

# TRUTH IN A POST-TRUTH SOCIETY: HOW STICKY DEFAULTS, STATUS QUO BIAS, AND THE SOVEREIGN PREROGATIVE INFLUENCE THE PERCEIVED LEGITIMACY OF INTERNATIONAL ARBITRATION

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*Events over the last year have generated significant questions about how democratic discourse can proceed in a post-truth society where empirical evidence has little persuasive value. Justice Brandeis once famously claimed that the best way to combat pervasive falsehoods and political misperceptions was through “more speech,” but that strategy is built on the assumption that errors arise out of information deficits. As contemporary debate shows, the Brandesian response is ill-suited to a world increasingly built on “alternative facts.” Fortunately, interdisciplinary research not only explains why existing methods of persuasion fail, it also describes how to combat the problems associated with the modern legal and political climate.*

*The current Article addresses the problem of pervasive political misconceptions through the lens of the ongoing debate about the legitimacy of international arbitration. Numerous empirical studies indicate that international arbitration—meaning both international commercial (business-to-business) arbitration and investment (investor-state) arbitration—offers a fair and unbiased means of resolving complex, high-value legal disputes through sophisticated, highly formal procedures that more closely resemble judicial procedures in commercial courts than domestic arbitration. Critics routinely ignore this data, however, and continue to question the validity of the procedure. Why?*

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*Through empirical and theoretical studies conducted by political scientists, philosophers, psychologists, and economists, this Article demonstrates how three phenomena—sticky defaults, status quo bias, and the sovereign prerogative—work in parallel to create enduring, but demonstrably incorrect, perceptions about the legitimacy of international arbitration. Interdisciplinary research also provides a potential solution in the form of a heuristic known as the Reversal Test, which acts as an objective diagnostic tool to identify the influence of unconscious cognitive distortions such as the status quo bias. Through this analysis, this Article not only addresses one of the core paradoxes in international dispute resolution, but also provides intriguing insights into policy debates in other fields.*

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#### I. INTRODUCTION

Over the last few decades, interest in international arbitration has grown exponentially. Not only has there been a significant increase in the amount of scholarship in this field, but usage rates have also risen to unprecedented heights.<sup>1</sup> Indeed, reports indicate that up to 90% of all international commercial contracts currently include an arbitration provision,<sup>2</sup> with similar mechanisms in place in approximately 93% of the 3,000–5,000 international investment treaties now in effect.<sup>3</sup>

Some people interpret the extensive use of arbitration in international commercial and investment disputes as reflecting widespread acceptance of the legitimacy of the procedure,<sup>4</sup> a view that is bolstered by the highly prestigious and

1. See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 61–63, 68, 78, 99 (2d ed. 2014); S.I. STRONG, RESEARCH AND PRACTICE IN INTERNATIONAL COMMERCIAL ARBITRATION: SOURCES AND STRATEGIES 88–137 (2009) [hereinafter STRONG, RESEARCH] (including a bibliography of works in the field).

2. See Otto Sandrock, *The Choice Between Forum Selection, Mediation and Arbitration Clauses: European Perspectives*, 20 AM. REV. INT'L ARB. 8, 37 (2009).

3. See ORG. FOR ECON. CO-OPERATION & DEV. (“OECD”), DISPUTE SETTLEMENT PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS: A LARGE SAMPLE SURVEY 5, 9 (2012), <http://www.oecd.org/investment/internationalinvestmentagreements/50291678.pdf>; S.I. Strong, *Mass Procedures as a Form of “Regulatory Arbitration” – Abaclat v. Argentine Republic and the International Investment Regime*, 38 J. CORP. L. 259, 300 n.271 (2013) [hereinafter Strong, *Mass Procedures*].

4. See David F. Levi & Mitu Gulati, *Judging Measures*, 77 UMKC L. REV. 381, 387 (2008).

profitable nature of this area of law.<sup>5</sup> However, neither the extensive use nor the well-established reputation of international arbitration among users has been enough to quell all criticism. A variety of individuals, including those within the judiciary<sup>6</sup> and the popular press<sup>7</sup> continue to raise questions about the validity of the procedure. While much of the skepticism is directed at domestic arbitration rather than international arbitration,<sup>8</sup> there are concerns that policy-makers operating in the contemporary “post-truth society” may confuse the two procedures and adopt laws that inappropriately limit cross-border arbitral proceedings.<sup>9</sup>

5. See Christopher J. Borgen, *Transnational Tribunals and the Transmission of Norms: The Hegemony of Process*, 39 GEO. WASH. INT'L L. REV. 685, 718 (2007) (discussing acculturation and prestige in international arbitration); Susan D. Franck et al., *International Arbitration: Demographics, Precision and Justice*, in LEGITIMACY: MYTHS, REALITIES, CHALLENGES, ICCA CONG. SER. NO. 18, 33, 79–83 (Albert Jan van den Berg ed., 2015) [hereinafter Franck et al., LEGITIMACY] (providing empirical data on the prestige of both international commercial arbitration and international investment arbitration); Elizabeth Olson, *Growth in Global Disputes Brings Big Paychecks for Law Firms*, N.Y. TIMES: DEALBOOK (Aug. 26, 2013, 6:31 PM), [http://dealbook.nytimes.com/2013/08/26/growth-in-global-disputes-brings-big-paychecks-for-law-firms/?\\_r=0](http://dealbook.nytimes.com/2013/08/26/growth-in-global-disputes-brings-big-paychecks-for-law-firms/?_r=0).

6. For example, the Lord Chief Justice of the United Kingdom has said that he believes the private resolution of international disputes hinders the development of the common law, a view that created a furor in the international community. See Lord Thomas of Cwmgiedd, *Bailii Lecture, Developing Commercial Law Through the Courts: Rebalancing the Relationship Between the Courts and Arbitration 2* (Mar. 9, 2016), (transcript available at <http://www.bailii.org/bailii/lecture/04.pdf>); Alison Ross & Lacey Yong, “A Judicial Land Grab?” *GAR Live Reacts to Lord Chief Justice’s Proposal*, GLOBAL ARB. REV. (May 26, 2016), <http://globalarbitrationreview.com/article/1036346/-a-judicial-land-grab-gar-live-reacts-to-lord-chief-justices-proposal>. However, Chief Justice Roberts of the U.S. Supreme Court appears to take the opposite view, as does Sir Vivian Ramsey, a former English High Court judge. See Lara Bullock, *Arbitration Facing Major Challenges*, LAW WEEKLY (Australia) (Nov. 8, 2016), <http://www.lawyersweekly.com.au/news/19918-arbitration-facing-major-challenges> (“Arbitration decisions should now have come of age so that they are at least as important in developing the law as court decisions, and clearly in the international context an arbitration decision is likely to be of some persuasion for another arbitral tribunal.”); Richard Wolf, *Chief Justice Roberts Seeks to Limit Role of Courts*, USA TODAY (Feb. 4, 2016, 6:03 AM), <http://www.usatoday.com/story/news/2016/02/04/supreme-court-chief-justice-john-roberts-access/79427212/>.

7. The best-known of these is a series of highly controversial articles on arbitration published by the *New York Times* in late 2015. See Michael Corkery & Jessica Silver-Greenberg, *Beware the Fine Print Part III: In Religious Arbitration, Scripture is the Rule of Law*, N.Y. TIMES: DEALBOOK (Nov. 2, 2015), <http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html>; Jessica Silver-Greenberg & Michael Corkery, *Beware the Fine Print Part II: In Arbitration, a ‘Privatization of the Justice System,’* N.Y. TIMES: DEALBOOK (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>; Jessica Silver-Greenberg & Robert Gebeloff, *Beware the Fine Print Part I: Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES: DEALBOOK (Oct. 31, 2015), [http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?\\_r=0](http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0); Jessica Silver-Greenberg & Michael Corkery, *Efforts to Rein in Arbitration Come Under Well-Financed Attack*, N.Y. TIMES: DEALBOOK (Nov. 15, 2015), <http://www.nytimes.com/2015/11/16/business/dealbook/efforts-to-rein-in-arbitration-come-under-well-financed-attack.html>; see also Hiro N. Aragaki, *Arbitration’s Suspect Status*, 159 U. PA. L. REV. 1233, 1235 (2011).

8. For example, the Lord Chief Justice of the United Kingdom was speaking of international arbitration, although the series of articles that appeared in the *New York Times* focused primarily on domestic proceedings. See *supra* notes 6–7 and accompanying text.

9. See Franck et al., LEGITIMACY, *supra* note 5, at 34 (noting V.V. Veeder had called on “the international arbitration community ‘to act now to regulate itself or risk ‘reputational disaster’”); S.I. Strong, *Alternative Facts and the Post-Truth Society: Meeting the Challenge*, 165 U. PA. L. REV. ONLINE 137, 137–38 (2017) [hereinafter Strong, *Alternative Facts*]; see also BORN, *supra* note 1, at 128 (cautioning against the desire to equate domestic and international arbitration); William S. Blatt, *Teaching Emotional Intelligence to Law Students: Three Keys to Mastery*, 15 NEV. L.J. 464, 472 (2015) (labelling overgeneralization as a type of cognitive distortion); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 218 (1995); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 787 (2001).

Most of the current debate focuses on investment arbitration, a treaty-based mechanism that involves quasi-public law claims by foreign investors against host states.<sup>10</sup> However, international commercial arbitration, a private, business-to-business, contract-based procedure, has also occasionally come under fire.<sup>11</sup>

Many of the contemporary criticisms are similar to those enunciated during the early days of the twentieth century, when:

nations regarded international commercial arbitration with a mixture of suspicion and hostility. . . . This hostility arose from a reluctance to compromise perceived principles of national sovereignty, a disdain for principles of party autonomy and doubts concerning the fairness, neutrality and efficacy of contemporary international commercial arbitration.<sup>12</sup>

Although distrust of international arbitration waned significantly by the end of the twentieth century, “the early years of the 21st century have witnessed a potential resurgence of historic ideological opposition to some aspects or applications of the international arbitral process, with a few states and some commentators condemning the legitimacy and fairness of the process.”<sup>13</sup> Thus, the contemporary arbitral community must contend with a variety of accusations aimed at the “secret” nature of international proceedings,<sup>14</sup> the alleged “cabal” of “insiders” who control the process,<sup>15</sup> and the purportedly detrimental effect that arbitration has on public policy.<sup>16</sup>

Although many of these attacks have little, if any, foundation in fact, they have very real ramifications on law and policy.<sup>17</sup> Indeed, the lack of popular understanding about the nature and scope of international arbitration may very well have contributed to the negative perception of certain international trade agreements such as the Trans-Pacific Partnership (“TPP”) and the subsequent decision to withdraw from negotiations.<sup>18</sup>

10. See, e.g., HALEY SWEETLAND EDWARDS, *SHADOW COURTS: THE TRIBUNALS THAT RULE GLOBAL TRADE* (2016); THE BACKLASH AGAINST INVESTMENT ARBITRATION (Michael Waibel et al. eds., 2010); Sergio Puig, *Recasting ICSID’s Legitimacy Debate: Towards a Goal-Based Empirical Agenda*, 36 *FORDHAM INT’L L.J.* 465, 468–69 (2013) (citing authorities).

11. See BORN, *supra* note 1, at 250; Petra Butler & Campbell Herbert, *Access to Justice vs Access to Justice for Small and Medium-Sized Enterprises: The Case for a Bilateral Arbitration Treaty*, 26 *N.Z.U.L. REV.* 186, 189 (2014); Susan D. Franck, *The Role of International Arbitrators*, 12 *ILSA J. INT’L & COMP. L.* 499, 503–04 (2006); Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 *U. KAN. L. REV.* 1301, 1301 (2006) [hereinafter Rogers, *Transparency*]. See generally CATHERINE A. ROGERS, *ETHICS IN INTERNATIONAL ARBITRATION* 57–217 (2014).

12. BORN, *supra* note 1, at 165 (footnotes omitted).

13. *Id.* at 168 (footnotes omitted) (“It remains to be seen how substantial and long-lived this trend is.”).

14. See Rogers, *Transparency*, *supra* note 11.

15. See Susan D. Franck et al., *The Diversity Challenge: Exploring the “Invisible College” of International Arbitration*, 53 *COLUM. J. TRANSNAT’L L.* 429, 467–68 (2015) [hereinafter Franck et al., *Diversity*]; V.V. Veeder, *The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator—from Miami to Geneva*, 107 *AM. SOC’Y INT’L L. PROC.* 387, 387 (2013).

16. See Hans Smit, *Comments on Public Policy in International Arbitration*, 13 *AM. REV. INT’L ARB.* 65, 65 (2002) (noting four types of public policy concerns in international arbitration).

17. See *infra* note 23 and accompanying text (regarding empirical data on international arbitration). While the misperceptions may not rise to the level of “alternative facts,” the difference between perception and reality is nevertheless alarming. See Franck et al., *LEGITIMACY*, *supra* note 5, at 34; Strong, *Alternative Facts*, *supra* note 9, at 138–39.

18. See *Trans-Pacific Partnership (TPP)*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership> (last visited Jan. 18, 2018) (noting U.S. withdrawal

Although critics often characterize international arbitration as a lawless, unprincipled procedure used by corporations bent on circumventing proper judicial oversight,<sup>19</sup> those who specialize in the field are well aware of numerous initiatives to address real and perceived ills, which have resulted in increased self-regulation<sup>20</sup> and transparency.<sup>21</sup> These measures prove the arbitration world to be highly responsive to calls for reform, something that cannot be said of many national judiciaries.<sup>22</sup> Furthermore, numerous empirical studies have found arbitral outcomes and procedures to be fair and unbiased, thereby proving many of the challenges to international arbitration to be factually inaccurate.<sup>23</sup>

Although the objective evidence in favor of the legitimacy of international arbitration is compelling, that data has had little, if any, effect on popular and judicial perceptions of the procedure.<sup>24</sup> Not only does this phenomenon raise a number of practical problems,<sup>25</sup> it also creates an analytical paradox that is

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from negotiations pursuant to instructions from the executive); *see also infra* notes 203–05 and accompanying text.

19. For example, critics of arbitration often claim that it is “lawless,” which may be true of some forms of domestic arbitration, but which is not true of either international commercial arbitration or investment arbitration. *See* S.I. STRONG, INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES 4–5 (2012) [hereinafter STRONG, JUDICIAL GUIDE] (noting both processes are extremely legalistic as a matter of both procedure and substance).

20. *See* INT’L BAR ASS’N, IBA GUIDELINES ON CONFLICTS OF INTEREST IN INTERNATIONAL ARBITRATION (2014), [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx#](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#); Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT’L L. 53, 59–60 (2005). Self-regulation, as opposed to external, state-sponsored regulation (often referred to as the “common and control” model), is currently popular in a variety of fields under the rubric of “new governance theory.” *See* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 3–4 (Donald R. Harris et al. eds., 1992) (noting new governance theory does not advocate complete deregulation); Cristie Ford, *New Governance in the Teeth of Human Frailty: Lessons From Financial Regulation*, 2010 WIS. L. REV. 441, 442–43, 465 (discussing self-regulation and the recent financial crisis); Andrew M. Perlman, *Toward a Unified Theory of Professional Regulation*, 55 FLA. L. REV. 977, 1016 (2003) (discussing self-regulation of the legal profession).

21. *See* G.A. Res. 69/116, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Dec. 18, 2014) [hereinafter Transparency Convention]; Franck et al., *Diversity*, *supra* note 15, at 467–68; Rogers, *Transparency*, *supra* note 11, at 1322 (noting most initiatives to increase transparency come from within the arbitral community).

22. *See* Lara A. Bazelon, *Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always Be Trusted to Police Themselves and What Congress Can Do About It*, 97 KY. L.J. 439, 441–42 (2008); John A. Dooley III, *Judiciary Reform: Doing Nothing Is Not an Option*, 35 VT. B.J. 27, 27 (2009); Rogers, *Transparency*, *supra* note 11, at 1322.

23. *See* ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE, INVESTOR-STATE DISPUTES AT THE SCC 7 (2017), <http://www.sccinstitute.com/media/178174/investor-state-disputes-at-scc-13022017-003.pdf> (noting most awards have been rendered in favor of respondent states, with 21% of tribunals declining jurisdiction, 37% denying all of the investor’s claims, and 42% of tribunals upholding the investor’s claims in part or in full, and further noting that costs are allocated in an equitable manner, based on relative success); Christopher R. Drahozal, *Empirical Findings on International Arbitration: An Overview*, in OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION (forthcoming); Susan D. Franck et al., *Inside the Arbitrator’s Mind*, 66 EMORY L.J. 1115, 1166–67 (2017); S.I. Strong, *Realizing Rationality: An Empirical Assessment of International Commercial Mediation*, 73 WASH. & LEE L. REV. 1793, 1995–96 n.68 (2016) [hereinafter Strong, *Rationality*] (listing empirical studies of international arbitration). *See generally* Franck et al., *LEGITIMACY*, *supra* note 5, at 34–122.

24. *See* Diane A. Desierto, *Rawlsian Fairness and International Arbitration*, 36 U. PA. J. INT’L L. 939, 948 (2015) (“[T]he critiques on the seeming ‘unfairness’ of international arbitration apparently arise from expectations wed to a more judicial or structurally adjudicative paradigm of international dispute resolution.”).

25. Persistent and pervasive misperceptions about a particular legal device can have serious ramifications on both law and practice. *See* Brendan Nyhan & Jason Reifler, *The Roles of Information Deficits and Identity Threat in the Prevalence of Misperceptions*, DARTMOUTH 1–2 (Feb. 24, 2017), <http://www.dartmouth.edu/~nyhan/opening-political-mind.pdf> [hereinafter Nyhan & Reifler, *Roles*]. The arbitral community is keenly aware

symptomatic of today's post-truth society. If empirical research shows international arbitration to meet or exceed standard criteria for legitimacy, why do questions about the procedure's validity continue to exist?

Conventional wisdom suggests that people maintain beliefs that are demonstrably incorrect because of "their lack of interest in or knowledge of [the matter under debate]. Specifically, people may have failed to encounter accurate information about the issues in question."<sup>26</sup> Under this view, the best means of correcting falsehoods and misinformation is through "more speech," according to no less eminent an authority than U.S. Supreme Court Justice Louis Brandeis.<sup>27</sup>

The notion of an "information deficit" certainly can be used to explain the continuing bias against international arbitration, and the concept is indeed consistent with the highly specialized and often confidential nature of arbitral proceedings<sup>28</sup> and the ongoing propensity for non-users to confuse international arbitration with domestic arbitration, despite significant differences between the two procedures.<sup>29</sup> However, this concept does not explain the recursive nature of the challenges to international arbitration from people who have not only been provided with accurate information, but who have a fundamental interest in coming to a correct conclusion on the facts.<sup>30</sup>

The answer to that conundrum may be found in empirical research conducted by Brendan Nyhan and Jason Reifler proving that people can, and often do, maintain factually inaccurate beliefs if the information is offered "in formats that easily allow for counter-argument."<sup>31</sup> Indeed, Nyhan and Reifler not only found that some attempts to correct misinformation can actually strengthen misperceptions among those who are most strongly committed to their initial position, they also discovered that people's inability to abandon their biases is particularly pronounced when they are presented with both sides of an argument, as is often the case in legal and political debate.<sup>32</sup>

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of the need to maintain the reputation of international arbitration among non-users, lest states withdraw their support for the procedure. See Franck et al., *LEGITIMACY*, *supra* note 5, at 34.

26. Nyhan & Reifler, *Roles*, *supra* note 25, at 2 (citations omitted).

27. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled in part on other grounds* by *Brandenburg v. Ohio*, 395 U.S. 444 (1969); see also Edward Glaeser & Cass R. Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 65, 65 (2014); Nyhan & Reifler, *Roles*, *supra* note 25, at 3.

28. See STRONG, RESEARCH, *supra* note 1, at 3–5.

29. See William. W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1242–43 (2003) (noting the U.S. Federal Arbitration Act is ill-suited to address all types of arbitration). In fact, international and domestic arbitration differ radically. See BORN, *supra* note 1, at 73–93; STRONG, JUDICIAL GUIDE, *supra* note 19, at 4.

30. See Strong, *Alternative Facts*, *supra* note 9, at 138–42 (discussing problems of pervasive political misconceptions).

31. Nyhan & Reifler, *Roles*, *supra* note 25, at 1 (citation omitted).

32. See Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 304 (2010) [hereinafter Nyhan & Reifler, *Corrections*]. Journalists also adopt this approach, which does much to explain the inability of media reports to correct political falsehoods. See Nyhan & Reifler, *Roles*, *supra* note 25, at 4; Craig Silverman, *The Backfire Effect: More on the Press's Inability to Debunk Bad Information*, COLUM. JOURNALISM REV. (June 17, 2011), [http://www.cjr.org/behind\\_the\\_news/the\\_backfire\\_effect.php](http://www.cjr.org/behind_the_news/the_backfire_effect.php).

This research is very useful in helping to explain the ongoing debate about legitimacy in international arbitration.<sup>33</sup> For example, lawyers are trained to believe that the best form of persuasion is through content-based arguments (so-called “hard evidence”), which means that the arbitral community has typically responded to external criticism by addressing the merits of the dispute.<sup>34</sup> However, this strategy fails to recognize that “misperceptions are not just an information problem.”<sup>35</sup> Indeed, “the threatening nature of certain facts appears to inhibit people [including judges, legislators and others who may have a vested interest in maintaining litigation as the status quo] from acknowledging the true state of the evidence on controversial issues.”<sup>36</sup> As a result, “[e]xposure to accurate information may not be enough” to rebut certain types of misconceptions.<sup>37</sup>

Nyhan and Reifler also found that people’s preexisting views are “likely to contribute to misperceptions about controversial issues.”<sup>38</sup> In fact, their studies show that “[d]irectionally motivated reasoning—biases in information processing that occur when one wants to reach a specific conclusion—appears to be the default way in which people process (political) information.”<sup>39</sup>

This latter phenomenon suggests that those seeking to overcome ongoing skepticism about the legitimacy of international arbitration may need to reconsider their strategic responses to misperceptions about the procedure.<sup>40</sup> In so doing, the arbitral community should heed Nyhan and Reifler’s conclusion that pervasive “[m]isperceptions often fit comfortably in people’s worldviews in this sense by seeming to confirm people’s prior beliefs.”<sup>41</sup> This phenomenon has been described by psychologists as “confirmation bias,” which is a type of unconscious cognitive distortion that affects rational decision-making.<sup>42</sup> However, social scientists have empirically demonstrated the existence of many other types of unconscious biases, including one known as the status quo bias.<sup>43</sup> As the name suggests, the status quo bias reflects an emotional preference for the established legal or social norm, regardless of the rationality of that preference.<sup>44</sup> In many ways, that description appears to apply perfectly to the situation involving international arbitration.<sup>45</sup> In fact, as shall be seen, the status quo bias not

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33. See Nyhan & Reifler, *Corrections*, *supra* note 32, at 304.

34. See Katherine R. Kruse, *Engaged Client-Centered Representation and the Moral Foundations of the Lawyer-Client Relationship*, 39 HOFSTRA L. REV. 577, 584 (2011); see also ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE, *supra* note 23 and accompanying text.

35. Nyhan & Reifler, *Roles*, *supra* note 25, at 2.

36. *Id.*; see also *infra* notes 146–48 and accompanying text (discussing why judges and others have an interest in preserving the status quo).

37. Nyhan & Reifler, *Roles*, *supra* note 25, at 1.

38. *Id.*

39. *Id.* (citations omitted).

40. See *id.* at 2; Silverman, *supra* note 32; see also *supra* notes 34–35 and accompanying text (discussing an alternative approach).

41. Nyhan & Reifler, *Roles*, *supra* note 25, at 1 (citations omitted).

42. See Lawrence M. Solan, *Four Reasons to Teach Psychology to Legal Writing Students*, 22 J.L. & POL’Y 7, 19–23 (2013).

43. See Nick Bostrom & Toby Ord, *The Reversal Test: Eliminating Status Quo Bias in Applied Ethics*, 116 ETHICS 656, 660 (2006); see also *infra* note 133 and accompanying text.

44. See Bostrom & Ord, *supra* note 43, at 659; Robert A. Prentice & Jonathan J. Koehler, *A Normality Bias in Decision Making*, 88 CORNELL L. REV. 583, 597 (2003).

45. See *supra* notes 23–24 and accompanying text.

only describes why questions continue to arise about the legitimacy of international arbitration, but it also explains why arbitration is so popular among those who work frequently in the field.<sup>46</sup>

Therefore, the purpose of this Article is to analyze whether and to what extent the status quo bias and related phenomena affect the perceived legitimacy of international arbitration among nonusers. The discussion adopts an interdisciplinary research methodology that draws on empirical and theoretical studies conducted by political scientists, philosophers, psychologists, and economists. The Article also describes how to combat the effect of the status quo bias, individually and institutionally. In so doing, this Article not only helps those aiming to address the legitimacy crisis in international arbitration, but also those seeking to overcome the difficulties associated with democratic discourse in a post-truth society.

The discussion proceeds as follows. First, Part II defines the concept of legitimacy so as to place the rest of the analysis in context. Legitimacy can be considered from several different perspectives, and it is possible that the debate about arbitral legitimacy is the result of a lack of consensus about terms.

Next, Part III considers the origin and nature of the status quo bias, using data drawn from political science, psychology, and behavioral economics. This research establishes the empirical basis for the status quo bias and strongly suggests that cognitive distortions are affecting the debate about the legitimacy of international arbitration, regardless of whether participants in those discussions are aware of those influences.<sup>47</sup>

Adherents of the law and economics movement may consider the status quo bias to be largely analogous to the concept of legal defaults, which are said to affect rational decision-making by increasing the attractiveness of the established norm.<sup>48</sup> While the two phenomena are similar in many ways, the status quo bias is an empirically established (*i.e.*, backward-looking) phenomenon ra-

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46. See *infra* notes 228–32 and accompanying text (discussing cognitive shifts associated with departing from the established status quo).

47. Some commentators consider loss aversion and the endowment effect as some of the factors leading to the irrational preference for the status quo. See Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 1165–68 (2013) (discussing also the effects of discounting, procrastination, and omission bias); Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1134–38 (2010) (discussing omission bias). The “endowment effect” is used to describe “the fact that people often demand much more to give up an object than they would be willing to pay to acquire it.” Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 1 J. ECON. PERSP. 193, 194 (1991) (noting this phenomenon illustrates status quo bias and reflects a type of loss aversion). Loss aversion describes the perception that the disadvantages of giving up a particular position or item are more costly than the gains associated with the proposed alternative. See *id.* at 197–98. While the legal literature contains numerous references to the endowment effect, some scholars have suggested that there is no empirical basis for that phenomenon, although empirical researchers have proven the existence of the status quo bias even when no explicit gains or losses are involved. See Gregory Klass & Kathryn Zeiler, *Against Endowment Theory: Experimental Economics and Legal Scholarship*, 61 UCLA L. REV. 2, 4–5 (2013); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 36 (1988). As a result, this Article will focus on status quo bias, which appears to have a much stronger empirical foundation, rather than on the endowment effect. See Klass & Zeiler, *supra*, at 6 (limiting criticisms to the endowment effect rather than behavioral economics writ large); Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228 (2003) [hereinafter Korobkin, *Endowment Effect*].

48. See Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 612 (1998) [hereinafter Korobkin, *Bias*].



ther than a predictive (*i.e.*, forward-looking) theory of behavior. Since both perspectives are important to the current analysis, Part IV delves into the question of how various default rules, particularly “sticky defaults,” relate to questions about the legitimacy of international arbitration.<sup>49</sup>

Although some countries protect the right to proceed to arbitration as a constitutional concern,<sup>50</sup> most, if not all, jurisdictions consider judicial procedures to be the default means of resolving legal disputes.<sup>51</sup> The choice of litigation as a systemic default is intriguing, given that arbitration has existed in parallel with litigation since the beginning of recorded history.<sup>52</sup> While this phenomenon could be due to a variety of factors, one possibility involves an unconscious perception that the state has a “sovereign prerogative” to resolve legal disputes.<sup>53</sup> Part V therefore considers whether, as a matter of political science and constitutional legal theory, a presumption of state superiority in dispute resolution can, or should, be used to justify continuing skepticism about the legitimacy of international arbitration.

Part VI concludes the Article by pulling together the various strings of argument and analysis. The discussion also includes a heuristic on how to identify status quo bias in this field<sup>54</sup> and offers several normative suggestions on how the international arbitral community should proceed going forward.

Before beginning, it is important to identify four important provisos about the current analysis. First, this Article focuses exclusively on international arbitration, meaning international commercial arbitration and investment arbitration (also known as investor-state arbitration).<sup>55</sup> Domestic forms of arbitration are expressly excluded from this discussion, although some of the observations and hypotheses reflected herein may be equally relevant to certain types of domestic proceedings.

Second, this Article considers investment arbitration and international commercial arbitration as a combined unit, even though most commentators working in legitimacy theory approach those two mechanisms separately. This methodological choice is based on the likelihood that non-specialists (who are, for the most part, the ones questioning the legitimacy of international arbitration)

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49. This connection was first made in the late 1990s. *See id.*

50. *See, e.g.*, CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 116; *see also* S.I. Strong, *International Arbitration and the Republic of Colombia: Commercial, Comparative and Constitutional Concerns from a U.S. Perspective*, 22 DUKE J. COMP. & INT'L L. 47, 86–87, 93, 99–105 (2011) [hereinafter Strong, *Constitutional*] (discussing constitutional actions involving arbitration).

51. *See* U.S. CONST. art. III, §§ 1–2; *id.* art. IV, § 1; NANCY H. ROGERS ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* 116 (Vicki Been et al. eds., 2013).

52. *See infra* note 191 and accompanying text (regarding the use of arbitration in ancient Greece and Rome as well as the U.S. colonies).

53. *See* Robert L. Scharff & Francesco Parisi, *The Role of Status Quo Bias and Bayesian Learning in the Creation of New Legal Rights*, 3 J.L. ECON. & POL'Y 25, 28–30 (2006).

54. *See* Bostrom & Ord, *supra* note 43, at 664; *see also id.* at 679 (“The power of the heuristic lies in its ability to diagnose cases where status quo bias must be suspected and to challenge defenders of the status quo in these cases to provide further justification for their views.”).

55. A third form of international arbitration—interstate arbitration (also known as state-to-state arbitration)—exists, but arises relatively infrequently and is therefore excluded as well. *See* Gary Born, *A New Generation of International Adjudication*, 61 DUKE L.J. 775, 798, 830, 832 (2012) [hereinafter Born, *Generation*].

consider the two procedures to be functionally identical.<sup>56</sup> However, this Article will address differences between the two procedures when those distinctions are relevant to the discussion.

Third, this Article sets aside concerns about the “crisis of legitimacy” that is currently said to exist with respect to national and international courts.<sup>57</sup> Eventually, it will be important from a methodological perspective to compare the general perception of litigation to the general perception of arbitration,<sup>58</sup> detailed discussion of that issue is beyond the scope of the current Article, and nothing in the following pages should be taken to question the legitimacy of national or international courts.<sup>59</sup>

Fourth and finally, while this Article refers to various challenges to the legitimacy of both international commercial and investment arbitration, the discussion will not ultimately seek to prove the legitimacy of either process, since that issue is far too detailed to include in the space provided.<sup>60</sup> Instead, this Article focuses on various phenomena (the status quo bias, sticky defaults, and the sovereign prerogative) that affect rational decision-making about arbitral legitimacy.

## II. LEGITIMACY IN INTERNATIONAL ARBITRATION

### A. *Relevant Standards*

Recent years have seen a considerable amount of interest in the concept of legitimacy, with commentators approaching the issue from a variety of perspectives and for a variety of purposes.<sup>61</sup> Because perceptions of legitimacy “may

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56. See Blatt, *supra* note 9, at 472; Eisenberg, *supra* note 9, at 218. Those with a high degree of familiarity with international commercial and investment arbitration (*i.e.*, parties and counsel) exhibit a high degree of satisfaction with the process. See *2008 International Arbitration Study - Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards*, QUEEN MARY U. LONDON, SCH. INT’L ARB., <http://www.arbitration.qmul.ac.uk/research/index.html> (last visited Jan. 18, 2018) (containing details regarding seven different empirical studies concerning international arbitration).

57. See James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdoms and Recent Challenges Thereto*, 10 ANN. REV. L. & SOC. SCI. 201, 202 (2014); Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819, 827 (2002).

58. Questions arise as to whether the public perception of litigation is as positive as it is generally deemed to be. See Gibson & Nelson, *supra* note 57, at 215; S.I. Strong, *Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest?*, 2015 J. DISP. RESOL. 1, 12–13 [hereinafter Strong, *Regulatory Capture*] (discussing public perception of judicial performance); Penny J. White, *Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy*, 74 MO. L. REV. 635, 636, 666 (2009).

59. Further reading on legitimacy and litigation is available. See Gibson & Nelson, *supra* note 57, at 201; Laurence R. Helfer & Karen J. Alter, *Legitimacy and Lawmaking: A Tale of Three International Courts*, 14 THEORETICAL INQUIRIES L. 479, 501–02 (2013); Kornhauser, *supra* note 57, at 827; Frank I. Michelman, *Living with Judiciary Supremacy*, 38 WAKE FOREST L. REV. 579, 582 (2003); Orna Rabinovich-Einy, *The Legitimacy Crisis and the Future of Courts*, 17 CARDOZO J. CONFLICT RESOL. 23, 24 (2015).

60. Further reading is available. See *supra* note 23 and accompanying text.

61. See Gibson & Nelson, *supra* note 57, at 202; Dan Priel, *The Place of Legitimacy in Legal Theory*, 57 MCGILL L.J. 1, 6 (2011).

vary over time and across different international actors,” it is possible for different members of the international community to hold different views about the propriety of international arbitration.<sup>62</sup> However, in general:

The historic record shows that we have moved from the legitimation of public authority based on one generally accepted concept—legitimacy by metaphysical myths or the will of God—to a variety of legitimation concepts and strategies. This diversification of legitimacy concepts clearly reflects the increasing refinement and sophistication of governmental structures as well as the growing social pluralism in the modernizing individual societies.<sup>63</sup>

While the evolution of legal and political theory reflects the reality of contemporary law and scholarship, analytic heterogeneity creates its own set of problems. For example, Jost Delbrück has recognized that “in modern state theory and practice no catch-all concept of legitimacy is prevalent. Although an increasing number of states adhere to democracy as the basis of legitimate government, other criteria of legitimacy are also applied, partly concurrently, partly in competition with one another.”<sup>64</sup> As a result, any analysis of the legitimacy of international arbitration must approach the issue from a variety of perspectives.

One of the most well-known definitions of legitimacy comes from Tom Tyler, who claimed that “[l]egitimacy is a psychological property of an authority, institution, or social arrangement that leads those connected to it to believe that it is appropriate, proper, and just.”<sup>65</sup> This approach is reminiscent of the analytical jurisprudence of Lon Fuller, H.L.A. Hart, Joseph Raz, and other theorists focusing on the internal nature of law,<sup>66</sup> since it describes how and why people respect legal decisions and rules, even in cases where forcible coercion is unlikely or impossible.<sup>67</sup> These theories have been successfully applied to international arbitration.<sup>68</sup>

The Tyler definition is particularly helpful in the current context, since critics have often challenged the legitimacy of both domestic and international arbitration based on their inability to compel compliance with arbitral awards and orders without the assistance of a court.<sup>69</sup> However, international arbitration

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62. Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT’L L. REV. 107, 160 (2009) [hereinafter Grossman, *Legitimacy*].

63. Jost Delbrück, *Exercising Public Authority Beyond the State: Transnational Democracy and/or Alternative Legitimation Strategies?*, 10 IND. J. GLOBAL LEGAL STUD. 29, 43 (2003).

64. *Id.*

65. Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375, 375 (2006).

66. See H.L.A. HART, *THE CONCEPT OF LAW* 82 (Peter Cane et al. eds., 2d ed. 1997) (“There is a difference . . . between the assertion that someone was *obliged* to do something and the assertion that he *had an obligation* to do it.”); Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 638–43 (1958) (discussing “fidelity to law”); John Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, 114 PENN ST. L. REV. 119, 123 (2009) (noting contributions of Hart and subsequent theorists, such as Joseph Raz); Thomas Schultz, *Secondary Rules of Recognition and Relative Legality in Transnational Regimes*, 56 AM. J. JURIS. 59, 78–79 (2011) (discussing Lon Fuller and Matthew Kramer).

67. See Tyler, *supra* note 65, at 375, 379.

68. See Joshua Karton, *The Structure of International Arbitration Law and the Exercise of Arbitral Authority*, 8 CONTEMP. ASIA ARB. J. 229, 247–48 (2015); Schultz, *supra* note 66, at 63–70.

69. See Michael Hunter Schwartz, *Power Outage: Amplifying the Analysis of Power in Legal Relations (with Special Application to Unconscionability and Arbitration)*, 33 WILLAMETTE L. REV. 67, 88, 90 (1997) (noting the link between legitimacy and power and recognizing that force is the most elemental type of power).

clearly meets the Tyler test, based on empirical data showing that parties voluntarily comply with arbitral awards and orders well over 90% of the time.<sup>70</sup> The fact that a very small number of parties (less than 3%, according to some commentators) seek the assistance of the courts to enforce arbitral awards does not change this conclusion, since parties also occasionally need judicial assistance in enforcing litigated outcomes.<sup>71</sup> Furthermore, a number of legal philosophers, most notably Joseph Raz, have explicitly discussed the legitimacy of arbitration.<sup>72</sup>

As useful as the Tyler approach is, it is not perfect. Indeed, theorists discussing psychological legitimacy and the internal motivation of the law often seem to presume the need for a state actor,<sup>73</sup> since “traditional concepts of legitimacy, particularly those developed since the establishment of the Westphalian state system, are almost inherently state-centered.”<sup>74</sup> The emphasis on the role of the state is equally evident in the international realm, since legitimacy theorists often focus on how “norms are transferred across the international system and internalized by states and other actors.”<sup>75</sup>

Much of the debate about international legitimacy focuses on the nature of international law and the extent to which an international actor can legislate in the absence of territorial sovereignty.<sup>76</sup> Some theorists focus on the nature of the

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Legitimacy theorists operating at the domestic level often focus on the question of why people comply with the law, including adjudicated decisions. See Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043, 1045–47. Some commentators have extended their analysis of compliance to arbitration. See *id.* at 1048.

70. See BORN, *supra* note 1, at 3410 (“[I]n practice, the overwhelming majority of international awards are complied with voluntarily.”); Michael Kerr, *Concord and Conflict in International Arbitration*, 13 *ARB. INT’L* 121, 129 n.24 (1997) (citing data suggesting that “about 98 per cent of awards in international arbitrations are honoured or successfully enforced and that enforcement by national courts has only been refused in less than 5 per cent of cases”).

71. See FED. R. CIV. P. 70 (providing five means by which a court can enforce a judgment for a specific act); 12 FED. PRAC. & PROC. CIV. § 3022 (2014) (“[The power to punish for contempt] has been used with some frequency in enforcement proceedings.”); Kerr, *supra* note 70, at 129 n.24. No statistics are apparently kept on the frequency of judicial enforcement measures, which include freezing orders, garnishment procedures and the like, but scholars believe that judicial enforcement is sought much more often than people realize. See Electronic Letter from Prof. Emeritus Allen Kamp to Prof. S.I. Strong (Dec. 2, 2016) (on file with author); Electronic Letter from Prof. Jason Kilborn to Prof. S.I. Strong (Nov. 18, 2016) (on file with author).

72. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 41–42 (1986) (using binding arbitration as an example of an authoritative decision that is dependent on the underlying reasons offered by each party in support of their proposed resolution); Mark Capustin, *The Authority of Law in the Circumstances of Politics*, 20 *CAN. J.L. & JURIS.* 297, 300–01 (2007); JOSEPH RAZ, *Authority, Law, and Morality*, in JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 194, 196 (1994).

73. See Linarelli, *supra* note 66, at 124 (discussing Hart and Raz).

74. Delbrück, *supra* note 63, at 30.

75. See Harlan Grant Cohen, *Finding International Law, Part II: Our Fragmenting Legal Community*, 44 *N.Y.U. J. INT’L L. & POL.* 1049, 1060 (2012); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2600 (1999) (framing the question as one of international relations).

76. These debates often follow on in the tradition of nineteenth and twentieth century legal philosophers such as John Austin and H.L.A. Hart. See THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 43, 86 (1995); THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 21 (1990); Cohen, *supra* note 75, at 1060–61; Thomas M. Franck, *Legitimacy in the International System*, 82 *AM. J. INT’L L.* 705, 706 (1988); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *CALIF. L. REV.* 1823, 1834–35 (2002); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 *VA. J. INT’L L.* 1, 82–83 (2002).

internationalist endeavor,<sup>77</sup> while others consider the legitimacy of certain substantive norms.<sup>78</sup> Although these analyses have their place, discussions about the legitimacy of international arbitration are better served by considering legitimacy from a procedural perspective. Methodologically, the best approach involves applying arguments regarding the legitimacy of judicial decisions to arbitration.<sup>79</sup>

A significant number of contemporary commentators have considered the role of the judiciary in contemporary society, following the lead of legal philosopher Ronald Dworkin, who framed the courts as “the capitals of law’s empire.”<sup>80</sup> Unfortunately, most of the scholars working in this field “define their legal theories either as a form of defense or challenge to the specific activities of courts,” usually with the goal of “developing institutional principles which simultaneously define and constrain the activities of courts” so as to demonstrate the legitimacy or illegitimacy of the activity in question.<sup>81</sup> As a result, most of these analyses focus on the legitimacy of particular decisions, procedures, or interpretive theories rather than on the legitimacy of state-sanctioned adjudication.<sup>82</sup>

Some assistance may be obtained from commentary considering the legitimacy of international courts, traditionally interpreted as permanent adjudicatory bodies such as the International Court of Justice (“ICJ”), the International Criminal Court (“ICC”), or the Permanent Court of Arbitration (“PCA”).<sup>83</sup> Nienke

77. See Nathan Berman, *Intervention in a “Divided World”: Axes of Legitimacy*, in *FAULT LINES OF INTERNATIONAL LEGITIMACY* 115, 118–19 (Hilary Charlesworth & Jean-Marc Coicaud eds., 2010).

78. See Jean-Marc Coicaud, *Deconstructing International Legitimacy*, in *FAULT LINES OF INTERNATIONAL LEGITIMACY*, *supra* note 77, at 29, 30–31 (noting key questions of international legitimacy); Jean-Marc Coicaud, *The Evolution of International Order and Fault Lines of International Legitimacy*, in *FAULT LINES OF INTERNATIONAL LEGITIMACY*, *supra* note 77, at 87, 100–01.

79. See Yves Dezalay & Bryant Garth, *Fussing About the Forum: Categories and Definitions as Stakes in a Professional Competition*, 21 *LAW & SOC. INQUIRY* 285, 299 (1996) (“The legitimacy of international commercial arbitration is no longer built on the fact that arbitration is informal and close to the needs of business; rather legitimacy now comes more from a recognition that arbitration is formal and close to the kind of resolution that would be produced through litigation—more precisely, through the negotiation that takes place in the context of U.S.-style litigation.”); Rabinovich-Einy, *supra* note 59, at 26–27 (“As courts become more flexible and ADR procedures more formalized, new sources of legitimacy need to be developed and conceptualized. . . . [P]rinciples developed in the field of dispute systems design DSD as a framework for generating legitimacy in courts as well as ADR, based on the recognition that the formal-informal divide has lost much of its strength.”).

80. RONALD DWORKIN, *LAW’S EMPIRE* 407 (1986); see also Priel, *supra* note 61, at 1–5 (discussing legitimacy in the context of the work of Ronald Dworkin and other positivists). Some classical theorists, most notably Thomas Hobbes, did not distinguish between the role of arbitrators and judges. David Dyzenhaus, *The Very Idea of a Judge*, 60 *U. TORONTO L.J.* 61, 68–69 (2010). Some commentators have gone so far as to suggest that positivists’ real aim is to have law without judges, since the act of judging results in indeterminacy. See *id.* at 62.

81. Adeno Addis, *Adjudication and Institutional Legitimacy*, 71 *B.U. L. REV.* 161, 161–62 (1991).

82. See RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 269 (2016) (calling for a more robust analysis of the structure of judicial decisions rather than their content). The one exception involves the legitimacy of judicial decisions imposed by illegitimate states (such as those with questionable international status) or by judges enforcing immoral laws (as was the case in Nazi Germany and Vichy France). See Norman L. Greene et al., *Nazis in the Courtroom: Lessons from the Conduct of Lawyers and Judges Under the Laws of the Third Reich and Vichy France*, 61 *BROOK. L. REV.* 1121, 1126–27 (1995) (discussing, among other things, whether German judges’ error was too adamant an adherence to positivism); H. Lauterpacht, *Recognition of States in International Law*, 53 *YALE L.J.* 385, 426–27 (1944) (discussing effect of nonrecognition of states).

83. See Born, *Generation*, *supra* note 55, at 794; Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 *TEMP. L. REV.* 61, 80 (2013) [hereinafter Grossman, *Normative*].

Grossman has suggested that these institutions can be considered legitimate if four criteria are met, stating:

First, legal persons whose international legal rights and duties are at issue in international court proceedings must have the right to present their views. Second, to the extent international courts are making law or policy, those potentially affected should have the ability to participate. Third, international courts are legitimate when they help states to better comply with a core set of human rights obligations than states would without international courts. Fourth, international courts cannot facilitate the violation of core norms by states and still retain their legitimacy. Finally, legitimacy requires that courts act in a manner generally consistent with the object and purpose of the normative regimes they interpret and apply.<sup>84</sup>

These criteria appear largely applicable to international arbitration. For example, international arbitration requires procedures that allow both parties to present their positions to the tribunal,<sup>85</sup> provides for third-party participation (amicus briefs) in cases where the outcome affects persons other than the litigants,<sup>86</sup> and reflects the normative values contained in the governing law.<sup>87</sup> Certain other principles (such as those relating to the incorporation of human rights considerations<sup>88</sup> and respect for core principles of international public policy<sup>89</sup>)

84. Grossman, *Normative*, *supra* note 83, at 104.

85. See BORN, *supra* note 1, at 2140–41.

86. This issue arises primarily in investment arbitration, which affects public interests in a way that international commercial arbitration typically does not. See Katia Fach Gómez, *Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest*, 35 *FORDHAM INT'L L.J.* 510, 523 (2012). Indeed, the quasi-public nature of investment arbitration has resulted in a hegemonic critique of international investment law that originates from a Marxist analysis of international law and views international investment law as an attempt by developed countries to impose their power on weaker, developing countries; and . . . a more nuanced critique of the perceived unevenness created by a regime that protects property, investment, and foreign investors without sufficient regard to other non-investment-related interests of host states. Both strands consistently turn, however, around a common core: the criticism that investment treaties unilaterally favor the interests of investors over the host state's competing interests, thus establishing an asymmetric legal regime that is detrimental to state sovereignty. Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 *CHI. J. INT'L L.* 471, 474–75 (2009) (citations omitted). Space restrictions preclude a detailed analysis of these issues here, but they do bear mention.

87. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (discussing the second-look doctrine in international commercial arbitration); *Case C-126/97, Eco Swiss China Time Ltd. v. Benetton Int'l NV*, 1999 E.C.R. I-3055 (requiring competition law to be taken into account in arbitration); BORN, *supra* note 1, at 2129–30. While investment arbitration is currently struggling with the question of whether normative law is properly taken into account given the absence of hard precedent, no one seriously doubts that arbitral tribunals seek to apply treaty law in investment proceedings.

88. Commentators have considered the role of human rights in international commercial arbitration and found the current approach appropriate. See Neil McDonald, *More Harm Than Good? Human Rights Considerations in International Commercial Arbitration*, 20 *J. INT'L ARB.* 523, 537 (2003). The issue is slightly different in the investment realm. See Susan Karamanian, *The Place of Human Rights in Investor-State Arbitration*, 17 *LEWIS & CLARK L. REV.* 423, 423–24 (2013).

89. Authorities agree that international commercial arbitration clearly protects substantive and procedural public policy. See BORN, *supra* note 1, at 2649–50; INTERNATIONAL LAW ASSOCIATION, PUBLIC POLICY AS A BAR TO ENFORCEMENT OF INTERNATIONAL AWARDS (2000), [http://www.academia.edu/18312524/ILA\\_FINAL\\_REPORT\\_ON\\_PUBLIC\\_POLICY\\_AS\\_A\\_BAR\\_TO\\_ENFORCEMENT\\_OF\\_INTERNATIONAL\\_ARBITRAL\\_AWARDS\\_NEW\\_DELHI\\_2002](http://www.academia.edu/18312524/ILA_FINAL_REPORT_ON_PUBLIC_POLICY_AS_A_BAR_TO_ENFORCEMENT_OF_INTERNATIONAL_ARBITRAL_AWARDS_NEW_DELHI_2002); INTERNATIONAL LAW ASSOCIATION, FINAL REPORT ON PUBLIC POLICY AS A BAR TO ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS (2002), <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

are clearly met in international commercial arbitration and arguably met in investment arbitration.<sup>90</sup> However, steps have been taken by the international investment community to address both of these concerns.<sup>91</sup>

Some commentators have suggested that international bodies such as the ICJ, the ICC, and the PCA have benefitted greatly from the explicit grant of sovereignty reflected in the international treaties creating those mechanisms, leading to what has been called the “state consent” model of international adjudication.<sup>92</sup> It is possible to bring international arbitration within this paradigm by focusing on the jurisdictional nature of international commercial and investment arbitration, since both mechanisms require some type of state consent.<sup>93</sup> Indeed, some commentators, most notably Gary Born, have explicitly argued that international arbitration reflects the “second generation” of international adjudication.<sup>94</sup> However, a state-centric model may not be the best way of considering the legitimacy of the international arbitral regime, given the concurrent need for party consent in both investment and commercial proceedings.<sup>95</sup>

As useful as consent-based theories of legitimacy may be, such approaches fail to take into account other perspectives on legitimacy, including the concept of legal legitimacy, which focuses on the correctness of particular determinations as a matter of law; moral legitimacy, which considers certain extra-legal concepts of fairness and respect; and sociological legitimacy, which describes why people should, or in fact do, respect certain institutions for reasons other than self-interest.<sup>96</sup> However, Grossman has suggested that these principles, taken together, indicate that an adjudicative mechanism like international arbi-

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90. Overall, investment arbitration has met with more criticism than international commercial arbitration. See Born, *Generation*, *supra* note 55, at 842–43. However, many of the concerns are similar to those that were overcome in the world of international commercial arbitration in the late twentieth century. See BORN, *supra* note 1, at 165.

91. See Karamanian, *supra* note 88, at 426–32 (discussing human rights and investment arbitration); J. Anthony VanDuzer, *Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation*, 52 MCGILL L.J. 681, 684–85 (2007) (discussing international public policy and investment arbitration).

92. Grossman, *Normative*, *supra* note 83, at 65–66; see also S.I. Strong, *Discovery Under 28 U.S.C. § 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 1 STAN. J. COMPLEX LITIG. 295, 327 (2013) [hereinafter Strong, *Section 1782*].

93. See Strong, *Section 1782*, *supra* note 92, at 323–50 (discussing grants of jurisdiction); see also JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* ¶¶ 5-9 to 5-15 (2003).

94. See Born, *Generation*, *supra* note 55, at 860; Delbrück, *supra* note 63, at 33–34 (discussing the need to consider legitimacy beyond the state model); Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT’L L. 295, 301 (2003) (discussing the need to establish “perceived” legitimacy (as opposed to political legitimacy or democratic legitimacy) in the context of special international tribunals). International law has also placed an increasing emphasis on the obligations of private persons, as opposed to state entities. See Paul B. Stephan, *The New International Law—Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555, 1563 (1999).

95. See Strong, *Section 1782*, *supra* note 92, at 334, 339–46. Indeed, some commentators claim that arbitral legitimacy can and should be based solely on the consent of the parties. See George A. Bermann, *The “Gateway” Problem in International Commercial Arbitration*, 37 YALE J. INT’L L. 1, 2–3 (2012); see also LEW ET AL., *supra* note 93, ¶¶ 5–16 to –21 (discussing the jurisdictional and contractarian theories of international arbitration).

96. See Grossman, *Legitimacy*, *supra* note 62, at 115–16; see also Delbrück, *supra* note 63, at 33–34.

tration “is legitimate when it is (1) fair and unbiased, (2) interpreting and applying norms consistent with what states believe the law is or should be, and (3) transparent and infused with democratic norms.”<sup>97</sup>

### B. Putting Theory into Practice

Although this Article does not seek to prove the legitimacy of international arbitration per se, it is nevertheless helpful for present purposes to describe briefly how international arbitration meets the test for legitimacy identified at the end of the preceding section so as to provide a basis for subsequent discussions.<sup>98</sup> First, numerous empirical studies have concluded that arbitration provides a fair and unbiased means of resolving international commercial and investment disputes.<sup>99</sup> Although it can be difficult to measure judicial performance at either the national or international level,<sup>100</sup> some research suggests that international arbitration is superior to many national courts, particularly in cases involving international commercial and investment law.<sup>101</sup>

Second, research strongly suggests that international arbitration complies with state-supported norms, both as a procedural<sup>102</sup> and substantive matter.<sup>103</sup>

97. Grossman, *Legitimacy*, *supra* note 62, at 115; *see also* Delbrück, *supra* note 63, at 33–34. Initially, this test was said not to apply to international commercial arbitration (as opposed to investment arbitration) “because different legitimacy-influencing factors come into play when only private parties are involved.” Grossman, *Legitimacy*, *supra* note 62, at 111. However, upon closer examination these criteria can be met by both international commercial arbitration and investment arbitration. *See infra* notes 98–127 and accompanying text.

98. *See* Grossman, *Legitimacy*, *supra* note 62, at 115 (stating that, to be legitimate, a procedure needs to be “(1) fair and unbiased, (2) interpreting and applying norms consistent with what states believe the law is or should be, and (3) transparent and infused with democratic norms”).

99. *See, e.g.*, Franck et al., *LEGITIMACY*, *supra* note 5, at 61; Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT’L L.J. 435, 486–87 (2009); *see also supra* note 23 and accompanying text.

100. *See Performance Measures Topic Brief*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20756997~menuPK:2025688~pagePK:210058~piPK:210062~theSitePK:1974062,00.html> (last visited Jan. 18, 2018) [hereinafter *WORLD BANK, Performance*]; Stephen Choi & Mitu Gulati, *A Tournament of Judges?*, 92 CALIF. L. REV. 299, 305–15 (2004). Nevertheless, some comparative studies exist. *See Benchmarks and Comparative Data*, WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20746049~menuPK:2036192~pagePK:210058~piPK:210062~theSitePK:1974062,00.html> (last visited Jan. 18, 2018) [hereinafter *WORLD BANK, Benchmarks*]; EUROPEAN COMM’N FOR THE EFFICIENCY OF JUSTICE, *European Judicial Systems: Efficiency and Quality of Justice* (2016), <http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%202023%20report%20EN%20web.pdf> (discussing data collected in 2014) [hereinafter *EUR. JUD. SYSTEMS*]; *Judicial Performance and Its Determinants: A Cross-Country Perspective*, ORG. FOR ECON. CO-OPERATION AND DEV., <http://www.oecd.org/eco/growth/judicial-performance.htm> (last visited Jan. 18, 2018).

101. *See, e.g.*, Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 BERKELEY J. INT’L L. 111, 116–34 (2008) (considering bias issues concerning the International Court of Justice, various international criminal courts, the World Trade Organization, and investment arbitration); Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT’L L. 111, 116 (2002) (noting difficulty of identifying fairness of international courts); *see also* OECD, *supra* note 3.

102. *See* S.I. Strong, *Limits of Procedural Choice of Law*, 39 BROOK. J. INT’L L. 1027, 1100–01 (2014) [hereinafter *Strong, Procedural Choice*]; *see also* S.I. Strong, *Reasoned Awards in International Commercial Arbitration: Embracing and Exceeding the Common Law-Civil Law Dichotomy*, 37 MICH. J. INT’L L. 1, 19 (2015) [hereinafter *Strong, Reasoned Awards*].

103. *See* BORN, *supra* note 1, at 2130; Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1557 (2005) [hereinafter *Franck, Inconsistent*]; Franck et al., *LEGITIMACY*, *supra* note 5, at 78 (considering legitimacy



For example, international arbitration is as procedurally sophisticated as national court proceedings concerning similar types of disputes.<sup>104</sup> Indeed, the most common criticism of international arbitration is not that it is too informal, but that it is too legalistic.<sup>105</sup>

International arbitration is equally competent in matters of substance.<sup>106</sup> Indeed, some commentators believe that arbitrators may be better than national judges in some types of substantive decision-making, most notably in cases involving the application of a foreign country's mandatory rules of law, due to the heightened neutrality associated with arbitration.<sup>107</sup> International arbitration is also more flexible than litigation with respect to the choice of applicable law, although states are seeking to expand party autonomy in judicial procedures to the same level seen in international arbitration through promulgation of the Hague Principles on Choice of Law in International Commercial Contracts.<sup>108</sup>

Finally, international arbitration appears to comply with standards regarding transparency and democratic ideals, although this is admittedly the most contentious of the three elements.<sup>109</sup> These matters have been considered most comprehensively in investment proceedings, since those disputes are considered quasi-public in nature, and recent years have seen a series of reforms meant to respond to concerns regarding transparency and the so-called "democratic deficit."<sup>110</sup> For example, the United Nations Commission on International Trade Law ("UNCITRAL") adopted the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration in 2013,<sup>111</sup> followed by the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration in 2014.<sup>112</sup> As a result of these and other initiatives, outside scrutiny can now be brought to bear on arbitral hearings, which are increasingly made open to the

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as substantive justice, particularly with respect to "prestige of arbitration, the reappointment of arbitrators and interaction with co-arbitrators, fraud, and diversity").

104. See BORN, *supra* note 1, at 2129–30.

105. See *id.* at 2127.

106. See *id.* at 2130.

107. See *id.*; Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957, 995–96 (2005) [hereinafter Rogers, *Vocation*].

108. See Hague Conference on Private International Law, Principles on Choice of Law in International Commercial Contracts, art. 3 (2015), <https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf>; Geneviève Saumier, *The Hague Principles and the Choice of Non-State "Rules of Law" to Govern an International Commercial Contract*, 40 BROOK. J. INT'L L. 1, 4–5 (2014) (noting that states have traditionally resisted this degree of party autonomy in litigation).

109. See Franck, *Inconsistent*, *supra* note 103, at 1557; Grossman, *Legitimacy*, *supra* note 62, at 115.

110. See Andrea K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, 113 PENN ST. L. REV. 1269, 1270–71, 1273 (2009) (describing the mixed public-private features of investment arbitration); Born, *Generation*, *supra* note 55, at 842–43 ("Investment arbitration has faced substantial criticism since the turn of the twenty-first century. Some of these complaints have been directed broadly at foreign investment and the basic premise of international investment protection, typically claiming that investment arbitration is skewed in favor of foreign investors. Other criticisms have focused on specific features of investment arbitration, including its lack of transparency, its insufficiently determinate legal standards, its lack of opportunities for amicus curiae participation, and its lack of appellate review.") (footnotes omitted).

111. See United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based Investor-State Arbitration, *as adopted by* G.A. Res. 68/109, U.N. Doc. A/68/462, at 1–3 (Dec. 16, 2013), <http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf>.

112. See Transparency Convention, *supra* note 21.

public through live-stream technology,<sup>113</sup> and on arbitral awards, which are now routinely published in full.<sup>114</sup>

International commercial arbitration has adopted a number of similar measures.<sup>115</sup> Some of these initiatives, such as those involving increased transparency in arbitral selection, are of relatively recent origin.<sup>116</sup> Others, such as those involving the publication of selected arbitral awards, are of much longer duration.<sup>117</sup> Social interests in transparency of private commercial disputes may also be met through the public policy exception to enforcement of arbitral awards, which allows states to raise concerns about the procedural or substantive legitimacy of certain awards *sua sponte*.<sup>118</sup>

International arbitration is also capable of addressing other transparency-related concerns. For example, the long-standing tradition of requiring fully reasoned awards in both international commercial and investment arbitration provides the parties themselves with an excellent understanding of the reasoning underlying individual decisions.<sup>119</sup> International commercial and investment arbitration are also both capable of resolving various types of large-scale injuries at a single time, in a single venue, which would overcome certain transparency-

113. For example, three ICSID proceedings have been opened to the public since the beginning of 2016. *See* Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21 (public hearing broadcast online from Sept. 7, 2016 to Sept. 14, 2016); Gabriel Res. Ltd. & Gabriel Res. (Jersey) v. Rom., ICSID Case No. ARB/15/31 (public hearing broadcast via close circuit television at the ICSID headquarters on Sept. 23, 2016); Vattenfall AB v. Fed. Republic of Ger., ICSID Case No. ARB/12/12 (public hearing broadcast online from Oct. 10, 2016 to Oct. 21, 2016, with a four-hour delay as agreed by the parties); Press Release, Vattenfall AB, International Arbitration Proceedings by Vattenfall Against the Federal Republic of Germany: Hearing Starts on Monday as a Video Stream (Oct. 6, 2016), <https://corporate.vattenfall.com/press-and-media/press-releases/2016/international-arbitration-proceedings-by-vattenfall-against-the-federal-republic-of-germany-hearing-starts-on-monday-as-a-video-stream/>; *ICSID Holds Hearing in Mining-Related Dispute Filed Against Romania*, LEXIS LEGAL NEWS (Sept. 21, 2016), <http://www.lexislegalnews.com/articles/11329>; *Bear Creek Mining Corporation v. Republic of Peru (ICSID Case No. ARB/14/21)–Public Hearing*, ISDS (Aug. 15, 2016), <http://isds.bilateral.org/?bear-creek-mining-corporation-v>; *see also* ICSID, LIVESTREAM, <https://livestream.com/ICSID> (including other hearings). Since 2002, all U.S. international agreements involving investor-state dispute settlement, including those arising under the North American Free Trade Agreement (“NAFTA”), must be open to the public via close-circuit television or live video. *See, e.g.,* *Hearing: Spence International Investments et al. v. Republic of Costa Rica (ICSID Case No. UNCT/13/2)–Public Hearing*, LIVESTREAM (Apr. 24, 2015), <http://livestream.com/ICSID/events/3954046> (involving a case heard publicly in 2015 pursuant to the Central American Free Trade Act (“CAFTA”).

114. Many treaty-based awards are now published in their entirety. *See* *Award - ICSID Convention Arbitration*, INT’L CENTRE FOR SETTLEMENT INV. DISPUTES (2017), <https://icsid.worldbank.org/en/Pages/process/Award-Convention-Arbitration.aspx>.

115. *See* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1683–84 (2016); Rogers, *Transparency*, *supra* note 11, at 1322–37.

116. *See* Catherine Rogers, *A Window into the Soul of International Arbitration: Arbitrator Selection, Transparency and Stakeholder Interests*, 46 VICT. U. WELLINGTON L. REV. 1179, 1187 (2015) (discussing the Arbitrator Intelligence project).

117. *See* STRONG, RESEARCH, *supra* note 1, at 44–45, 83–85.

118. *See* 9 U.S.C. §§ 1–307 (2012); G.A. Res 40/72, U.N. Doc. A/40/17 (Dec. 11, 1985), *revised by* G.A. Res 61/33, U.N. Doc. A/61/17 (Dec. 4, 2006), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html) [hereinafter UNCITRAL Model Arbitration Law]; United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 3 [hereinafter New York Convention]; Lahav, *supra* note 115, at 1683–84.

119. *See* Strong, *Reasoned Awards*, *supra* note 102, at 2.

related problems generated by bilateral procedures.<sup>120</sup> Interestingly, the U.S. Supreme Court has not identified any concerns about transparency in this context and has instead explicitly adopted a rule that reduces transparency in matters involving class or collective claims.<sup>121</sup>

While the emphasis on transparency as a proxy for legitimacy makes some sense, the claim that a dispute resolution process must be “infused with democratic norms” is somewhat more difficult to analyze<sup>122</sup> because most countries do not elect their judges and actually intend the judiciary to operate in a counter-majoritarian manner.<sup>123</sup> Furthermore, the claim that litigation reflects the values of deliberative democracy through election or appointment of judges by democratically elected representatives<sup>124</sup> fails to recognize that arbitration fulfills similar goals in perhaps an even more direct manner through its “commitment to the Habermasian [sic] foundations . . . that ‘the acted upon [*i.e.*, the parties] should assent to the rules or decisions that are made about them,’ preferably after full

120. See S.I. STRONG, CLASS, MASS, AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW 235 (2013) [hereinafter STRONG, CLASS ARBITRATION] (discussing class, mass, and collective arbitration and the need for arbitrators to appreciate the existence and scope of other, similar damages to provide proper redress). Class arbitrations can arise in the international setting. See *Stolt-Neilsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 666 (2010).

121. Restrictions on large-scale arbitration (such as through the use of private waivers) have received judicial approbation in the United States, despite the opposition of the arbitral community, thereby resulting in decreased transparency in class actions and other collective disputes. See STRONG, CLASS ARBITRATION, *supra* note 120, at 249–53 (discussing *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013) and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011)). This issue is again coming before the Supreme Court in the context of labor arbitration. See *Morris v. Ernst & Young LLP*, 834 F.3d 975, 991 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1161 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1021 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017).

122. Grossman, *Legitimacy*, *supra* note 62, at 115; see also Born, *Generation*, *supra* note 55, at 779; Delbrück, *supra* note 63, at 33–34; Grossman, *Legitimacy*, *supra* note 62, at 160.

123. See Strong, *Regulatory Capture*, *supra* note 58, at 3. The United States appears to be the only jurisdiction in the world to select its judges through popular election. At this point, twenty-two states use contested judicial elections to select their judges, with seven states holding partisan elections and fifteen using non-partisan elections, *i.e.*, elections in which the party affiliation of the candidates is not shown on the ballot. Thirteen states use some form of the Missouri Plan, named for the state that first adopted this form of “merit” selection. The remaining fifteen states employ some variation of the federal model, mixing executive appointment with some form of legislative confirmation. And the experiment continues “in 2011, [with] 26 states . . . consider[ing] legislation to change or replace their judicial merit selection systems.”

Scott W. Gaylord, *Unconventional Wisdom: The Roberts Court’s Proper Support of Judicial Elections*, 2011 MICH. ST. L. REV. 1521, 1522 (2011) (citation omitted) (“Conventional wisdom, however, holds that the experiment with judicial elections has failed . . .”). The only other countries to include an electoral element to judicial selection are Switzerland, which appoints judges through election by the Federal Assembly, and Japan, which allows judges to be removed from the bench through a referendum. See NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 78–79 (Japan), [http://www.shugiin.go.jp/internet/itdb\\_english.nsf/html/statics/english/constitution\\_e.htm](http://www.shugiin.go.jp/internet/itdb_english.nsf/html/statics/english/constitution_e.htm); Benjamin Suter, *Appointment, Discipline and Removal of Judges: A Comparison of the Swiss and New Zealand Judiciaries*, 46 VICT. U. WELLINGTON L. REV. 267, 280 (2015); Sher Watts Spooner, *Why Does America Elect Judges, Anyway?*, DAILY KOS (Mar. 6, 2016, 10:00 AM), <http://www.dailykos.com/story/2016/3/6/1489191/-Why-does-America-elect-judges-anyway>.

124. See Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 116 (2012) (“Sometimes in a representative democracy, the representative branches *aren’t*.”) (emphasis in original) (noting that certain theoretical presumptions about democratic ideals may sometimes be reversed in practice); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 272 (2008) (discussing various conflicts regarding the role of the judiciary and of democratic values); Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 594–95 (2005) (suggesting judicial election is more democratic than judicial appointment).

participation in reasoned deliberation, with the hearing of ‘others’ and fair decision rules.”<sup>125</sup> Indeed, if, as Alexandra Lahav has argued, “democracy is self-government,” then arbitration fulfills that goal to the same extent as litigation, if not more.<sup>126</sup>

As this brief discussion shows, international arbitration more than meets the basic criteria for legitimacy. Why, then, do critics continue to question the legitimacy of international arbitration? The answer may very well be found in the psychological phenomenon known as the status quo bias.<sup>127</sup>

### III. THE STATUS QUO BIAS

In a rational world, debates about the merits of international arbitration would focus solely on the inherent utility of the procedure.<sup>128</sup> Rational choice theory is popular among both legal scholars (particularly devotees of the law and economics movement) and political scientists<sup>129</sup> and has been applied in a variety of settings, including international dispute resolution.<sup>130</sup>

125. Carrie Menkel-Meadow, *Deliberative Democracy and Conflict Resolution*, 12 DISP. RESOL. MAG. 18, 19 (2006) [hereinafter Menkel-Meadow, *Deliberative Democracy*] (discussing JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION (Thomas McCarthy trans., 1984)). Although constitutional theorists are often “obsessed” with the countermajoritarian features of judicial review, few academics discuss arbitration as a means of addressing the democratic deficit by allowing parties to choose the mechanism and the individuals who resolve their legal disputes. See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 158–59 (2002).

126. Lahav, *supra* note 115, at 1661. As Lahav notes:  
Litigation is usually understood as providing two useful ends. The default, and perhaps most hard-wired, conception of litigation is as a mechanism for dispute resolution. . . . A second, somewhat less dominant but still prevalent model of litigation is as a system for law declaration. . . . Both of these approaches to litigation look at the ends of litigation: in the first model, resolution, and in the second model, law production and clarification. Both contribute to the regulatory function of litigation because individuals and organizations anticipate or learn from the results adjudication and adjust their behavior accordingly. This Article presents a third understanding of litigation as a process in which litigants perform self-government. *Id.* at 1658–59; see also Schultz, *supra* note 66, at 70–71 (noting the role of self-governance in the work of Jürgen Habermas and in international arbitration).

127. See Nyhan & Reifler, *Roles*, *supra* note 25, at 2.

128. While there is no single definition of rational choice theory, “most versions . . . assume that the intensity of individuals’ preferences for an entitlement derive solely from the inherent utility of that entitlement to the individual.” Korobkin, *Endowment Effect*, *supra* note 47, at 1227; see also Samuelson & Zeckhauser, *supra* note 47, at 8 (“A fundamental property of the rational choice model, under certainty or uncertainty, is that only preference-relevant features of the alternatives influence the individual’s decision. Thus, neither the order in which the alternatives are presented nor any labels they carry should affect the individual’s choice.”).

129. See Robert O. Keohane, *Rational Choice Theory and International Law: Insights and Limitations*, 31 J. LEGAL STUD. 307, 307 (2002) (noting political scientists have been using rational choice theory since the early 1980s, although international lawyers did not adopt this framework until later). Rational choice theory has long been used in international law and international relations. See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT’L L. 335, 337 (1989); Keohane, *supra*, at 307; Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205, 220 (1993); Alexander Thompson, *Applying Rational Choice Theory to International Law: The Promise and Pitfalls*, 31 J. LEGAL STUD. 285, 286 (2002).

130. Rational choice theory has been used to discuss everything from disclosure in international arbitration to dispute system design. See, e.g., Giacomo Rojas Elgueta, *Understanding Discovery in International Commercial Arbitration Through Behavioral Law and Economics: A Journey Inside the Mind of Parties and Arbitrators*, 16 HARV. NEGOT. L. REV. 165, 165 (2011); Sandeep Gopalan, *A Demandeur-Centric Approach to Regime Design in International Commercial Law*, 39 GEO. J. INT’L L. 327, 330 (2008); Peter B. Rutledge, *Convergence and Divergence in International Arbitration*, 2012 J. DISP. RESOL. 49, 50 (2012).

Although some commentators have called for increased reliance on rational choice theory in analyses of international arbitration,<sup>131</sup> there is a significant problem with that approach, namely extensive evidence that people do not actually adopt optimum rationality.<sup>132</sup> Instead, numerous empirical studies have shown that decision-making is affected by a variety of factors that can result in “[d]irectionally motivated reasoning.”<sup>133</sup> Among other things, people often rely on unconscious “biases in information processing that occur when one wants to reach a specific conclusion.”<sup>134</sup>

One well-documented cognitive distortion is the status quo bias, which arises when an individual or institution prefers the established course of action over any available alternatives, even if those alternatives would increase the welfare of the decision-maker.<sup>135</sup> While most analyses of the status quo bias focus on questions of substantive law,<sup>136</sup> the principles are equally applicable to procedural issues, including those involving arbitration.<sup>137</sup>

According to William Samuelson and Richard Zeckhauser, “[t]he status quo bias is best viewed as a deeply rooted decision-making practice stemming partly from a mental illusion and partly from psychological inclination.”<sup>138</sup> Because the phenomenon operates on an unconscious level, it is extremely difficult to identify and overcome,<sup>139</sup> particularly given the “bias blind spot, which prevents us from taking our own biases as seriously as we do the biases of others.”<sup>140</sup> Thus, research subjects have been found to be “readily persuaded of the

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131. See Stavros L. Brekoulakis, *International Arbitration Scholarship and the Concept of Arbitration Law*, 36 *FORDHAM INT’L L.J.* 745, 769 (2013).

132. See Samuelson & Zeckhauser, *supra* note 47, at 8–9; see also Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out That Baby*, 87 *CORNELL L. REV.* 309, 310–11 (2002) (discussing “the notorious macro-micro problem of social science” and the difficulties adherents of the Chicago School of microeconomics have in using public choice theory to predict political action).

133. Nyhan & Reifler, *Roles*, *supra* note 25, at 2; see also Samuelson & Zeckhauser, *supra* note 47, at 47. Some of the more frequently discussed phenomenon include “positive illusions, anchoring, the representativeness heuristic, hindsight bias, the framing of options, irrelevant information, and the structure of decision-making processes.” Jean R. Sternlight & Jennifer K. Robbennolt, *Psychology and Effective Lawyering: Insights for Legal Educators*, 64 *J. LEGAL EDUC.* 365, 370 (2015) (footnotes omitted). Others include contrast bias and procrastination bias. See Zimmerman, *supra* note 47, at 1134.

134. Nyhan & Reifler, *Roles*, *supra* note 25, at 2.

135. See Samuelson & Zeckhauser, *supra* note 47, at 8; Zimmerman, *supra* note 47, at 1134. Although there are a number of key differences between individual and institutional (or group) decision-making processes, the status quo bias is not limited to individuals. See Samuelson & Zeckhauser, *supra* note 47, at 45; Ozan O. Varol, *Constitutional Stickiness*, 49 *U.C. DAVIS L. REV.* 899, 938 (2016). Instead, the principle also “influence[s] policymaking within organizations, both public and private. Once made, policies frequently persist and become codified implicitly or explicitly . . .” Samuelson & Zeckhauser, *supra* note 47, at 45.

136. See Korobkin, *Endowment Effect*, *supra* note 47, at 1256–92 (citing examples).

137. See Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in the Federal Courts*, 63 *HASTINGS L.J.* 127, 166 n.201 (2011); Matthew J.B. Lawrence, *Procedural Triage*, 84 *FORDHAM L. REV.* 79, 85 (2015) [hereinafter Lawrence, *Triage*]; Andrew E. Taslitz, *Trying Not to Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 *TEX. TECH. L. REV.* 315, 347 (2012).

138. Samuelson & Zeckhauser, *supra* note 47, at 10.

139. See Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 *U.C. DAVIS L. REV.* 1563, 1572–73 n.38 (2013) (surveying authorities); Samuelson & Zeckhauser, *supra* note 47, at 9.

140. See Solan, *supra* note 42, at 10.

aggregate pattern of behavior (and the reasons for it), but seemed unaware (and slightly skeptical) that they *personally* would fall prey to this bias.”<sup>141</sup>

As pronounced as the status quo bias is in laboratory settings, the effect is often magnified in the real world because of the social, reputational, and financial costs that are associated with deviating from the established course of action.<sup>142</sup> Economists frame these concerns in terms of sunk costs, regret avoidance, and a drive for internal or psychological consistency.<sup>143</sup> Thus, one reason why people continue to question the legitimacy of international arbitration, despite suggestions from scholars that Congress and other policy-makers “should not assume that juries necessarily make ‘better’ decisions than arbitrators,”<sup>144</sup> is because of their unconscious desire to elevate the status of judicial procedures so as to justify the sunk costs in national courts.<sup>145</sup>

Increasing the perceived legitimacy of international arbitration may also be somewhat threatening to individuals and institutions that benefit from the existing perception of litigation as the default norm. For example, increasing respect for international arbitration could not only diminish the reputation of the judicial system by eliminating litigation’s preferential status in the panoply of dispute resolution alternatives,<sup>146</sup> but could also injure the social standing (and perhaps financial opportunities) of judges,<sup>147</sup> a powerful segment of the law-making community.<sup>148</sup> Proponents of court proceedings may also be seeking to avoid the type of cognitive dissonance that might arise if arbitration were found to be as good as, or better than, litigation in resolving international disputes.<sup>149</sup>

Initially, it might appear useful to determine how litigation became the status quo, even though research shows that the status quo bias exists regardless of

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141. Samuelson & Zeckhauser, *supra* note 47, at 9.

142. *See id.* at 10.

143. *See id.* at 37–38.

144. Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 LAW & CONTEMP. PROBS. 105, 107 (2004).

145. *See* Samuelson & Zeckhauser, *supra* note 47, at 38–39.

146. Numerous authorities have identified a compelling state interest in maintaining the reputation of the judiciary. *See, e.g.*, *Kamasinski v. Judicial Review Council*, 44 F.3d 106, 111 (2d Cir. 1994); *Doe v. Fla. Judicial Qualifications Comm’n*, 748 F. Supp. 1520, 1525 (S.D. Fla. 1990); *Butler v. Ala. Judicial Inquiry Comm’n*, 802 So. 2d 207, 215 (Ala. 2001); *In re Chmura*, 608 N.W.2d 31, 38–40 (Mich. 2000); *In re Kaiser*, 759 P.2d 392, 399 (Wash. 1988) (en banc).

147. Although a great deal has been written about the financial self-interest of arbitrators, the concept of judicial self-interest has been considered far less frequently. *See* Joanna Shepherd, *Measuring Maximizing Judges: Empirical Legal Studies, Public Choice Theory, and Judicial Behavior*, 2011 U. ILL. L. REV. 1753, 1754–55. However, research suggests that judges are extremely interested in maintaining or increasing the rate of litigation in national courts. *See id.*; *see also* Tracey E. George & Chris Guthrie, *Induced Litigation*, 98 NW. U. L. REV. 545, 547 (2004) (noting how an increase in funding and judicial resources results in an increase in litigation). Although the status of the judiciary varies from country to country, judges are among the elite in many countries and would be loath to see that status eroded. *See* Thadd A. Blizzard, *Gender and Judging*, 25 HASTINGS WOMEN’S L.J. 267, 270 n.11 (2014) (book review).

148. The judiciary has often responded to external threats by adopting strong-arm methods to defend the status quo. *See* Dana A. Remus, *The Institutional Politics of Federal Judicial Conduct Regulation*, 31 YALE L. & POL’Y REV. 33, 38 (2012). Allowing parties to exit or avoid the judicial system is critically important given the difficulties of policing the judicial branch. *See* Margaret Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 GEO. L.J. 1567, 1606 (2009) (“[T]he punishment of speech critical of the judiciary ‘cannot safely be left to [the judiciary], who have an obvious vested interest in the status quo’ and in preserving their own reputations.”) (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST* 117 (1980)).

149. *See* Samuelson & Zeckhauser, *supra* note 47, at 39.

how a particular procedure becomes the established norm.<sup>150</sup> Indeed, Samuelson and Zeckhauser found that “individuals fail to discriminate to some degree between imposed actions, random selections, and choices voluntarily (and thoughtfully) undertaken.”<sup>151</sup>

In the case of dispute resolution, “courts and jury trials were established to be in the ‘best’ category by default” pursuant to a “traditional public civil justice model.”<sup>152</sup> However, the rise of international arbitration in the post-World War II era and particularly since the 1980s has led to a certain amount of tension between the relative status of litigation and arbitration.<sup>153</sup> For example, as Tracey George and Chris Guthrie note:

One group of scholars—which we call the “public adjudication” group—would call for more courts and more judges even if the effect were to induce litigation. For these scholars, litigation is an underutilized public good that should be expanded to meet latent demand among individuals who “sit on their rights” rather than litigate. Another group of scholars—which we call the “private ordering” group—would argue that society is already too litigious. For these scholars, disputes should be resolved not inside, but rather outside, the courtroom.<sup>154</sup>

Some observers frame the debate more forcefully in favor of the presumptive superiority of litigation.<sup>155</sup> For example, Judith Resnik writes:

In theory, judges are agents of the state, charged with implementing its law through public decision making; arbitrators are creatures of contracts, obliged to effectuate the intent of the parties. The distinction is presumed to be constitutionally respectful and welfare-maximizing, enabling the enforcement of public rights and protecting the autonomy of contractual relationships.

Yet the two practices—adjudication and arbitration—are coming to be styled as fungible options on a “dispute resolution” (DR) spectrum. An increasingly common parlance (crisscrossing the globe) replaces the phrase “alternative dispute resolution” (ADR) with DR, so as to put courts—now deemed “Judicial Dispute Resolution” (JDR) or “Judicial Conflict Resolution” (JCR)—on a continuum of mechanisms responding to conflicts. This formulation aligns courts with a range of options that clouds courts’ identity as a unique constitutionally obliged mode of decision making.<sup>156</sup>

150. *See id.* at 39–40.

151. *Id.* at 40.

152. Ron Spears, *Are Courts Heading for a Market Failure?*, 103 ILL. B.J. 1, 52 (2015).

153. *See* BORN, *supra* note 1, at 68.

154. George & Guthrie, *supra* note 147, at 547–48 (speaking in the context of domestic proceedings, although the principle holds true in the international realm); *see also* Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 24–25 (1999) [hereinafter Menkel-Meadow, *Repeat*].

155. *See* Owen M. Fiss, *The History of an Idea*, 78 FORDHAM L. REV. 1273, 1277 (2009).

156. Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2806–07 (2015) [hereinafter Resnik, *Diffusing*] (footnote omitted); *see also* Menkel-Meadow, *Repeat*, *supra* note 154, at 25. Resnik coined the term “Dispute Diffusion” . . . to capture these new commitments to the eclipse of court-based adjudication as the primary paradigm for government-authorized dispute resolution.” Resnik, *Diffusing*, *supra*, at 2807. Although Resnik excludes international arbitration from her discussion, this point at least seems apt in the international context. *See id.* at 2808.

To some extent, these discussions arise because the legal community has never truly decided whether arbitration is an alternative to, or the equivalent of, litigation.<sup>157</sup> However, it is also possible that this debate arises because of an unconscious belief that litigation must retain a position of superiority over arbitration, based solely on a bias in favor of the status quo.<sup>158</sup>

#### IV. STATUS QUO BIAS AND STICKY DEFAULTS

##### A. *Litigation as the Dispute Resolution Default*

In many ways, the status quo can be analogized to legal defaults, although default rules describe behavior on a theoretical or predictive basis while the status quo bias reflects empirically observed, actual phenomena.<sup>159</sup> Both perspectives are important to the current analysis, since they consider the actions of individuals and institutions in both a forward- and backward-looking manner.

Adherents of the law and economics movement have conducted extensive studies of the use and effect of defaults, not only in the area of contract law,<sup>160</sup> but also in other contexts, including procedural<sup>161</sup> and arbitral law.<sup>162</sup> Generally

157. See, e.g., LARRY E. EDMONSON, DOMKE ON COMMERCIAL ARBITRATION § 1:1, 1–3 (2010) (“[Arbitration] coexists with court procedure as an adjunct and part of the American system of administering justice.”); *id.* § 1:3, 1–8–1–9 (indicating that early precedent distinguished between commercial arbitration as a substitute for litigation and labor arbitration as a substitute for avoiding industrial strife, but suggesting that these distinctions may no longer apply); Cindy G. Buys, *The Arbitrators’ Duty to Respect the Parties’ Choice of Law in Commercial Arbitration*, 79 ST. JOHN’S L. REV. 59, 93–94 (2005) (noting differences between arbitration and litigation); Nathan Isaacs, *Two Views of Commercial Arbitration*, 40 HARV. L. REV. 929, 929 (1927); Pierre Mayer, *Comparative Analysis of Power of Arbitrators to Determine Procedures in Civil and Common Law Systems*, in ICCA CONGRESS SERIES NO. 7, PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION 25 (Albert Jan van den Berg ed., 1996) (“[Sometimes] one considers arbitration as a substitute for State justice, albeit of a private nature, but nevertheless pursuing the same ends.”); Josef P. Sirefman, *In Search of a Theory of Arbitration*, 26 ARBITRATION 68, 69 (1960); Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 260 (2007) (“[A]rbitration is a substitute for adjudication by litigation . . . .”); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1673 (2005) (concluding arbitration is not the same as litigation); S.I. Strong, *Does Class Arbitration “Change the Nature” of Arbitration?* Stolt-Nielsen, AT&T, and a Return to First Principles, 17 HARV. NEGOT. L. REV. 201, 241–45 (2012) (discussing the nature of arbitration). International disputes are particularly difficult to analyze in this regard, since they can usually be heard in a variety of national courts if an arbitration agreement does not apply. This phenomenon has led to a relatively complicated debate about the theoretical nature of international arbitration. See, e.g., LEW ET AL., *supra* note 93, ¶ 5–4 (discussing the four main theories of international arbitration: the jurisdictional theory, the contractual theory, the hybrid theory, and the autonomous theory); Strong, *Section 1782*, *supra* note 92, at 348 (positing a new theory of international arbitration based on the concept of concurrent jurisdiction).

158. See Samuelson & Zeckhauser, *supra* note 47, at 9.

159. See Korobkin, *Endowment Effect*, *supra* note 47, at 1271. Theoretical scholarship attempts to forecast or predict certain behavior, while empirical research describes existing behavior. See *id.* at 1241.

160. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87–88 (1989); Willis, *supra* note 47, at 1165.

161. See Sergio J. Campos, *Eric as a Choice of Enforcement Defaults*, 64 FLA. L. REV. 1573, 1577 (2012); Daphna Kapeliuk & Alon Klement, *Changing the Litigation Game: An Ex Ante Perspective on Contractualized Procedures*, 91 TEX. L. REV. 1475, 1475 (2013); Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 462 (2007); Robert J. Rhee, *Toward Procedural Optionality: Private Ordering of Public Adjudication*, 84 N.Y.U. L. REV. 514, 516–17 (2009); Matthew A. Smith & Michael S. McPherson, *Nudging for Equality: Values in Libertarian Paternalism*, 61 ADMIN. L. REV. 323, 328 (2009).

162. See Jack Graves, *Court Litigation over Arbitration Agreements: Is It Time for a New Default Rule?*, 23 AM. REV. INT’L ARB. 113, 114 (2012) [hereinafter Graves, *Litigation*]; Ryan McCarl, *ICSID Jurisdiction*



speaking, default rules involve “settings or rules about the way products, policies, or legal relationships function that apply unless users, affected citizens, or parties take action to change them.”<sup>163</sup> Default provisions can be established by choice or circumstance and can operate in a variety of fashions.<sup>164</sup> For example, some defaults operate as gap-fillers in cases where parties have not affirmatively chosen a particular option.<sup>165</sup> Other provisions, known as “policy defaults,” are adopted “with an explicit purpose to alter the ultimate position of the parties.”<sup>166</sup> These types of rules are set to a position that is assumed to be “good for most individuals, under the assumption that only the minority who have clear preferences to the contrary will opt out.”<sup>167</sup>

Policy defaults can be contrasted with “penalty defaults,” which reflect a position that one or more parties dislike and which mean to increase the likelihood that parties will attempt to contract around the default.<sup>168</sup> Penalty defaults are used when policy-makers are unsure of the rule that would be chosen by informed individuals.<sup>169</sup>

Penalty defaults, like policy defaults, can be considered a type of “nudge” to encourage parties to adopt certain types of behavior.<sup>170</sup> According to Cass Sunstein, “default rules, even or perhaps especially if they appear to be invisible, count as prime ‘nudges,’ understood as interventions that maintain freedom of choice, that do not impose mandates or bans, but that nonetheless incline people’s choices in a particular direction.”<sup>171</sup> Although states have other means of promoting individual or institutional behavior without limiting choice (such as through the use of positive incentives), defaults are perhaps the most powerful means of promoting a particular outcome, since they require parties to incur transaction costs to avoid the default position.<sup>172</sup> Indeed, the transaction costs associated with negotiating for arbitration in international commercial and investment matters can be significant.<sup>173</sup>

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over *International Mass Investment Arbitrations: Due Process and Default Rules*, 51 STAN. J. INT’L L. 173, 190–94 (2015).

163. See Willis, *supra* note 47, at 1157.

164. Defaults may be adopted consciously or unconsciously by “choice architects.” See Richard H. Thaler, *Do You Need a Nudge?*, YALE INSIGHTS (Nov. 4, 2009) <http://insights.som.yale.edu/insights/do-you-need-nudge>; see also RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6 (2008).

165. See Willis, *supra* note 47, at 1157.

166. *Id.*

167. *Id.*

168. See Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2087 (2012); Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1, 35 (2013).

169. See Sunstein, *supra* note 168, at 5.

170. See THALER & SUNSTEIN, *supra* note 164, at 6; Willis, *supra* note 47, at 1157 n.4; Ian Ayres, *Ya-Huh: There Are and Should Be Penalty Defaults*, 33 FLA. ST. U. L. REV. 589, 617 (2006) [hereinafter Ayes, *Ya-Huh*].

171. Sunstein, *supra* note 168, at 5.

172. See Samuelson & Zeckhauser, *supra* note 47, at 33; Pierre Schlag, *Nudge, Choice Architecture, and Libertarian Paternalism*, 108 MICH. L. REV. 913, 915–16 (2010) (book review); S.I. Strong, *Incentives for Large-Scale Arbitration: How Policymakers Can Influence Party Behaviour*, in *CLASS AND GROUP ACTIONS IN ARBITRATION* 146, 150–59 (Bernard Hanotiau & Eric A. Schwartz eds., 2016); Sunstein, *supra* note 168, at 5.

173. Most dispute resolution provisions in international commercial contracts are individually negotiated unless the transaction is routine in nature. See GARY B. BORN, *INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING* 132 (4th ed. 2013). The dispute resolution mechanisms found in bilateral and multilateral investment treaties are often subject to intense international negotiation over a period of years, as demonstrated by the recent discussions regarding the investor-state dispute settlement

Defaults can be set to maximize whatever substantive or procedural values the choice architect wants to promote,<sup>174</sup> and the default does not have to be visible or heavy-handed to have an effect.<sup>175</sup> To the contrary, the cumulative nature of small individual nudges can have significant results in shaping social norms and expectations.<sup>176</sup> As Russell Korobkin has observed:

[W]hen lawmakers anoint a contract term the default, the substantive preferences of contracting parties shift—that term becomes more desirable, and other competing terms becoming less desirable. Put another way, contracting parties view default terms as part of the status quo, and they prefer the status quo to alternative states, all other things equal.<sup>177</sup>

Litigation clearly operates as the default mechanism for resolving domestic legal disputes.<sup>178</sup> Litigation can also be considered the presumptive default for international commercial disputes since those matters typically involve questions of private international law that would be resolved in national courts absent an arbitration agreement.<sup>179</sup> The same can be said of international investment disputes, particularly since treaty-based arbitration was created precisely to avoid the type of biases commonly associated with domestic litigation in the host state.<sup>180</sup>

Litigation's status as the default norm is apparent, given that "the critiques on the seeming 'unfairness' of international arbitration apparently arise from ex-

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("ISDS") mechanism to be incorporated into the Transatlantic Trade and Investment Partnership ("TTIP") between the United States and the European Union. See Press Release, European Commission, EU Finalizes Proposal for Investment Protection and Court System for TTIP (Nov. 12, 2015), [http://europa.eu/rapid/press-release\\_IP-15-6059\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6059_en.htm) [hereinafter European Commission Press Release]; see also BORN, *supra* note 1, at 120–26.

174. See Smith & McPherson, *supra* note 161, at 328.

175. See Thaler, *supra* note 164.

176. See *id.* Notably, what parties consider to be the status quo appears to be set by legislation rather than long-standing tradition. See Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1602 (1998) ("The path of least resistance, not ingrained historical tradition, appears to define the status quo for contracting parties.").

177. Korobkin, *Bias*, *supra* note 48, at 611–12.

178. See Lahav, *supra* note 115, at 1658.

179. See David P. Stewart, *Private International Law: A Dynamic and Developing Field*, 30 U. PA. J. INT'L L.J. 1121, 1123 (2009); Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67, 122–23 (2009). While claims involving public international law (the law of nations) were once restricted to international tribunals, such matters are also now increasingly heard in national court. See Mathias Reiman, *From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum*, 22 PENN ST. INT'L L. REV. 397, 410 (2004).

180. Litigation remains the default for investor-state disputes because court is generally the only available forum absent an investment treaty (or arbitration agreement in a contract), and investors still need to identify the availability of that option and file the request for arbitration, even in cases where a treaty does exist. See Strong, *Section 1782*, *supra* note 92, at 333–34 (discussing "offer to arbitrate"). Investment treaties vary in how disputes are to be resolved. Some treaties include a "fork-in-the-road" provision that states:

[I]f the investor chooses to submit a dispute to the host State courts or to any other agreed dispute resolution procedure (for example, to ICC arbitration under the dispute resolution clause in the relevant investment contract), the investor forever loses the right to submit the same claims to the international arbitration procedure in the BIT.

LUCY REED ET AL., *GUIDE TO ICSID ARBITRATION* 100 (2d ed. 2011). Fork-in-the-road provisions are typically limited to contract-based claims rather than treaty-based claims. While investors may have the right to bring a treaty-based claim in arbitration, filing may be contingent on compliance with various preconditions, which could include exhaustion of local remedies. See *id.* at 124–30.

pectations wed to a more judicial or structurally adjudicative paradigm of international dispute resolution.”<sup>181</sup> Some commentators have sought to resolve the tension between international litigation and international arbitration by calling for the creation of new “extraterritorial courts” to address evolving forms of international disputes, based on the assumption that, “when it comes to offering principled adjudication, public courts enjoy a number of structural advantages over private arbitration.”<sup>182</sup> However, such mechanisms differ little from international arbitration in practice and indeed create a number of negative externalities of their own.<sup>183</sup>

Richard Thaler has noted that choice architects often adopt the status quo as their default without putting much thought into that decision.<sup>184</sup> However, it is critically important to determine what type of default litigation does, or should, reflect. For example, litigation could be seen as a simple gap-filler that arises in the absence of party agreement to the contrary. Framing litigation as an ordinary default would suggest that the state has little to no interest in defending or establishing court proceedings as the preferred means of resolving legal disputes.

Litigation could also be considered a type of policy default reflecting a belief that the judicial system is the preferred or optimal means of addressing legal disputes. This paradigm would likely be based on a belief that resolution of legal disputes falls within the sovereign prerogative, which is discussed in Part V.<sup>185</sup>

Finally, litigation could be characterized as a penalty default, particularly in cases involving international disputes. A number of studies have suggested that litigation of cross-border disputes in national courts is expensive, time-consuming, and prone to various types of procedural or substantive errors, which indicate that judicial proceedings may operate as a penalty default, driving parties to resolve their disputes through alternative means.<sup>186</sup> Indeed, these factors,

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181. Desierto, *supra* note 24, at 948.

182. Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 4 (2008). Professors Jens Dammann and Henry Hansmann identified a number of alleged deficiencies of international arbitration based largely on a single empirical study of domestic U.S. disputes. *See id.* at 32; *see also id.* at 34 n.95. However, they do not discuss and do not appear to have considered more recent empirical studies focusing specifically on international disputes, even though there are significant differences between domestic and international arbitration. *See* STRONG, JUDICIAL GUIDE, *supra* note 19, at 2–5; *see also supra* note 23 and accompanying text (listing empirical studies of international arbitration). Furthermore, many of their conclusions—such as those relating to the alleged unpredictability of arbitration—fly in the face of well-established arbitral theory and practice. *See* BORN, *supra* note 1, at 86, 98.

183. *See* Dammann & Hansmann, *supra* note 182, at 4–31; *see also* BORN, *supra* note 1, at 73–94 (discussing benefits of international arbitration). Other scholars seek to improve the perception of international arbitration by noting the way in which courts continue to supervise arbitral proceedings, thereby “borrowing” from the legitimacy of the courts to increase the legitimacy of arbitration. *See* Christopher S. Gibson, *Arbitration, Civilization and Public Policy: Seeking Counterpoise Between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*, 113 PENN ST. L. REV. 1227, 1265–67 (2009) (discussing the International Law Association’s 2002 interim report on public policy as a bar to enforcement of international arbitral awards).

184. *See* Thaler, *supra* note 164 (“The status quo is typically the default. And the choice architect typically doesn’t think very carefully about this.”).

185. *See infra* notes 242–307 and accompanying text.

186. *See* BORN, *supra* note 1, at 70–71; WORLD BANK, DOING BUSINESS 2017: EQUAL OPPORTUNITY FOR ALL (2017), <http://www.doingbusiness.org/reports/global-reports/doing-business-2017> (describing and ranking

along with long-standing and widespread difficulties in international enforcement of foreign judgments and the real or perceived lack of neutrality among national court judges, explain why arbitration has become the preferred dispute resolution mechanism in international commercial and investment matters.<sup>187</sup>

Some people might argue that litigation cannot be considered a penalty default due to its long and enduring history and its intimate association with the state.<sup>188</sup> However, it is important to remember that the term “penalty default” is not a pejorative; it is simply a term used to describe how a particular rule operates. As it turns out, plenty of state-affiliated procedures operate as penalty defaults.<sup>189</sup> Furthermore, defensiveness at the suggestion that litigation might operate as a penalty default could be read as reflecting the unspoken and perhaps unconscious belief that litigation is “better” than arbitration simply by virtue of its age and connection with the state,<sup>190</sup> even though arbitration has an equally impressive pedigree and has existed in parallel with litigation since the beginning of recorded history in both the common law and civil law legal traditions.<sup>191</sup>

When seeking to appreciate the nature of litigation, it is important not only to determine what type of default rule litigation is, but also to consider the intensity of pull toward the default. The strongest defaults (*i.e.*, those that generate “default inertia”) are described as “sticky,” meaning that more people adopt the default position than would be expected if the rule were not in place.<sup>192</sup> “Slippery defaults” exist on the opposite end of the spectrum and reflect defaults that are not sticky or are less sticky than initially intended by the choice architects.<sup>193</sup>

Policy defaults are typically meant to be relatively sticky, since that position is believed to be optimal for most individuals.<sup>194</sup> However, a default’s

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key aspects of national litigation relating to 190 countries under the “enforcing contracts” section). Institutions are entirely capable of creating highly ineffective incentive systems through chance or choice. See Steven Kerr, *On the Folly of Rewarding A, While Hoping for B*, 9 ACAD. MGMT. EXECUTIVE 7, 7 (1995).

187. See BORN, *supra* note 1, at 73–93 (listing benefits of international arbitration over international litigation); S.I. Strong, *Recognition and Enforcement of Foreign Judgments in U.S. Courts: Problems and Possibilities*, 33 REV. LITIG. 45, 49 (2014).

188. See *infra* notes 253–54 and accompanying text.

189. See Ayres, *Ya-Huh*, *supra* note 170, at 590.

190. Such a belief may very well reflect a bias in favor of the status quo. See *supra* notes 128–58 and accompanying text.

191. See BORN, *supra* note 1, at 7–63; DEREK ROEBUCK, ANCIENT GREEK ARBITRATION *passim* (2001); DEREK ROEBUCK & BRUNO DE LOYNES DE FUMICHON, ROMAN ARBITRATION *passim* (2004); DEREK ROEBUCK, EARLY ENGLISH ARBITRATION *passim* (2008); DEREK ROEBUCK, MEDIATION AND ARBITRATION IN THE MIDDLE AGES: ENGLAND *passim* (2013); DEREK ROEBUCK, THE GOLDEN AGE OF ARBITRATION: DISPUTE RESOLUTION UNDER ELIZABETH I *passim* (2015); Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN ST. L. REV. 929, 943–45 (2004). Although some commentators count arbitration in the United States as beginning with the enactment of the Federal Arbitration Act in 1925, the procedure has existed in the United States since colonial days. See Symposium, *Introduction: Beyond the FAA: Arbitration Procedure, Practice, and Policy in Historical Perspective*, 2016 J. DISP. RESOL. 1, 1–5 (2016).

192. Willis, *supra* note 47, at 1157; see also Maurits Barendrecht & Berend R. de Vries, *Fitting the Forum to the Fuss with Sticky Defaults: Failure in the Market for Dispute Resolution Services?*, 7 CARDOZO J. CONFLICT RESOL. 83, 83–84 (2005); Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1647 (2014) (discussing sticky default rules in the context of behavioral law and economics theory, which is a growing field that emphasizes the combination of politics and psychology); Anne Van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT’L L.J. 421, 428 (2014); Willis, *supra* note 47, at 1157–58 (“The magnetism of defaults is believed to be so strong that it has been called the ‘iron law of default inertia.’”).

193. Willis, *supra* note 47, at 1157 n.3.

194. *Id.* at 1157.

“stickiness” is affected by both background conditions and mechanisms meant to increase or decrease the power of the default.<sup>195</sup> Indeed,

mechanisms that give defaults power can be divided into three classes: transaction barriers, judgment and decision biases, and preference formation. “Transaction barriers” are obstacles to choosing options that reflect preferences, even when options and preferences are easily understood. “Judgment biases” skew perception and appraisal of options. “Decision biases” are reactions to uncertainty about options or preferences. . . . In any particular situation, one or more of these three classes of mechanisms may make defaults powerful for different individuals to varying degrees depending on, for example, how clearly the individual understands her options and her preferences.<sup>196</sup>

International arbitration has benefitted significantly from the removal of a number of transaction barriers that previously existed as a matter of national and international law.<sup>197</sup> For example, the adoption of various international treaties<sup>198</sup> and model laws,<sup>199</sup> supplemented by certain pro-arbitration policies,<sup>200</sup> have helped make international arbitration the dispute resolution mechanism of choice among those who work routinely in international commercial and investment law.<sup>201</sup> Nevertheless, the status quo bias reinforces the stickiness of litigation as a dispute resolution default among those who have little or no experience with international arbitration.<sup>202</sup> Indeed, some of the most strident critics of investment arbitration are those who first learned about it during negotiations over

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195. *Id.* at 1161 (“Background conditions that contribute to the traction of defaults are a confusing decision environment and preference uncertainty.”).

196. *Id.* at 1161–62.

197. *See* BORN, *supra* note 1, at 63–70. Interestingly, the concept of a transaction barrier can be used to describe the legal background involving international commercial and investment mediation, which is not as supportive as it is for international arbitration and which has led some commentators to call for additional measures to remove the remaining transaction barriers. *See* S.I. Strong, *Beyond International Commercial Arbitration? The Promise of International Commercial Mediation*, 45 WASH. U. J.L. & POL’Y 11, 32 (2014). These calls have led UNCITRAL to take up a proposal from the U.S. Department of State regarding a new treaty in this area of law. *See* Rep. of Working Grp. II on the Work of its Sixty-Sixth Session (New York, 6–10 February 2017), ¶ 13, U.N. Doc. A/CN.9/901 (Feb. 16, 2017) [hereinafter WGII Report]; Strong, *Rationality*, *supra* note 23, at 1985.

198. *See* Organization of American States, Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, May 8, 1979, O.A.S.T.S. No. 51, 1439 U.N.T.S. 87 [hereinafter Montevideo Convention]; Inter-American Convention on International Commercial Arbitration of 1975, Aug. 15, 1990, Pub. L. No. 101-369, 104 Stat. 448 (1990) [hereinafter Panama Convention]; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID Convention]; European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 364 [hereinafter European Convention]; New York Convention, *supra* note 118.

199. *See, e.g.*, UNCITRAL Model Arbitration Law, *supra* note 118.

200. The pro-arbitration policy is particularly strong in international matters. *See* Final Act of the United Nations Conference on International Commercial Arbitration, U.N. Doc. E/CONF.26/L.62 (June 6, 1958) (describing intent of UNCITRAL regarding international arbitration); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (noting arbitration agreements should be enforced in the international realm, “even assuming that a contrary result would be forthcoming in a domestic context”).

201. *See* BORN, *supra* note 1, at 73, 122; Born, *Generation*, *supra* note 55, at 827; Sergio Puig, *No Right Without a Remedy: Foundations of Investor-State Arbitration*, 35 U. PA. J. INT’L L. 829, 841 (2014).

202. *See* Willis, *supra* note 47, at 1165 (framing the status quo bias as a combination of judgment and decision biases). Lack of expertise regarding a particular issue increases decisional uncertainty and thus strengthens the status quo bias. *See id.* at 1161–62. Interestingly, arbitration may already be or may be becoming a sticky default in international commercial and investment settings. *See infra* notes 225–41 and accompanying text.

“mega-regional” treaties like the TPP and the Transatlantic Trade and Investment Partnership (“TTIP”),<sup>203</sup> even though investment arbitration has been in existence for decades and has developed into an extremely beneficial mechanism for states.<sup>204</sup> Nevertheless, some of these latecomers speak of investment arbitration as if it were some sort of newly emergent phenomenon that threatens the very pillars of sovereignty and democracy.<sup>205</sup>

Other factors affect stickiness as well. For example, the pull toward the default increases the longer the provision has endured, the greater the perceived departure from the established norm, and the higher the number of alternatives.<sup>206</sup> Thus, the long-standing nature of the litigation default increases its stickiness, as does the proliferation of alternative means of dispute resolution in modern jurisprudence.<sup>207</sup>

One issue that remains open is whether and to what extent international arbitration can be considered to depart from the established norm. On the one hand, international arbitration is very similar to international litigation in terms of its procedural complexity and formality.<sup>208</sup> Rather than reflecting the type of “second class” justice that is commonly associated with domestic arbitration, international arbitration has been referred to as “‘Rolls Royce’ justice” due to its high degree of sophistication and individualization.<sup>209</sup> However, international arbitration can be seen as departing from the litigation norm as a result of (1) arbitration’s status as a private, party-controlled mechanism rather than a public, state-controlled device and (2) arbitration’s unique blend of common law and civil law procedures.<sup>210</sup> As a result, these features may strengthen the intensity of the pull toward litigation as the default norm.

203. See Alexander W. Resar, *The Evolution of Investor-State Arbitration in the Trans-Pacific Partnership Agreement*, 34 BERKELEY J. INT’L L. 159, 159–60 (2016) (noting conclusion of TPP and President Obama’s intent to sign); *Transatlantic Trade and Investment Partnership (TTIP)*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/ttip> (last visited Jan. 18, 2018). For example, the debate about the need to establish a new judicial entity—the Investment Court System—for use in the TTIP between the United States and the European Union was particularly troubling to industry insiders. See Daniele Gallo & Fernanda G. Nicola, *The External Dimension of EU Investment Law: Jurisdictional Clashes and Transformative Adjudication*, 39 FORDHAM INT’L L.J. 1081, 1087 (2016); European Commission Press Release, *supra* note 173. The future of the TPP, TTIP, and other investment treaties is in jeopardy under the new administration. See Minxin Pei, *A Trade War with China is Likely Under Donald Trump*, FORTUNE (Nov. 10, 2016), <http://fortune.com/2016/11/10/donald-trump-china-trade/>.

204. See Born, *Generation*, *supra* note 55, at 838–44.

205. See *id.* at 842–44; Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT’L L. 775, 778–79 (2008) [hereinafter Choudhury, *Recapturing*].

206. See Varol, *supra* note 135, at 940–41.

207. See Samuelson & Zeckhauser, *supra* note 47, at 8 (“The more options that were included in the choice set, the stronger was the relative bias for the status quo.”) (emphasis omitted). The world of international dispute resolution has become increasingly diversified in the post-World War II period. See Born, *Generation*, *supra* note 55, at 778–90; Gerhard Wagner, *The Dispute Resolution Market*, 62 BUFF. L. REV. 1085, 1095 (2014) (“The real market to analyze is not the market for judicial services but, more broadly, the market for dispute resolution services. That includes not only the settling of disputes via arbitration, but also the many varieties of alternative dispute resolution, such as expert proceedings, conciliation, mediation, etc.”).

208. See BORN, *supra* note 1, at 2126 (“[P]articularly in major matters, elements of the procedures of an international arbitration can closely resemble proceedings in the commercial courts of some major trading states.”).

209. RUSSELL J. WEINTRAUB, INTERNATIONAL LITIGATION AND ARBITRATION: PRACTICE AND PLANNING 455 (1994); see also BORN, *supra* note 1, at 2129.

210. See BORN, *supra* note 1, at 2125–26.

Judicial proceedings may also enjoy a “first-mover advantage” as a result of the widespread perception that litigation constitutes the first formal means of resolving legal disputes.<sup>211</sup> The “first-mover advantage” is related to the concept of an “anchor” that can be used to skew later decision-making by framing all alternatives as relative to the anchor.<sup>212</sup> “Anchoring bias” is well documented in the legal and psychological literature and is similar, in ways, to the status quo bias.<sup>213</sup>

Research has suggested that the first-mover advantage can be both pronounced and long-lasting, particularly in cases where first movers achieve “a technological edge over competitors,” “preempt later arrivals’ access to scarce assets,” or “build an early base of customers who would find it inconvenient or costly to switch to the offerings of later entrants.”<sup>214</sup> Each of these criteria could be said to apply to litigation, although the gap may be narrowing, particularly with regard to technical expertise, since international arbitrators are widely believed to have considerable skills in resolving commercial and investment disputes.<sup>215</sup>

While it may seem unusual to frame the world of international dispute resolution as a competitive market, such characterizations are consistent not only with theoretical paradigms advanced by law and economics scholars, but also with observable phenomena, including ongoing battles within the field for jurisdictional, institutional, and individual supremacy.<sup>216</sup> Scholars have also described the relationship between litigation and arbitration in market terms<sup>217</sup> and have recognized various supply-side distortions arising out the protective environment surrounding litigation.<sup>218</sup>

Research also suggests that litigation may benefit from the first-mover effect as a result of the judiciary’s institutional role as a constitutional and political

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211. Fernando Suarez & Gianvito Lanzolla, *The Half-Truth of First-Mover Advantage*, HARV. BUS. REV. 121, 122 (2005) (“A first-mover advantage can be simply defined as a firm’s ability to be better off than its competitors as a result of being first to market in a new product category. . . . Although no advantage lasts forever, firms that succeed in building durable first-mover advantages tend to dominate their product categories for many years . . .”).

212. See Varol, *supra* note 135, at 947. In fact, arbitration has existed in parallel with litigation for centuries. See *supra* note 191 and accompanying text.

213. See Dan Orr & Chris Guthrie, *Anchoring, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 OHIO ST. J. ON DISP. RESOL. 597, 598 (2006) (“[A]nchoring has a significant impact on negotiators and negotiation outcomes.”); Varol, *supra* note 135, at 948.

214. Suarez & Lanzolla, *supra* note 211, at 122.

215. See BORN, *supra* note 1, at 73. Some of these qualities could also be used to explain why international arbitration has been preferred to international mediation. See *id.* at 73–93; see also *infra* notes 225–41 and accompanying text.

216. See Christopher R. Drahozal, *Innovation in Arbitration Law: The Case of Delaware*, 43 PEPP. L. REV. 493, 494 (2016); Wagner, *supra* note 207, at 1132–34.

217. See Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 41 (1999) (“Arbitration developed in a free market, competing with courts for an increasing share of the supply of dispute resolution.”); Gilles Cuniberti, *Beyond Contract – The Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT’L L.J. 417, 419 (2009); Nikolaos Lavranos, *National Courts, Domestic Democracy, and the Evolution of International Law: A Reply to Eyal Benvenisti and George Downs*, 20 EUR. J. INT’L L. 1005, 1010 (2009); Spears, *supra* note 152, at 53; Wagner, *supra* note 207, at 1095.

218. Barendrecht & de Vries, *supra* note 192, at 83–84 (writing in the domestic context) (“[P]roviders of default dispute resolution services, such as courts and lawyers, are effectively shielded from competition . . .”).

matter. For example, Ozan Varol has argued not only that “[t]he prevailing orthodoxies in the existing constitutional order occupy an ‘almost monopolistic position’” in terms of status and influence but that “[t]he repeated application of existing constitutional provisions elevates them to a higher position” so that “[c]ompeting constitutional norms may thus be perceived as presumptively undesirable.”<sup>219</sup> This phenomenon suggests that international arbitration suffers in comparison to litigation in terms of legitimacy because of the heightened respect given to judicial proceedings in most constitutional regimes.<sup>220</sup>

This hypothesis may be particularly compelling given the international nature of the analysis, for although international arbitration is also part of the U.S. constitutional framework by virtue of an extensive web of treaties which are considered the law of the land pursuant to the Supremacy Clause,<sup>221</sup> numerous scholars have suggested that the United States does not grant a great deal of respect to international law as a matter of practice.<sup>222</sup> Interestingly, international arbitration may be given a higher degree of respect in those countries that adopt a monist (rather than dualist) approach to international law<sup>223</sup> or in those countries that provide specific protections for arbitration as a matter of constitutional law.<sup>224</sup>

### B. Arbitration as the Dispute Resolution Default

Although litigation represents the legal default for resolving legal disputes, parties’ overwhelming preference for arbitration in international commercial and investment matters could be taken to suggest that international arbitration is in the process of overcoming the status quo bias to become the default as a matter of practice, at least among those who are actually engaged in international commerce and investment.<sup>225</sup> However, the extensive and ongoing criticism of international arbitration from journalists, judges, and laypersons suggests that the current situation does not reflect a universal shift toward a new default.<sup>226</sup> In-

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219. Varol, *supra* note 135, at 939.

220. See U.S. CONST. art. III, §§ 1–2; see also *infra* notes 242–307 and accompanying text.

221. See U.S. CONST. art. VI; ICSID Convention, *supra* note 198; New York Convention, *supra* note 118; Panama Convention, *supra* note 198; 2012 U.S. Model Bilateral Investment Treaty, <http://www.state.gov/documents/organization/188371.pdf>; S.I. Strong, *Monism and Dualism in International Commercial Arbitration: Overcoming Barriers to Consistent Application of Principles of Public International Law*, in BASIC CONCEPTS OF PUBLIC INTERNATIONAL LAW: MONISM & DUALISM 547, 555–68 (Marko Novakovic ed., 2013) [hereinafter Strong, *Monism and Dualism*].

222. See David H. Moore, *Constitutional Commitment to International Law Compliance?*, 102 VA. L. REV. 367, 368–72 (2016); D.A. Jeremy Telman, *A Monist Supremacy Clause and a Dualistic Supreme Court: The Status of Treaty Law in the United States*, in BASIC CONCEPTS OF PUBLIC INTERNATIONAL LAW 571, 574–78, 585–89.

223. See Strong, *Monism and Dualism*, *supra* note 221, at 555–68.

224. See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 116 (“Individuals may be entrusted temporarily with the function of administering justice as jurors in criminal proceedings, as mediators or as arbitrators authorized by the parties to issue verdicts in law or in equity in [sic] the terms defined by the law.”); see also *id.* art. 29 (involving due process); see also Strong, *Constitutional*, *supra* note 50, at 86–87, 93, 99–105 (discussing constitutional actions involving arbitration); Strong, *Monism and Dualism*, *supra* note 221, at 555–68.

225. See *supra* notes 2–3 and accompanying text.

226. See *supra* notes 6–7 and accompanying text.



stead, the preference for international arbitration may simply reflect the viewpoint of a particular epistemic group made up of specialists in international arbitration.<sup>227</sup>

It is also possible to describe this phenomenon in psychological terms involving the status quo bias. According to behavioral economists, the act of choosing a particular alternative raises its value in the eyes of the decision-maker through a process known as “preference formation.”<sup>228</sup> “All things equal, this induces a bias toward retaining the choice in subsequent decisions even under changed conditions.”<sup>229</sup> As a result, a positive initial experience can lead to the creation of a new status quo bias in favor of that alternative.<sup>230</sup> This phenomenon, which has been observed through empirical studies,<sup>231</sup> would not only explain the marked preference for international arbitration within the international dispute resolution community, but would also explain many of the difficulties currently experienced by those advocating the increased use of mediation and conciliation in international commercial and investment disputes.<sup>232</sup>

Support for international arbitration is so high within the arbitral community that some people have recommended making arbitration the legal default for cross-border business disputes. For example, Gary Born has proposed adoption of an international treaty making arbitration the default for international commercial disputes and has even drafted model language for states interested in pursuing this type of mechanism.<sup>233</sup> Other commentators have suggested similar initiatives at the national level, either through the creation of legislation establishing arbitration as the default in international commercial cases<sup>234</sup> or

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227. See S.I. Strong, *Clash of Cultures: Epistemic Communities, Negotiation Theory and International Lawmaking*, 50 AKRON L. REV. 495, 502 [hereinafter Strong, *Epistemic Communities*] (discussing the extraordinarily large number of conferences involving international arbitration).

228. Willis, *supra* note 47, at 1161–62; see also Samuelson & Zeckhauser, *supra* note 47, at 40.

229. Samuelson & Zeckhauser, *supra* note 47, at 40.

230. See *id.*; Willis, *supra* note 47, at 1169–70.

231. Lisa Bernstein raised the possibility of a status quo bias in favor of certain types of domestic arbitration in the early 1990s. See Korobkin, *Bias*, *supra* note 48, at 621 n.43.

232. See Strong, *Epistemic Communities*, *supra* note 227, at 514 (noting difficulties in negotiating a new instrument on international commercial conciliation due to the influence of different epistemic groups in international dispute resolution); Strong, *Rationality*, *supra* note 23, at 2009, 2063 (noting the preference for international commercial mediation among those that had experience with the process); see also Samuelson & Zeckhauser, *supra* note 47, at 46 (discussing status quo bias involving public policy negotiations). UNCITRAL is currently drafting a new international instrument that may eliminate a number of the transaction barriers associated with international commercial mediation and conciliation. See WGI Report, *supra* note 197, ¶ 13; see also *supra* notes 194–201 and accompanying text. It is possible the new instrument could be made applicable in the investment context as well, if adopted in individual bilateral investment treaties (“BITs”).

233. See Draft Model Bilateral Arbitration Treaty, [https://www.wilmerhale.com/uploadedFiles/Shared\\_Content/Editorial/News/Documents/Draft-Model-BAT.pdf](https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/News/Documents/Draft-Model-BAT.pdf); Gary Born, BITS, BATS, and Buts: Reflections on International Dispute Resolution, 4, [https://www.wilmerhale.com/uploadedFiles/Shared\\_Content/Editorial/News/Documents/BITS-BATs-and-Buts.pdf](https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/News/Documents/BITS-BATs-and-Buts.pdf); see also Graves, *Litigation*, *supra* note 162, at 136 (calling for the arbitral community “to move beyond mere revisions of the New York Convention” and instead adopt “a new convention that fully recognizes arbitration as the default legal rule for resolution of international commercial disputes”).

234. See Cuniberti, *supra* note 217, at 487; Jack M. Graves, *Arbitration as Contract: The Need for a Fully Developed and Comprehensive Set of Statutory Default Legal Rules*, 2 WM. & MARY BUS. L. REV. 227, 233–34 (2011).

through the adoption of a “strong” version of negative *competence-competence*.<sup>235</sup> This latter suggestion would allow national courts to consider international arbitration to be the *de facto* choice of international commercial actors in the absence of a clear indication to the contrary.<sup>236</sup>

The preference for arbitration among specialists in international commercial and investment disputes is at least as strong as the preference for litigation among nonspecialists, which suggests the debate between the two camps will continue. While there are those who believe that policy-makers should take heed of the recommendations of relevant epistemic groups, particularly in areas (such as international arbitration) that require specialized technical knowledge,<sup>237</sup> the indifference to expert and empirical evidence in recent legal and political debates raises questions as to the role that subject-matter expertise will play in the future.<sup>238</sup> Furthermore, policy-makers are not themselves immune to unconscious influences such as the status quo bias.<sup>239</sup> Indeed, those who are part of the established power structure (such as legislators and judges) may be particularly worried by activities that appear to threaten the legitimacy and viability of their chosen belief systems and professional activities, and thus may be more prone to cognitive distortions that promote the continuation of the existing legal regime.<sup>240</sup> Thus, the power of the bias in favor of litigation may be the result not only of the psychological effect of the status quo but also of an equally forceful pull in favor of state-sanctioned activities *per se*.<sup>241</sup>

## V. LEGITIMACY AND THE SOVEREIGN PREROGATIVE

The final issue to consider involves the possible connection between the perceived legitimacy of international arbitration and what might be called “the sovereign prerogative.”<sup>242</sup> Courts and commentators have long recognized that

235. See Graves, *Litigation*, *supra* note 162, at 114. In its standard form, negative *competence-competence* describes the propensity of national courts to give arbitral tribunals the opportunity to decide questions of their own jurisdiction in the first instance. See BORN, *supra* note 1, at 1049. While most countries hold that arbitral tribunals have jurisdiction to decide their own jurisdiction (the positive notion of *competence-competence*, also known as *Kompetenz-Kompetenz*), some legal systems—most notably France—consider the only realistic way to give effect to *competence-competence* is to impose a negative duty on national courts to refuse to hear arbitration-related concerns until after the arbitration has run its course, except in the most extreme cases. See *id.* (noting negative *competence-competence* varies in its intensity, depending on the policy of the country in question).

236. See Graves, *Litigation*, *supra* note 162, at 114.

237. See Strong, *Epistemic Communities*, *supra* note 227, at 530–31.

238. See Strong, *Alternative Facts*, *supra* note 9, at 138–42.

239. See Samuelson & Zeckhauser, *supra* note 47, at 45.

240. See *supra* notes 142–45 and accompanying text (discussing social, reputational, and financial costs associated with challenging the status quo bias).

241. See George & Guthrie, *supra* note 147, at 547–48; Resnik, *Diffusing*, *supra* note 156, at 2806–07; Varol, *supra* note 135, at 939.

242. See William J. Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1085 (1994) (“The ‘*lex prerogativa*’ stood for that complex and varied set of rights, powers, and privileges belonging to the Crown as sovereign. Included in this bundle of prerogatives were powers (and obligations) to regulate and promote the domestic life of the kingdom.”).

states have an inherent interest in the proper adjudication of civil disputes, including those heard in arbitration.<sup>243</sup> For example, David Luban has suggested that litigation generates a variety of public goods, including the opportunity for nonlitigants to intervene in the action, identification and publication of facts important to the public, mechanisms for facilitating and enforcing settlements, creation of legal rules and precedents, and systemic transformation of various types of public and private institutions.<sup>244</sup> However, other commentators, most notably John Lande, have argued that most, if not all, of these goals can be attained through means other than litigation.<sup>245</sup>

Even if states have an interest in the adjudication of private disputes, that does not necessarily mean that dispute resolution is or should be an exclusive function of the state. To the contrary, numerous authorities, including the U.S. Supreme Court, have recognized that private means of dispute resolution, including arbitration, are legitimate in a variety of contexts.<sup>246</sup> Questions therefore arise regarding the precise nature of the state interest in dispute resolution, particularly in cross-border commercial and investment cases, and what weight that interest should be given.<sup>247</sup>

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243. See, e.g., *Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cty.*, 480 U.S. 102, 113 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476–77 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (noting the importance of “the forum State’s interest in adjudicating the dispute” when considering questions of personal jurisdiction); William W. Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic*, 12 *ARB. INT’L* 137, 138–40 (1996); see also Vasil Marmazov & P.V. Pushkar, *Is There a Right to Fair Settlement of a Case by Means of Arbitration, as Guaranteed by the European Convention on Human Rights?*, 2 *L. UKR.* 52, 52–64 (2001), <http://eurolaw.org.ua/publications/ukrainian-journal-of-european-studies/5-2011/42-is-there-a-right-to-fair-settlement-of-a-case-by-means-of-arbitration-as-guaranteed-by-the-european-convention-on-human-rights>. There is, of course, a state interest in upholding parties’ contractual rights, which would affect the state interest in upholding arbitration. See U.S. CONST. art. I, § 10, cl. 1; *Eli Lilly Do Brasil, Ltda. v. Fed. Express Corp.*, 502 F.3d 78, 88–89 (2d Cir. 2007) (Meskill, J., dissenting); *Preferred Capital, Inc. v. Sarasota Kennel Club, Inc.*, 489 F.3d 303, 308 (6th Cir. 2007).

244. See David Luban, *Settlements and the Erosion of the Public Realm*, 83 *GEO. L.J.* 2619, 2622–29 (1995); see also Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 *OHIO ST. J. ON DISP. RESOL.* 241, 247–51 (1996).

245. See John Lande, *Symposium: How Much Justice Can We Afford?: Defining the Courts’ Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 *J. DISP. RESOL.* 213, 225–28 (2006).

246. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 160–61 (1978) (“This system of rights and remedies, recognizing the traditional place of private arrangements in ordering relationships in the commercial world, can hardly be said to have delegated to Flagg Brothers an exclusive prerogative of the sovereign. . . . [W]e do not consider a more detailed description of [New York law] necessary to our conclusion that the settlement of disputes between debtors and creditors is not traditionally an exclusive public function.”); BORN, *supra* note 1, at 130, 957. Most authorities conclude that the state has a special interest in criminal law matters due to the potential restrictions on a person’s liberty. See Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 *GEO. L.J.* 1, 8 (2005). However, the line between criminal law and civil law has become increasingly blurred, which raises questions about the applicability of various constitutional protections. See *id.* at 5; see also David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 *GEO. L.J.* 683, 684 (2006).

247. See Strong, *Section 1782*, *supra* note 92, at 352. Some commentators have suggested that the state interest in promoting commerce is the primary driving force in international commercial arbitration. See Loukas Mistelis, *Reality Test: Current State of Affairs in Theory and Practice Relating to “Lex Arbitri,”* 17 *AM. REV. INT’L ARB.* 155, 178 (2006) (suggesting commercial interests overcome state interests in “subjecting arbitration proceedings to national law.”); see also Strong, *Section 1782*, *supra* note 92, at 360 (“Some authorities have attempted to distinguish state interests in investment arbitration from those in international commercial arbitration on the basis of the underlying substantive law, claiming that the state interest in investment arbitration is or should be more pronounced because investment disputes involve important issues of public or regulatory law.”).

Most analyses regarding the state interest in dispute resolution are framed in general terms, with broad, sweeping statements about judicial efficiency<sup>248</sup> or the preservation of the fairness of the process.<sup>249</sup> However, these concerns cannot be used to oppose the legitimacy of international arbitration because empirical studies have shown that international arbitration provides a fair and efficient procedure that is equal to litigation in many national systems and superior to litigation in numerous others.<sup>250</sup>

One interesting theory that has not been extensively discussed in the literature involves a potential state interest in preserving constitutional institutions, which would include the judiciary.<sup>251</sup> This approach, which might be related to Burkean prudential concerns militating against major institutional change that may threaten traditional institutions, not only demonstrates the influence of the status quo bias in favor of litigation, it also suggests the possibility of an implied sovereign prerogative in dispute resolution.<sup>252</sup>

This proposition bears further analysis, since political theorists have long recognized the links between judicial jurisdiction and sovereign prerogative.<sup>253</sup> Indeed, the concept of state-sanctioned systems of justice as being superior to all others dates back to the medieval era and the concept of natural law and the divine right of kings.<sup>254</sup> Eventually, the evolution of constitutional democracy transformed the divine right of kings into the contemporary concept of legal legitimacy as a popular mandate.<sup>255</sup> Although some scholars have identified a certain amount of tension between democracy and popular sovereignty, given the

248. See Andrew Le Sueur, *Access to Justice Rights in the United Kingdom*, 5 EUR. HUM. RTS. L. REV. 457, 473 (2000).

249. See *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1076 (1991); John Hardwicke et al., *NCALJ Panel Discussion, ALJ Decisions – Final or Fallible?*, in 25 J. NAT'L ASS'N ADMIN. L. JUDGES 191, 199 (2005).

250. See *supra* note 23 and accompanying text.

251. See Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1444–47 (2013).

252. See Varol, *supra* note 135, at 939; Brad Masters, Comment, *Reconciling Originalism with the Father of Conservatism: How Edmund Burke Answers the Disruption Dilemma in N.L.R.B. v. Noel Canning*, 2013 BYU L. REV. 1061, 1073 (2013); see also Carl T. Bogus, *Rescuing Burke*, 72 MO. L. REV. 387, 390 (2007) (noting some legal commentators misread Edmund Burke).

253. Various commentators have considered judicial jurisdiction and the sovereign prerogative to resolve disputes from the perspective of political theory, although such analyses are no longer in vogue, given the current emphasis on law and economics. See, e.g., MARTIN H. REDISH, *FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY* 3 (1991) (“[T]he questions of *if* and *when* a federal court is to adjudicate an issue of constitutional or federal law—questions traditionally answered by the doctrines of federal jurisdiction—will implicate principles of American political theory as much as *how* those substantive legal issues are ultimately resolved.”); EUGENE V. ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* xvi (1962); Charles Silver, *American Political Theory Considered*, 60 GEO. WASH. L. REV. 562, 563 (1992) (“There is no disputing [the] claim that deep questions of constitutionalism, political theory, and jurisprudence arise when one thinks seriously about the federal law of jurisdiction. To identify the set of cases federal courts should hear, one must offer a normative account of the role of the federal courts.”).

254. See Delbrück, *supra* note 63, at 32–33; Philip B. Kurland, *Curia Regis: Some Comments on the Divine Right of Kings and Courts to Say What the Law Is*, 23 ARIZ. L. REV. 581, 582 (1981). For a useful discussion of the historical rise of judicial independence, see Scott D. Gerber, *The Court, the Constitution, and the History of Ideas*, 61 VAND. L. REV. 1067, 1089 (2008) (discussing the evolution of judicial independence as a matter of political theory from the early common law period).

255. See Kurland, *supra* note 254, at 582.

latter's monarchical roots,<sup>256</sup> conventional wisdom justifies the principle of popular sovereignty through reference to the social contract.<sup>257</sup> As a result, contemporary commentators routinely claim that “democratic institutions, including courts, ought to be preferred sites for effecting changes in law and public policy.”<sup>258</sup> Of course, as Carrie Menkel-Meadow has noted, arbitration is in many ways better situated than litigation to promote democratic values in dispute resolution, given the amount of autonomy and self-governance inherent in arbitration.<sup>259</sup>

Most contemporary analyses regarding the sovereign prerogative and litigation focus on whether judicial procedures promote and provide moral, legal, and political legitimacy.<sup>260</sup> However, some inquiries approach the issue from a structural perspective and consider the role played by various constitutional courts.<sup>261</sup> For example, theorists have argued that the elevation of constitutional courts over other national courts—and, in some cases, over the legislature<sup>262</sup>—can lead to a type of quasi-religious mysticism whereby constitutional judges—like kings and popes—are seen as incapable of error.<sup>263</sup> This phenomenon is reflected in language referring to the “cult of the court” (sometimes referred to

256. See Kornhauser, *supra* note 57, at 840 n.40 (citing STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* 19–26 (1996)).

257. See *id.* at 840 (“United States political theory and popular belief both hold that the government’s authority (that is, its legitimacy) rests on the consent of the governed. This consent derives from social contract, but it is not the traditional contract between the governing and the governed. Rather, the consent is amongst the people who agreed to form a government for their mutual benefit . . .”). Social contract theory has been discussed for centuries by such esteemed political philosophers as Hugo Grotius, Thomas Hobbes, Samuel von Pufendorf, John Locke, Jean-Jacques Rousseau, Immanuel Kant, and John Rawls. See Rubin, *supra* note 132, at 355–56.

258. Kevin E. Davis & Helen Herschkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 514 (2011); see also *supra* notes 63, 97 and accompanying text (noting democratic elements of legitimacy).

259. See Menkel-Meadow, *Deliberative Democracy*, *supra* note 125, at 18–19 (discussing Jürgen Habermas); see *supra* note 125 and accompanying text.

260. See also Carrie Menkel-Meadow, *The Lawyer’s Role(s) in Deliberative Democracy*, 5 NEV. L.J. 347, 348 (2004); Winston P. Nagan & Aitza M. Haddad, *Sovereignty in Theory and Practice*, 13 SAN DIEGO INT’L L.J. 429, 485–86 (2012) (discussing sovereignty and legal process as reflected in HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (1994)); Note, *Filling the Void: Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L.J. 164, 199 n.169 (1977) (“[P]rocess has replaced sovereign prerogative as a defining attribute of judicial power.”).

261. Each country structures its judiciary in its own unique manner. However, many civil law systems separate their courts by subject matter, with one branch devoted to constitutional matters. See PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 72–76, 78–79, 86–88 (3d ed. 2007).

262. The United States in particular is known for its system of “judicial supremacy,” which exists in contrast to the notion of parliamentary or legislative supremacy. See Janet L. Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?*, 82 TEX. L. REV. 1963, 1963–65 (2004). Some commentators have suggested that judicial supremacy provides the “emotional cement” that binds together different factions within a legal system. Max Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290, 1306 (1937).

263. See JOHN BRIGHAM, *THE CULT OF THE COURT* 63 (1987) (quoting WALTER MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 13 (1964)). U.S.-style judicial review is not limited to common law countries. For example, Germany also allows “*a posteriori* constitutional review of legislation,” although Germany does not appear to have a “cult of the court” similar to that in the United States. Elaine Mak, Book Note, *Judicial Transformations: The Rights Revolution in the Courts of Europe*, 6 EUR. CONST. L. REV. 163, 169 (2010) (reviewing MITCHELL LASSER, *JUDICIAL TRANSFORMATIONS: THE RIGHTS OF REVOLUTION IN THE COURTS OF EUROPE* (2009)). Conversely, the United Kingdom does not embrace U.S.-style judicial review (the term “judicial review” in England refers to a particular type of administrative review) but does hold judges in high regard. See Hiebert, *supra* note 262, at 1963–64.

as the “cult of the judge”<sup>264</sup> and the “oracular myth ‘of the judge as a high priest of justice with special talents for elucidation of ‘the law.’”<sup>265</sup> A number of judges have explicitly embraced this perception of judicial infallibility,<sup>266</sup> although others have explicitly recognized the limits of their role within the relevant constitutional structure.<sup>267</sup>

While the veneration of judges is to be expected in common law countries due to the role that “judge-made law” plays in those legal systems,<sup>268</sup> many civil law countries exhibit significant respect for the judiciary, even in legal systems (such as France) that have a heightened regard for democratic institutions.<sup>269</sup> However, these types of historical and cultural influences may affect national perceptions about the legitimacy of international arbitration. For example, France’s long-standing concerns about judicial excess may be the reason that France considers international arbitration to be an honorable and highly legitimate procedural device.<sup>270</sup>

In some ways, the link between the sovereign prerogative and national courts may be traced back to political theorists who have implicitly suggested that the state is the rightful arbiter of legal disputes through references to the notion of the public good.<sup>271</sup> For example, John Rawls has written that “[a]ll citizens should have the means to be informed about political issues” and “should be in a position to assess how proposals affect their well-being and which policies advance their conception of the public good.”<sup>272</sup> Adherents to this view might question whether international arbitration can be considered legitimate due to its use of private and confidential procedures.<sup>273</sup> However, Rawls specifically limited his statements to “political issues,” which are not implicated

264. See BRIGHAM, *supra* note 263, at 63. The phrase “cult of the robe” appeared in the United States as early as 1828. *Id.*

265. *Id.* at 63 (quoting WALTER MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 13 (1964)).

266. See Valerie Richardson, *Scalia Defends Keeping God, Religion in Public Square*, WASH. TIMES (Oct. 1, 2014), <http://www.washingtontimes.com/news/2014/oct/1/justice-antonin-scalia-defends-keeping-god-religio/> (“What can they do to me? I have life tenure.”) (quoting former U.S. Supreme Court Justice Antonin Scalia).

267. See *Brown v. Allen*, 344 U.S. 443, 540 (1952) (“We are not final because we are infallible, but we are infallible only because we are final.”) (Jackson, J., concurring), *superseded by statute*, 29 U.S.C. § 2254(d) (2012); BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921) (“The judge, even when he is free, is still not wholly free.”).

268. See, e.g., DWORKIN, *supra* note 80, at 407; Kurland, *supra* note 254, at 581.

269. See Cesare Pinelli, *The Populist Challenge to Constitutional Democracy*, 7 EUR. CONST. L. REV. 5, 13 (2011). French concerns about excessive judicial power date back to the French Revolution. See K. ZWEIGERT & H. KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* 89–90 (Tony Weir trans., 3d ed. 1998).

270. See BORN, *supra* note 1, at 1049 (discussing the French approach to negative *competence-competence*); Cuniberti, *supra* note 217, at 418; Pinelli, *supra* note 269, at 12. Although such issues are beyond the scope of the current Article, it would be interesting to consider how national perceptions about the traditional role of the judiciary align with views about the legitimacy of international arbitration.

271. See Stephen J. Ware, *Is Adjudication a Public Good? “Overcrowded Courts” and the Private Sector Alternative of Arbitration*, 14 CARDOZO J. CONFLICT RESOL. 899, 909–15 (2013). Political theorists sometimes refer to this as the “common good.” See Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839, 862 n.106 (2011).

272. JOHN RAWLS, *A THEORY OF JUSTICE* 225 (1971).

273. See BORN, *supra* note 1, at 89–90.

in many arbitral proceedings.<sup>274</sup> Furthermore, there are a variety of ways to provide the public with “the means to be informed about political issues” in arbitration, assuming that members of the public do indeed wish to take up that opportunity.<sup>275</sup>

The political conception of the public good (sometimes referred to as “a public good”) is sometimes confused with the notion of “public goods” in economic theory.<sup>276</sup> Although the two principles are similar, the economic approach to public goods involves “a supposedly value-neutral technique to coordinate economic activity between states and markets” while the political conception focuses on “a normative standard to evaluate the justice of legal arrangements that make up the state polity.”<sup>277</sup> However, the two principles can be construed in a harmonious manner for purposes of the current discussion, since law and economics scholars often characterize litigation as a type of “public goods,”<sup>278</sup> which is consistent with the political notion that the public has both a right and an interest in having disputes heard in a public forum.

Some scholars go even further and argue that procedural law in general constitutes public goods.<sup>279</sup> However, it is unclear whether this claim relates to a particular aspect of civil or criminal procedure or to the overarching structure of the judiciary.<sup>280</sup> Other interpretive problems arise when consequentialist theories, such as those involving law and economics, are applied to questions of procedure, since procedural law values fairness as much as it does efficiency, which is the primary concern of the law and economics movement.<sup>281</sup> Indeed, reliance on theories requiring the maximization (or at least optimization) of efficiency is

274. See RAWLS, *supra* note 272, at 225. Critics tend to question the legitimacy of investment arbitration more than international commercial arbitration precisely because of the political aspects of the former proceedings. See *supra* note 110 and accompanying text (noting the quasi-public nature of investment arbitration).

275. For example, anecdotal reports suggest that relatively few people take the opportunity to attend open hearings in the investment arbitration context. See *supra* note 113 and accompanying text (regarding livestreaming).

276. See Daniel Augenstein, *To Whom It May Concern: International Human Rights Law and Global Public Goods*, 23 *IND. J. GLOBAL LEGAL STUD.* 225, 226–27 (2016).

277. *Id.*

278. See Davis & Herschkoff, *supra* note 258, at 514; George & Guthrie, *supra* note 147, at 555–56 (“[T]he justice system appears to be a pure public good because the courts resolve disputes peacefully and articulate legal rules that enable people to order their lives, [which leads to] benefits (or output) [that] are nonexcludable and nonrival. . . . [Courts] are not purely public [goods because some benefits inure to individuals and are thus] . . . inherently divisible and rival.”) Pure public goods may be “consumed by many actors without reducing the benefits to any one actor.” Davis & Herschkoff, *supra* note 258, at 514.

279. See André Nollkaemper, *International Adjudication of Global Public Goods: The Intersection of Substance and Procedure*, 23 *EUR. J. INT’L L.* 769, 777 (2012).

280. See Strong, *Procedural Choice*, *supra* note 102, at 1052 (“Although the notion of a state procedural prerogative dominated the jurisprudential landscape for many years, commentators have recently identified a possible distinction between the law relating to litigation procedures and the law relating to judicial organization.”).

281. See Owen M. Fiss, *The Death of the Law*, 72 *CORNELL L. REV.* 1, 5 (1986) (“[T]he efficiency hypothesis rests largely on a normative assumption. . . . Such a normative assumption cannot . . . save an enterprise that purports to be descriptive and predictive. . . .”); Michael I. Swygert & Katherine Earle Yanes, *A Unified Theory of Justice: The Integration of Fairness into Efficiency*, 73 *WASH. L. REV.* 249, 261 (1998) (noting efficiency-based arguments are problematic in cases involving procedural rights because “[i]n many private relations, . . . courts and other decisionmakers have not allowed what would be the most efficient ‘Coasean’ result”); see also Gunnar Beck, *Legitimation Crisis, Reifying Human Rights and the Norm-Creating Power of the Factual: Reply to “Reifying Law: Let Them Be Lions,”* 26 *PENN. ST. INT’L L. REV.* 565, 579–80 (2008) (classifying law and economics as a consequentialist theory); Strong, *Procedural Choice*, *supra* note 102, at 1055–58.

somewhat questionable in the procedural context given the numerous inefficiencies that litigation purposefully embraces as a matter of dispute system design.<sup>282</sup> Although these practices may not always result in a savings of time or money, they are nevertheless necessary as a matter of procedural justice.<sup>283</sup>

The public interest in litigation, particularly litigation outcomes, may be highest in common law jurisdictions because of the role that judicial decisions play in the development of the law.<sup>284</sup> Certainly this rationale has been enunciated by various critics of arbitration,<sup>285</sup> based largely on the belief that arbitration's inability to create hard precedent reduces the legitimacy of the procedure.<sup>286</sup> However, such arguments lack persuasiveness, since they not only overlook the legitimacy of various unpublished and nonprecedential agency decisions,<sup>287</sup> but also ignore the diminished role of judge-made law in common law legal systems.<sup>288</sup>

The latter phenomenon is the result not only of common law countries' increasing reliance on statutes,<sup>289</sup> but also of the extremely large number of reported (and in some jurisdictions, unreported) decisions that are now available in most jurisdictions, which dilutes the value of any individual opinion.<sup>290</sup> Indeed, as Richard Posner has noted, it is now physically impossible to conduct a comprehensive analysis of every relevant precedent in any particular case,<sup>291</sup> a

282. See Janet Cooper Alexander, *Judges' Self-Interest and Procedural Rules: Comment on Macey*, 23 J. LEGAL STUD. 647, 647 (1994); Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L.J. 669, 723 (2010); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUD. 627, 627 (1994). For example, one of the United States' most hallowed procedural practices, U.S.-style discovery, is extremely inefficient. See Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845, 849 (2012); Schwartz, *supra* note 69, at 141.

283. See Alexander, *supra* note 282, at 647; Gensler, *supra* note 282, at 723; Macey, *supra* note 282, at 627.

284. See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 259 (1979); Ware, *supra* note 271, at 910.

285. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) [hereinafter Fiss, *Settlement*]; Lord Thomas of Cwmgiedd, *supra* note 6, at 2. See generally Ross & Yong, *supra* note 6.

286. See W. Mark C. Weidemaier, *Toward a Theory of Arbitral Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895 (2010) (“[A]rbitrators may not immediately enjoy unquestioned legitimacy as producers of law [but] . . . [this] discussion explores the process by which arbitrators might gain such legitimacy . . .”). But see Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357, 361–78 (2007) (suggesting arbitration already recognizes and creates certain forms of soft precedent).

287. See, e.g., *In re Three Eight Corp.*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,749 at 40,444 (June 16, 1993) (“[U]nless the reasoning of an initial decision [by an administrative law judge] is specifically adopted by the Commission, it does not represent Commission precedent.”); Margaret Gilhooly, 3 ADMIN. L.J. 53, 53 (1989) (“Not all agencies publish their decisions, however, nor do they make them available as a body of decisions or regard them as precedential.”).

288. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 5–7 (1985). This phenomenon can be explained by economic concepts of market saturation and diminishing returns. See J.B. Ruhl & Harold J. Ruhl, Jr., *The Arrow of the Law in Modern Administrative States: Using Complexity Theory to Reveal the Diminishing Returns and Increasing Risks the Burgeoning of Law Poses to Society*, 30 U.C. DAVIS L. REV. 405, 411–12 (1997).

289. See CALABRESI, *supra* note 288, at 5–7.

290. The distinction between reported and nonreported decisions can be significant. See J.J. GEORGE, *JUDICIAL OPINION WRITING HANDBOOK* 403–07 (4th ed., 2000).

291. See POSNER, *supra* note 82, at 76; see also Ryan C. Black et al., *Upending a Global Debate: An Empirical Analysis of the U.S. Supreme Court's Use of Transnational Law to Interpret Domestic Doctrine*, 103 GEO. L.J. 1, 14 (2014) (“[There are] diminishing returns to exhaustive documentation of every such source, especially when the goal is at least in part to write opinions that will be accepted as legitimate and binding.”).



factor that has led adherents of the law and economics movement to “question whether the benefits precedents confer on non-parties justif[ies] the public subsidy for adjudication”<sup>292</sup> and to suggest that certain types of claims should not be heard in court, but instead made subject to arbitration so as to free up valuable public resources for other purposes.<sup>293</sup>

Together, these elements suggest that linking the legitimacy of particular proceedings to the ability to generate binding precedent not only misstates various issues of substance, but also seeks to address a problem (*i.e.*, a shortage of judicial decisions) that does not in fact exist.<sup>294</sup> Furthermore, those who focus solely on precedent fail to address the underlying philosophical question of whether international arbitration, like litigation, can constitute a public good, as some commentators have claimed.<sup>295</sup> For example, if the public good of procedural law is associated with procedure *qua* procedure,<sup>296</sup> then no distinction can realistically be made between international litigation and international arbitration, given the high degree of formality and sophistication associated with both processes.<sup>297</sup> Indeed, if such a distinction can be made, international arbitration would likely prove superior, given its unique ability to harmonize elements drawn from both the common law and civil law legal traditions, its aptitude for

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This phenomenon requires judges and advocates to utilize their discretion when selecting which legal authorities to present, although that process is increasingly influenced not by finely honed legal acumen but by automated search mechanisms, which calls into question issues relating to the development of the common law. *See* Black et al., *supra*, at 14. (“Selective citation is . . . a reality . . . as there are always more potentially relevant precedents and authorities that could be cited and which may detract from the ultimate conclusion.”) (emphasis omitted); Ian Gallacher, *Forty-Two: The Hitchhiker’s Guide to Teaching Legal Research to the Google Generation*, 39 AKRON L. REV. 151, 153 (2006); Susan Nevelow Mart, *The Algorithm as a Human Artifact: Implications for Legal [Re]Search*, 109 L. LIB. J. 387 (2017) (breaking down the algorithmic effects of Westlaw, Lexis Advance, Fastcase, Google Scholar, and Casetext on legal research).

292. *Ware, supra* note 271, at 912.

293. *See* Lawrence, *Triage, supra* note 137, at 130; *see also id.* at 80–82 (“Hearings are a scarce resource in many administrative and judicial processes. . . . Our reliance on a one-size-fits-all approach to distributing scarce procedural protections among claimants makes sense [in only limited circumstances.]); *Ware, supra* note 271, at 915.

294. For example, international arbitration is often considered to generate various forms of soft precedent deemed to be a type of public goods. *See* Kaufmann-Kohler, *supra* note 286, at 361–78; Rogers, *Vocation, supra* note 107, at 1005 (“In a meaningful sense, international arbitration produces precedents that are public goods.”); Strong, *Reasoned Awards, supra* note 102, at 15 (“[A]rbitral awards are considered very important forms of persuasive authority and have been said to reflect a type of ‘soft precedent’ in certain types of international disputes (most notably those involving investment and sports arbitration) and in certain types of matters (most notably those involving arbitral procedure).”).

295. *See* Barnali Choudhury, *International Investment Law as a Global Public Good*, 17 LEWIS & CLARK L. REV. 481, 484 (2013) (claiming investment arbitration constitutes a global public good because “it provides an overarching legal framework that guides FDI [foreign direct investment] activity and enhances its predictability and . . . provides a mechanism by which FDI inflows benefit investors and states alike,” two features that also apply to international commercial arbitration); Choudhury, *Recapturing, supra* note 205, at 791 (discussing investment arbitration); Jennifer Kirby, *What Is an Award, Anyway?*, 31 J. INT’L ARB. 475, 475 (2014) (noting view of preeminent international commercial arbitrator who “considered international arbitration to be the key to world peace”); Rogers, *Vocation, supra* note 107, at 963.

296. *See* Nollkaemper, *supra* note 279, at 777.

297. *See* BORN, *supra* note 1, at 2127 (“[P]articularly in major matters, elements of the procedures of an international arbitration can closely resemble proceedings in the commercial courts of some major trading states.”); WEINTRAUB, *supra* note 209, at 455.

producing a widely enforceable outcome, and its capacity for facilitating Habermasian principles of autonomy.<sup>298</sup>

Proponents of litigation as a *public* dispute resolution device promoting *public* values through a *public* process have often denigrated arbitration as a second-class device suitable only for unimportant private disputes that do not affect political concerns.<sup>299</sup> However, as Carrie Menkel-Meadow has noted, the distinction between public and private is often “murky” in the world of dispute resolution,<sup>300</sup> particularly in light of the increasing privatization of judicial procedures.<sup>301</sup>

This is not to say that some academics have not adopted a bright-line approach to these types of concerns. For example, constitutional scholars such as Owen Fiss support judicial resolution of disputes based on the belief that the primary purpose of litigation “is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them.”<sup>302</sup> In his mind, “[a]djudication is nothing more or less than a social institution for interpreting and enforcing our public values. . . . [T]he social understanding . . . is not peculiarly the property of lawyers, but properly belongs to the body politic and can thus appropriately be considered ‘political.’”<sup>303</sup>

While this approach continues to find support from some segments of the scholarly, judicial, and popular communities,<sup>304</sup> Fiss was writing in the immediate aftermath of the Pound Conference. The Pound Conference triggered the move toward arbitration and other forms of alternative dispute resolution in the United States and thus reflected a time in which the status quo was seen as under particularly sharp attack, even though the Pound Conference was convened by U.S. Supreme Court Chief Justice Warren Burger, one of the most prominent figures of the legal establishment.<sup>305</sup> However, in the forty years since the Pound Conference, other commentators, such as Menkel-Meadow, have come to appreciate that blanket condemnation of particular types of dispute resolution as

298. See BORN, *supra* note 1, at 73–93 (listing benefits of international arbitration over international litigation); Menkel-Meadow, *Deliberative Democracy*, *supra* note 125, at 19.

299. See BORN, *supra* note 1, at 2127, 2129; WEINTRAUB, *supra* note 209, at 455; see also *supra* notes 272–75 and accompanying text (regarding Rawls).

300. Menkel-Meadow, *Repeat*, *supra* note 154, at 31–32.

301. This process was largely triggered as a means of responding to the challenges of arbitration. See Robert G. Bone, *Party Rulemaking: Making Procedural Rules Through Party Choice*, 90 TEX. L. REV. 1329, 1362–67 (2012); Davis & Herschkoff, *supra* note 258, at 520–64; Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 776–83 (2011); David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389, 392–95, 402–25; Matthew J.B. Lawrence, *Mandatory Process*, 90 IND. L.J. 1429, 1431 (2015); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 667–68 (2005); Strong, *Procedural Choice*, *supra* note 102, at 1034–35.

302. See Fiss, *Settlement*, *supra* note 285, at 1085; see also Owen M. Fiss, *The Law Regained*, 74 CORNELL L. REV. 245, 249 (1989) [hereinafter Fiss, *Regained*].

303. Fiss, *Regained*, *supra* note 302, at 249.

304. See *supra* notes 6–16 and accompanying text.

305. See William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277, 279–81 (1977) (noting the Pound Conference, convened by U.S. Chief Justice Warren Burger, called for the development of various means of alternative forms of dispute resolution, including arbitration); Fiss, *Settlement*, *supra* note 285, at 1073.

contrary to the public good is either unnecessary or inappropriate.<sup>306</sup> Instead, the better question is not whether one is “for or against” private dispute resolution, but “when, how, and under what circumstances” particular cases should be subject to something other than judicial adjudication, a process that has come to redefine “ADR” as involving “appropriate dispute resolution” rather than “alternative dispute resolution.”<sup>307</sup>

## VI. CONCLUSION

As the preceding suggests, the legitimacy of international arbitration can be quite contentious. However, this Article has identified a number of incontrovertible conclusions.

First, it is beyond cavil that discussions about the legitimacy of international arbitration are affected by the status quo bias.<sup>308</sup> Social scientists have empirically established the existence of the status quo bias in a variety of settings, and there is no reason to doubt that it affects the perception of international arbitration on an unconscious level.<sup>309</sup> Indeed, a simple heuristic test, discussed below, can be used to confirm this conclusion.

Second, litigation’s status as the default for resolving legal disputes has clearly affected popular, judicial, and scholarly perceptions about the legitimacy of international arbitration, even though the original choice architects may not have consciously intended to give litigation any type of preferential status.<sup>310</sup> Regardless of whether litigation is considered a penalty default, a policy default, or a gap-filling device, the simple fact that parties must contract out of judicial proceedings if they wish to engage in arbitration reinforces the view of litigation as the preferred, state-sanctioned norm.<sup>311</sup> Now that the effect of the default is known, however, there are a number of ways to eliminate or minimize the current state of affairs through various policy “nudges,” if there is sufficient political will to do so.<sup>312</sup>

Third, it appears likely that concerns about the legitimacy of international arbitration are based, at least to some extent, on a belief that the resolution of legal disputes falls within the sovereign prerogative of the state.<sup>313</sup> This perception may be affected by various cognitive distortions, such as the status quo bias or the first-mover effect, or by certain theoretical phenomena, such as those relating to legal defaults and the “stickiness” of constitutional institutions.<sup>314</sup> However, the view that litigation is the best or only means of resolving legal disputes is controverted by historical evidence that arbitration has operated in tandem

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306. See Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663, 2664–65 (1995) [hereinafter Menkel-Meadow, *Whose Dispute*]; see also Katherine R. Kruse, *Learning from Practice: What ADR Needs from a Theory of Justice*, 5 NEV. L.J. 389, 393 (2004) (discussing the evolution of Menkel-Meadow’s work).

307. Menkel-Meadow, *Whose Dispute*, *supra* note 306, at 2664–65.

308. See *supra* notes 128–58 and accompanying text.

309. See *supra* notes 128–58 and accompanying text.

310. See *supra* notes 159–241 and accompanying text.

311. See *supra* notes 159–241 and accompanying text.

312. See *supra* notes 233–36 and accompanying text.

313. See *supra* notes 242–307 and accompanying text.

314. See *supra* notes 128–58, 194–215 and accompanying text.

with litigation for millennia<sup>315</sup> and empirical evidence that contemporary forms of international arbitration proceed in a fair and evenhanded manner.<sup>316</sup>

The preceding pages have demonstrated the many ways in which the status quo bias, the effect of legal defaults, and the influence of a perceived sovereign prerogative are interconnected. However, all of these issues can be traced back to the status quo bias, since it may very well be possible—once the bias is overcome—to generate sufficient political will to alter the legal default rules, thereby changing the perception that the state has a sovereign prerogative in matters relating to the resolution of legal disputes.<sup>317</sup> The question therefore arises as to how to overcome the status quo bias.

Generally speaking, it is very difficult to overcome unconscious cognitive distortions like the status quo bias, since people often fail to recognize the existence and effect of those influences on their decision-making processes.<sup>318</sup> Indeed, Samuelson and Zeckhauser have suggested that “even if the [status quo] bias is recognized, there appear to be no obvious ways to avoid it beyond calling on the decision-maker to weigh all options evenhandedly.”<sup>319</sup> Thus, the best, if not only, way to remedy the status quo bias in favor of litigation is through education regarding the way in which these types of cognitive distortions operate,<sup>320</sup> a strategy that differs significantly from the current content-based approach to criticism of international arbitration.<sup>321</sup> Of course, as empirical tests have shown, individuals and institutions will likely resist the notion that they themselves are subject to the status quo bias, even if they agree that such a bias exists in others.<sup>322</sup>

Efforts to identify and overcome the status quo bias may be facilitated by a heuristic known as the “Reversal Test,” which philosophers Nick Bostrom and Toby Ord developed to determine whether the status quo bias is affecting a particular decision.<sup>323</sup> According to the Reversal Test:

When a proposal to change a certain parameter is thought to have bad overall consequences, consider a change to the same parameter in the opposite direction. If this is also thought to have bad overall consequences, then the onus is on those who reach these conclusions to explain why our position cannot be improved through changes to this parameter. If they are unable to do so, then we have reason to suspect that they suffer from status quo bias.<sup>324</sup>

In the current situation, international litigation reflects the status quo and changes to increase party autonomy through the use of international arbitration are considered to have negative consequences (*i.e.*, be in some way illegitimate).

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315. See *supra* note 191 and accompanying text.

316. See *supra* note 23 and accompanying text.

317. See Thaler, *supra* note 164, at 83 (noting that legal default rules are often created without conscious thought, but that change is possible).

318. See *supra* note 140 and accompanying text (discussing the “bias blind spot”).

319. Samuelson & Zeckhauser, *supra* note 47, at 9.

320. See Bassett, *supra* note 139, at 1572–73 (surveying authorities); Varol, *supra* note 135, at 940–41.

321. See *supra* notes 34–35 and accompanying text.

322. See Solan, *supra* note 42, at 10.

323. See Bostrom & Ord, *supra* note 43, at 664–65.

324. *Id.*

According to the Reversal Test, the existence of a bias in favor of litigation can be tested by asking whether it would be better to eliminate all autonomy in the resolution of international disputes and require all matters to be heard in court, thereby prohibiting international arbitration as well as international mediation and conciliation.<sup>325</sup> Given the current level of support for international arbitration among states (for example, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, more commonly known as the New York Convention, is the most successful commercial treaty in history, with 157 states parties<sup>326</sup>) and among parties (for example, up to 90% of all international commercial contracts currently include an arbitration provision,<sup>327</sup> with similar mechanisms in place in approximately 93% of the 3,000–5,000 international investment treaties now in effect<sup>328</sup>), it is safe to say that any attempt to eliminate or even curtail international arbitration would be considered disastrous by both users and policy-makers.<sup>329</sup> Thus, the Reversal Test strongly suggests the existence of an unconscious bias favoring litigation in international commercial and investment matters.

Bostrom and Ord recognize that the existence of a bias in favor of the status quo does not mean that the balance is inappropriately set.<sup>330</sup> Once the Reversal Test has demonstrated the operation of the status quo bias, however, the burden shifts to the proponents of the status quo to indicate why the existing regime should be maintained.<sup>331</sup>

It is beyond the scope of the current Article to identify and discuss the various ways the status quo in favor of litigation might be defended. However, it is necessary to note that proponents of litigation cannot simply refer to the pro-litigation or anti-arbitration arguments identified in the preceding pages to meet the burden identified in the Reversal Test, since the Reversal Test reverses the burden of proof and requires proponents of the status quo to show, by at least a preponderance of the evidence, that the current approach is superior to the proposed alternative.<sup>332</sup> That standard appears difficult to meet given the significant amount of empirical evidence supporting the legitimacy of international arbitration and the views of those epistemic communities that are best placed to provide expert analysis of the issue.<sup>333</sup>

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325. Mediation, conciliation and arbitration are all private (non-judicial) forms of dispute resolution based on party autonomy. See Strong, *Rationality*, *supra* note 23, at 1980 n.18.

326. See New York Convention, *supra* note 118, at 1; Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNCITRAL, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Jan. 18, 2018); see also *supra* notes 198–200 and accompanying text (discussing other international instruments supporting international arbitration).

327. See Sandrock, *supra* note 2, at 37.

328. See OECD, *supra* note 3, at 7, 17; Strong, *Mass Procedures*, *supra* note 3, at 300 n.271.

329. Attempts have been made to eliminate various forms of domestic arbitration, but, as previously noted, domestic arbitration is very different from international arbitration. See Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1311 (2011) (discussing 139 anti-arbitration bills introduced in Congress between 1995 and 2010); see also *supra* note 29 and accompanying text.

330. See Bostrom & Ord, *supra* note 43, at 665.

331. See *id.*

332. See *supra* notes 6–16 and accompanying text (discussing various challenges to the legitimacy of international arbitration).

333. See Strong, *Epistemic Communities*, *supra* note 227, at 502 (discussing epistemic groups in international dispute resolution); see also *supra* note 23 and accompanying text.

Notably, Bostrom and Orb's heuristic can be used to test other presumptions of procedural superiority in the field of international dispute resolution.<sup>334</sup> For example, the Reversal Test can be used to gauge whether there is a bias in favor of international arbitration and against international mediation and conciliation by specialists in international dispute resolution.<sup>335</sup>

Some may claim that even if litigation benefits from an unconscious bias in its favor, any attempt to change the status quo would be too costly. Bostrom and Orb have anticipated this type of concern and created a more complex heuristic, the Double Reversal Test, to account for transaction costs.<sup>336</sup> The Double Reversal Test states:

Suppose it is thought that increasing a certain parameter and decreasing it would both have bad overall consequences. Consider a scenario in which a natural factor threatens to move the parameter in one direction and ask whether it would be good to counterbalance this change by an intervention to preserve the status quo. If so, consider a later time when the naturally occurring factor is about to vanish and ask whether it would be a good idea to intervene to reverse the first intervention. If not, then there is a strong *prima facie* case for thinking that it would be good to make the first intervention even in the absence of the natural countervailing factor.<sup>337</sup>

Although it is beyond the scope of the current Article to consider fully the various ramifications of the Double Reversal Test, this mechanism provides a useful and objective response to arguments that certain procedural changes are too costly to adopt.<sup>338</sup>

Commentators have long suggested that international arbitration could benefit from increased use of interdisciplinary theoretical analysis,<sup>339</sup> and the preceding discussion has shown precisely why such studies are needed in this field. Rather than defend the legitimacy of international arbitration through repeated, but ultimately unpersuasive, empirical studies, the better approach may be for the arbitral community to understand why the procedure remains subject to attack. As the preceding discussion has shown, the problem is not with the mechanism itself but with the perception of the process. By relying on various types of social scientific research—particularly studies involving psychology, philosophy, political science, and economics—this Article has provided a new, and hopefully more fruitful, approach to the debate about the legitimacy of international arbitration.

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334. See Bostrom & Ord, *supra* note 43, at 679 (“The reversal heuristic is in principle applicable to any situation where we want to evaluate the consequences of some proposed change of a continuous parameter.”).

335. See *id.* at 664–65; see also *id.* at 676 (noting those who wish to determine the relative merits of more than two different dispute resolution alternatives (such as litigation, arbitration, and mediation) can use the Reversal Test by considering two options at a time); Strong, *Epistemic Communities*, *supra* note 227, at 503–04 (discussing a possible bias against international mediation and conciliation).

336. See Bostrom & Ord, *supra* note 43, at 673.

337. *Id.*

338. See *id.*

339. See Brekoulakis, *supra* note 131, at 746.