

# Influence in investor-state dispute settlement: a dynamic concept

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## ABSTRACT

Investor-state dispute settlement (ISDS) plays an increasingly important role in international trade resolution. The decisions have significant financial and in many cases policy implications, yet little is known about the formation of the ad-hoc panels and the decision-making process. Drawing on empirical evidence from interviews with key actors in the ISDS system, this article argues that influence plays a central role in both processes. The analysis further develops the framework for understanding influence in international decision-making to accommodate external factors (those visible to those appointing the decision-makers) and internal factors (those factors that become visible in the decision-making room). It draws our attention to the nuanced relationship and distinction between the characterization of influence in both contexts and poses a challenge to the traditional focus of appointments based on power and prestige which neglects the group decision-making context and the multifaceted construction of influence in this increasingly important method of adjudication.

## I. INTRODUCTION

[I]f parties had greater visibility on the process of deliberations and on the fact that what really matters is how generally competent on both levels, on the legal level and on the knowledge of the file level, [arbitrators are, and] that those are the things that really matter in the end, they might be choosing, they might be focusing a little bit less on clout and a little bit more on skills. (Arb 92)

Investor-state dispute settlement (ISDS) is currently the main path to dispute resolution for high-value claims between states and investors. The decisions reached have important social and economic impact but as this quotation highlights little is known about the conduct of deliberations and what really matters in the decision-making room. ISDS is a dispute resolution process under which foreign investors can address disputes with the government of the country in which they have invested using arbitration. The ISDS decision is made by a panel typically of three arbitrators; two party-appointed arbitrators and a chairperson agreed by both parties or appointed by an ISDS governing institution. The arbitrators are given authority by the governments and large corporations to engage in a process of collective decision-making to resolve their disputes. Unlike the court system, the ISDS system of international arbitration is a private process, though awards are often made public.<sup>1</sup> Further, while courts draw a panel from a limited cohort of judges, in ISDS, panels are constituted ad hoc in response to the dispute from a vast number of potential arbitrators from a range of fields and expertise. As such, panels rarely feature the same actors and the systematic analysis of patterns of individual panel decisions provides very little insight into the decision-making process.<sup>2</sup> Accordingly, very little is known about the collective decision-making process in this increasingly used method of dispute resolution.<sup>3</sup>

More, however, is known about the individuals who are appointed to this prestigious decision-making role. Quantitative research has mapped the key actors in the field and the connections between them to identify the individuals who possess power and influence in the international investment arbitration community.<sup>4</sup> This quantitative research builds on the earlier, and seminal, qualitative analysis by Dezalay and Garth which categorized the individuals dominating the arbitration field (from which many in the ISDS field hail). Dezalay and Garth, in 1996, identified two successive generations of arbitrators. The first generation of arbitrators in the 1960s, which Dezalay and Garth called the ‘Grand Old Men’, was formed by influential individuals who had a distinguished career outside international arbitration, typically as international trade lawyers, law professors, diplomats and judges. These ‘Grand Old Men’ were appointed to arbitration roles based on their prominent positions and reputation as sensible, balanced and trusted grandees.<sup>5</sup> In their previous careers, these men (as they typically were) had participated in the negotiation and making of international treaties and had contributed to the development of principles and policies of international law which they were then called to apply and interpret as arbitrators. Their distinguished background and role in the development of the founding principles ensured that the grand old men did not just resolve a commercial dispute as arbitrators; they were also ‘pronouncing the law’. However, the 1980s and 1990s witnessed a rapid growth in the popularity of international arbitration with more disputes, and importantly disputes involving bigger amounts, being resolved through arbitration. At the same time, the field of international business transactions was being dominated by Anglo-American law firms which used their power to impose the values of competition, expertise and specialization in the practice of arbitration.<sup>6</sup> The result of the combination of these two parallel developments, namely growth

<sup>1</sup> Awards are made public in the ICSID website (see here: <<https://icsid.worldbank.org/cases/case-database>> accessed 03.01.2023) and other databases, including the ITA (see here: <<https://www.italaw.com>> accessed 03.01.2023).

<sup>2</sup> This form of analysis is typically used in the United States when studying panel decision-making in the court system. See for example VA Hettinger, SA Lindquist and WL Martinek, *Judging on a Collegial Court: Influences on Federal Appellate Decision-Making* (U of Virginia P 2007).

<sup>3</sup> See D Behn and others, *PITAD Investment Law and Arbitration Database: Version 1.0*, Pluricourts Centre of Excellence (University of Oslo, 31 January 2019). In particular, the graph of ‘Cases over time’ shows the general upward trend in the number of cases.

<sup>4</sup> M Langford, D Behn and R Lie, ‘The Revolving Door in International Investment Arbitration’ (2017) 20 *Journal of International Economic Law* 301; S Puig, ‘Social Capital in the Arbitration Market’ (2014) 25 *European Journal of International Law* 387.

<sup>5</sup> Y Dezalay and BG Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (U of Chicago P 1996) 34.

<sup>6</sup> *ibid* 48

and expertise, was that arbitration moved from a relatively niche field that was practised on the side to a flourishing legal profession of international practice. In the course of arbitration's transition to an international specialized field, the grand old men were gradually joined by a second generation of arbitrators, which Dezalay and Garth called the 'young technocrats'.<sup>7</sup> Young technocrats emerged as international arbitration specialists, selling their professional services to the users of arbitration by contrasting their hard-working ethos to the less rigorous approach of the grand old men.<sup>8</sup> The influential status afforded to these individuals is a reflection of the needs of those who appoint arbitrators and the characteristics of the individual they seek to represent them. Dezalay and Garth thus in their seminal work identified and categorized influential individuals in the international arbitration field and highlighted the facets of individuals that are amplified by the appointments process.

Research which focuses on influential individuals is similarly seen in other legal decision-making contexts. Indeed, there exist several studies on influence in the context of national judiciaries, especially in the United States. These studies do not examine influence in the process of decision-making, rather, they have focused on assessing the influence of individual justices on legal developments, mostly justices in higher courts, using citations to a judge's opinions as a proxy of a judge's influence.<sup>9</sup> In this work, as with the work of Dezalay and Garth, little is known about the impact of influential individuals in the decision-making room.

Beyond the legal decision-making context, influence in collective decision-making processes has received greater attention. Indeed, the central role of influence in decision-making has been identified in 1973 by Cox and Jacobson who examined the factors that affected collective decision-making by representatives of large international organizations and governments. The authors identified that the capacity to exercise influence by individual actors was derived both from external factors (for example, position, status, reputation) and from their intrinsic personal characteristics (for example, charisma, administrative competence, negotiating ability and the ability to persist in intransigence).<sup>10</sup> These two facets of influence are intimately related, for example, personal characteristics could serve to either enhance or diminish the influence associated with position.<sup>11</sup> In this research, we use the theoretical framework developed by Cox and Jacobson to understand influence in the collective decision-making process at the heart of ISDS. Our study returns to the qualitative approach employed by Dezalay and Garth and builds on their research to understand the characteristics of arbitrators that affect influence.<sup>12</sup> This article draws on data gathered between 2019-2022 from in-depth interviews and surveys with 103 ISDS arbitrators, counsel and representatives of arbitration institutions which administer ISDS arbitrations as part of a multimethod interdisciplinary project exploring impartiality in ISDS. In this article, we shift the focus *from* the characterization of the individuals who are influential in the field *to* the nuanced issue of the characteristics of individuals which lead to influence in the collective decision-making process. The focus of our work thus moves from the analytical unit of the field<sup>13</sup> to the

<sup>7</sup> *ibid* 38.

<sup>8</sup> *ibid* 36. Building on Dezalay and Garth's work, Schultz and Kovacs identified a third generation of arbitrators: 'the Managers' who are appointed for a combination of their technical expertise in arbitration and their management skills. T Schultz and R Kovacs, 'The Rise of a Third Generation of Arbitrators?' (2012) 28(2) *Arbitration International* 161, 170.

<sup>9</sup> See here MN Kosma, 'Measuring the Influence of Supreme Court Justices' (1988) 27(2) *The Journal of Legal Studies* 333. D Klein and D Morrisroe, 'The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals' (1999) 28(2) *The Journal of Legal Studies* 371.

<sup>10</sup> RW Cox and others, *The Anatomy of Influence: Decision Making in International Organization* (Yale UP 1973) 19-20. Please note, the main authors of this book are RW Cox and HK Jacobson and we only refer to these authors in the text of this article.

<sup>11</sup> *ibid* 19.

<sup>12</sup> Puig (n 4); Langford, Behn and Lie (n 4).

<sup>13</sup> The analytical tool employed by Dezalay and Garth in their qualitative study is 'an international legal field'. Dezalay and Garth (n 5) 15.

narrower unit of the decision-making room, and from a focus on influential individuals to the characteristics of individuals which effect influence in the complex context of ISDS collective decision-making. The experiences, perceptions and understandings of these key actors draw attention to the difference between the characteristics amplified by the appointments process and the seemingly overlooked personal characteristics that also influence the final outcome. While external perceptions of influence ie status, position, do play a role in the influence exercised in the collective decision-making process, this research identified other important factors such as hard work, preparation, intelligence, communication and interpersonal skills that also mediate influence and may have a significant impact on the final outcome. This fuller understanding of the decision-making process identifies individual characteristics, beyond status and expertise, which influence decision-making process and should be considered in the appointments process.

This article will first introduce the theoretical and conceptual framework developed by Cox and Jacobsen to understand influence in collective decision-making by international organizations, followed by an exposition of the data collection and methodology adopted to interview key actors in ISDS. The analysis initially presents an exposition of how influence is understood in the decision-making room grounded in the interview data. It then moves to explore the relationship between the external facets of influential arbitrators (esteem, experience and expertise) identified by Dezalay and Garth and others as characteristics amplified by the traditional appointments process and influence in the decision-making room. The article then presents an analysis which highlights the more nuanced role of personal characteristics in creating influence in decision-making. Facets of the individual, although recognized by those that appoint as important, are often overlooked by the traditional appointments process. The discussion centres on the significance of this fuller understanding of the concept of influence in the decision-making process of ISDS, including its potential contribution to discussions on appointments and diversity.

### A. A brief introduction to ISDS

The system of ISDS decides cases of the highest importance, those where issues of public international law and national sovereignty are at stake.<sup>14</sup> It is built upon a network of investment treaties, created to provide an alternative forum for the resolution of investment disputes beyond the national courts and diplomatic measures previously used.<sup>15</sup> As such, the ISDS system was established primarily to offer a depoliticized dispute resolution process free from political pressures from the states hosting the investments and investors' home states.<sup>16</sup>

The precipitous growth in the number of ISDS cases has been accompanied by claims of a legitimacy crisis in the field.<sup>17</sup> Concerns centre on the outcomes of ISDS cases and include claims of pro-investor bias<sup>18</sup> and inconsistency in decisions.<sup>19</sup> More recently, disquiet has grown about a lack of diversity in the field and in particular the underrepresentation of

<sup>14</sup> G Kahale III, 'Rethinking ISDS' (2018) 44 Brooklyn Journal of International Law 11, 22.

<sup>15</sup> CA Rogers, 'The Politics of International Investment Arbitrators' (2013) 12 Santa Clara Journal of International Law 223, 226.

<sup>16</sup> AK Bjorklund, 'Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Repoliticization of International Investment Disputes' (2010) 21 (1-4) American Review of International Arbitration 211, 214.

<sup>17</sup> M Langford and D Behn, 'Managing Backlash: The Evolving Investment Treaty Arbitrator?' (2018) 29(2) The European Journal of International Law 551, 552 and 556.

<sup>18</sup> *ibid* 552; W Park, 'Arbitrator Integrity and Investor-State Disputes' in A Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (2009) (Brill 2010) 102; G Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration' (2016) 53 Osgoode Hall Law Journal 540, 559.

<sup>19</sup> S Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham Law Review 1521, s IV (The Inconsistent Decisions) at 1558; J Alvarez and G Topalian, 'The Paradoxical Argentina Cases' (2012) 6 World Arbitration & Mediation Review 491, 494.

arbitrators from developing countries and of women.<sup>20</sup> These various concerns have led to calls for the reform or removal of the ISDS system. Notably, the EU has proposed that an investment court system replace the current ISDS system<sup>21</sup> and this is one of the various reform options being considered by UNCITRAL in its detailed review of the ISDS system.<sup>22</sup>

International arbitrations are conducted by ad-hoc tribunals typically consisting of three arbitrators, one appointed by each side and the third, acting as president of the tribunal, appointed either by an agreement of the party-appointed arbitrators, sometimes with the participation of the parties themselves, or by the arbitral institution administering the process. Further, unlike the court system which draws from a limited cohort of judges to hear a case, ISDS panels are constituted from a vast and international cohort of potential arbitrators. In stark contrast to judges, there are no consistent formal standards for appointment and no defined pool for selection. Rather, as Dezalay and Garth's earlier qualitative work suggests, appointment is founded on individuals' symbolic capital in the field.<sup>23</sup> The panel is given authority by the parties to interpret the text of the relevant international treaty, apply fundamental principles of public international law, identify and understand the relevant facts and reach a collective decision. In every aspect, the individual decision-maker has significant power and it is the exercise of this power which underpins many of the central criticisms of ISDS. As one interviewee (who acts as an ISDS arbitrator) put it:

I think my critique, and I have a critique, is that it's too much power to be vested in three mortals who are unaccountable. That's my critique. I don't want, just as an example, I don't want, well, either one, [the name of a well-know arbitrator] or [the name of another well-known arbitrator], or any of the others, I don't personally want them to dispose of the GDP of a country. They're unaccountable, they're just not accountable. [...] For me, the core of the critique is this privatisation, the privatisation of decision-making on matters of such public importance. That doesn't mean, when I say that, that I think the public interest should triumph, okay? Simply that I think when there is that much at stake, with a public interest dimension, to have people, three individuals on the planet, three individuals on the planet, however they're selected. (Arb 73)

At the heart of these concerns are two elements; the private nature of the decision-making process and the influence that individuals may exercise on the final outcome. These concerns are amplified by the party-appointment system which elevates concerns of party bias and perceptions of unequal representation grounded in understandings of influential arbitrators. In response to these criticisms, empirical studies have tended to focus on identifying *who* exercises this decision-making power (and their status within the field)<sup>24</sup> and the *factors* which influence the exercise of their individual power, including various types of bias such as bias towards particular types of disputant<sup>25</sup> and bias towards the appointing party<sup>26</sup> including affiliation bias.<sup>27</sup>

<sup>20</sup> See for example Puig (n 4) 401; S Puig and A Strezhnev, 'The David Effect and ISDS' (2017) 28(3) *The European Journal of International Law* 731, 739.

<sup>21</sup> <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_15\\_6059](https://ec.europa.eu/commission/presscorner/detail/en/IP_15_6059)> accessed 03.01.2023

<sup>22</sup> See <[https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state)> accessed 03.01.2023 for details of the work of UNCITRAL'S Working Group III (Investor-state Dispute Settlement Reform).

<sup>23</sup> Dezalay and Garth (n 5) 18.

<sup>24</sup> See for example Langford, Behn and Lie (n 4); Puig (n 4) 418.

<sup>25</sup> See for example J Donaubaauer, E Neumayer and P Nunnenkamp, 'Winning or Losing in Investor-to-State Resolution: The Role of Arbitrator Bias and Experience' (2018) 26 *Review of International Economics* 892; Puig and Strezhnev (n 20).

<sup>26</sup> A Van Den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in MA Arsanjani and J Cogan (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff Publishers 2010).

<sup>27</sup> S Puig, 'Blinding International Justice' (2016) 56 *Virginia Journal of International Law* 647.

Central to these studies is the implicit recognition that the behaviour and attitudes of the individual members of the panel may influence the final outcome.<sup>28</sup> However, the focus on the individuals and the exercise of their individual decision-making power neglects the collective decision-making context of ISDS and the impact which that context may have on the exercise and effect of individual power. This article moves beyond the focus on the individual arbitrator to examine the complex interactions between individuals at the heart of collective decision-making. As such, and as has been called for, the unit of analysis moves from the individual arbitrator to the arbitral tribunal and the factors that underpin individual influence in that context.<sup>29</sup>

### B. Influence in collective decision-making

And that's where you close the door, and nobody knows what's going on and the three of them discuss it. (Arb 89)

The collective decision-making process of ISDS is rarely subject to scrutiny. As with judicial deliberations, the deliberations of the ISDS panel are conducted in private and are confidential.<sup>30</sup> In contrast to the judicial system, although there is an increase in the publication of awards, ISDS panel awards are not published as a matter of course and the consent of the parties is required for publication.<sup>31</sup>

The ad-hoc composition of panels and the lack of detailed procedural guidance results in varied processes of decision-making. But even in this context the panels share some general procedural norms. The decision-making processes are guided by the presiding arbitrator, who manages the process and the involvement and contributions of the party-appointed arbitrators. While the presiding arbitrator is at the centre of the decision-making process, the decision-making is collective and the panel co-construct a final award.<sup>32</sup> As such, the party-appointed members of the panel exert influence over and are influenced by the other panel members and it is the complex interplay of influence that underpins the final decision.

The centrality of influence in international decision-making has been the concern of Cox and Jacobson. Their seminal book published in 1973 developed a theoretical framework to understand the influence of individuals in collective decision-making in the context of international organizations. The authors highlighted the central importance of individuals' influence, defined as 'the modification of one actor's behaviour by that of another' on the final outcome.<sup>33</sup> With a central focus on the relational process of decision-making rather than the individual identity of the decision-makers, the authors constructed a framework to understand the role of influence.<sup>34</sup> In doing so, the authors do not suggest that a single individual is responsible for the final decision. Rather, in the context of collective decision-making the

<sup>28</sup> For example, Franck (n 19) 1521.

<sup>29</sup> Puig and Strezhnev call for further research 'taking the unit of analysis to be the Arbitral tribunal rather than the individual Arbitrator.' Puig and Strezhnev (n 20) ,756.

<sup>30</sup> See for example Rule 15(1) of the ICSID Convention Arbitration Rules which provides 'The deliberations of the Tribunal shall take place in private and remain secret.'

<sup>31</sup> L Nottage, 'Confidentiality Versus Transparency in International Arbitration: Asia Pacific Tensions and Expectations' (2020) 16(1) *Asia International Arbitration Journal* 1, 21. See also J Law and G Unuvar, 'Transparency and Participatory Aspects of Investor-State Settlement in the EU 'New Wave' Trade Agreements' (2019) 32 *Leiden Journal of International Law* 781, 798.

<sup>32</sup> Under certain institutional rules, the chair's role extends to being able to make the award alone, should a majority decision not be reached, though this has not occurred to date. art 32 (Making of the Award) of the International Chamber of Commerce's 2021 Arbitration Rules states 'When the Arbitral tribunal is composed of more than one Arbitrator, an award is made by a majority decision. If there is no majority, the award shall be made by the president of the Arbitral tribunal alone.'

<sup>33</sup> Cox and others (n 10) 3. Citing D Cartwright, 'Influence, Leadership, Control' in JG March (ed), *Handbook of Organizations* (Rand McNally 1965) 3. A similar definition of influence is also provided in the social psychology literature. See for example JRP French and BH Raven, 'The Bases of Social Power' in D Cartright (ed), *Studies in Social Power* (U of Michigan P 1959) 150, 152.

<sup>34</sup> Cox and others (n 10) 14.

influence of an individual can shape and modify the position of the other decision-makers and ultimately the final outcome.

Influence, the authors argue, is exercised in four dominant ways, each characterized by the types of actions of individual actors.<sup>35</sup> The four categories are initiators, vetoers, controllers and brokers.<sup>36</sup> Traditional understandings of ISDS decision-making place the key actors in all of these forms of influence. First, ‘controllers’ are those actors whose views must be taken into account, for example, because of their formal authority.<sup>37</sup> In the context of ISDS this is typically the presiding arbitrator who, as mentioned earlier, manages the process, the drafting of the award and ultimately has the decisive vote on the outcome of the case should the party-appointed arbitrators reach differing views.<sup>38</sup> This influence is conferred on the presiding arbitrator by the other actors but also may in part be a reflection of their previous interactions with that arbitrator in different roles.<sup>39</sup> Indeed, as Cox and Jacobson identify, those that seek to become controllers carefully cultivate their reputation for influence.<sup>40</sup> An aspiring presiding arbitrator may nurture such a reputation from performing a range of roles including party-appointed arbitrator, lawyer, academic, conference speaker and author. While the presiding arbitrator typically plays the role of controller, this role may also be assumed by the party-appointed arbitrators whose views may have to be taken into account, for example, because of particular expertise or a threat to dissent.<sup>41</sup> Secondly, the ‘initiator’ is the individual who takes the initiative.<sup>42</sup> In the context of ISDS, this role is characterized by the chair who, drawing on the panel deliberations, typically prepares the first draft of the award thereby shaping the award.<sup>43</sup> The initiator role is also played by the party-appointed arbitrator in taking the initiative to ensure that the appointing party’s case is heard and understood by the tribunal.<sup>44</sup> However, being an initiator does not automatically lead to influence. The influence of an initiative depends on others’ support or opposition to it.<sup>45</sup> The role of initiator may also be played, more subtly, by the well-prepared party-appointed arbitrator who is able to provide answers to questions posed by the chair. Thirdly, the ‘brokers’ are the consensus builders, the ‘go-betweens’<sup>46</sup> who acknowledge and engage with opposing positions to reach a negotiated position.<sup>47</sup> The chair is typically characterized as the broker, engaging with the party-appointed arbitrators and creating opportunities to build consensus.<sup>48</sup> Fourthly and finally, the ‘vetoer’ exercises or threatens to exercise their power to block initiatives.<sup>49</sup> These would be party-appointed arbitrators who are prepared to dissent rather than

<sup>35</sup> *ibid* 12.

<sup>36</sup> *ibid* 12.

<sup>37</sup> *ibid* 12.

<sup>38</sup> Langford, Behn and Lie note that the presiding arbitrator ‘possesses the most responsibility in case management, and exercises the most influence in the final decision.’ Langford, Behn and Lie (n 4) 304. Similarly, Rogers describes the chairperson as ‘a leader and tiebreaker on the tribunal’. C Rogers, *Ethics in International Arbitration* (OUP 2014) 7, 88.

<sup>39</sup> Cox and others (n 10) 13.

<sup>40</sup> *ibid* 13.

<sup>41</sup> One of the characteristics for which party-appointed arbitrators are chosen is their expertise in national law, subject area, or industry. See Rogers (n 38) 8.85. Further, in identifying the important structural feature which party-appointed arbitrators play in international arbitral tribunals, Rogers notes that ‘(t)he threat and potential reality of publishing a dissent is part of this process of challenge that promotes accountability.’ Rogers (n 38) 8.61.

<sup>42</sup> Cox and others (n 10) 12.

<sup>43</sup> As Born describes, chairpersons take the lead in drafting the awards. G Born, *International Commercial Arbitration* (Kluwer 2014) 2042. Further, Fortier states ‘In the event a consensus on certain issues is clear, the chairman will generally offer to prepare a first draft of an eventual award, for discussion at a later date.’ L Yves Fortier, ‘The Tribunal’s Deliberations’ in L Newmann and R Hill (eds), *The Leading Arbitrators’ Guide to International Arbitration* (2nd edn, Juris Publishing 2008) 479–80.

<sup>44</sup> Blackaby and others describe the party-appointed arbitrator’s role as ‘to make sure that the arbitral tribunal properly understands the case of the appointing party.’ N Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015) 4.30.

<sup>45</sup> Cox and others (n 10) 13.

<sup>46</sup> *ibid* 12.

<sup>47</sup> *ibid* 12.

<sup>48</sup> As Yves Fortier describes, ‘If there is disagreement between the two party-appointed arbitrators, the chairman will begin to earn his extra stipend.’ Yves Fortier (n 43) 479–80.

<sup>49</sup> Cox and others (n 10) 12.

adopt the shared position.<sup>50</sup> While we recognize the importance of dissent and that the threat of dissent has the potential to mediate influence, the literature, arguments and discussion are too extensive for this article and thus are not the focus of our article.<sup>51</sup> The focus of this article is on how actors' characteristics exert influence in the decision-making room.

Cox and Jacobson explain that the influence exerted by these various categories of actors is both intimately related to, and distinguishable from, power. They define power as capability; the aggregation of resources available to the actor.<sup>52</sup> Power may be converted into influence—indeed, in the arbitration context, Menon has identified that 'Power . . . is often most effective when channelled through the capillaries of influence'<sup>53</sup>—but that this is not necessarily so.<sup>54</sup> Whether or not power is converted into influence depends on the actor's level of concern for the particular matter.<sup>55</sup> Building on Cox and Jacobson's work, Arts and Verschuren elaborate that 'we can make a distinction between power as the general ability to influence, and influence as the realisation of a single effect.'<sup>56</sup> Further, Cox and Jacobson argue that the capacity to exercise influence is derived in part from power including the individual's position or office and this can be modified by 'personal characteristics of individuals [which] can enhance or diminish the power that would normally accrue to someone in their position.'<sup>57</sup> Thus the influence that each actor exercises is a facet of both the position they hold and the personal characteristics of the individual.

Among the personal characteristics identified by Cox and Jacobson which might enhance power and influence is the external characteristic of personal status (acquired outside of the organization in which they hold their position), for example, through wealth, achievement, election to an important office and having influence in an important community.<sup>58</sup> Similarly, Parsons acknowledges that being part of a collective, which he describes as 'being "one of us"', can enhance influence.<sup>59</sup> These external characteristics are those recognized by Dezalay and Garth as symbolic capital, and are those characteristics associated with appointment.<sup>60</sup> However, Cox and Jacobson also identified that power and influence can be enhanced by intrinsic personal characteristics including facets of personality such as 'personal charisma, ideological legitimacy, administrative competence . . . negotiating ability, and ability to persist in intransigence'.<sup>61</sup> These internal characteristics of the decision-maker mediate influence in the decision-making room and also have the potential to influence the final decision.

Drawing on Cox and Jacobson's framework, this article explores these facets (external and intrinsic or internal) of the individual decision-maker that may enhance or reduce influence on the other decision-makers and ultimately the final outcome in the ISDS context. In contrast to other papers in the ISDS field that focus on influential individuals, this article draws

<sup>50</sup> See Rogers (n 38) fn [41].

<sup>51</sup> A Sheppard and D Kapeliuk-Klinger, 'Dissents in International Arbitration' in T Cole (ed), *The Roles of Psychology in International Arbitration* (Kluwer 2017) 313, 320; A Jan van den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in MH Arsanjani, J Cogan, R Sloane and S Wiessner (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Brill 2010) 821; PJ Martinez-Fraga and HJ Samra, 'A Defence of Dissents in Investment Arbitration' (2012) 43 *The University of Miami Inter-American Law Review* 445, 450–63.

<sup>52</sup> Cox and others (n 10) 4. Parsons associates power in particular with office. T Parsons, 'On the Concept of Influence' (1963) 27(1) *The Public Opinion Quarterly* 37, 53.

<sup>53</sup> S Menon, 'Adjudicator, Advocate or Something in Between? Coming to Terms with the Role of the Party-Appointed Arbitrator' (2017) 34(3) *Journal of International Arbitration* 347, 361.

<sup>54</sup> Cox and others (n 10) 4.

<sup>55</sup> *ibid* 4.

<sup>56</sup> B Arts and P Verschuren, 'Assessing Political Influence in Complex Decision-Making: An Instrument Based on Triangulation' (1999) 20(4) *International Political Science Review* 411, 413.

<sup>57</sup> Cox and others (n 10) 19.

<sup>58</sup> *ibid* 20.

<sup>59</sup> Parsons (n 52) 51.

<sup>60</sup> Dezalay and Garth (n 5) 18.

<sup>61</sup> Cox and others (n 10) 20.



on the lived experiences of those who decide these important cases to examine the role of influence in the complex interactions at the heart of collective decision-making. In doing so, we explore the relationship between the understanding of influence in the appointments process and the more nuanced and complex effect of influence in decision-making.

## II. METHODS AND METHODOLOGY

The data presented in this article emerged as part of a large-scale empirical mixed-method project exploring how the concept of impartiality is constructed and employed in ISDS. The study draws on 96 interviews with key actors in the ISDS system.<sup>62</sup> The interviewees included: highly experienced ISDS arbitrators and more recent entrants to the field, sharing between them over 1200 ISDS arbitral appointments; senior representatives of institutions which administer ISDS arbitrations<sup>63</sup>; and senior barristers and lawyers from international law firms who regularly serve as counsel in ISDS arbitrations. Ethical approval was obtained from the Queen Mary University of London Ethics of Research Committee before approaching potential participants. The interviews were conducted from April 2018 to January 2022. Prospective participants were invited to take part in the research via e-mail. The response rate was 46.8% (220 invitations were sent and 103 invitations were accepted). Interviews were conducted, between 2019 and 2022, in person, via phone and Zoom and lasted an average of 36 minutes with the longest lasting 1 hour 7 minutes and the shortest 10 minutes. The interviews were transcribed and anonymized, and interview transcripts were coded using thematic analysis, a method for identifying, organizing, describing, analysing and reporting themes found within a data set.<sup>64</sup> During the analysis of the first 36 interviews, the importance of influence in the ISDS system emerged as a key theme (and continued to appear in the next round of analysis of a further 35 interviews). The early findings were further explored in a later and final round of interviews with a separate cohort of key actors ( $n = 25$ ). In these interviews, the understanding and enactment of influence were explored using prompt questions, for example: 'Some interviewees have explained that when choosing an arbitrator an important characteristic is the influence or "clout" which "their" party-appointed arbitrator will have on the other tribunal members and in particular the chair in the decision-making process. What in your view makes an arbitrator influential in the decision-making process? And conversely what in your view makes an arbitrator lack influence?' Although we had prompt questions, in the final round of interviews 8 of the 25 interviewees introduced the concept of influence themselves and this was further explored during the interview. The article thus adopts a grounded methodology, following the unexpected emergent theme of influence.

The data presented will use the anonymized attribution of Arb (Arbitrator) or Coun (Counsel). Arbitrator includes those who have served as arbitrators and may also have served as counsel and counsel are those who have appointed arbitrators but have not participated as an arbitrator.<sup>65</sup> The interviews were coded using thematic analysis, which provides a rich, detailed and complex account of influence in ISDS.<sup>66</sup>

<sup>62</sup> The participants were invited to an interview and to undertake a psychometric survey. Some participants did not complete both elements. The data presented in this paper is drawn from the interviews.

<sup>63</sup> The representatives were from leading arbitral institutions which administer ISDS disputes and are located in different countries.

<sup>64</sup> V Braun and V Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77.

<sup>65</sup> For the attribution of Arb, the text makes it clear, where relevant, whether the data relates to their role as arbitrator or counsel.

<sup>66</sup> Braun and Clarke (n 64) 77.

### III. CHARACTERIZING INFLUENCE IN ISDS

Our research identified two different understandings of influence in ISDS: the traditional understanding of influence articulated most commonly by those who appoint arbitrators and a more nuanced understanding typically expressed by those who play a role in the decision-making room. Research on influence in decision psychology is generally located in commercial settings with a focus on influence towards a defined endpoint.<sup>67</sup> As such, the literature links influence with persuasion and the aim of one actor to persuade another to adopt a specific and clearly defined position. Accordingly, influence in the context of persuasion has a direction and a clearly defined end point. This was the understanding of influence articulated by those who appoint, frequently using the language of ‘persuade’ and ‘convince’, and seeking to appoint arbitrators who can persuade others to their specific view;

I guess, for the party who is ferociously interested in seeing their case prevail, [then probably an 0:42:54] ideal party-appointed arbitrator would be somebody with the necessary clout at the tribunal, and one who has taken a fairly firm view on a dispositive issue in that case and is seen as being able to persuade his colleagues, or her colleagues, to have that view. (Coun 83)

Indeed, those who appoint arbitrators carry out extensive due diligence to identify arbitrators with a favourable position on the relevant disputed issues in the hope that the arbitrator will persuade others on the tribunal to that specific position;<sup>68</sup>

... how do arbitrators in fact get appointed? Well, the truth of course is that, especially since the party representatives, the attorneys, typically make the appointment, they will look for someone who they believe will be leaning towards their position. So, that is what due diligence is all about. You look into the arbitrator, you look at how that arbitrator has decided in the past, and you try to identify the issues that will come up before the tribunal. And you look at the track record of a particular person. In fact, there is a lot of work, in how that particular person has decided in the past. But also what that particular person has published. (Arb 44)

This is not typically the understanding of influence of those who are in the decision-making room. Unlike other forms of influenced decision-making, the ISDS collaborative decision-making process does not have a clearly defined and pre-determined outcome, beyond consensus. As such, the party-appointed arbitrators are typically not trying to persuade or advocate a specific position; instead in this context, influence was characterized as a tool to mediate engagement with the important factual details and relevant legal principles.<sup>69</sup>

Indeed, interviewees identified that the central role of the party-appointed arbitrator is to ensure that the party’s case is heard and clearly understood. As Arb 67 noted, the role is not to exclusively raise issues of the appointing party, but there is a duty to present the party’s argument;

<sup>67</sup> RB Cialdini, *Influence; The Psychology of Persuasion* (Harper Collins 2007).

<sup>68</sup> The narrow range of issues addressed in ISDS enables and encourages this type of extensive due diligence. As Arb 75 explains: ‘the challenge for investor-state is that it’s the same issue that is relitigated over and over and over again, it’s the same kind of case over and over and over again. And so of course you see a certain line-up; this one tends to view this consistently that way, this one tends to view this one that way, and it’s the nature of the issue that keeps being presented.’

<sup>69</sup> Although accusations have been made of biased party-appointed arbitrators in ISDS who advocate a specific position, this is not however the recognized role of the party appointed arbitrator and, as considered later, leads to a loss of influence in the decision-making process. It is generally accepted that the party-appointed arbitrator should not actively advocate the party’s position. See for example Menon (n 53) 364–5. However, there are many anecdotal incidences of a more advocating approach.

I would think that you would raise important arguments on both sides, but certainly assuming that the other party-appointed arbitrator is perhaps focusing on the arguments that have been raised by the party that has appointed them, then you certainly need to be sufficiently on the ball to be able to present the argument that the party that has appointed you has made. Then not necessarily favour that argument, but make sure that it has gotten the proper hearing and the deliberation. (Arb 67)

It is, as Arb 86 stated, ‘about making sure that they are heard’ and ‘their case is understood’. This position is shared by those who appoint the arbitrators;

Well, I think that the thing that’s critical when you appoint an arbitrator is, of course you the arbitrator has to be impartial and independent but they need to be able to make sure that your party’s position is properly heard and vetted within the tribunal. (Arb 46)

It is not simply the facts of the case that the party-appointed arbitrator seeks to convey but also the understandings of legal principle that support that case. As such, influence is constructed differently in ISDS. Influence is not pressure to persuade to a predetermined position, but rather a more nuanced ambition that the case and relevant legal principles are heard, understood, and considered in the final deliberations. It is thus distinct from traditional understandings of influence.

The context within which influence is embodied is also different from that conceived by Cox and Jacobson. Under Cox and Jacobson’s framework, influence is comprised of position and personal characteristics.<sup>70</sup> Position or office is located in the role of the individual in the specific organization. As such, in that context the use of position encompasses the influence of the institution they represent.<sup>71</sup> While, the arbitrator does not typically gain influence from the appointing parties/institutions, there is some suggestion that arbitrators derive influence from the position/offices they hold or have held for example as professors in reputable institutions, judges in the International Court of Justice, KCs, presidents of arbitration institutions and organizations or managing partners in major international law firms. This form of positional influence is related to their individual status rather than derived from the parties they are appointed by. Indeed, the process of appointments and the duty to be impartial ensure that arbitrators do not derive any influence from the parties they are appointed by.

The personal characteristics identified by Cox and Jacobson include both external characteristics upon which personal status is built outside the organization attributed to the individual from, for example, wealth, appointment to an important office and achievements and intrinsic characteristics which are elements both of personality including for example charisma and ability to persist in intransigence, and facets of life experience including competence and negotiating ability.<sup>72</sup> These categories of personal characteristics were also facets of influence in ISDS and, as the following section shows, those who appoint arbitrators tend to associate influence with external characteristics.

### A. External characteristics and influence in ISDS

Definitely influence, I think, for everyone is important and stature is important and experience is important. All those things play into the influence. (Arb 65)

<sup>70</sup> Cox and others (n 10) 19.

<sup>71</sup> Cox and Jacobson identified that representatives of high status countries (including the United States, the Soviet Union, the United Kingdom and France) had the greatest influence in the international organizations which they examined. *ibid* 393. See also p 423.

<sup>72</sup> *ibid* 20.

This quotation highlights the importance of influence to those who appoint and the characteristics of the arbitrator which they associate with influence. These external characteristics, which are constructed and apparent outside the decision-making room and conspicuous to those who appoint include social stature (esteem), experience and expertise. It is these characteristics that are thought to mediate influence, that dominate the appointments process and that those who appoint seek to ‘balance’ in the room;

Because I do think that people try and stack the deck, either with their party-appointed being super influential, thinking that that person is going to dominate the less influential, and/or dominate the Chair, then trying to pick the Chair of the parties who are involved, there’s always the fear that then you’ve got an influential Chair, and an influential party on the other side, with your person isolated. (Arb 88)

This perception of (un)equality of arms was evident in many of the interviews. This is underpinned by the concern that a ‘lightweight’ would not exert appropriate influence in the decision-making. As such, those who seek to appoint arbitrators do so with a keen eye to influence and the factors that they perceive as enhancing that influence.

Typically, appointments processes in ISDS are based on elements of social capital identified in the opening quotation and noted by Dezalay and Garth. Those external characteristics such as reputation, experience, stature and achievement afford the arbitrator the opportunity to be present in the room. Indeed, reputation and experience were consistently identified as a foundation of appointment into the role, though those who appoint recognize that this serves to limit the pool of selection;

Well, in fact, the most important thing [when appointing an arbitrator], I think, is reputation. . . . So, being already well-known, [which, to me 0:02:16] seems difficult from the young ones. Experience. So, experience and good reputation. (Arb 36)

In this context, experience is linked to perceptions of credibility and, indeed, authority;

So credibility is not only a function of prior ISDS experience as an arbitrator, but I would say the broader notion of you as a person, how many years of experience of international arbitration you’ve had, you know, a public international role. (Arb 08)

The credibility associated with experience and reputation is in turn equated to influence;

When we brought our very senior QC, one of the most established arbitrators in the world, on board, all of a sudden he [the presiding arbitrator] had a peer sitting next to him. His whole attitude changed visibly. (Arb 66)

The importance, to those who appoint, of the external characteristics associated with influence conveys their *perception* of the significance of these characteristics in the decision-making process. Indeed, in the interviews, some made a clear link between external reputation and influence in the decision-making process noting that prestige, experience and reputation will mean that ‘kind of person will have clout’.<sup>73</sup> Clout was a term frequently used to denote influence in the decision-making room. Although this ‘clout’ was thought on

<sup>73</sup> A single quotation from the interview with Arbitrator 89 who went on to say . . . *there’s a big difference to when you walk into a room, you don’t know anybody.*

occasion to sway the decision-making process in the ‘direction’<sup>74</sup> of the arbitrator, for the majority this form of influence effected more detailed consideration of the arguments asserted by the ‘name’ as Arb 02 noted;

If the arbitrators know you by reputation, you’re not going to win the case, but they’re going to listen very carefully to everything you say. If they don’t know you or if they know you and don’t enough respect for you, you’re not going to lose the case, but they’re not going to listen carefully to every word you say. They may tend to be dismissive here and there.

This may also, in part, be because the reputation and social stature attributed with influence has a foundation in previous experience of arbitration;

Well, in a group of three, things are easier. Because if you have another experienced colleague it’s easier to convince an inexperienced colleague. (Arb 44)

Influence was not limited to experience of arbitration. As one would expect, subject matter knowledge which includes general expertise, for example, expertise in public international law or more specific area expertise such as quantum, was also identified as important to influence decision-making. Indeed, the combination of experience and knowledge both in arbitration and the relevant subject matter of the dispute was consistently recognized as a significant effector of influence.

I think a number of factors [give somebody influence or this clout], but I think the main one will be the level of expertise and how well [in trade 0:16:03] or well vested the person is in the field of international arbitration. And, also, with the area of law that is being explored in the dispute because although we are all experts in the field, we come with different level of expertise. So, the level of expertise that a person comes to the dispute with is certainly important. (Arb 102)

It is interesting in the context of appointments that some interviewees elevated the importance of arbitration experience above subject knowledge;

He’s a very successful practitioner but he’s not really made many steps in arbitration. No matter how clever they are, they will need to prove to the other two, who are part of that world, that he is worth listening to and that he understands procedurally and how these things work. (Arb 101)

Experience however could also limit the decision-making process. As one arbitrator suggested, the presence of a senior arbitrator, with a wealth of experience, could serve to intimidate a less experienced arbitrator;

And the answer to that is, without a doubt, there are some that go there and you would feel, it’s a question of confidence, and they will assert their seniority, both age and experience, and that’s quite intimidating. . . It’s quite difficult to challenge that. (Arb 96)

So much so, that another arbitrator saw it as the role of the presiding arbitrator to limit the influence effected by experience;

<sup>74</sup> ‘It’s difficult in practice because as arbitrators we have a tendency to go in the direction of the name. . .’ (Arb 04).

And it's very important for the Chair not to think, "Well, this guy's been and done it, so let's just go with that." No, I think it's very important for the Chair to balance out, if that is unbalanced, because it can be. (Arb 88)

The perception of a close relationship between influence in the decision-making room and expertise and esteem ensures those appointing an arbitrator seek both subject matter expertise and arbitration experience;

Yes, particular expertise and also particular – let's say because an arbitrator may have the particular expertise of the merits of the case but to be a person, that he is not familiar with arbitration as a whole. So, I mean, an arbitrator must also be familiar with the arbitration in general, not just to be an energy expert. Because he cannot cope with the needs of the procedure, the procedural needs, or other issues that may arise. So, I think that's a combination of two, yeah. (Arb 82)

It is no surprise that esteem, experience and expertise are the foundation of appointment. Each of these external characteristics is associated with influence in the decision-making room, each is relatively measurable and apparent to the appointer, as Arb 76 noted;

But when push comes to shove, and I have the same thing if I send out these lists, because as an arbitrator you try to get the chair, almost invariably they go for the known names. It's not difficult to understand why because, a) a counsel has to recommend to its client that yes, this is a known person and he or she has experience, and, b) a state has also to give an accounting eventually to the Parliament to say look we have chosen an arbitrator who has a reputation, and if it goes wrong they say well, of course, it's the stupid tribunal but we have selected an arbitrator who was a really distinguished and an experienced person.

But an appointments process grounded in esteem, experience and expertise is not without consequence. Arb 76 noted that the process was 'a real barrier for new entrants' which has a significant impact on any move towards more diversity in the field. In particular, as Arb 92 noted, external influence is rarely attributed to female arbitrators<sup>75</sup>;

So just I feel like some can be influenced by that, but ultimately this goes to- So far fewer women have that type of influence or clout if you will, than men, just because of historic circumstances and, frankly, gender bias.

Arb 92 went onto highlight that in the decision-making room, this form of clout, these external factors, may only underpin one form of influence that operates in the decision-making. Other characteristics of individuals may also build influence in the room;

But I think that what counters that is just hard work, and when the president has a question, to be the one who answers that question and answers it fully, in an unbiased manner, so that you are continuously gaining their trust and you are building a relationship with the president. (Arb 92)

<sup>75</sup> The exact term used for influence may make the interviewee identifiable. As such, we have replaced the term with our standard term of external influence. In addition to the point on historic circumstances, this quotation raises the issue of gender bias. We recognise that there is an extensive and on-going discussion surrounding gender diversity in international arbitration and there are many influential female arbitrators in the ISDS community. This quotation highlights a concern that the external characteristics amplified by the appointments process may limit diversity. Unfortunately, we do not have the space in this paper to explore this argument in detail but we will do so elsewhere.

Indeed, while the appointments process informed by external characteristics, including esteem, expertise and experience, does afford the arbitrator the opportunity to be present in the room, inside the room and throughout the decision-making process internal characteristics also play an important role and establish influence in the room.

### **B. Internal characteristics and influence in ISDS**

You want to think that whoever you appoint will have the personal attributes to be able to convince. This is not a legal quality nature, this is more a personal quality and it goes to a mix of intellectual honesty, being a nice person, and all things that you would think have not much to do with the merits of the case, and in fact has nothing to do with the merits of the case, but do play a role in the decision-making. (Arb 08)

This quotation highlights a prominent theme that emerged in the interviews with the decision-makers and those who appoint arbitrators; the importance of arbitrators' personal characteristics in the decision-making process. Indeed, interviewees identified a range of personal characteristics which serve to either enhance or diminish arbitrators' influence in the decision-making room. These personal attributes determine whether a party-appointed arbitrator will be listened to attentively, their position considered, and whether they will effectively fulfil their central role to ensure that the appointing party's case is heard and clearly understood.

Internal characteristics which mediated influence in the room included professional and social skills and personality traits. These facets of personality and a professional manner underpinned effective participation in the tribunal and an ability to influence the final outcome, as articulated by Arb 75;

That's another thing, you want someone who's, because of their personality, their work manner, that you believe they're going to be effective on the tribunal, and by effective I mean have the ability to persuade to other people. (Arb 75)

One of the dominant internal characteristics was the perception of intelligence which was consistently associated with authority and influence in the decision-making room;

I've met arbitrators who are very quietly spoken, who are intellectual powerhouses. After a while, that dawns on the other co-arbitrators and then they start getting listened to. So, the person that comes in with all light and fury can peter out, and the person with, in fact, real authority with the co-arbitrators can be more persuasive. (Coun 83)

A perception of overt intelligence was thought to ensure that the arguments are more consistently and attentively listened to. Indeed Arb 90 would suggest that it is intelligence that is the most influential factor in the decision-making process;

I think this gives the strongest clout, if you like. When you see someone more intelligent than you, more experienced than you, this develops a natural tendency to listen more carefully to what this person is saying, let's put it that way. (Arb 90)

In addition to intelligence, other internal characteristics were identified as effecting influence in decision-making, including hard work and diligence.

### 1. *Hard work and preparation*

A hard-working disposition was the internal characteristic most consistently identified as mediating influence and important to the decision-making process. Indeed one interviewee with experience of appointment noted while clout was important, it was hard work and the detailed understanding of the case that may underpin influence in the room;

Then, when it comes to clout, I think it's a combination of things. Obviously, professional reputation is important to some extent, but, frankly, I think the most important thing is to be sure that you're appointing someone who's bright, and who is hardworking and can be sure to work hard to understand the issues, and to read all the papers and really digest the evidence.

That, in my view, is someone who will have real clout because any chairperson, frankly, will be glad and relieved to have a hardworking co-arbitrator that's really reading the papers and helping them decide the case. I think I would place that above professional accolades and reputation, even though that's obviously important. (Arb 97)

This understanding was shared by party-appointed arbitrators who identified the central importance of their hard work and preparation to ensure that the appointing party's case is heard and understood;

I think my duty is to make sure that I have worked very hard to understand the case myself, so I'm fully informed and make sure that the other members of the tribunal understand [the appointing party's] case. (Arb 03)

Indeed, arbitrators shared the view that hard work and preparation were one of the fundamental duties of an effective arbitrator as the detailed understanding of the cases presented underpinned effective decision-making. For many of the interviewees, there was a clear link between an arbitrator being prepared or 'on top of the file' and their influence in the decision-making process and the final award;

In my experience also as an arbitrator, is how hard you work on the specific case, and my experience is also the more effort you put in a case the more you are likely to influence the final outcome. (Arb 84)

It was notable that several 'early career' arbitrators recognized the importance of this form of influence, and the potential to redress the inequality of arms created by influence informed by external factors;

Because, you know, look, I've been in cases where, yes, I'm the newbie, so to speak, right? And we've all been there in the last few years. But what I do to counter that influence: I personally do two things, right? One: I learn the record very well. So that it doesn't matter how much you say, "This is that", I'll give you the five facts, that tells you, "Although I appreciate your view, I think you're wrong for five reasons." So, I'm always trying to be very careful. (Arb 88)

However, many recognized that these internal characteristics do not work in isolation, and it is the combination of both the external and internal characteristics which was deemed effective in enhancing the decision-making process. Some of those who appoint also recognized



this intersection. Indeed, as Counsel 34 suggested, these internal qualities may serve to redress the power imbalance associated with the external characteristics of prestige;

So, sometimes if- let's say a claimant appoints a very significant and senior academic, or an aging one, you will look for someone who is going to be very much a foil to that, and perhaps more of a practitioner who is younger, motivated, energetic, who has a well-respected profile, but also is well known for being a very hard worker, who is going to get into the documents and be an attention to detail person. (Coun 34)

Dezalay and Garth noted the dynamic nature of the international arbitration community and the relationship between hard work and the emergence of young guns.<sup>76</sup> There is some evidence in the interviews of a change in the pattern of influence over time with interviewees suggesting that those who appoint increasingly elevate the importance of hard work above reputation:

Yes, I think they are two changes. Let's say, 15 years ago I would be much influenced by the reputation of the person in the field and how important, so to speak, the person was in the field of international arbitration. One of the divas, or founding fathers or mothers, or whatever. Now there are two new criteria which appear, and we are taking very seriously, is first, how hard the person works. Because we have realised that many of the big names don't work. (Arb 14)

Hard work was a dominant characteristic of the emerging young guns identified by Dezalay and Garth, and it was recognized, by arbitrators and those that appoint them, as a central element of influence in the decision-making room. It is this internal characteristic that is of utmost importance if those who are new to the field are to perform their role effectively. Indeed, data from the interviews suggest that this characteristic is starting to gain traction with those who appoint. Other internal factors were also associated with influence in the decision-making room.

## 2. *Social skills and communication*

That's another factor that I take into account in selecting the departure point of the arbitrator, someone that I know will have a particular kind of welcome, good communication within the arbitral tribunal that will be listened to. (Arb 12)

Central to ensuring that the party's case was heard and understood is effective communication and many interviewees associated general social skills, including communication skills, with influence. The interviewees elaborated on the form of communication skills which underpin this form of influence. These include being eloquent and articulate;

I think, in this world, there are individuals who stand out, because of either their knowledge or the depth of their experience, or in some way certainly I think in the English-speaking arbitral world, also based on how eloquent they are, that's a value that plays out so powerfully in the Anglo-American world, how articulate are you, how eloquent are you, how persuasive are you. We can all think of ten examples when I describe that. Let's use Johnny Veeder as an example. I think someone like that who carries experience and

<sup>76</sup> Dezalay and Garth (n 5) 36.

expertise and incredible eloquence, and humour, would be a very influential person on a tribunal. (Arb 87)

Interviewees also identified that an arbitrator's lack of communication skills, such as being too aggressive or dominant, can lead to a lack of influence with the other arbitrators;

I mean, you've seen this when you sit as an arbitrator, I'm sure, when you have an arbitrator who is too aggressive or antagonising, you know, you tend to- . . . Disregard what this arbitrator is saying, and take the decision with the rest (Arb 08)

There is, however, a delicate balance to be struck by arbitrators. While being too aggressive or dominant can lead to a loss of influence, being passive would also be ineffective. Effective communication requires more than eloquence. The reciprocal nature of communication and the collaborative decision-making context of ISDS requires that an effective influential arbitrator must also be a skilled listener. The listening that underpins influence is not passive; it has a foundation in diligence and preparation. As this interviewee noted, the latter is needed to do the former;

You have to listen, but, in order to listen, you have to know inside out the documents. (Arb 81)

In addition to communication skills, the interviews highlight the importance of social interpersonal skills or, in other words, the soft skills that underpin the ability 'to get on' with others and 'the way precisely you interact on a personal level with the colleagues'.<sup>77</sup> Once again, these traits do not exist in isolation. A good arbitrator has a range of internal and external traits that may effectively influence and contribute to the final decision;

So, yes, I think that I would deem those as being the characteristics of somebody who would have clout with the chairman, is somebody who has the relevant professional experience, who's respected within their own community, who is, ideally, engaged in thought leadership and then simply has the interpersonal skills to persuade their colleagues. (Coun 83)

Recognition of these interpersonal and communication skills and the influence that these skills mediate is filtering into the appointments process;

[B]ut then, second and just as important, does this person have a way of personality and approach, does this person have the ability to persuade an unknown person, because usually you have no idea who the president's going to be, so can this person generally be likeable and persuasive to whomever it may be. (Arb 75)

There is some recognition that these skills could redress the balance of power and position;

Then on the gravitas point, as long as I am convinced that somebody has the people skills then I don't mind if they haven't sat as an arbitrator before or not often. If I think this person will immediately earn the respect of their co-arbitrators that's okay. I've

<sup>77</sup> Arb 84.

actually appointed a number of people not in their first tribunal who are just not big names. (Coun 35)

Those in the decision-making room recognize the importance of effective communication skills. Although there is no shift away from the dominance of esteem, experience and expertise, there is also some recognition by those who appoint of the potential importance of these internal skills. However, there was another skill recognized by arbitrators as central to influence : ‘intellectual honesty’.

### 3. *Intellectual honesty*

Intellectual honesty is a term developed by the scientific community which applies to a method of problem-solving which is characterized by intellectual attentiveness, and an unbiased and honest attitude.<sup>78</sup> Many of the arbitrators recognized the influence of the perception that the other arbitrator was dedicated to solving the problem with an unbiased and honest attitude;

Then there are, I think, more personal social skills, in the way precisely you interact on a personal level with the colleagues. I think these are three important components. Obviously, I mean, part of probably all of three is some intellectual honesty. I mean, this goes without saying. Once you are identified as not being perfectly intellectually honest you are almost automatically going to be isolated or really not trusted completely. (Arb 84)

In the ISDS context, arbitrators relate intellectual honesty to impartiality;

Impartiality is probably intellectual honesty applied to the specific case. I think that’s the only distinction of intellectual honesty, it’s a personal quality and impartiality is how you apply to the specific case. I don’t think there are actually to me different notions. Significantly different notions. (Arb 84).

Accordingly, for this interviewee intellectual honesty appears to be a personal and foundational attribute which underpins the exercise of impartiality. Indeed, while intellectual honesty does not function in isolation, intellectual honesty, and the impartiality it underpins, is central to effective influence;

You want to think that whoever you appoint will have the personal attributes to be able to convince.

This is not a legal quality nature, this is more a personal quality and it goes to a mix of intellectual honesty, being a nice person, and all things that you would think have not much to do with the merits of the case, and in fact has nothing to do with the merits of the case, but do play a role in the decision-making. (Arb 08)

The absence of intellectual honesty can actively undermine the influence that the arbitrator seeks to achieve. Indeed, the interviewees identified several distinct characteristics that can actively undermine influence.

<sup>78</sup> N Wiener, ‘Intellectual Honesty and the Contemporary Scientist’ (1964) 8(3) *American Behavioural Scientist* 15; LM Guenin, ‘Intellectual Honesty’ (2005) 145(2) *Synthese* 177.

### C. Loss of influence

Well, of course. I mean, sometimes, it's rare they have their helmet on so hard, but the effect of that is, of course, they dial themselves out of any influence in the decision, but it is very rare. (Arb 58)

The perception of the absence of intellectual honesty informs many of the factors that serve to diminish rather than increase influence. As identified earlier, some factors were associated with a lack of preparation or communication skills limiting the quality or effectiveness of the submissions for consideration. Others however centred on the presiding arbitrator's perception of the party-appointed arbitrator, once again highlighting the centrality of the presiding arbitrator in the decision-making. The factors that limit influence relate to both external and internal characteristics and often to both. In this context, many interviewees highlighted robust adherence to the appointing party's position as a factor that may undermine influence. This loss of influence arises in part because this robust positioning undermines intellectual honesty and is evidence of a lack of considered engagement with the opposing position which in turn limits the scope of the agreed position that could be adopted. The interviewees attributed this robust positioning to a range of factors, from the reputation or ego of the arbitrator to the appearance of bias towards the appointing party (party bias).

Apparent bias of the arbitrator has increasingly been recognized as a limitation on influence and this study supports those findings.<sup>79</sup> Fundamentally, the perception of bias can result in the 'loss of credibility'<sup>80</sup> with the other tribunal members and this loss of credibility can result in the 'biased' arbitrator being 'alienated' and 'excluded' by the other decision-makers;

Because one of the arbitrators was unwisely and demonstratively biased and prejudiced in favour of the party that appointed him, and that annoyed and alienated the other two arbitrators, who then did exactly the opposite. And that was very much to the detriment of the party that appointed that particular arbitrator. (Arb 44)

Indeed, those who serve as presiding arbitrators confirmed that they disregard the contributions of party-appointed arbitrators they perceive as biased;

Because in the situations where I am presiding arbitrator, I've discussed the case obviously with my colleagues on the tribunal, and you express preliminary views and you debate issues. But if one of my co-arbitrators is a person who is clearly partial, then I tend not to listen to that person. And the person might say something and it might be right, but you tend not to listen to that person, if they're very clearly partial. So if you want to win a case, generally you need two votes, one is not enough. (Arb 74)

The isolation and loss of influence associated with the perception of bias were also recognized by those involved in the appointments process;

<sup>79</sup> J Paulsson, *Are Unilateral Appointments Defensible?* (Kluwer Arb. Blog) <<http://kluwerarbitrationblog.com/blog/2009/04/02/are-unilateral-appointments-defensible/>> accessed 03.01.2023

<sup>80</sup> 'If there is a spectrum [sic spectre] of impartiality, then I would find that extremely disappointing. If it does happen, and when it does happen, I find it extremely unproductive and the proceedings are always the poorer for it because whomever is less impartial, for whatever reason, finds their credibility is affected on the tribunal, a huge effect on credibility'. (Arb 45)

You have to explain also the interest of the party itself not to appoint someone who would be partial or lacking those fundamental skills you need to influence the final process. Precisely because you say we can appoint someone who is partisan, but then you are more likely to lose the case or to have this person remain isolated within the tribunal. (Arb 84)

This quotation highlights that, in the collective decision-making context of ISDS, influence and the potential to accumulate and lose it are central to those who appoint arbitrators. In the complex context of the ISDS tribunal, it is the external and internal characteristics of the individual arbitrator that mediate influence in the decision-making process which in turn can impact on the final decision.

#### IV. DISCUSSION

The seminal work of Dezalay and Garth illuminated the central role of influential people in the arbitration field. This article shifts the frame from influential people to the characteristics of the individual which mediate influence in the decision-making room. It draws on data from interviews with key actors to explore how influence is constructed and considered the factors that serve to enhance and diminish influence. In particular, the article explored the form of influence exerted by the party-appointed arbitrators.

To explore the complexity of influence in ISDS, we drew upon the framework of influence in international panel decision-making developed in the work of Cox and Jacobson. This framing highlighted some key distinctions between the construction of influence in the international commercial decision-making context and that of ISDS. In particular, the analysis highlighted the dichotomy of understandings of influence at play in the ISDS system. Those that appoint have a traditional understanding of influence, similar to that understood by Cox and Jacobson, where influence mediates a decision in favour of the 'influential party'. Influence is a form of persuasion, and the process of effective influence results in an outcome favourable to the appointing party. This understanding of influence may in part explain an appointments process anchored in traditional understandings of influence, namely esteem, experience and expertise.

However, those in the room have a more nuanced understanding of influence from traditional understandings of influence. Influence by the party-appointed arbitrator in ISDS takes place in a collective decision-making context where effective influence is that the party's case is heard and understood. It is perhaps not unexpected that this dichotomy appeared; the tension between the advocate/judge role of the party-appointed arbitrator has been a topic of academic debate.<sup>81</sup> This tension is keenly felt by those in the party-appointed role with many in the interviews noting the fine line that must be drawn to ensure that the arbitrator remains impartial in the decision-making process while ensuring that the appointing party's case is fully heard and understood.

There are other key distinctions. In other international decision-making contexts, external power and influence are derived from the institution the individual represents. In ISDS, the individual arbitrator rather than the institution is at the heart of influence and the external characteristics that mediate that influence are underpinned by the individual's personal career, esteem, prestige and experience. It has long been recognized that social capital with a foundation in experience, expertise and esteem is an important element of influence. These external characteristics are the bedrock of the appointments process, and these external features of influence are used to justify a place in the decision-making room. But influence in

<sup>81</sup> See for example Menon (n 53) 364–5.

the room is also leveraged by internal characteristics. The evidence shows that hard work, eloquence and the soft social skills that support collective decision-making have an important impact on the influence exerted on the decision-making process and ultimately the final decision. These two sets of characteristics do not exist or function independently. External characteristics may be a reflection of internal characteristics and the impact of external characteristics may be modified by the internal characteristics. As such both external characteristics and internal characteristics play an important role on the complex nexus of influence in ISDS panel decision-making.

The increasing importance of these internal characteristics has been recognized by other authors in the field.<sup>82</sup> This research adds to that work by providing a robust empirical foundation and extends that work to understand the relationship between these factors and influence on the decision-making process. But this large empirical study also identifies the central importance of other mediators of influence, in particular, ‘intellectual honesty’.<sup>83</sup> At the core of intellectual honesty is attentive and open-minded decision-making.<sup>84</sup> The perception of bias associated with the party-appointed system has been a topic of extensive debate and is a central argument in the proposals for reform of the ISDS appointments process. These findings support the suggestions that a perception of bias limits influence in the final decision and, indeed, may even serve to informally exclude the arbitrator from the decision-making.<sup>85</sup> In addition, this study highlights the increasing recognition of the importance of intellectual honesty by those who make the decisions.

It is unsurprising that associations were made between influence and the appointments process. Indeed, one of the central ambitions of the party-appointed process is to appoint the most effective arbitrator; one who will ensure the party’s case is heard and understood and thus exert influence on the final decision. It has long been recognized that the appointments process in ISDS leads to a ‘reliance on trusted and known arbitrators who have significant experience.’<sup>86</sup> As acknowledged by Dezalay and Garth, this trust is typically founded in reputation and name, their social capital.<sup>87</sup> The authors noted the rise of the young technocrats, the professional arbitrator, appointed for hard work and arbitration expertise, and the influence that this ‘new’ generation effects on the decision-making process.

This study not only poses a challenge to this limited understanding of influence but suggests that there is increasing recognition of other characteristics of an arbitrator that may exert influence on the final decision and that these characteristics may influence appointment.<sup>88</sup> There have been extensive discussions of a move towards a more traditional appointments system, similar to that of the courts. While this process may provide the structures to support and encourage a more diverse decision-making panel, influence will remain

<sup>82</sup> See for example Schultz and Kovacs (n 8) 170.

<sup>83</sup> Intellectual honesty was discussed in a brief document for Open Democracy (2015) which discussed intellectual honesty in the context of the debates surrounding the inclusion of TSDS in the Trans Pacific Partnership. The discussion was about the intellectual honesty of the debate rather than the system.

<sup>84</sup> For a detailed discussion on the doctrine of impartiality in ISDS and the proposal of a new approach to assessing impartiality in ISDS see Stavros Brekoulakis and Anna Howard, ‘Impartiality and the Construction of Trust in Investor State Dispute Settlement’ (forthcoming); Stavros Brekoulakis and Anna Howard, ‘Contextual Impartiality: A New Approach to Assessing Impartiality in Investor State Dispute Settlement’ (forthcoming).

<sup>85</sup> Blackaby (n 44) 4.76.

<sup>86</sup> AK Bjorklund and others, ‘The Diversity Deficit in International Arbitration’ (2020) 21 *Journal of World Investment and Trade* 410, 426.

<sup>87</sup> C Rogers, ‘The Vocation of the International Arbitrator’ (2004) 20 *American University International Law Review* 957; Puig and Strezhnev (n 20).

<sup>88</sup> See for example work by Queen Mary University in 2010 which identified that corporate counsel at leading corporations indicated that the most important factor (66%) in choosing a party-appointed arbitrator is ‘open-mindedness and fairness’. See 2010 International Arbitration Survey: Choices in International Arbitration, at 26 <<http://www.whitecase.com/files/upload/fileRepository/2010-International-Arbitration-Survey-Choices-International-Arbitration.PDF>> accessed 7.11.2022.

at the heart of the panel decision and the factors that mediate influence will remain central to the decision-making process.

This study did not explore the comparative weight that those who appoint arbitrators afford to external and internal characteristics, but many recognized that a turn towards internal characteristics in the appointments process had the potential to reshape the demography of ISDS, providing opportunity for a new cohort of arbitrators that demonstrate excellence in this additional skill set. A recent study suggested that to enhance diversity in the ISDS system those that appoint should be attentive ‘to the qualities of the adjudicator, with a clear and objective list for assessing arbitrator’s skills and expertise’ with a view to providing training to support any perceived skills deficit.<sup>89</sup> While we agree with the sentiment, the proposed expansion is centred on expertise moving from the narrow focus of public international law and international investment law to include other relevant expertise such as in commercial law, relevant sectors and quantification of damages.<sup>90</sup> While welcome, these proposals focus on expertise and miss the nuanced characteristics which are increasingly recognized to effect influence in the decision-making room. Further, there is evidence that the demographic characteristics of the pool of experts used in ISDS from these additional fields, in particular industries or quantum,<sup>91</sup> suggests that widening the relevant range of expertise would be insufficient to enhance diversity and to challenge the traditional focus of appointments based on power and prestige. Rather, we suggest that ISDS should move to a new phase, which allows for more overt recognition in the appointments process of both the external and internal factors that mediate influence.

We dedicate this paper to our collaborator, colleague and friend, Dr Daniel Behn. His passion, integrity and boundless curiosity shaped this work and will remain with us. He had so much more to contribute.

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<sup>89</sup> Bjorklund and others (n 86) 432.

<sup>90</sup> *ibid*

<sup>91</sup> Langford, Behn and Lie (n 4) 316–17.