, two cases at the ICSID arbitration are noteworthy and apparently support this hypothesis. In the ancient Klöckner case, an ad hoc committee annulled an award, the first annulment in the history of the ICSID, holding, among other findings, that the arbitral tribunal acted as an amiable compositeur, instead of applying a rule of law. Otherwise, one more recent “dissenting” opinion, though on a minor issue (costs and fees), was named as a “declaration” by the arbitrator, in spite of its clear initial opposition with the outcome. Both rulings suggest that arbitrators might be constrained to dissent, favoring the splitting-the-differences theory.

Past literature has already tried to empirically appraise whether arbitrators tend to split their differences. Soia Mentschikoff assessed this issue in the 1960’s, studying disputes ruled pursuant to the American Arbitration Association (AAA) rules. This research eventually concluded that arbitrators do not compromise their awards, because in 50% of the cases the award was “in full either for the plaintiff or for the defendant.” Stephanie E. Keer & Richard W. Naimark reached the same conclusion in an empirical research conducted over cases decided through AAA during

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72 The arbitrator mentioned that “I would have rallied more enthusiastically to such a solution on costs [Claimants should pay for the costs], believing it to be more equitable as between the parties, in the sense that the Claimants should be reminded that their inability to satisfy the burden of proof could result in the payment of heavier costs than might otherwise have been the case. However, my two co-arbitrators think otherwise, and I am bound to acknowledge that they have more experience of practice in the field of international commercial arbitration than I have. Furthermore, I freely acknowledge that I am in full and unqualified agreement with the decision on the merits in this case and fully accept that the lawyers acting for the Claimants presented their arguments on the merits of the case professionally and in full good faith. In all the circumstances, and despite my misgivings on the handling of the issue of costs in this case, I am persuaded that I can, in the final analysis, vote in favour of the decision recorded in paragraph 105 of this Award, subject to the publication of this Declaration together with the Award. (Salini Constr. (Ita) v. Jordan, ICSID Arb. 02/13, (2006)).

73 Commercial Arbitration, 61 Colum. L. Rev. 846, 860-861 (1961). Still, the author based her conclusion on questions answered by arbitrators and also by analyzing at random some of the cases. However, this research does not provide more information about the data collected.
the years 1995-2000. Based on the finding that the mean percentage of claim amounts awarded was 50.53% and the median 46.66%, as well as in 31% claimants won nothing and in 35% of the rulings all amount claimed was awarded, resulting in “outright wins or losses 66 per cent of the time”, their conclusion refuted the myth of the split award 74.

Furthermore, the interrelation of the selection effect (party-appointed arbitrator), assessed in the hypothesis #1, and the splitting-the-differences theory might be of some interest, since, theoretically, one theory tends to neutralize the other at their extreme. Yet, if arbitrators are extremely biased toward the interest of their own selectors, they will certainly not be able to reach any agreement to simply split the award.

To test whether or not arbitrators are splitting-the-differences at the ICSID awards, this paper focuses not only on the relief granted to applicants and, therefore, on the amounts awarded, as traditionally has been the practice, but also takes into account the effect of dissenting opinions on the damages awarded, assuming that when one arbitrator dissents, the damage awarded must be decided beyond (in either way) the point acceptable to compromise the award.

IV. Description of Dataset 75

The awards were gathered at the ICSID website 76, at the International Treaty Arbitration (ITA) website 77 and at the ICSID Reports 78. The analysis focuses on the list of 157 “concluded

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75 As suggested by Lee Epstein & Gary King, the data collected is described in this part to attend replication standards. The Rules of Inference 69 U.Chi. L. Rev. 1, 38 (2002).
76 http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlRsRH&actionVal=ListConcluded
77 http://ita.law.uvic.ca
cases” of the ICSID as of February 2009. Among these cases, the parties amicably settled 55 before an award was rendered, 17 cases were discontinued, 05 were conciliation proceedings and 13 awards are not available. As a result, based on the list of the ICSID “concluded cases”, 66 awards and 194 votes were examined for this research. Except for 2 cases ruled by a sole arbitrator, an arbitral tribunal formed by three members held all cases. Moreover, 129 different arbitrators ruled all the cases. These awards involve rulings definitely settling the disputes, whether on the merits or for the lack of jurisdiction. Interlocutory rulings accepting the jurisdiction of the ICSID were not included in the sample.

The ICSID website and also the awards provide the name and the nationality of all arbitrators, as well as the information of which party selected each arbitrator.

As to the wealth of states, the OECD (Organization for Economic Co-operation and Development) and the World Bank websites offer the material data. According to the World Bank measure, low-income and middle-income economies are often referred to as developing economies, while high-income economies are referred to as developed economies. These economies are divided in four different groups based on 2007 GNI per capita as follows: “low income, $935 or less; lower middle income, $936 - $3,705; upper middle income, $3,706 - $11,455; and high income, $11,456 or more.”

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79 See fn 44.
80 The sample did not include the annulment procedures awards since they result from a diverse procedure, whether on the selection of the arbitrators or on the requirements for a claim to be admitted. Nevertheless, it is noteworthy that from 1997 to 2008 (February) 12 annulment procedures were concluded according to the ICSID website.
82 http://www.oecd.org (last access on April 10, 2009).
84 Id.
The World Bank also presents a measure of states’ governance (“voice and accountability index”)
\(^{85}\). The voice and accountability index indicates the level of democracy of states, as it
measures the extent to which “country's citizens are able to participate in selecting their
government, as well as freedom of expression, freedom of association, and a free media.”\(^{86}\)

The arbitrators’ background were amassed from the ROSTER OF INTERNATIONAL
ARBITRATOR\(^{87}\), Google and the ICSID website. The legal system of states was obtained at the
University of Ottawa\(^{88}\), while the information about the language and religion of states was
gathered at Macalester College\(^{89}\) and at the Word Facts and Figures website\(^{90}\).

V. Data Overview

Prior to the appraisal of the proposed hypotheses, a general overview of the outcome of the
claims, as well as the main characteristics of parties and arbitrators involved at the disputes, might
be beneficial to a systematic comprehension of the ICSID arbitration.

A. Who are the parties at the disputes?

Wealth

Investors from developed and wealthy economies bring a significant number of claims.
Actually, 84.8% of the claims were brought by investors of OECD states and in 89.4% of the

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\(^{87}\) Smit Carbonneau Mistelis (Juris Net ed. 2008).

\(^{88}\) [http://www.droitcivil.uottawa.ca/world-legal-systems/eng-tableau.php#z](http://www.droitcivil.uottawa.ca/world-legal-systems/eng-tableau.php#z) (last access on April 10, 2009).

\(^{89}\) Available at [http://www.macalester.edu/research/economics/page/haveman/trade.resources/Data/Gravity/language.txt](http://www.macalester.edu/research/economics/page/haveman/trade.resources/Data/Gravity/language.txt) (last access on April 10, 2009).

cases by investors from high-income economies\textsuperscript{91}. Only in 2000, an award first settled a claim brought by an investor not from an OECD state of high-income economy\textsuperscript{92}. Ever since, other six awards stemmed from proceedings initiated by investors from developing states; however, none of those investors were from low-income economies. Indeed, they came from upper or lower middle-income economies.

As to the respondents, 24.2\% were OECD countries, 15.2\% were high-income economies, 33.3\% were upper-middle-income countries, 25.8\% were lower-middle-income states and 25.8\% low-income economies\textsuperscript{93}. The first award arising out of a claim in which a respondent was an OECD and a high-income economy is from 2000\textsuperscript{94}, with other six similar rulings so far. Interestingly, three quarters of all rulings until 1998 were related to low-income countries as defendants\textsuperscript{95}.

Although the data shows a shift in the original trend, where only low-income economies were sued, the claims continued to be largely brought by investors from developed economies against developing states.

\textbf{Democracy}

The voice and accountability index helps to illustrate the very same polarization at the ICSID arbitration. Whereas the mean of applicants corresponds to 84.12\% of the index and the median to

\textsuperscript{91}Susan D. Franck found a similar result in her research of international investment arbitration, not restrict to ICSID, with 88.9 per cent of the claims were from OECD countries and near 90 per cent were brought by high-income countries. She also indicated the absence of claims from low-income countries. 86 N. C. L. Rev. 1, 29-30 (2007).

\textsuperscript{92}In Maffezzini (Arg.) v. Spain, where the arbitral tribunal applying the most favored national clause granted relief for an Argentine investor against the Kingdom of Spain (ICSID Arb. 97/07 (2000)).

\textsuperscript{93}Susan D. Franck found that 30.5\% of respondents were OECD countries, while 19\% of the cases were brought against low-income countries. 86 N. C. L. Rev. 1, 31-32 (2007).

\textsuperscript{94}See fn 92.

\textsuperscript{95}This represents 12 out of 16 awards during 1977-1998; while only 5 out of 50 awards have involved a low-income economy as defendant since 1999.
85.1%, respondents average is at 43.67% and the median is at 45.67%. Only in 2000, an award settled a claim from an investor that was not at the upper-quartile (over 75%) of the voice and accountability index. Otherwise, only in 1997 a claim brought against a state at the upper-quartile was eventually awarded. Besides, other five awards settled disputes brought against an investor from the upper-quartile, whilst in other nine awards a respondent-state presents akin level of governance and democracy.

Hence, the ICSID arbitration appears to follow the same trend regarding the level of democracy, as much as the wealth of states, where almost all awards in the twentieth-century involved investors from wealthy democracies against low-income economies with worse governance practices.

**Region**

Regarding the region of the parties, investors from Europe and North America represent more than 90% of all applicants at the ICSID. Indeed, investors from the former region contribute to 51.5% of all awards, while North American investors are 39.9% of all plaintiffs. Investors from South America and Asia represent, respectively, 0.6% and 0.3% of all cases. On the other hand, African countries are the most representative defendants (33.3%), followed by North American (21.2%), Europeans (18.2%), South American (15.2%) and Asian (12.1%) states. Up to 1997 all awards settled disputes against African (75%) or Asian (25%) states, claimed by European or North American investors.

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96 States are ranked from 100 % to 0 %. See fn 85 and 86.
97 See fn 92.
98 In Cable Television (U.S.) v. The Federation of St. Christopher (St. Kitts) and Nevis, ICSID Arb. 95/02 (1997).
99 NAFTA cases are a material aspect.
100 See fn 99.
101 See fn 98, as to the first awarded claimed by a North American investor against a North American State (Central America).
Culture (Legal System/ Religion/Language)

As to the legal system, applicants are equally distributed into investors of civil law (51.5%) and common law (56.1%) traditions, while respondents are usually from a civil law system (84.8%).

Investors are from states where the predominant religion is Roman Catholic (36.4%) or Protestant (34.8%), while the former religion is even more representative among respondents’ states (43.9%), followed by Islam or Muslim (28.8%).

English is the main language of investors’ states (50%), followed by Italian (12.1%) and Spanish (9%), while the main language of respondents’ states is Spanish (31.8%), Arabic (16.6%) and French (15.1%).

B. Who are the arbitrators?

The present sample shows that 129 different arbitrators decided 66 disputes, where 91 arbitrators ruled only one case and 25 decided two disputes. Indeed, the arbitrator with more involvement ruled seven cases. The assessment of the ICSID arbitration yields to the same conclusion evinced by Susan A. Franck: arbitrators at international investment disputes might not be considered a “mafia”.

Wealth

The majority of arbitrators are in general from developed and wealthy economies: 93.8% of applicants appointed arbitrators of an OECD state and 96.9% of a high-income economy. Similarly, respondents select the majority of arbitrators from developed economies, though investors usually choose arbitrators from developed economies in a higher percentage. Indeed,

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102 Given that certain states have mixed legal system, the percentage is not limited to 100%.
103 Susan D. Franck, 86 N. C. L. Rev. 1, 75-77 (2007). Although it should be noticed the inexpressive participation of women as arbitrators.
73.4% of arbitrators selected by respondents are from an OECD state and 59.4% from a high-income economy. Likewise, 21.9% of respondents’ selection rests on arbitrators of upper-middle economies.

Interestingly, when a respondent is not a member of OECD it appointed an arbitrator from an OECD state in the majority of the cases (64%). If we analyze exclusively respondents that are not high-income economies, in 44% of the cases they also selected arbitrators of high-income states. As to the presiding arbitrator, in 75.8% of the cases they came from OECD states and in 80.3% of the cases from high-income economies\textsuperscript{104}. In summary, the majority of arbitrators are from developed economies.

**Democracy**

The mean of arbitrators appointed by applicants (87.82\%) and the mean of presiding arbitrators (88.70\%) are usually from the upper-quartile of the voice and accountability index, while the mean of arbitrators selected by respondents is 71.25\%\textsuperscript{105}. Although the mean of arbitrators selected by respondents is in the third-quartile, it is higher than the mean of defendants, which is in the second-quartile.

**Region**

Regarding the region where arbitrators come from, investors select North American arbitrators in 50% of the cases, and European arbitrators in 43.7% of the disputes. On the other hand, respondents appoint Europeans in 42.2% of the cases and North American arbitrators in 31.3% of the disputes. Respondents in 12.5% of all arbitrations appoint nationals from Africa. As

\textsuperscript{104} Similarly, Susan D. Franck found a predominance of presiding arbitrators from OECD (73.4\%) and high-income economies (73.4\%). 50 Harv.Intl.L.J., 201 (2009)

\textsuperscript{105} The median of all arbitrators is at the upper-quartile of the index, as follows: 88.7\% for the host-states of arbitrators appointed by investors, 85.1\% for the host-states of arbitrator selected by the respondent-states, and 92.75\% for the host-states of presiding arbitrators.
to presiding arbitrators, the majority are Europeans (56%), followed by North Americans (16.6%), South Americans (13.6%) and Australians (7.5%).

Culture (Legal System/Religion/Language)\textsuperscript{106}

In 70.3% of the cases arbitrators appointed by applicants are from a common law system and in 43.8% from a civil law system. As to arbitrators selected by defendants, the pattern is exactly the opposite, 75% is from a civil law system, while 54.7% from common law states (10.9% are from a muslin law system). The president is from a civil law system in 72.7% of the cases and from a common law tradition in 63.6% of the disputes.

Arbitrators selected by investors are from states where the predominant religion is Roman Catholic (48%) or Protestant (41%), while the former religion is also representative among arbitrators selected by respondents (50%), followed by Protestant (17%) and Islam/Muslim (13%). The majority of presiding arbitrators are usually from a state were the predominant religion is Roman Catholic (60.6%), Protestant (13.6%) or Anglican (15.1%).

In 59.3% of the disputes arbitrators selected by investors are from countries were English is the official language, followed by French (9.3%) and Spanish (9.3%). Although English (29.7%), Spanish (20.3%) and French (15.6%) are also the predominant language of the arbitrators selected by respondents, in reality the dispersion is higher when compared to the applicant choices. As to the presiding arbitrators, English (31.8%), Spanish (22.7%) and German (19.6%) are the main languages of their states.

\textsuperscript{106} Given that certain states have mixed legal systems, the percentage is not limited to 100%. Moreover, several arbitrators obtained degrees from more than one legal system, which was also included in this measure.
C. The General Outcome of the ICSID claims

The ICSID arbitration has granted relief to investors in 42.4% of all awards of the sample, while 22.7% of the disputes were dismissed by lack of jurisdiction. If we only considered the claims that have survived the jurisdiction test, relief was granted in 54.9% of applicants’ claims. Susan A. Franck found that investors won 38.5% of the cases of her sample and that investors successfully established jurisdiction 57.5% of the times.\(^{107}\)

As the characteristics of the disputes changed over the years, the percentage of relief granted to investors also seemed to shift. Chart V illustrates the cumulative percentage of relief granted for investors based on the number of awards during 1977-2008:

![Chart V – Cumulative relief granted to Investors](image)

An analogous pattern was also detected in the amount of damages granted. The ratio among relief granted and relief requested shows that investors received on average 15.2% of the amount requested. If we disregard the claims dismissed by lack of jurisdiction, applicants recovered on average 19.4% of the amount pleaded.

\(^{107}\) Although Susan A. Franck’s empirical research focused on international investment arbitration, it was not restricted to ICSID arbitration. 86 N. C. L. Rev. 1, 75-77 (2007).
Chart VI illustrates the cumulative ratio among the amount of relief granted to investors and the amount of relief requested by investors, in comparison with the cumulative relief granted for investors per claim (Chart V) during 1977-2008, showing a parallel decrease in both measures:

As a matter of fact, it seems possible to recognize, not only by the characteristics of the parties, but also by the outcome of the cases and the number of rulings, that the ICSID arbitration has been shifting, and therefore, it may be considered in some sense asymmetric to the ICSID arbitration of earliest decades. In the next part this facet is considered to appraise the voting behavior of arbitrators.

VI. Testing the Hypotheses

A. Hypothesis #1 – Voting Bias

The first issue is whether arbitrators favor the interest of the parties that select them. In order to test this theory, this paper takes into consideration, on one hand, the level of dissenting opinions and, on the other hand, the degree of deference of party-appointed arbitrators towards their selector (selection effect).
Regarding exclusively dissenting opinions, it is possible to sustain that arbitrators tend to vote in favor of the parties that selected them. The ICSID arbitration faces 20.3% of dissents (13 dissenting opinions out of 64 awards), based on all cases of the sample with a panel of three arbitrators. Chart VII illustrates the evolution of dissenting opinions’ average from 1977 to 2008:

**Chart VII – Cumulative dissent per case**

When compared to other international courts, the level of dissent at the ICSID until 2008 is higher than those at WTO Appellate Body, but it is similar to the European Court of Human Rights. Nevertheless, when compared to extreme polarized courts, such as the U.S. Supreme Court, the dissent at the ICSID is not material. The dissent at the ICSID also seems to be shifting over the years and it was even higher last century, reaching 33.3%.

The main issue related to the behavior of party-appointed arbitrators rests on the fact that all dissenting opinions at the ICSID arbitration favored exactly the party that selected the

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arbitrator. Yet, half of all dissenting opinions favored investors and the other half favored states. There is no dissenting opinion stemmed from presiding arbitrators in the sample. How should this recurring pattern over more than three decades be interpreted? Is this voting behavior sufficient to identify a bias in party-appointed arbitrators?

Regardless of its weight, the level of dissenting opinions is not substantial enough to accept that this test – by itself – supports the conclusion that all party-appointed arbitrators are biased. This test is suggestive that a peculiar sense of care regarding the interest of the party-appointed arbitrator appears to play an interesting role in the voting attitudes of party-appointed arbitrators.

Indeed, a second test available as to the party-appointed arbitrator bias relies on the number of votes in which party-appointed arbitrators favored the interest of their selectors. Whilst arbitrators appointed by investors adhered to applicant claims 51.6% of the times, arbitrators selected by states show a higher level of compliance with states, with 65.6% of their votes in favor of states’ interest. This result appears to support the conclusion that arbitrators selected by states might feel more constrained to adhere to their interest than arbitrators appointed by investors. Investors are usually private players that might not be necessarily perceived as a constraint among arbitrators,

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110 One dissenting opinion is not clear about its outcome. One arbitrator appointed by the plaintiff indicates that he would vote in a different way as to the awarding of quarterly compound interest rate, but he was not clear how the interest should apply, whether monthly or even annually. The arbitrator stated that he “concurs in the Tribunal’s entire award and is persuaded that compound interest should be awarded. However, he is not persuaded that compounding should be quarterly.” Wena Hotels Limited (Gbr.) v. The Arab Republic of Egypt, ICSID Arb. 98/04 (2000). Additionally, this was the second vote where an original dissent opinion was named as a simple statement or declaration.

111 The notorious ruling on jurisdiction in Tokios Tokeles (Ltu.) v. Ukraine was not considered, since the votes included in the sample refer to awards that either definitely settle the disputes or dismissed the claims entirely, while in Tokios the dissenting stemmed from a ruling ascertaining ICSID jurisdiction. Nevertheless, the terms of the dissent are worthy noticing: “The chairman of an arbitral tribunal dissenting from a decision drafted by his two colleagues: this is not a frequent occurrence. If I have decided to dissent, it is because the approach taken by the Tribunal on the issue of principle raised in this case for the first time in ICSID’s history is in my view at odds with the object and purpose of the ICSID Convention and might jeopardize the future of the institution. In other words, my dissent does not relate to any particular aspect of this brilliantly drafted Decision, or to any particular assessment of the facts, but rather to what I would call the philosophy of the Decision. I would fail in my duty if I were to conceal my doubts out of friendship for my colleagues.” After this ruling, the presiding arbitrator resigned. ICSID Arb. 02/18 (2004).
particularly when compared to states. However, the evolution of this behavior during three decades is of some interest in this issue. Chart VIII illustrates the continuous voting behavior of the party-appointed arbitrator per case in connection with the continuous number of dissents per case:

**Chart VIII – Party-Appointed Arbitrator and Dissenting opinions**

The evolution of the voting attitudes of party-appointed arbitrators evinces that the ICSID has been moving on the behavior of arbitrators. At first, arbitrators appointed by applicants clearly conformed to investors’ interest; while recently arbitrators appointed by states tend to adhere to the government position. The level of dissenting opinions was higher exactly when either party-appointed arbitrators conformed to their selectors in the majority of the rulings. This shift on the voting behavior of the party-appointed arbitrator was also accompanied by a move on relief granted, as noticed at Chart V. In order to better address this issue, Table I segregates the data as to votes favoring investors by presiding arbitrator and party-appointed arbitrators, during the twentieth-century and the twenty-first century:
A selection bias might be suggested at Table I if party-selected arbitrators were ruling in favor of their selectors. The conformance level of arbitrators towards their selectors is following the very same path, as arbitrators selected by investors vote in favor of their interest in a higher level than arbitrators selected by states do, while the presiding arbitrator is in the middle of the range. Still, if one assumes that the presiding arbitrator might be neutral, the result of the proposed first period of the ICSID is stronger than the second period. The distance in the votes of each one of the three arbitrators is around 20%, leading to a significant 38.1% length among party-appointed arbitrators. From 1977 to 2000, for instance, the presiding arbitrator ruled for investors in 65.2% of the cases, while arbitrators selected by investors vote in their favor in 85.7% and arbitrators selected by respondents vote in accordance with state’s interest in 52.4% (or 47.6% for investors). From 2001 to 2008 the differences were much less salient for this selection effect, if one admits the presiding arbitrator as a neutral parameter. The difference among party appointed arbitrators is limited to 12.2%.

However, if one decides to adopt another type of measure, that a neutral equilibrium as to the outcome of cases might be at 50%, rather than in the presiding arbitrator, the result for the selection effect would be even stronger for the proposed first period regarding investor-appointed arbitrators and not so significant as to state-appointed arbitrators. The proposed second period, on the other hand, would show, in this 50%-50% assumption, a stronger selection effect concerning

Table I – Votes in favor of Investors

<table>
<thead>
<tr>
<th>ICSID ARBITRATORS</th>
<th>BY PRESIDING ARBITRATOR</th>
<th>BY ARBITRATOR APPOINTED BY APPLICANT</th>
<th>BY ARBITRATOR APPOINTED BY RESPONDENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977-2000</td>
<td>0.652</td>
<td>0.857</td>
<td>0.476</td>
</tr>
<tr>
<td>2001-2008</td>
<td>0.341</td>
<td>0.390</td>
<td>0.268</td>
</tr>
<tr>
<td>1977-2008</td>
<td>0.438</td>
<td>0.516</td>
<td>0.344</td>
</tr>
</tbody>
</table>
state-selected arbitrators, but an opposite effect regarding investor-selected arbitrators, who would be heavily voting against the interest of their own selectors. As a matter of fact, due to the nature of international investment disputes, often formed by hard cases that deal with concepts like creeping expropriation and lack of jurisdiction, the first assumption seems more accurate for this measure particularly at the second proposed period and without any further qualitative analysis. Nevertheless, the fact that the level of relief granted to investors has drastically shifted may not be overlooked, as well as the circumstance that investor-selected arbitrators have been recently voting against the interest of their own selectors.

In sum, given that all dissenting opinions favored exactly the party that appointed the arbitrator and also that party-arbitrators are more consistently voting in accordance with their selectors’ interest, based on the voting behavior of the presiding arbitrator, it is possible to suggest that party-arbitrators hold a particular sense of care towards the interests of their own selectors, largely at the first proposed period at the ICSID.

However, bearing in mind the limitation of these measures, this sense of care may not be qualified as a bias at this level, not only because the results for the second proposed period were much less salient, but also because one should not fail to notice, as previously discussed\(^ {112} \), that the parties tend to appoint arbitrators that – in their own views – sound more sympathetic to their interest, creating, as a consequence, a somewhat expected effect towards the interest of selectors, whenever the parties are successful in their choices\(^ {113, 114} \).

\(^{112}\) See fn 67.

\(^{113}\) By further and lately addressing the influence of the “strategic interest” of arbitrators’ home-state, this paper tries to control in some sense the influence of this selection. However, a multivariable regression is essential to better assess these initial findings.

\(^{114}\) Interestingly, parties do not seem to nominate arbitrators primarily based on their previous votes. 70.5% of all arbitrators ruled only one case, while 19.3% ruled two. Moreover, only one party-appointed-arbitrator has been a dissenter twice. Still, the ICSID Secretary-General has appointed him when the first arbitration had not been ruled yet. See Societe Ouest Africaine (Bel) v. The Republic of Senegal, ICSID Arb. 82/01 (1998) and American Manufacturing Trading (U.S.) v. The Republic of Zaire, ICSID Arb. 93/01 (1997).
As a contrast to this finding, Eric A. Posner & Miguel F. P. Figueiredo evince a strong bias due to the selection of judges at the ICJ (90%), whenever national judges vote claims related to their own states\textsuperscript{115}. Besides the nationality-effect, which is neutralized at the ICSID\textsuperscript{116}, the differences between the ICSID and the ICJ might be also explained by the size of the panel, which is smaller at the ICSID. At the ICJ the judges appointed by the states could simply cancel each other out\textsuperscript{117}, and the ruling, in this situation, would not be restricted to one presiding judge, as it would be the case at the ICSID. Additionally, the ICJ necessarily deals with claims of two states, while the direct interest of a single state is at stake in the ICSID arbitration, which is most likely to reduce the political implications of the rulings. All in all, the judges at the ICJ might be perceived more as an “agent” or even a “trustee” of their states, when deciding about their interests\textsuperscript{118}.

On the other hand, these previous measures bring an intriguing question: What could explain the shift on the voting behavior of arbitrators at the ICSID? Theoretically, two possible reasons for this movement might be scrutinized. The first reason is whether recent claims brought by investors are weaker than they used to be, since nowadays the disputes deal with creeping expropriation, rather than direct expropriation, or even due to the lack of care of investors to bring their claims. Secondly, that state-appointed arbitrators are now effectively conforming to their interests, while in the past, because almost all claims were mainly brought against low-income economies with worse democratic practices, there was no strong psychological, economic, or career effects towards the voting behavior of arbitrators, which has been shifting with the increase

\textsuperscript{115} 34 J. Legal Stud. 601 (2005).
\textsuperscript{116} See Part. II,B, supra.
\textsuperscript{117} Id. at 18.
of BITs, as well as more international commitment as to the ICSID arbitration. Certainly this paper does not intend to answer all these issues, which depend on further qualitative analysis of awards and on deeper statistic assessments. This present research might, otherwise, offer ingredients and incentives to future investigations. Yet, the measure of other variables is likely to provide more insights as to the behavior of arbitrators at the ICSID, also because the attitudes of the presiding arbitrator were not subject to any closer scrutiny under the previous examination.

Thus, this paper now seeks to identify whether the “strategic interests” of the home-states of arbitrators influence their votes, in order to favor parties with the same characteristics, as to wealth, culture (religion, language and legal system), region and democratic level. For this purpose, given the shift on the ICSID arbitration during the entire period, a three period examination is proposed: (i.) from 1977 to 2008, (ii.) from 1977 to 2000, and (iii.) from 2001 to 2008.

The results for the ICSID arbitration do not show any bias towards either variable when we considered all awards from 1977 to 2008. Table II illustrates this conclusion. The second column of the table provides the results for applicant-arbitrator match variables. So, this column indicates not only when applicants and arbitrators share the same characteristic, but also if arbitrators vote in favor of applicants. The third column indicates the results for the respondent-arbitrator match variables. However, this third column measures when arbitrators vote in favor of applicant, whenever respondent and arbitrator variables match. A bias might be expected when the result in the second column is high, while it is low in the third column\(^{119}\). In order to appraisal the results,

\(^{119}\) The “no match” measure includes the votes favoring applicants when arbitrators did not share the same characteristics of the parties. “All votes” measures all votes granting relief for applicants. Certain disputes, in which the parties shared exactly the same characteristics, were not included in the sample for that specific variable when, for example, an investor’s state and the respondent are high-income economies, and therefore, this case was not considered for the income variable. The numbers in parentheses reveal the total number of votes that matched each variable. To measure the democratic level this paper divides the voice and accountability index in quartiles.
this paper will focus on a neutral anchor at 50%; however it is interesting to test and to contrast the results with the “all votes” and “no match” measures whenever a significant effect is detected.

Table II – The ICSID Voting behavior
Relief Granted to Investors (1977-2008)

<table>
<thead>
<tr>
<th></th>
<th>ARBITRATOR-APPLICANT MATCH</th>
<th>ARBITRATOR-RESPONDENT MATCH</th>
</tr>
</thead>
<tbody>
<tr>
<td>OECD</td>
<td>0.44 (98)</td>
<td>0.52 (29)</td>
</tr>
<tr>
<td>Income</td>
<td>0.44 (113)</td>
<td>0.58 (26)</td>
</tr>
<tr>
<td>Democracy</td>
<td>0.41 (122)</td>
<td>0.61 (23)</td>
</tr>
<tr>
<td>Region</td>
<td>0.46 (48)</td>
<td>0.39 (18)</td>
</tr>
<tr>
<td>Judicial System</td>
<td>0.42 (26)</td>
<td>0.47 (34)</td>
</tr>
<tr>
<td>Language</td>
<td>0.45 (33)</td>
<td>0.46 (28)</td>
</tr>
<tr>
<td>Religion</td>
<td>0.29 (38)</td>
<td>0.42 (43)</td>
</tr>
</tbody>
</table>

No match: 0.429
All Votes: 0.438

As noticed, none of the variables support the conclusion of a voting bias based on the entire period of the sample; nevertheless, the results are somewhat asymmetric when we address the very same issue in two periods.

Table III presents the results for the awards issued during the twentieth-century (1977-2000), when 23 disputes were settled. The structure of the table and data are the same as Table II.
During this first period, there was a high correlation among votes in favor of investors when the arbitrators’ home state sided the same characteristics of the investors’ state. This pattern was significant for all variables. However, when the focus remains on the results for the arbitrator-respondent match variable, this pattern is not sustainable and a bias might be slightly suggested only for region, language and religion, rather than wealth, democratic level and legal system variables.

As to wealth (OECD), for instance, arbitrators are voting in favor of investors regardless of the interest at stake. Although in 68% of the disputes arbitrators voted in favor of similar investors regarding the level of economic development, they also favored investors in 67% of the disputes regardless of the fact that respondents sided the same economic level of arbitrators’ home state.
Besides, this percentage of relief and the percentage of relief granted to investors by the “no match” measure and also to “all votes” measure are alike. Like OECD measure, a parallel voting pattern was found for income, democracy and judicial system, although it is somewhat weaker for this latter measure, especially if we consider the “all votes” and “no match” measures as a neutral anchor. Indeed, it appears that a party facing an arbitrator of similar cultural background (particularly language and religion), coming from the same region, was more likely to increase its chance of success in this first period of the ICSID, despite the small number of observations and also the lack of regression at this point.

On the other hand, as predicted, the outcome at the ICSID arbitration is diverse in the twenty-first century. Table IV shows the findings for the voting patterns from 2001 to 2008, with 42 awards at the sample. The structure of this table and data are the same as Tables II and III.

| Table IV – The ICSID Voting Behavior Relief Granted to Investors (2001-2008) |
|-----------------|-----------------|-----------------|-----------------|
|                  | **ARBITRATOR-APPLICANT** | **ARBITRATOR-RESPONDENT** |                |
|                  | MATCH            | MATCH            |                |
| OECD             | 0.28 (58)        | 0.27 (11)        |                |
| Income           | 0.27 (64)        | 0.58 (12)        |                |
| Democracy        | 0.23 (71)        | 0.64 (9)         |                |
| Region           | 0.19 (26)        | 0.38 (13)        |                |
| Judicial System  | 0.25 (16)        | 0.43 (21)        |                |
| Language         | 0.28 (18)        | 0.46 (13)        |                |
| Religion         | 0.08 (26)        | 0.44 (34)        |                |

**No match: 0.293**

**All votes: 0.310**
Unlike the first period, the results for language, religion, legal system and region do not seem to imply any significant effect on the voting behavior of arbitrators and, therefore, do not support the theory that arbitrators tend to favor the interest of parties that have the parallel interest of arbitrators’ states\textsuperscript{120}.

Interestingly, the results for income and democracy appear to yield an opposite effect of what was predicted since arbitrators are voting against investors’ interests whenever the income or the democracy variables match. At the same time, arbitrators are voting against the respondents when they share similar characteristics. However, as to wealth, this conclusion is supported only by the income measure, but not by the OECD variable\textsuperscript{121}. The number of matches of respondents and arbitrators for the income and also for the democracy measures is still lower than the matches for investors, and an apparent bias leading arbitrators to favor parties with diverse characteristics regarding income and level of democracy does not seem to have any apparent theoretical foundation except for an extreme seeking of legitimacy for the ICSID arbitration\textsuperscript{122}.

Given this raw data, it is possible to suggest that cultural and region effects were of some influence on the voting behavior of arbitrators in the twentieth-century whereas a negative effect concerning the level of development and democracy seems to play some role in the voting behavior of arbitrators in the twenty-first century of the ICSID arbitration. However, a regression is certainly crucial to better access these initial results.

\textsuperscript{120} The measure for religion is very peculiar; arbitrators are less likely to vote in favor of an investor that came from a state with a different predominant religion. But this result is not supported by any of other cultural variable, neither by the respondent-arbitrator measure (assuming an anchor of 50%) and does not appear to be theoretically sustainable.

\textsuperscript{121} It is worthy mentioning that the income variable is based on four different levels, while the OECD measure is based on only two.

B. Hypothesis #2 – Splitting-the-differences

To assess whether arbitrators split the differences of the parties’ interest at the ICSID awards, the initial focus is directed towards the amounts awarded in disputes settled by a panel of three arbitrators. Chart IX illustrates the distribution of all awards of the sample.

Chart IX – Relief Granted / Relief Requested

As to the entire period, investors’ claims were completely rejected or dismissed in 58.73% of the disputes, while in 3.17% of the disputes investors were awarded the entire amount requested, usually in claims founded upon debt instruments. Otherwise, in 36.51% of the awards investors were granted partial relief, among 0.01% and 99.9% of the amount requested in their claims.

When the analysis relies on the results for each of the periods, the distribution is somewhat diverse, as expected by our previous measures. The ICSID from 1977 to 2000 presented the majority (54.5%) of the awards in the middle ranges (0.01%-99.9%), as opposed to the later period (from 2001 to 2008), where 70.7% of all awards - judged by a panel of three arbitrators - denied full relief to investors. This very simple test almost excludes the conclusion that arbitrators are splitting-the-differences of the parties’ interest, particularly in two of the measures: (i.) awards
issued after 2001 and (ii.) when the entire period is measured. Conversely, given that the first period alone has a high percentage of cases settled without so many outright rulings, this test by itself is not sufficient to entirely exclude this hypothesis at the last century measure.

To better appraisal this issue, this paper proposes another test, this time relying on dissenting opinions. The splitting-the-differences theory is grounded on dissent aversion. Hence, it assumes that arbitrators might negotiate the outcome to avoid dissenting opinions and outright rulings to enhance the prospects of upcoming appointments. Based on this assumption, the second test measures two aspects. First, whether the level of dissent is higher on the proposed second period of the ICSID (from 2001 to 2008) and, second, whether the amounts awarded in the disputes with dissenting opinions from arbitrators appointed by respondents are higher than the amounts awarded when there is no dissenting opinions from arbitrators appointed by respondents. This paper assumes that respondent-arbitrators are able to compromise the award, but only upon to a certain extent.

As illustrated by Chart V, the level of dissent was higher in the first period of the ICSID, with 7 dissenting opinions out of 23 awards (30.4%), while the second period had 6 dissenting opinions out of 41 disputes (14.6%). If the splitting-the-differences theory is correct, we should expect less compromised awards from 1977 to 2000 than all over 2001 and 2008. However, Chart VIII shows an exactly opposite pattern, with more outright rulings in this second period. It might be possible, as previously noticed, that a higher selection effect, deriving from party-appointed arbitrators (Part VI.A) might neutralize a compromised award at certain levels. Still, the small number of observations should not be overlooked at this point.

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123 One dissent was named as a “statement”. See fn 110.
124 One dissent was named as a “declaration”. See fn 72.
When the measure turns to the amount of damages granted, the result also does not support the splitting-the-differences theory. This exam focuses on all awards in which the amount of damages granted was not outright. So, awards granting either relief to all claims or relief to none of the claims were excluded from this measure. This measure tries to conciliate the party-arbitrator effect with the splitting-the-differences theory, predicting that respondent-selected arbitrators might dissent when the value of damages is higher than a certain extent, until which they were able to compromise the outcome. Therefore, if an arbitrator appointed by a respondent assumes the cost of a dissent, the damages awarded in the cases with dissenting opinions might be higher than the damages resulted from unanimous rulings. Table V shows the results for the entire period:

<table>
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<tr>
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</thead>
<tbody>
<tr>
<td>All Awards (Unanimous and Dissenting Opinions)</td>
<td>0.244 (12)</td>
<td>0.275 (12)</td>
<td>0.288 (24)</td>
</tr>
<tr>
<td>Unanimous Awards</td>
<td>0.297 (11)</td>
<td>0.340 (7)</td>
<td>0.315 (18)</td>
</tr>
<tr>
<td>Awards with a dissenting opinion by Respondent-Appointed Arbitrator</td>
<td>0.219 (4)</td>
<td>0.03 (1)</td>
<td>0.182 (5)</td>
</tr>
</tbody>
</table>

The very small number of observations does not show any material result. Yet, unlike predicted by the splitting-the-differences hypothesis, this measure presents an opposite finding, given that the disputes with dissenting opinions by arbitrators appointed by respondents during the entire period lead to lower amounts awarded on damages (a mean of 18.2% of the requested value), when compared to unanimous awards on damages (a mean of 31.5% of the requested value). The results for the other two periods are alike.
All in all, the splitting-the-differences theory is not supported by any of the measures. For sure, this conclusion should be subject to further scrutiny including the new rulings at the ICSID of the twentieth-first century. However, this methodology might be useful for future empirical research, not limited to the ICSID arbitration.

**VII. Conclusion**

The first inference establishes that the ICSID arbitration has been shifting over the years. For this reason, this paper proposes an analysis of two periods at the ICSID, the twentieth-century awards and the twenty-first century awards. This shift has been perceived as to the characteristic of parties in the disputes, the outcome of the cases and, moreover, in the voting behavior of arbitrators, leading investors to win the great majority of claims in the first proposed period, when the disputes were extremely polarized among investors from wealthy democracies and developing states with worse governance practices. On the other hand, investors are losing the majority of the cases in the second period, in the twenty-first century, when this initial polarization is less sensitive.

Further research can focus on the forthcoming awards at the ICSID, based on the list of pendent cases at the ICSID, trying to assess whether this losing trend toward investors will be continuous. Also, further qualitative analysis of the ICSID awards and deeper statistic assessments should investigate the reasons for this shifting at the ICSID arbitration, as for example, if it was caused by weaker claims brought by investors in this century because recent disputes tend to deal with creeping expropriation rather than direct expropriation or even due to investors’ lack of care in bringing their claims, as a possible effect of the ICSID arbitration attractiveness and popularity. Another possible explanation might be that the increase of BITs and
the resulting international commitment towards the ICSID arbitration lead arbitrators to effectively conform to the interest of the states, as political actors, rather than investors, while in the past, particularly because almost all claims were mainly brought against low-income economies with worse levels of democracy, there were no strong psychological, economic, or career effects towards the voting behavior of international arbitrators.

Hopefully, the present research may offer some seeds for future investigation, particularly now that the ICSID arbitration system has been under intensively debate after Bolivia and Ecuador critics and denunciations. Albeit this paper does not intend to directly address all these issues, the critics that the ICSID is a biased court, favoring the interest of wealthy economies, sound rather unrealistic if one takes into account the outcome of the claims herein scrutinized, mainly in the twentieth-first century.

The present paper also found that party-appointed arbitrators seem to demonstrate a peculiar sense of care towards the interest of their selectors, especially in the first period of the ICSID arbitration, though this selection effect is somewhat weaker when compared, for instance, to the International Court of Justice. Nevertheless, it appears that the effort of the drafters of the ICSID Convention, in trying to counterbalance the party-appointed effect, controlling for the nationality-effect, has been rewarded, particularly in this century, by a less prominent influence of selection effect in the outcome of the disputes.

Further research might focus on this issue, comparing, for instance, these findings with the outcome of international investment disputes arising out of NAFTA, where usually the parties select arbitrators with their own nationality. This test might be an opportunity to compare, theoretically, the effectiveness of different selection rules in the same type of disputes.
Still, based on the raw data collected for all variables, the measures identify that cultural (particularly language and religion) and region effects were of some influence on the voting behavior of arbitrators in the twentieth-century disputes. Indeed, a party being judged by an arbitrator from its same region and with similar cultural characteristics enhanced their chance of success in this first period, regardless of the small number of observations and the lack of a regression. On the other hand, a negative effect, as to the level of development and democracy, seems to play an interesting role on the voting behavior of arbitrators in the twenty-first century at the ICSID arbitration. Yet, a regression is essential to better assess those initial findings.

The splitting-the-differences hypothesis fails to explain the voting behavior of arbitrators at the ICSID, considering that the majority of rulings, particularly in the second period, did not grant any relief to investors, and in the first period, when this result was not as strong, the level of dissenting opinions was higher, when one should expect an opposite pattern since a compromised award might outweigh the cost of a dissenting opinion. Still, the small number of observations should not be disregarded, although this methodology might offer some insights to further research on this issue.

Another aspect that might be of some interest to further investigation at the ICSID arbitration is the lawyering influence on the selection of arbitrators and the outcome of cases, similarly to what has been perceived and addressed at the U.S. Supreme Court\textsuperscript{125}. Additionally, following the trend of information availability at the ICSID, it would be of great value for future empirical research if the ICSID website also disclosed additional data regarding the background of all arbitrators, not restricted to information regarding the members of the Panel of Arbitrators.

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