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ARTICLE

Impartiality and the Construction of Trust in Investor-State Dispute Settlement

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Abstract—This article analyses impartiality in investor-State dispute settlement (ISDS) by identifying the way that the parties' trust in arbitrators is constructed. Drawing on the findings of a large-scale empirical project, it questions the applicability of an orthodox judicial doctrine of impartiality to ISDS on the grounds that trust in arbitrators is constructed on a fundamentally different basis from that of trust in judges. The primary feature of a judicial doctrine of impartiality is that trust is founded on an absolutist approach to impartiality which is intended to ensure that judges have no predispositions to parties. In contrast, trust in ISDS is founded on the method of party appointment which is based on a very different assumption—that arbitrators' predispositions can be valuable and appropriate in the decision-making process. The empirical findings show that the parties' choice of a predisposed arbitrator is generally considered compatible with the understanding of impartiality in ISDS. Accordingly, this article calls for a new, and contextualised, approach which better corresponds to the fundamental value of trust in ISDS.

I. INTRODUCTION

The dispute resolution system of ISDS has continued to attract controversy. While it was originally established with a view to being an 'apolitical'[3] alternative to the national courts and 'gunboat diplomacy' previously used for disputes between foreign investors and States,[4] ISDS is currently the subject of extensive reform proposals.[5]

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[3] Charles N Brower and Sadie Blanchard, 'What's in a Meme—The Truth about Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States' (2014) 52(3) Colum J Transnat'l L 689, 696.

[4] Susan Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham L Rev 1521, 1525. See also Catherine A Rogers, 'The Politics of International Investment Arbitrators' (2013) 12 Santa Clara J Int'l L 223, 226.

[5] The detail of the reform options for ISDS under consideration by UNCITRAL Working Group III is available at <https://uncitral.un.org/en/reformoptions> accessed 27 November 2023.

These have been developed in response to the ongoing debate about ISDS's legitimacy which stems largely from claims that it lacks impartiality and is often perceived as being structurally and systemically biased in favour of investors and against States.[6] The significant sums of money and public interest issues which are characteristic of ISDS disputes mean that these claims have attracted widespread attention.

This attention has increasingly tended to focus on two different reform options. The first is a root-and-branch proposal to *replace* ISDS with a court-based system of adjudication. This approach is supported by a number of States and aims at eliminating elements of the procedural design of ISDS, notably the method of party appointment of arbitrators, which are perceived as the underlying structural cause of ISDS's lack of impartiality. Typically, in ISDS each party unilaterally appoints one arbitrator and the presiding arbitrator is appointed jointly by the parties or the party-appointed arbitrators.

The second response to criticisms of the current system focuses on proposals to *reform* ISDS by aiming to strengthen the formal standards of arbitrators' conduct as a means of enhancing their impartiality. Notably, the Code of Conduct for Arbitrators in International Investment Dispute Resolution promulgated by the Secretariats of the International Centre for Settlement of Investment Disputes (ICSID) and UNCITRAL includes the far-reaching disclosure requirement on arbitrators[7] to 'disclose any circumstances likely to give rise to justifiable doubts as to his or her independence or impartiality'.[8]

However, absent from the debate on impartiality in ISDS is a focus on the underlying and fundamental issue of *what* is being assessed in the first place. Proposals to replace ISDS with a court-based system are based on the assumption that, due to the system of party-appointed arbitrators, ISDS is *by design* a partial system of adjudication, while proposals to reform ISDS assume that the problem of impartiality in ISDS is a question of individual arbitrators' ethics. However, both sets of proposals aim to address the claims of impartiality without articulating what is meant by impartiality in the specific context of ISDS. To assess whether there is, in fact, a problem (real or perceived) in relation to impartiality in ISDS and, if so, what the solution to that problem might be it is necessary to identify how impartiality is understood in ISDS.[9]

The starting point of that analysis is the fact that impartiality in ISDS has been constructed to date by drawing on the dominant doctrine transposed from the judiciary. While ISDS was created as an alternative to the courts, with its differing procedural design and most notably disputants' ability to appoint the members of ISDS tribunals on an ad hoc basis, the doctrine of impartiality has been borrowed

[6] Such accusations have led to a flurry of empirical research on bias in ISDS. See, for example: Gus Van Harten, 'Arbitrator Behaviour In Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias In Investment Treaty Arbitration' (2016) 53 Osgoode Hall Law J 540; Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration' (2012) 50 Osgoode Hall Law J 211; Thomas Shultz and Cedric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study' (2014) 25(4) Eur J Int Law 1147; Sergio Puig and Anton Strezhnev, 'The David Effect and ISDS' (2017) 28(3) Eur J Int Law 731.

[7] This disclosure requirement also applies to those who have been contacted regarding potential appointment as an arbitrator and have not yet been appointed. See art A11(1) (Disclosure Obligations) and art A1(d) (Definitions).

[8] Code of Conduct for Arbitrators in International Investment Dispute Resolution, art A11(1) (Disclosure Obligation); see also art A3 (Independence and Impartiality). The Code was adopted by UN Member States at UNCITRAL's 56th session in July 2023.

[9] Rogers has identified 'the empty rhetoric of impartiality' in international arbitration (Catherine A Rogers, *Ethics in International Arbitration* (OUP 2014) 311).

wholesale and unquestioningly from the courts where judges are appointed independently of the disputants on a permanent basis. This transplantation of the judicial doctrine of impartiality into the ISDS context is predicated on an *absolutist* approach to impartiality, which is manifested in three different ways. First, it portrays a universal conception of impartiality which applies across differing methods of legal adjudication. Second, it suggests a singular duty of impartiality which applies irrespective of the particular role and function of an arbitrator—whether sole, presiding or party-appointed arbitrator. Third, it entails a binary conception of impartiality, with arbitrators being categorised as either impartial or biased. In contrast, parties' trust in arbitrators does not conform to this absolutist doctrine of impartiality.

Drawing on the findings of our large-scale empirical project, this article questions the applicability of the judicial doctrine of absolutist impartiality to ISDS on the grounds that trust in arbitrators is constructed on a fundamentally different basis from that of trust in judges. In ISDS, trust is founded on the method of party appointment and has a dual function. First, it means that the parties trust that their party-appointed arbitrator holds certain predispositions which are important for the party's case.[10] Second, it means that a party-appointed arbitrator is trusted to perform a role which of itself gives rise to predispositions to the appointing party's case in the sense that the nature of the role of a party-appointed arbitrator places (in the words of the interviewees) a particular 'mandate', 'duty' or 'job' on a party-appointed arbitrator to ensure that the party's case is fully considered and properly understood which of itself gives rise to certain predispositions. Overall, trust in the appointment of ISDS arbitrators entails that party-appointed arbitrators are chosen for, and perform a role which results in, certain predispositions. Importantly, the findings show that the choice of a predisposed arbitrator by parties and the predispositions which arise from the performance of the party-appointed arbitrator's specific role are, to a certain degree, considered compatible with the understanding of impartiality which applies in ISDS. Accordingly, this article calls for a new, and contextualised, approach to impartiality in ISDS which better corresponds to the fundamental value of trust in ISDS.[11]

In sum, this article is the first to approach the debate about impartiality in ISDS as part of a broader assessment of the judicial approach to impartiality which permeates legal adjudication. While some have questioned whether a singular standard of impartiality should apply to all members of the arbitral tribunal irrespective of the nature of their appointment,[12] this article is the first to critically examine the underlying basis of the current singular, and indeed universalist, approach. Drawing on original empirical data, the article is the first to explain how trust in ISDS is constructed by parties to ISDS and how the foundation of that trust entails a different understanding of impartiality than that which applies in judicial adjudication. In particular, the understanding of impartiality in ISDS is compatible with a degree of predisposition

[10] In the *Cambridge Dictionary*, the term 'predisposition' is defined as 'the state of being likely to behave in a particular way'. On the basis of this definition, the term is used in this article as 'the state of being likely to favour certain views'.

[11] A subsequent article develops this new approach on the basis of the empirical findings identified in this article. See Stavros Brekoulakis and Anna Howard, 'Contextual Impartiality: A New Approach to Assessing Impartiality in Investor State Dispute Settlement' (2024 forthcoming). These two publications are the foundational articles of a series of outputs that will be produced from this empirical project.

[12] For example, Yuval Shany, 'Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings' (2008) 30 Loy LA Int'l & Comp L Rev 473, 474; Catherine Rogers, 'Reconceptualizing the Party-Appointed Arbitrator' (2023) 64(1) Harv Law Rev 137.

by party-appointed arbitrators to the position of the appointing parties. This compatible degree of predisposition typically comes from a combination of the parties' careful choice of an arbitrator who holds legal views favouring the parties' case and the specific role of a party-appointed arbitrator to ensure that the appointing party's case is properly considered and understood in the deliberation room.

This article is structured as follows: Section II examines how impartiality in ISDS is assessed and identifies the current judicial doctrine of impartiality employed in ISDS. Drawing on empirical findings, Section III explains how the foundational value of trust is constructed in ISDS. Section IV shows that the trust which is placed upon party-appointed arbitrators has important implications for the way in which they discharge their duty of impartiality in ISDS. Section V contrasts the construction of trust in arbitrators with that in judges and argues that this fundamental difference calls for a distinct and tailored approach to impartiality in ISDS. Section VI closes the article with a summary of its findings, a call for a new and nuanced approach to impartiality in ISDS and the identification of important issues associated with the development of this approach.

II. THE CURRENT DOCTRINE OF IMPARTIALITY IN ISDS

ISDS is a dispute resolution process under which foreign investors can address disputes with the government of the State in which they have invested (known as the host State) through the use of arbitration. Accordingly, the legal doctrine of impartiality in ISDS stems from the doctrine used in international arbitration. This doctrine is structured around a set of legal rules and jurisprudentially developed tests of bias. Almost all national laws lay down the arbitrators' duty to act impartially as between the parties and disclose potential conflicts of interest.[13] Where circumstances give rise to *justifiable doubts* as to an arbitrator's impartiality,[14] a party has the right to apply to a national court to remove an arbitrator.[15]

While no single set of standards of impartiality of arbitrators exists across different jurisdictions, most national courts frame the legal test of arbitrators' bias in terms of *appearance of bias* rather than actual bias. In England and Wales, for example, the common law test for apparent bias is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a *real possibility* that the arbitrator was biased.[16]

In the USA, notwithstanding the fact that section 10(a)(2) Federal Arbitration Act refers to 'evident partiality',[17] most US courts apply the 'appearance of bias' test[18] or similar tests including whether 'a reasonable person would have to conclude that the

[13] eg English Arbitration Act 1996, s 33; see also institutional rules, eg UNCITRAL Arbitration Rules 2012, art 11 and ICC Rules of Arbitration 2021, art 11.

[14] UNCITRAL Model Law on International Commercial Arbitration 1985, art 12 (2) and Swiss Private International Law Act 1987, art 180.

[15] English Arbitration Act 1996, s 24(1).

[16] See *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48; *AT&T Corp. v Saudi Cable Co.* [2000] 2 Lloyd's Rep 127, 134–35 (English Court of Appeal).

[17] The US Supreme Court has not provided guidance on how to apply the evident partiality test since its seminal decision in *Continental Casualty Co. v United States*, 314 US 527 (1942).

[18] *New Regency Productions v Nippon Herald Films*, 501 F.3d 1101, 1108 (9th Cir. 2007). See also the more recent decision in *Equicare Health Inc v Varian Medical Systems, Inc* (ND Cal. 19 April 2023).

arbitrator was partial' or whether there exists 'a significant compromising connection to the parties [giving rise to a] concrete, not speculative impression of bias'.[19]

Similarly, in France the legal test of arbitrators' impartiality is articulated around appearance of bias. However, French courts take a subjective approach to assessing apparent bias focusing on whether there exist circumstances which are likely to give rise to reasonable doubts as to the impartiality of the arbitrator 'in the minds of the parties' rather than the fair-minded informed observer.[20] Courts in other civil law jurisdictions, including in Switzerland, apply an appearance of bias test which they benchmark against standards of justifiable doubts of bias.[21]

The appearance of bias test is similarly applied in ISDS. Most investor-State disputes are conducted either under the framework of the UNCITRAL Arbitration Rules or the ICSID Convention.[22] Regarding the threshold applicable for challenging an arbitrator on the grounds of lack of impartiality, Article 12 of the UNCITRAL Arbitration Rules provides that any 'arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence'. The use of the word 'justifiable' establishes an objective standard which is similar to the English common law test of appearance of bias.[23] As Caron and Caplan have explained '[w]hile a party's subjective concerns about an arbitrator's bias may prompt a challenge, it is the objective reasonableness of their concerns that is ultimately determinative'.[24] The challenging party does not need to prove the arbitrator's *actual* lack of impartiality; establishing the *appearance* of lack of impartiality is sufficient.[25]

For investor-State disputes conducted under the ICSID framework, the interplay between Articles 14(1) and Article 57 requires that the requisite threshold for disqualification is a 'manifest lack' of an arbitrator to 'exercise independent judgment', which, as is generally accepted, encompasses impartial judgment.[26] Despite the language of Articles 14(1) and 57, which suggests a higher threshold of disqualification of a 'manifest lack' of impartiality, ICSID tribunals have applied tests similar to the 'justifiable doubts' standard under the UNCITRAL Arbitration Rules.[27] Further, the

[19] *Positive Software Solutions Inc v New Century Mortgage Corporation*, 436 F.3d 495, 282–83 (5th Cir. 2006).

[20] Court of Cassation, civil, Civil Chamber 1, 3 October 2019, 18-15.756, unpublished and the Cour d'appel de Paris ch. commerciale, 25 February 2020, 19/15817.

[21] See eg Swiss Federal Tribunal: 4A_258/2009, 11 January 2010, ASA Bull. 3/2010, 540.

[22] James Fry and Juan Ignacio Stampalija, 'Forged Independence and Impartiality: Conflicts of Interest of International Arbitrators in Investment Disputes' (2014) 30(2) Arbitr Int 189, 206.

[23] David Caron and Lee Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd edn, OUP 2013) 208. See also James Fry and Juan Ignacio Stampalija, 'Forged Independence and Impartiality: Conflict of Interest of International Arbitrators in Investment Disputes' (2014) 30(2) Arbitr Int 189 195. See *Halliburton* (n 16) [54].

[24] Caron and Caplan (n 23) 208.

[25] ibid 214.

[26] James Crawford, 'Challenges to Arbitrators in ICSID Arbitration' in David D Caron and others (eds), *Practising Virtue* (Oxford 2015) 598; Sam Luttrell, 'Bias Challenges in Investor-State Arbitration: Lessons from International Commercial Arbitration' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 457. Baiju S Vasani and Shaun A Palmer, 'Challenge and Disqualification of Arbitrators at ICSID: A New Dawn?' (2015) 30(1) ICSID Rev—FILJ 194, 197.

[27] eg *Compañía de Aguas del Aconquija SA & Vivendi Universal v Argentine Republic*, ICSID Case No ARB/97/3, Decision on the Challenge to the President of the Committee (3 October 2001) paras 20–21; *Caratube International Oil Company LLP & Devincci Salah Hourani v Republic of Kazakhstan*, ICSID Case No. ARB/13/13, Decision on the Proposal for Disqualification of an Arbitrator (20 March 2014) para 54. See also the UNCITRAL Secretariat's Note A/CN.9/WG.III/WP.167.

assessment of an arbitrator's impartiality is similarly an objective one[28] and one for which the appearance of bias is also sufficient.[29]

It is striking to note that the doctrine of impartiality applied in ISDS and, more generally, international arbitration is a judicially developed doctrine which has been adopted wholesale and unquestioningly from domestic and international courts. As was recently confirmed by the UK Supreme Court's decision in *Halliburton v Chubb*,[30] the test which courts in England and Wales apply to remove an arbitrator in an international arbitration is the domestic *Porter v Magill* common law test.[31] While the UK Supreme Court has recognised the differences in nature and circumstances between judicial and arbitral decision-making, it has stated that:[32]

> The objective test of the fair-minded and informed observer applies equally to judges and all arbitrators. There is no difference between the test in [English Arbitration law for arbitrators] which speaks of the existence of circumstances 'that give rise to justifiable doubts as to [the arbitrator's] impartiality' and the common law test [for English judges].

This transplantation of the judicial doctrine of impartiality into the ISDS context is predicated on an *absolutist* approach to impartiality, which is manifested in three different ways. First, it portrays a universal conception of impartiality which applies across differing methods of legal adjudication.[33] The assumption that there exists only one version of impartiality that permeates legal adjudication has become something of a *Grundnorm* for international lawyers.[34] Indeed, under the ICSID and UNCITRAL Codes of Conduct for Arbitrators and Judges in International Investment Dispute Resolution, the same duty of impartiality applies to arbitrators, members of international ad hoc annulment or appeal committees, and judges on a court-based system of investment adjudication.[35] As has been observed,[36] the judicial doctrine of impartiality reflects '*a transnational consensus*' which applies universally across international arbitral tribunals and international courts.[37]

Second, and relatedly, the judicial doctrine of absolute impartiality suggests a *singular duty* of impartiality that applies irrespective of the role and function of an arbitrator. In this context, every arbitrator is subject to the same legal standards of impartiality irrespective of the nature of their role, ie whether they act as party-appointed, sole or presiding arbitrator. The conception of impartiality as being a singular duty which applies irrespective of context has been confirmed by national

[28] Vasani and Palmer (n 26) 200.

[29] eg decision on proposal for the disqualification of the arbitrators Francisco Orrego Vicuna and Claus Von Wobeser in *Repsol SA and Repsol Butano SA v Argentine Republic*, ICSID Case No ARB/12/38 (13 December 2013); Georgios Dimitropoulos, 'Constructing the Independence of International Investment Arbitrators: Past, Present and Future' (2016) 36 Northwest J Int Law Bus, 371, 405.

[30] *Halliburton* (n 16) [52] and [55]; see also *AT & T Corp.* (n 16).

[31] *Porter v Magill* [2001] UKHL 67; [2002] 2 AC.

[32] *Halliburton* (n 16) [55].

[33] This singular approach to impartiality is also evident in the 'alternative' method of dispute resolution of mediation. See Linda Mulcahy, 'The Possibilities and Desirability of Mediation Neutrality—Towards an Ethic of Partiality?' (2001) 10(4) Soc Leg Stud 505, 508.

[34] ibid 506.

[35] ICSID and UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution (adopted in July 2023) arts 1(c) and 3, and ICSID and UNCITRAL Draft Code of Conduct for Judges in International Investment Dispute Resolution (May 2023) arts 1(a) and 3.

[36] UNCITRAL Secretariat's Note A/CN.9/WG.III/WP.167 para 21.

[37] See also the decision of the European Court of Human Rights in *Micallef v Malta*, App no 17056/06 (ECtHR, 15 October 2009) para. 93 referring to 'legitimate doubt in respect of [the tribunal's] impartiality'.

courts on a number of occasions, including for example by the Swiss Federal Tribunal which held that 'the independence and impartiality required of the members of the arbitral tribunal applies equally to the arbitrators appointed by the party as to the president of the arbitral tribunal'.[38] Interestingly, however, the Swiss Tribunal Federal added '[i]n stating this principle, the Federal Tribunal is certainly aware that an absolute independence of all the arbitrators constitutes an ideal which only rarely corresponds to reality'.[39]

Third, the judicial doctrine of absolute impartiality entails a *binary conception* of impartiality with adjudicators being either impartial or biased. Any form of partiality, even in the form of implicit bias including subconscious and cognitive bias, is neither acknowledged nor accepted by the judicial doctrine of impartiality.[40] The English Court of Appeal in Halliburton stated that 'the risk of unconscious bias … does not affect the relevant legal test for apparent bias …. It provides an example of how bias may act, or appear to act, on the mind, but it is not part of the test for whether there is bias.'[41] While the Court of Appeal accepted that the risk of unconscious bias 'is a relevant risk for the fair-minded and informed observer to take into account', it offered no guidance as to what in practice that means for the legal test of impartiality.[42]

No attention appears to have been given as to whether this universal, singular and binary approach transposed from the judicial doctrine of impartiality is suitable for ISDS which was created as an alternative to the courts with a differing procedural design including, most notably, the disputants' ability to appoint the members of the arbitral panel on an ad hoc basis. As the interviewees' insights reveal, parties appoint arbitrators whom they trust to fulfil the role of the party-appointed arbitrator, which is to ensure that the party's case is fully heard and understood in its context. Accordingly, parties appoint arbitrators who have the attributes which enable parties to entrust them with the execution of this role. Both the *attributes* for which arbitrators are chosen and the *very nature* of the role with which they are entrusted have important implications for our understanding of impartiality in ISDS.

III. METHODOLOGY OF THE EMPIRICAL PROJECT ON IMPARTIALITY IN ISDS

As the following section introduces some of the findings of an empirical project on impartiality in ISDS, a brief overview of the methodology is provided before turning to its findings. The empirical data presented in this article was obtained through 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

[38] This is a translation by the authors of the relevant section of the Decision of the Swiss Tribunal Federal 4A_234/2010 (29 October 2010). The original French version of the decision states: 'Force est, dès lors, d'admettre que l'indépendence et l'impartialité requises des members d'un tribunal arbitral s'imposent aussi bien aux arbitres désignés par les parties qu'au président du tribunal arbitral.' The same approach has also been adopted by the English Court of Appeal in *Halliburton* which held that 'a party-appointed arbitrator in English law is expected to come up to precisely the same high standards of fairness and impartiality as the person chairing the tribunal' ((n 15) [63]).

[39] This is a translation by the authors of the relevant section of the Decision of Swiss Supreme Court 4A_234/2010 (n 38). The original French version of the decision states: 'En énonçant ce principe, le Tribunal fédéral est certes conscient qu'une indépendence absolue de tous les arbitres constitue un idéal qui ne correspondra que rarement à la réalité.'

[40] On the influence of implicit and subconscious bias on judicial decision-making see Rachel Cahill-O'Callaghan, *Values in the Supreme Court: Decisions, Division and Diversity* (Hart 2020) 50–53.

[41] *Halliburton* (n 16) [41].

[42] See also *Locabail v Bayfield Properties* [2000] QB 451, 471–72: 'the law does not countenance the questioning of a judge about extraneous influences affecting his mind'.

actors in the ISDS system.[43] 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;[44] and senior barristers and lawyers from international law firms who regularly serve as counsel in ISDS arbitrations.[45] Ethical approval was obtained before approaching potential participants.[46] The interviews were conducted from April 2018 to January 2022. Prospective participants were invited to take part in the research via email. The response rate was 46.8 per cent (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. In these interviews, the understanding and application of impartiality in ISDS was explored using prompt questions, for example, on the value and role of the party-appointed arbitrator, the party-appointed arbitrator's approach to their appointing party and whether the same level of impartiality should apply to party-appointed arbitrators and chairpersons.

The interviews were transcribed and anonymised, and interview transcripts were then coded using thematic analysis, a method for identifying, organising, describing, analysing and reporting themes found within a dataset.[47] The interview transcripts were coded using thematic analysis, a method for identifying, organising, describing, analysing and reporting themes found within a dataset.[48] The NVivo computer software system was used to assist with the thematic analysis. The data presented uses the anonymised 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.[49] This article presents the key empirical findings of the project and, on the basis of these findings as well as supporting theorical analysis, the article questions the application of the judicial doctrine of impartiality which is currently applicable in ISDS.

[43] 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 article is drawn from the interviews.

[44] The representatives were from leading arbitral institutions which administer ISDS disputes and are located in different countries.

[45] Prospective interviewees were selected based on their level of participation in the ISDS system. As regards arbitrators, the interviewers sought the involvement of those who are firmly established in the field, those who are new entrants and those falling between these two groups. They also sought the involvement of arbitrators who are considered to be pro-investor or pro-State. The number of arbitral appointments is as of the date of completion of all of the interviews (and has increased since then). As regards counsel, the interviewees sought the involvement of those who are experienced in the appointment of arbitrators. For both categories, the interviewees sought geographical and gender diversity. For clarity, it should be noted that no end users of ISDS (ie representatives of States of investors) participated in the research. Given the study's aim to examine and assess the judicial doctrine of impartiality, the study focused on arbitrators and counsel whose understanding of the judicial doctrine of impartiality and its implications (due to their legal training) would be of particular value. The authors acknowledge that therefore the views presented may well reflect the position of people who are benefiting from ISDS either as arbitrators or counsel. However, in spite of this position the interviewees were willing to be critical of the system, as is identified in this publication and further publications.

[46] The ethical approval was obtained from the Ethics of Research Committee of the university (at the time the interviews were conducted) of the authors.

[47] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 Qual Res Psychol 77.

[48] ibid.

[49] For the attribution of Arb, the text makes it clear, where relevant, whether the data relates to their role as arbitrator or counsel.

IV. THE CONSTRUCTION OF THE FOUNDATIONAL VALUE OF TRUST IN ISDS

> Arb 37: it [arbitration] is based on a system where you trust one person and you take the risk with that person, that's it.

> Arb 89: how do you get a party to trust somebody sufficiently to appoint them? And that's what it's all about.

Typically, in ISDS each disputant unilaterally appoints one arbitrator and the presiding arbitrator is appointed jointly by the disputants or the party-appointed arbitrators. In the empirical project, the disputing parties' ability to appoint on an ad hoc basis arbitrators whom they trust was identified as a fundamental value of international arbitration:

> Arb 60: Clients do find it important to have a say, to have their own involvement in the constitution of the tribunal, and to be able to point at their arbitrator and to know that one person *they genuinely trust*, that is a good candidate for that position, is on that tribunal. To give that up would be a huge deal. [emphasis added]

Indeed, the party-appointment system is regarded as a cornerstone of the legitimacy of international arbitration[50] and leads to trust in the decision-making body as a whole and trust in the outcome:

> Arb 81: if one is opting out of the judicial system, even in the ISDS context, then the opportunity to have the option to be involved in the selection of at least part of the decision-making body, I think, is fundamentally important to a *sense of participation and ownership in and, therefore, trust in that decision-making body*. [emphasis added]

> Arb 86: if they've been there, if they've seen the arbitrator, if they feel intuitively or whatever basis that the arbitrator is the best that can be had, then it will make them accept the result. *So trust goes to thinking, 'All right, we gave it our best and it is what it is'*. [emphasis added]

As the interviewees explained, by having the opportunity to select and appoint an arbitrator whom they know and trust, the disputants feel assured that, at a fundamental level, the arbitration process will be fair and, in particular, that the disputant's case will be fully heard through their party-appointed arbitrator. The association between a party's opportunity to be fully heard and fairness was identified by interviewees, for example:

> Coun 83: I think that, leaving those differences aside, I suspect that the reasonable expectation of parties in appointing a party-appointed arbitrator is that it will help increase the chances of their case getting a fair hearing before the tribunal, by having a party-appointed arbitrator in place.
> Interviewer: How does that lead to getting a fair hearing?

[50] Brower and Rosenbery identify 'a close nexus between the perceived legitimacy of international arbitration and the parties' appointment of the arbitrators' adding that such legitimacy then leads to respect for the arbitral award, whether favourable or not (Charles N Brower and Charles B Rosenberg, 'The Death of the Two-Headed Nightingale: Why the Paulsson-Van Den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy Is Wrongheaded' (2013) 29(1) Arbitr Int 7, 19).

> Coun 83: I guess what's a fair hearing? I guess that it's one at which both or, if there are more than two parties, all parties have a full opportunity to be heard.

Importantly, however, the disputants' trust that the party-appointment system will ensure a fair hearing goes beyond the procedural requirement of due process. As the evidence shows, fair hearing in the context of the unilateral appointment of ISDS arbitrators means not just that the case of a party is fully heard; but also, and importantly, *that the party's case is understood in its proper context*. In that sense, trust in the context of ISDS is the party's confidence that its party-appointed arbitrator has the requisite attributes and qualities to ensure that the party's specific perspectives are carefully considered by the arbitral tribunal.

Interviewees identified three qualities which are particularly important for disputants in trusting that their appointed ISDS arbitrator will ensure that the party's case will be discussed and understood in its proper context.[51] The first and perhaps most important quality of trust is that a party-appointed arbitrator shares *similar perspectives* with those of the party who appointed them. It is important here to emphasise a key feature of ISDS disputes, namely that the disputants fall into two distinct categories: States and private investors. Indeed, ISDS disputes implicate broader policy questions, and often value judgements, about the purpose and legality of decisions taken by States as articulated, for example, by the following interviewees:

> Arb 42: The issues that come in investment arbitration are different from commercial arbitration, have often also a political and ideological tone, expropriation, nationalisation, so economic nationalism versus internationalism. These are themes on which if you look to professors or former public officials, we know now maybe the world is less polarised on certain aspects, but when there was a new international economic order there were those who have a favourable view for developing countries, challenging the existing international economic order, and others who are more prone to a commercial view, the sanctity of contract that state and government should act like a private person. You have these general views.

Against this highly complex and often politically sensitive background, the fact that a party-appointed arbitrator understands and appears to share important policy perspectives (a 'world view') is an essential consideration of trust for the disputants as identified, for example, by the following interviewees:

> Arb 95: Then the phenomenon of the last 15 or 20 years of investor-state disputes … is that people look for, and then arbitrators are seen as, pro investor or pro state, because there can be a world view that it is good for developing countries and the intention of treaties to encourage investment. So, therefore, risk capital should be protected from interference, wrongful interference, by states.
>
> On the other hand, there can be a legitimate world view that businesses are big and can look after themselves. They can get insurance; they take risks all the time. States' and particularly elected governments' role is to govern, and they may change their policies, and businesses just have to put up with that

[51] It is important to add that parties' trust in their party-appointed arbitrators is a vicarious trust in the sense that parties trust their appointed arbitrator because of their lawyers' trust in the arbitrator, as identified, for example, by Arb 94:

> Trust means various things. I mean, you have to know that, anyhow, the parties who appoint arbitrators are educated by the lawyers, they are lawyers. So, it is trust that the lawyer can put in you, rather than the parties, because it is on that consideration. They know us. I mean, they know the arbitrators they appoint, they know their skills, they know the way they work. And this is the trust, how it is transmitted to their clients.

> Arb 81: but they are also looking for, I think, an understanding of their perspective. So if it is an investor, an understanding of commercial investment, risk and protections. If it is a state, a perspective of how a state functions, how democratic process works, if it is, indeed, a democracy, and how laws are made and how people are protected within the state.
> So I don't want to use the word ideology because I don't think that is the right word. I think the right word is perspective. If one has never worked with a state or for a state, there is a lot of state law making process, state governance process that you don't really appreciate. So I think it is that perspective.
> Interviewer: That comes with a particular type of experience?
> Arb 81: Yes, that is what you are looking for. You are looking for your party nominated *to have your perspective so they can see it from your point of view and have empathy for your position*. [emphasis added]

Thus, it matters for ISDS disputants to appoint arbitrators with whom they share certain perspectives because it provides confidence that their positions will be properly engaged with in the decision-making process:

> Arb 46: 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. If I'm representing a state, I want my arbitrator to fully understand my position on FET in a given case and make sure that my position is heard, debated and argued within the tribunal or in their deliberation.
> Whatever the decision comes to, at least I'm satisfied, or I know that my party's position is being heard. The same thing if I'm representing an investor, I want to make sure that my arbitrator understands the commercial and financial stakes of what has happened and will be able to communicate that effectively within the tribunal and their deliberations.
> At least from a counsel's perspective, that's what's key, that you want to at least have people who that if they have these positions, that the *strong views that they may have on certain issues get properly debated within the tribunal and then ultimately, the deliberations lead to whatever the result is*. [emphasis added]

In addition to the broad State–private investor categorisation of parties in ISDS disputes, parties also hail from a wide variety of countries. Accordingly, and in particular for State parties, parties value the ability to appoint an arbitrator who has cultural familiarity with the disputant's home State:

> Coun 100: for state parties in particular, it's *extremely important for them to have a role in nominating an arbitrator*. You know, given the example of an African state … most state advocates will feel passionately about having an arbitrator, let's say, with African heritage who they will feel confident with and who can understand where they're coming from … So, you want your arbitrator to bring various different things to the table, and you want to be able to select an arbitrator with those particular traits, and yes, that is one of the benefits of arbitration, isn't it? [emphasis added]

> Arb 95: Also, internationally it allows people to appoint someone. Be it a country, regional, they understand what might be going on at a particular time … who understands the culture of the people that are involved in the project, at least from that party side [and] would understand how people would have operated, or will appreciate the nuance or the meaning in what was written that may not be as clear to someone who is just reading those words. So, for those reasons, I think the *party-appointed arbitrator has real value to parties*. [emphasis added]

This attribute of cultural familiarity may be particularly important if the appointing State party has no previous experience in the process of ISDS. While some States have, in the course of the last 40 years, been the subject of a large number of investment claims and have built the necessary legal capacity in defending these claims, the majority of developing States are relatively unfamiliar with ISDS. For these less experienced developing States, the opportunity to appoint an arbitrator who understands their background policy considerations and appreciates their cultural nuances can be particularly reassuring and valued.

The second key attribute of trust in a party-appointed arbitrator is *expertise*. In the context of ISDS arbitrator appointments, expertise includes technical specialisation and familiarity with industry norms and practices, as articulated by the following interviewees:

> Arb 54: There is certainly an argument that, if you're having a dispute about the Deep Sea Horizon or the Deepwater Horizon, you want somebody who knows something about oil and gas law, and norms in the oil and gas industry, and knows about oil and gas contracts.
> So in that respect- And if you really think your whole dispute hinges on the interpretation of Clause 85 in your contract, that trade usage is going to matter, then you know that you really want an *arbitrator that knows about trade usage.* [emphasis added]

Being a key element of trust, expertise enhances the parties' confidence in the quality of the final decision and in the fairness of the process for the resolution of the dispute, as interviewees explained:

> Arb 59: It's a trust on the one hand in the willingness and ability to really get deep down into the matter, whether it's fact or law. So, I have a lot of very high technical skills, so they trust that you are willing and able to go into areas that are non-legal in nature, whether it's technical or commercial. I think *there is a lot of trust* that even in highly complex things … that you'll always see the red ribbon of the case. [emphasis added]

> Arb 69: Well, I think it's always been this idea that you appoint people who you think know your business, know your industry, and *can be relied upon to give you fair justice* in a particular situation, and, particularly, in the, sort of, international context when you don't have the domestic courts involved. I mean, you know, I don't think anyone would say that your English commercial court, for example, would not do fair and impartial justice, but it's more that you might want a particular style of resolution. [emphasis added]

In ISDS disputes, which are now considered an autonomous field of international law, expertise includes specialised legal knowledge in public international law, in particular. Expertise in public international law is an important element of trust in the party-appointed arbitrator's understanding of the State's perspectives and interests in an ISDS dispute:

> Coun 71: And that's when I thought we need completely different expertise. We don't need the arbitration gurus, *we need public international law specialists* in these cases. And that's when I started to appoint a different type of lawyer to these cases. You know, again, some, in my view, did a better job than others, others did a very, very good job. But I was clear that we needed a very different specialty, a very specialised area of law, and it is not private, commercial or transactional, as I thought it was. [emphasis added]

Relevant perspectives and expertise alone are insufficient for a party to fully trust their appointed arbitrator. Indeed, the third, and final, key attribute associated with trust is *professionalism*, and in particular a hard-working approach to conducting their duties as arbitrators. This attribute assures parties that their dispute will be dealt with in a thorough manner and that the party-appointed arbitrator will devote the requisite time and attention to actively engage with the typically large and complex file of an ISDS case in order to bring the parties' particular perspectives into play. Several interviewees emphasised this important element of trust:

> Coun 33: In terms of trust, though, it's trust to do two things, one is that they will do the work. … That they will actually review, particularly in a complex case, or a case that just involves, frankly, wading through a lot of crap, that they will actually get to the detail and understand the basis of your arguments. They may not agree with them, but at least they'll look at them and understand them.
> And, you know, given that that trust is innate in every single appointment, the critical thing for me is a comfort that they will actually do the job

> Arb 89: Well it depends on what you're looking for from the arbitrator. If you're looking for somebody who is going to read the papers, understand the papers, ask the questions, argue the corner, then yes, you're looking for somebody who you can trust, who will work hard on this case and reach a decision which they believe is right, correct, having taken into account.

Further, some interviewees specifically link the idea of trust with the role of arbitrators as service providers and in particular the provision of professionalism and hard work:

> Arb 32: I think we really need to bear in mind that we are service providers and that parties come to us [as arbitrators]. They have put a great deal in the selection of arbitrators, so you need to deliver. They trust in your judgement, they trust in your case management skills, they trust in your legal analysis., whatever the reason is they come to you. But at the end of the day, what you do is apply the law to a set of facts, and it takes time and commitment and thoroughness to work the file. I think this is what parties are entitled to, especially because we are being paid either by the hour or by the day. If you are not willing to do the heavy lifting, there is no place for you in this business

The relationship of professional trust between arbitrators and disputants is further evident from interviewees' comments which emphasise the implicit promises that arbitrators make to the parties who appointed them that they have the necessary qualities and indeed the time to perform the entrusted tasks:

> Arb 32: [When we accept the appointment to act as arbitrators] We guarantee and attest that we have the time necessary to devote to the matter.

> Arb 72: What I'm talking about is the ability to actually do the work, and a capacity to perform promptly, and to do what they promise.

The findings which have been presented in this section show how the unilateral and ad hoc method of appointing arbitrators in ISDS is constructed on the basis of trust. Further, it identifies the attributes which enable parties to entrust their appointed arbitrators with the execution of their role. The findings which are presented in the

following subsection go further and show that the trust which is placed upon arbitrators has important implications for the way in which arbitrators, and in particular party-appointed arbitrators, in ISDS discharge their duty of impartiality.

V. THE IMPLICATIONS OF TRUST FOR IMPARTIALITY IN ISDS

As explained above, trust in the appointment of ISDS arbitrators means the party's confidence that its party-appointed arbitrator has the requisite perspectives, expertise and professionalism to ensure that the party's specific perspectives are carefully considered by the arbitral tribunal. The evidence presented in this section shows that this trust implicates impartiality in ISDS in two ways. First, it means that the parties trust that their party-appointed arbitrator holds certain predispositions which are important for the party's case which is why the specific arbitrator is selected. Second, it means that the party-appointed arbitrator is trusted to actively ensure that these predispositions will be brought into the deliberation room. Overall, as is explained below, trust in the appointment of ISDS arbitrators entails that party-appointed arbitrators are chosen for, and perform a role which gives rise to, certain predispositions.

Specifically, in the first place, trust is associated with predispositions which a party-appointed arbitrator already has. Indeed, as a significant amount of evidence shows, a party trusts that the particular perspectives of its party-appointed arbitrator for which they have been chosen will cultivate a degree of predisposition which would favour the position of the party:

> Arb 49: Yes, and, of course, this does definitely *go to your bias* in the broadest sense of the term. I think that you do look for a predisposition, if you're a claimant's counsel, that someone is not going to be too statist. [emphasis added]

> Coun 71: Well, it depends on who do you mean by people. Because, generally speaking, I think claimants will, for the most part, be naturally concerned about their cases and nothing more. And they will make appointments of people who they can probably, I'm going to say rely although it's probably too strong a word in this context, but people they can trust will resolve in one way or will be more *inclined to their interest*. They couldn't care less whether governments are run well or not. [emphasis added]

> Arb 38: No. You're right. If you have the choice of an arbitrator, I think it would be hypocritical to think that you don't care who is going to be … You, obviously, want to have an arbitrator who, if possible, is *sensitive to your views* and then will take into consideration and then possibly … [emphasis added]

Indeed, interviewees who serve as counsel for appointing parties described the careful selection process through which arbitrators with certain predispositions are identified:

> Arb 02: [Y]ou select somebody whose views you believe fit the way you see the case, who is more likely to see the case the way you do. That's step one. To do that, you have to do research and think about it very carefully. Once you identify a shortlist of potential party-appointed arbitrators who you believe will *see the case the way you do*. [emphasis added]

> Arb 14: The first item for me is to draw a list of people whose decisions might go to some extent in the direction of the legal issues or in the direction of how we want the legal issues in the case *to be decided in favour of the client*. That is our first criterion. [emphasis added]

> Arb 44: And the second one is, 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. [emphasis added]

Further, those serving as arbitrators acknowledge the effectiveness of the thorough selection process in appointing an arbitrator with favourable predispositions. As an arbitrator puts it:

> Arb 10: I am struck by the fact that although I do not believe I am partisan in any way, every time I have dissented, it has been in favour of the party who appointed me. I think about that a lot and it tells me at a minimum, the notion that counsel and parties are trying to choose party appointed *arbitrators who are philosophically predisposed towards their conception of the case*. Must be working to some extent, because I find myself saying, 'Here's how I think about the law. Here's how I think about facts.' Then I'm outvoted 2-to-1, it may be that my dissent consists of one sentence. [emphasis added]

Similarly, interviewees identify that the attribute of expertise, which is so valued by them, can lead to predisposition. Indeed, some of the interviewees have called the predisposition which comes from expertise as a form of 'predilection' or 'bias':

> Arb 27: Somebody who is familiar with how industries work. You want to have somebody who is familiar of how you assess the economic values. That's one of the things you do when putting up the tribunal. That, I think, is—or should be—one of the values of arbitration: that you have people who understand what the dispute is about. That brings with it *some element of bias*. [emphasis added]

> Arb 94: That is what I am saying and that is what I am focusing on, is that it's not a question of being honest or dishonest, it's a question of being rather involved in certain areas rather than in others, more knowledgeable in one area rather than another. That is my lead to what we *perceive as bias*. [emphasis added]

> Arb 97: If you understand an industry … you may be more inclined to pay more attention to those matters because they are within your field of expertise than you would to others … so I think it can lead you to pay more attention to certain aspects of the case than to others and that potentially can *create some bias* in favour of this or that particular issue. [emphasis added]

Importantly, for ISDS disputes expertise in a certain field of international law tends to shape your perspectives and potentially your approach to understanding and deciding disputes between investors and States.

Public international law is a field which concerns the governing of relations both between sovereign States and other entities like international organisations. Naturally, public international law is primarily shaped by the idea of State sovereignty as being a primary principle of public international law.

The concept of State sovereignty has evolved significantly over time. In its traditional Westphalian sense, sovereignty denoted the absolute authority of the State

unrestrained by any higher power or law. However, the rise of international organisations, the development of international economic law and human rights law, and the evolution of investment treaty law have placed limits on traditional conceptions of sovereignty. While the traditional notion of absolute sovereignty has been adapted to contemporary realities, in the view of many arbitrators with a strong public international law background, State sovereignty remains the primary actor and subject of international law. From this perspective, State sovereignty, and the corollary power to act in ways that give effect to that sovereignty, is a primary consideration in assessing the conduct of States in the context of ISDS disputes for many public international law scholars and lawyers.

By contrast, arbitrators with a commercial law training and background, would tend to recognise a more limited scope in the State's authority to regulate their affairs. From this perspective, while States play a major role in regulating international business, their sovereignty over commercial affairs is constrained by binding treaty commitments, customary legal obligations and international dispute settlement mechanisms. By entering into a plethora of bilateral and multilateral investment treaties, which accord individuals the right to bring direct actions against States, States have consented to qualify their sovereign rights and refrain from pursuing policies that could otherwise discriminate against foreign investments or protect domestic economic interests.

Different legal backgrounds and perceptions of sovereignty may naturally be associated with different decision-making behaviour.

Further, an arbitrator's background and expertise not only shapes their understanding of the legal context of the dispute but also its broader cultural context. The participation of States and corporations in ISDS disputes involves the meeting not only of the two distinct fields of public and private law but also the distinct operating cultures of States and corporations. States and public entities tend to be bureaucratic, with decision-making processes at the level of a government or a municipality tending to be slow, complex and involving several stages of review and approval from individuals who may have different views and political interests. Arbitrators who understand that particular context can serve as translators across the cultural divide between States and corporations, as explained by this interviewee:

> Arb 99: I think it is always *the system of trust*. If you select someone, even if you don't think, or if you don't expect, and we are just talking about the bone fide parties, if you don't expect that this arbitrator will act in your favour, and will endanger the process by being partial, and not being impartial and independent, still, he or she can act as a cultural translator.
> You know, very often you have a developing state, and you have a foreign investor, and maybe their mindset is so completely different on how they do things. On how the project went wrong, that if you have someone who understands this cultural divide, and can translate also in the arbitration, 'Okay that was done this way because in our culture'. Blah blah blah, and so on.
>
> More like making the point or the parties' background understandable. I think that is one of the features a good co-arbitrator should do. It is not being impartial and independent in the sense that manipulating the process, but making the parties' side understood, and heard. I think that is why parties clinch to that. [emphasis added]

Further, speaking about the trust which State parties show in a well-known and highly regarded arbitrator, who typically serves as State appointee, an interviewee observed that expertise can carry significant influence but also bias into the deliberation room:

> Coun 91: And there are a lot of arbitrators who are sitting in investment treaty arbitrator tribunals that do not understand public international law. They just don't get the basics. So, [X's] enormous subject matter expertise means that, more often than not, [X] is the public international law expert on the tribunal, and therefore [X] attains that level of influence, notwithstanding the fact that [s/he] could be construed as partisan in some respects.

The second way in which trust implicates the duty of impartiality in ISDS is that a party-appointed arbitrator is entrusted to perform a role which of itself gives rise to predispositions to the appointing party's case. As the interviewees described, the *nature of the role* of a party-appointed arbitrator, in and of itself, places (in the words of the interviewees) a particular 'mandate', 'duty' or 'job' on the arbitrator towards the party who appointed them.

Indeed, during the interviews, several interviewees identified how the party-appointed arbitrator is 'relied upon' to discharge this 'fundamental' role towards the appointing party:

> Arb 49: He does have a job. Any arbitrator *does have a job* to make sure that the party that appointed them is able to get their case out. I mean, that's a fundamental role that they have. I don't think they have to agree with it in the end or whatever, but they need to make sure that all the arguments are well vetted and that everybody had their full chance. You rely on the other party appointed to do that for the people that appointed them. [emphasis added]

> Arb 18: *It's the duty of the co-arbitrator* to see to it that the standpoint of the party that appointed him is duly considered, the same way the other party's standpoint is duly considered. At least you have a watchdog on both sides. I think this is a dialectic process, which has its merits. [emphasis added]

This special duty and mandate of the party-appointed arbitrator is described, in a number of interviews, as a 'unique circumstance', an 'additional function' or 'particular attention' towards the case of the party who appointed the arbitrator:

> Arb 67: I mean, I always understood the position of a party-appointed arbitrator to be, kind of, *a unique circumstance*, where you're not meant to rule in favour of the party that has appointed you. That is certainly not your role, although I think some clients think that that is their role. Your role at minimum, or maybe not at a minimum but maybe your key role, is of course to be impartial and to make the right call but in doing so, to ensure that the three members on the panel are not missing an important argument. 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. [emphasis added]

> Arb 64: Of course, sometimes, that is code for them being more sympathetic to the substance of the claim. So I would say that, in truth of issue partiality,[52] for me, there is a legitimate procedural side to that in terms of that if a party has appointed you that you might pay *particular attention* to ensuring that due process is fully… That if you're appointed by the claimant, the claimant has obtained due process in a full way.
> Of course, you also make sure that the respondent claim also receives due process, but you also expect that the respondent arbitrator would also be paying *particular attention* to ensure that all the respondent's issues and evidence are covered. Of course, it's the chair's role to do both, so at least there is a double set of eyes. So there is that kind of procedural *particular attention*. [emphasis added]

> Arb 42: The party-appointed arbitrator, in my view, has a role in, let's say, checking that the tribunal look objectively and fairly to the position also of the party who has appointed him or her. That is because in so many issues, so many pages that are written, maybe some issues get lost. The party-appointed arbitrator said, 'Well, look, but the respondent, or the claimant has made also this argument. We must [lead 0:11:49] also with the argument. It's not enough to say what you are suggesting in the draft', to be attentive, that there is proper consideration of the argument of the party who has appointed.
> That, in my view, is an *additional function* of a party-appointed arbitrator. [emphasis added]

Further, interviewees speaking from the perspective of appointing counsel similarly considered the role of the party-appointed arbitrator to be to ensure that the appointing party's case is heard, considered and understood. For example:

> Coun 34: So, you don't look for that as much as someone who will, at least, listen to your arguments, pay attention to them; and potentially within deliberations, if your arguments are not being given for consideration, or being misappreciated, or not appreciated, then your arbitrator will hopefully be able to clarify because they've read your arguments, and they've spent time considering carefully the record.

Some interviewees suggested that not only do parties trust that their party-appointed arbitrators hold certain predispositions but also that they will bring these predispositions into the deliberation room in order to ensure that the party's case is understood:

> Arb 66: So you want two things, I want set views and to be able to carry those views forward in a persuasive way.

Indeed, within the context of the arbitrator's role as a service provider, not bringing in the perspectives of the party who appointed them is considered a failure of their professional mandate:

> Arb 36: So the real problem that sometimes I meet is when the other co-arbitrator does not know the case well and does not defend at all, what are in fact really good arguments. But says nothing or almost nothing, was ready to accept what the other one says.
> Then, my role is to convince that, let's say, lazy arbitrator that the party appointing him is right and he should defend it, and these are the arguments, don't you think? Then that forms a majority.

[52] Issue partiality means an arbitrator's predisposition to a particular legal position as previously expressed, for example, in his/her decisions, publications and speeches.

While interviewees were careful to distinguish this 'duty' from 'partiality', their insights clearly suggest that the role and position of a party-appointed arbitrator carries with it a degree of predisposition towards the appointing party's case:

> Arb 22: [T] he duty of the party-appointed arbitrator is to put the position, to make the tribunal understand the position of the party who appointed him or her. That is more and more in the *borderline of leading for the party*. [emphasis added]

> Arb 18: The reality is different. Even the most neutral co-arbitrator will always see to it that the party that appointed him will be treated fairly and *may advance arguments of that party*. As long as he or she is not biased and one sided, then that's alright. It's not realistic to think that party appointment has no effect whatsoever on the reasoning, the behaviour of an arbitrator. [emphasis added]

> Arb 92: As an arbitrator, so I now practise mostly as an arbitrator. As an arbitrator, I certainly have mixed feelings about it. I feel that I have served with arbitrators that I have felt are biased, and I think that that bias comes from the fact that they are party appointed. So there is, in my mind, *a linkage between party appointment and a sort of conscious or subconscious bias*. So it may not be deliberate per se, but there is this underlying bias that I sense. [emphasis added]

In sum, this section demonstrates first that the attributes for which arbitrators are entrusted with the role of party-appointed arbitrators, including particular perspectives and expertise, and second the very nature of the role with which party-appointed arbitrators are entrusted are associated with a predisposition to the appointing party's case. Overall, trust in the appointment of ISDS arbitrators entails that party-appointed arbitrators are chosen for, and perform a role which gives rise to, certain predisposition.

VI. HOW THE CONSTRUCTION OF TRUST INVITES A DISTINCT APPROACH TO IMPARTIALITY IN ISDS FROM THAT OF THE JUDICIARIES

The previous section explained how the unilateral and ad hoc method of appointing arbitrators in ISDS is constructed on the basis of trust and how the trust which is placed upon arbitrators in the execution of their role entails a degree of predisposition towards the appointing party. As this section explains, the empirical evidence further shows that this degree of predisposition which comes from the trust in the party-appointed arbitrator is, to a certain degree, compatible with the historical and current understandings of impartiality in ISDS.

The importance of trust in the party-appointed arbitrator reconciles with the historical origins of the role of arbitrators. While originally arbitration was ancillary to national judicial systems, in the eighteenth and in particular the nineteenth century, arbitration evolved to become a distinct system of dispute resolution which is alternative to judiciaries. Historically, arbitrators did not have a judicial function; rather they were treated as *agents* for the two disputing parties to decide the dispute between the parties. Court decisions from the nineteenth century demonstrate that the courts categorised arbitration agreements as agency contracts pursuant to which

arbitrators had fiduciary, and not judicial, powers.[53] Thus, originally, the ad hoc party-appointment system in arbitration is the corollary of the historical treatment of arbitrators as agents, ie arbitrators were appointed by the parties, who were best placed to select an arbitrator whom they could trust as their agent. While the role of arbitrators has significantly evolved from its historical origins of agency, even today parties select arbitrators whom they trust for having the attributes that ensure that the party's case will be actively discussed at the deliberations room and understood in its proper context.

Indeed, the findings show that today arbitrators are alive to the fiduciary trust they assume when they accept the appointment by a party and that they respond to that trust, as identified, for example, by the following interviewees:

> Arb 09: You have to recognise that you're fulfilling a special function that you've been entrusted by contracting states. It's important to honour their trust in you and not exceed their trust in you. I do think there's an *extra level of care*.

> Arb 32: But the trust that's being placed in a co-arbitrator, and the pressures that the co-arbitrator feels after a selection process and the vetting that takes place, and sometimes arbitrators' interviews, some people take … very seriously and they really *feel a duty towards* the appointing party in varying degrees. [emphasis added]

In that sense, the trust in party-appointed arbitrators is constructed differently from the trust in judiciaries. When two parties decide to submit their dispute in the courts of a certain jurisdiction, they cannot choose the perspectives, expertise, experience and work ethos of the specific judge who will be assigned to decide their dispute. Rather, they choose to resolve their dispute in a national court because they trust the court system of that jurisdiction as a whole. In other words, it is trust in the judicial system which leads to trust in the individual judges. By contrast, parties in ISDS trust certain individuals because of particular attributes these individuals have. It is the trust in the individual members which leads to trust in the ISDS system as a whole. ISDS is not an integrated system of dispute resolution as national judiciaries are where all judges are chosen, and often trained, by a central appointing authority. The process and outcome of an ISDS arbitration is as good and trustworthy as the specific arbitrators who constitute the panel:

> Coun 69: You want somebody who is not a judge sitting up on the bench, but is there with you in the room and through a process which still results in a binding award, but is a process involving somebody who does understand your industry and your sector and the nature of your business in as intimate a way as you would like, while, of course, always *respecting the boundaries of impartiality*. [emphasis added]

> Arb 90: I mean, *the entire arbitration is all about appointment of arbitrators*—in other words, parties—can actually choose who is going to be the decision-maker. And I think this *is what really makes arbitration different from litigation*, for instance.
> So, yes, it is essential to arbitration, and it is very important to keep it that way, in my view. Because that really enhances *the trust in the system and confidence in the system*. And it also makes parties responsible for their choice of arbitrators. [emphasis added]

[53] Stavros Brekoulakis, 'The Policy Favouring Arbitration under English Law' (2019) 39 Oxf J Leg Stud 124, 144.

The personal element of trust in an individual arbitrator whom a party chooses to appoint in an ISDS case is well understood by experienced arbitrators who, broadly, regard their role in deciding an ISDS case as providing a professional service. The role of an arbitrator as a trusted service provider was identified by several interviewees, for example:

> Arb 76: For me it's not a sorority club being an arbitrator. I'm in a service industry, I have to render a service to parties and not in a club of friends doing BS somewhere at the golf club.

> Arb 86: I know this is going to sound strange, but we're service providers, right? In a sense, there's no difference between being a waiter or [laughter] an accountant. You're privately retained. You're being paid to do a job, and you have a professional duty to do the job as best you can, and give good service. I think definitely, certainly I feel a sense of duty that I'm doing a job; unlike a judge, you know, I can't just, if I want a coffee break, I'll take a coffee break, and come back tomorrow. No, I'm here to serve the needs that you have. So, I think definitely there is that element of service that is important.

It is noteworthy that this personal element of trust that creates a specific mandate for the party-appointed arbitrators is the corollary of the ad hoc and unilateral appointment system of ISDS.

> Arb 64: In the party-appointed system, the party-appointed arbitrator… *There's an unspoken rule or understanding* that they will pay particular attention to ensure that the arguments put forward by the party that has appointed them are … That all the issues are addressed and that there is a full discussion of those before the tribunal.

> Arb 32: So the parties want to have an opportunity to present their cases, and that's the deal that you make with the parties. *That's part of your mandate*. [emphasis added]

Further, the specific mandate of the party-appointed arbitrator is associated with an 'inclination' towards the appointing party which is accepted as normal and indeed rational and conveys a nuanced understanding of impartiality in ISDS:

> Arb 50: You have to accept party appointed arbitrations; the party appointed arbitrator has an inclination towards. That's why also I don't mind it, I do not mind it. I think it's normal. I think the chair has to be very careful to slap them down if they go over the top. Of course, there is and some more than others. A party appointed arbitrator, *a party appointed arbitrator is absolutely independent I think is irrational*. [emphasis added]

Indeed, the party-appointed arbitrator's specific mandate is an important part of arbitration's values:

> Arb 27: Yes. There are limits. I mean there are limits and then [they have] limits. I say, 'I don't go along with that', but I find it useful to have somebody who sees his role in watching that that party's position is properly reflected in the award. Even in the end, it may go against [his party], but I find this quite important. *That's part of arbitration*. [emphasis added]

By contrast, any form of inclination or predisposition towards a particular disputant's case resulting in itself from the act of appointment would be considered entirely

unacceptable for judges. The trust in the system and function of judiciaries, which is structured around the permanent and central method of appointment of judges, entails that no judge can have a 'special mandate', 'deal' or 'unspoken understanding' to ensure that the case of a certain party is understood in its proper context. The judicial doctrine of absolutist impartiality does not condone any 'inclination', 'predilection' or 'predisposition' which is associated with the particular role of a judge. As explained above, the judicial doctrine of impartiality entails a *universal* conception of impartiality which applies across differing methods of legal adjudication; a *singular* duty of impartiality which applies irrespective of the role and function of an arbitrator; and a *binary* conception of impartiality with arbitrators being held to be either impartial or biased. Under the judicial doctrine of absolutist impartiality every adjudicator across all types of legal adjudication must be wholly impartial, irrespective of the nature and context of their role. The judicial doctrine of absolutist impartiality therefore takes no account of context, with the same understanding of impartiality applying across different legal adjudication processes and across differing adjudicative roles. In other words, context, and specifically the way trust operates in ISDS, is not a relevant factor for the judicial doctrine of impartiality.

However, as the interviewees identified, in ISDS, context and more specifically trust arising from the ad hoc and unilateral system of appointment, is an important factor in assessing the behaviour and impartiality of arbitrators. In particular, trust in the appointment of ISDS arbitrators entails that party-appointed arbitrators are chosen for, and perform a role which results in, certain predispositions. As several interviewees pointed out, both the choice of a predisposed arbitrator by parties and the predispositions which arise from the performance of the party-appointed arbitrator's specific role are generally considered compatible with the understanding of impartiality which applies in ISDS.

For example, one interviewee explained that while the predisposition of party-appointed arbitrators for which they are chosen forms part of 'bias in the broadest sense of the term', this predisposition is generally considered a 'completely legitimate bias':

> Coun 49: Yes, and, of course, this does definitely go to your bias in the broadest sense of the term. I think that you do look for a predisposition, if you're a claimant's counsel, that someone is not going to be too statist. [But] to me, that's a fine example of legitimate predilections because they're both ideological. That doesn't mean that they're going to decide any case in any particular way necessarily. But to me, that's a *completely legitimate bias* if you want to use the term, obviously. The term is too strong; '*predilection*' is better. [emphasis added]

Another interviewee conveyed the acceptability of these predispositions or 'sensitivities to an approach' by distinguishing them from partiality:

> Arb 96: I think we all come with our cultural baggage, which is part of … You all try and second guess, you read people's—if you know them personally you get an idea of what their thinking might be. So inevitably I think there's that, it's not partiality but I think it's *sensitivity to an approach* that somebody may well take in terms of their consideration. [emphasis added]

And another interviewee described how the less-than-perfect impartiality of arbitrators who have been chosen for particular perspectives is an unspoken 'part of the system':

> Arb 85: It is, in a way, odd in the appointing side where people say, 'Appointment is one of the most important things. It means that I feel certain there is someone there who understands my perspective'. Yet, we all would equally say, 'We expect you to be as impartial as the Pope', which I think is what we want. But it is kind of funny when you think about it, the flip we expect. *Nobody really says it out loud but it is part of the system*, so… [emphasis added]

Similarly, interviewees also described the predispositions which arise from the performance of the party-appointed arbitrator's role as inevitable and as compatible with a more nuanced understanding of impartiality in ISDS:

> Arb 86: I think in an ideal world, it is the same standard, but for me, it is the corollary of party nomination, is that it *is very difficult to accept in practice the same level of independence and impartiality*. [emphasis added]

> Arb 96: I think we all have that. I think I'd be a liar if I said you're not conscious of who … If I could honestly say, I remember one arbitrator saying, 'Oh he often forgets who appoints him'. I think that's not true, and I think that's doing them a slightly dis-service. You want them to know that you are at least ensuring that their position is being heard by the tribunal. *I think it's a really thin line*. The most, I think tread on the right side about trying not to go over that. [emphasis added]

> Arb 76: No, actually the problem is simply, it's understanding, the whole concept of my arbitrator … from the mental point of also investment arbitration, is you recognise it and you should say then he or she, the wing person has a different role as of the chair. But that's not what they say. *They have a fiction, they keep up that, they're all at the same impartiality and neutrality requirements*. [emphasis added]

A system of allowing parties to appoint an arbitrator whom they trust to perform that role is the essence of arbitration as being distinct from judiciaries. This system of dispute resolution calls for a different and contextualised understanding of impartiality, as was conveyed by this interviewee:

> Arb 50: *It's a different understanding of [impartiality]*. Whilst in international arbitration we've increasingly fallen for the idea these people are judges and therefore must be impartial. I think it's a misunderstanding of what international arbitration is, of what arbitration is at all. The parties want to keep a finger in the pie and that's also necessary for its credibility. It's a credibility issue. If it's taken away from the parties, they don't feel any kind of connection with it and I think they don't like it. [emphasis added]

It should be pointed out that the different understanding of impartiality in ISDS does not suggest that the practice of ISDS is unprincipled or ethically compromised. Indeed, the system of ISDS is heavily regulated in terms of ethical laws and rules[54] and despite the criticism, examples of unprincipled behaviour on the part of arbitrators are very rare.[55] Rather, under this more nuanced understanding of impartiality the reason that certain forms of predisposition are considered legitimate is because of the idea of trust in the unique role of party-appointed arbitrators which has always

[54] See Section II which identifies the laws and rules which regulate impartiality in ISDS.

[55] In the arbitration between the Republic of Croatia and the Republic of Slovenia, Permanent Court of Arbitration, 2012-04, an arbitrator resigned after engaging in private conversations with one of the parties regarding the Tribunal's deliberations.

been a foundational value for arbitration. Parties trust that the arbitrator they select has certain perspectives and experiences which entail a form of bias and also that the arbitrator will perform the role in a manner which of itself gives rise to a form of bias.

From the above analysis it becomes clear that the way that trust operates in ISDS invites a distinct idea of impartiality from that of the judiciaries. The foundational trust that the party-appointed arbitrators hold certain predispositions and perform a role which gives rise to certain predispositions is associated with an acceptance of these forms of predispositions. It is an idea which does not reconcile with the current doctrine of absolutist impartiality which requires that all adjudicators across different forms of adjudication and irrespective of their role are absolutely impartial or otherwise biased.

It is this fundamental difference between the construction of trust in an arbitrator and a judge which calls into question the appropriateness of the judicial doctrine of absolutist impartiality for ISDS. If the underlying relation between disputants and party-appointed arbitrators, including the disputants' expectations of how party-appointed arbitrators will perform their role, is fundamentally different from that between disputants and judges, there is no reason to assume that the judicial doctrine of absolute impartiality is equally suitable to ISDS.

The suitability of the judicial doctrine of absolutist impartiality to ISDS can further be questioned on the basis of its *singular duty* of impartiality which, as explained earlier, applies irrespective of the role and function of an arbitrator. This singular approach is a poor fit for ISDS as it fails to acknowledge the differing roles, and associated expectations, of the presiding arbitrator and the party-appointed arbitrators. Typically, while each party appoints one arbitrator, the presiding arbitrator is appointed jointly by the parties or the party-appointed arbitrators. As the title suggests, the presiding arbitrator is expected to direct and manage the procedure and tends to take the lead in the deliberations and writing the award, including preparing the first draft. Indeed, the different and greater role of the presiding arbitrator was a common theme identified by the interviewees, for example:

> Arb 61: Well, the role of the [chairman] is certainly much larger than the party-appointed arbitrator, in terms of, as you said, drafting the award and writing to the parties, preparing the procedural orders and whatnot and the contacts with the institution under which you are operating. The chairman is doing most of this.
> The party-appointed arbitrators, the chairman will always ask for your views on the drafts, of this or that draft, but it is comparatively a minor role, if you wish, in terms of the whole operation.

The greater role of the presiding arbitrators is associated with a heightened level of impartiality compared to the party-appointed arbitrator in two ways: first, the presiding arbitrators' duty of directing and managing the arbitration requires them to demonstrate procedural even-handedness where both parties are given an equal opportunity to present their case and are treated equally. This aspect of the presiding arbitrators' role relates to procedural impartiality. Second, and importantly, the presiding arbitrators' role of leading the deliberations and writing the award requires them to ensure that both parties' positions on substance are properly considered in the deliberations. This aspect of the presiding arbitrators' role relates to substantive impartiality, and it is the form of impartiality which concerns this article. Whereas

understandings of party-appointed arbitrators' impartiality include a certain predisposition towards the party who appointed them, the understandings of presiding arbitrators' impartiality require them to be and be perceived as 'entirely neutral' in deciding the merits of the dispute:

> Arb 20: I mean that is something people often don't realise but the burden on the president is completely different. Now do people perceive the mandate, do arbitrators perceive the mandate differently? I mean everybody agrees that the president must be entirely neutral and partial, objective and so on, the position of the co-arbitrators, as we know, can be different and some view it as more trying to make sure that the position of their party is being heard or even defended.

> Arb 99: Well, probably I would say that the chairperson should be- I would not lower the standards for the co-arbitrators, but I would simply add another layer for the chairperson, who has to be completely independent and impartial. Especially in the ISDS system.

The singular and standardised approach of the judicial doctrine of impartiality is therefore a poor fit for the context of ISDS with the distinctive roles of the members of the arbitral tribunal and the differing levels of impartiality associated with those roles.

The way that trust in the appointment of ISDS arbitrators operates calls for a distinct and more nuanced approach to impartiality. Indeed, as one interviewee suggests, the legitimacy of ISDS does not depend on the adoption of the judicial understanding of impartiality:

> Arb 66: So you want two things, I want set views and to be able to carry those views forward in a persuasive way. *It doesn't mean that they are not impartial*, but it *doesn't mean the system is any less legitimate for their impartiality*, at least, it seems to me. [emphasis added]

VII. CONCLUSION

Drawing on original empirical findings, this article has identified how parties' trust is constructed in the context of ISDS and has challenged the applicability of the judicial doctrine of impartiality to ISDS. It argues that the absolutist approach of the judicial doctrine of impartiality is ill suited to the context of ISDS on the grounds that trust in arbitrators is constructed on a fundamentally different basis from that of trust in judges. Trust in ISDS is founded on the party-appointment system and is established in two predominant forms. First, parties trust that their party-appointed arbitrators hold certain predispositions which are important for the party's case. Second, parties trust that their party-appointed arbitrators will perform their role in a manner which of itself results in predispositions to the appointing party's case. In short, trust in the appointment of ISDS arbitrators entails that party-appointed arbitrators are chosen for, and perform a role which gives rise to, certain predispositions. The expectation and indeed inevitability of these predispositions do not suggest that ISDS is an unsuitable system of dispute resolution. Rather, they result in a unique understanding of impartiality with which these forms of partiality are compatible. The article therefore calls for a new approach to impartiality in ISDS which better corresponds to the foundational value of trust in ISDS.

This call for a nuanced and contextualised approach to impartiality is likely to be met with apprehension. While absolutes provide an alluring certainty and simplicity, nuance suggests uncertainty and complexity. To allay such apprehension there are a number of issues which this new approach to impartiality will need to address.

First, while certain forms of predisposition, as identified in this article, are compatible with the unique understanding of impartiality in ISDS, this does not suggest that other types of predisposition or partiality would also be compatible. The call for a new approach to impartiality is certainly not a call for a right to be partial and there must be clear limitations to the forms of predisposition which are permissible under this approach. Therefore, an important issue to be addressed is whether a principled line can be drawn between forms of permissible and impermissible forms of predisposition.

Second, this article has demonstrated that a nuanced and contextualised understanding of impartiality in ISDS is more empirically accurate than the absolutist approach of the judicial doctrine of impartiality. Building upon these empirical insights, a further issue to explore is whether there is a theoretical basis for a contextualised approach to impartiality and whether theory can assist in identifying the parameters of this approach.

Third, empirical resonance and theoretical foundations may not be sufficient to allay concerns about this proposed new approach to impartiality in ISDS. It is therefore important to consider the potential practical advantages of this approach, weighed against any potential disadvantages. In other words, what might this approach contribute to the ISDS field?

All of these issues are considered in a subsequent article which proposes the idea of contextual impartiality.[56] Under this more nuanced approach to impartiality, the question is not whether an arbitrator can meet universal standards of impartiality irrespective of the context within which the arbitrator operates. Rather, the question is what standards of impartiality should *reasonably be expected* from that arbitrator given the specific characteristics of the context in which that arbitrator is operating.

[56] The subsequent article develops this new approach on the basis of the empirical findings identified in this article [Brekoulakis and Howard (n 11)].