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

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

S.I. Strong*

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

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

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

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### I. INTRODUCTION

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

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

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


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


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

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

Many of the contemporary criticisms are similar to those enunciated during the early days of the twentieth century, when: nations regarded international commercial arbitration with a mixture of suspicion and hostility. . . . This hostility arose from a reluctance to compromise perceived principles of national sovereignty, a disdain for principles of party autonomy and doubts concerning the fairness, neutrality and efficacy of contemporary international commercial arbitration.\textsuperscript{12}

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

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


\textsuperscript{12} Born, supra note 1, at 165 (footnotes omitted).

\textsuperscript{13} Id. at 168 (footnotes omitted) ("It remains to be seen how substantial and long-lived this trend is.").

\textsuperscript{14} See Rogers, Transparency, supra note 11.


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

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

Although the objective evidence in favor of the legitimacy of international arbitration is compelling, that data has had little, if any, effect on popular and judicial perceptions of the procedure. Not only does this phenomenon raise a number of practical problems, it also creates an analytical paradox that is
symptomatic of today’s post-truth society. If empirical research shows international arbitration to meet or exceed standard criteria for legitimacy, why do questions about the procedure’s validity continue to exist?

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

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

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

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


28. See Strong, Research, supra note 1, at 3–5.


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

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

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

Nyhan and Reifler also found that people’s preexisting views are "likely to contribute to misperceptions about controversial issues." In fact, their studies show that "[d]irectionally motivated reasoning—biases in information processing that occur when one wants to reach a specific conclusion—appears to be the default way in which people process (political) information." This latter phenomenon suggests that those seeking to overcome ongoing skepticism about the legitimacy of international arbitration may need to reconsider their strategic responses to misperceptions about the procedure. In so doing, the arbitral community should heed Nyhan and Reifler’s conclusion that pervasive “[m]isperceptions often fit comfortably in people’s worldviews in this sense by seeming to confirm people’s prior beliefs.” This phenomenon has been described by psychologists as “confirmation bias,” which is a type of unconscious cognitive distortion that affects rational decision-making. However, social scientists have empirically demonstrated the existence of many other types of unconscious biases, including one known as the status quo bias. As the name suggests, the status quo bias reflects an emotional preference for the established legal or social norm, regardless of the rationality of that preference. In many ways, that description appears to apply perfectly to the situation involving international arbitration. In fact, as shall be seen, the status quo bias not

33. See Nyhan & Reifler, Corrections, supra note 32, at 304.
34. See Katherine R. Kruse, Engaged Client-Centered Representation and the Moral Foundations of the Lawyer-Client Relationship, 39 Hofstra L. Rev. 577, 584 (2011); see also Arbitration Institute of the Stockholm Chamber of Commerce, supra note 23 and accompanying text.
36. Id.; see also infra notes 146–48 and accompanying text (discussing why judges and others have an interest in preserving the status quo).
38. Id.
39. Id. (citations omitted).
40. See id. at 2; Silverman, supra note 32; see also supra notes 34–35 and accompanying text (discussing an alternative approach).
41. Nyhan & Reifler, Roles, supra note 25, at 1 (citations omitted).
42. See Lawrence M. Solan, Four Reasons to Teach Psychology to Legal Writing Students, 22 J.L. & Pol'y 7, 19–23 (2013).
43. See Nick Bostrom & Toby Ord, The Reversal Test: Eliminating Status Quo Bias in Applied Ethics, 116 Ethics 656, 660 (2006); see also infra note 133 and accompanying text.
45. See supra notes 23–24 and accompanying text.
only describes why questions continue to arise about the legitimacy of international arbitration, but it also explains why arbitration is so popular among those who work frequently in the field.46

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

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

Next, Part III considers the origin and nature of the status quo bias, using data drawn from political science, psychology, and behavioral economics. This research establishes the empirical basis for the status quo bias and strongly suggests that cognitive distortions are affecting the debate about the legitimacy of international arbitration, regardless of whether participants in those discussions are aware of those influences.47 Adherents of the law and economics movement may consider the status quo bias to be largely analogous to the concept of legal defaults, which are said to affect rational decision-making by increasing the attractiveness of the established norm.48 While the two phenomena are similar in many ways, the status quo bias is an empirically established (i.e., backward-looking) phenomenon r-

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

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

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

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

Part VI concludes the Article by pulling together the various strings of argument and analysis. The discussion also includes a heuristic on how to identify status quo bias in this field54 and offers several normative suggestions on how the international arbitral community should proceed going forward.

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

Second, this Article considers investment arbitration and international commercial arbitration as a combined unit, even though most commentators working in legitimacy theory approach those two mechanisms separately. This methodological choice is based on the likelihood that non-specialists (who are, for the most part, the ones questioning the legitimacy of international arbitration)
consider the two procedures to be functionally identical.\textsuperscript{56} However, this Article will address differences between the two procedures when those distinctions are relevant to the discussion.

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

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

II. LEGITIMACY IN INTERNATIONAL ARBITRATION

A. Relevant Standards

Recent years have seen a considerable amount of interest in the concept of legitimacy, with commentators approaching the issue from a variety of perspectives and for a variety of purposes.\textsuperscript{61} Because perceptions of legitimacy "may

\begin{itemize}
\item[56.] See Blatt, supra note 9, at 472; Eisenberg, supra note 9, at 218. Those with a high degree of familiarity with international commercial and investment arbitration (i.e., parties and counsel) exhibit a high degree of satisfaction with the process. See 2008 International Arbitration Study - Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards, QUEEN MARY U. LONDON, SCH. INT'L ARB., http://www.arbitration.qmul.ac.uk/research/index.html (last visited Jan. 18, 2018) (containing details regarding seven different empirical studies concerning international arbitration).
\item[58.] Questions arise as to whether the public perception of litigation is as positive as it is generally deemed to be. See Gibson & Nelson, supra note 57, at 215; S.I. Strong, Judicial Education and Regulatory Capture: Does the Current System of Educating Judges Promote a Well-Functioning Judiciary and Adequately Serve the Public Interest?, 2015 J. DISP. RESOL. 1, 12–13 [hereinafter Strong, Regulatory Capture] (discussing public perception of judicial performance); Penny J. White, Using Judicial Performance Evaluations to Supplement Inappropriate Voter Cues and Enhance Judicial Legitimacy, 74 Mo. L. REV. 635, 636, 666 (2009).
\item[60.] Further reading is available. See supra note 23 and accompanying text.
\item[61.] See Gibson & Nelson, supra note 57, at 202; Dan Priel, The Place of Legitimacy in Legal Theory, 57 MCGILL L.J. 1, 6 (2011).
\end{itemize}
vary over time and across different international actors," it is possible for different members of the international community to hold different views about the propriety of international arbitration. However, in general:

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

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

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

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

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64. Id.
66. See H.L.A. HART, THE CONCEPT OF LAW 82 (Peter Cane et al. eds., 2d ed. 1997) ("There is a difference ... between the assertion that someone was obliged to do something and the assertion that he had an obligation to do it"); Lon L. Fuller, Positivism and Fidelity to Law — A Reply to Professor Hart, 71 HARV. L. REV. 630, 638–43 (1958) (discussing "fidelity to law"); John Linarelli, Analytical Jurisprudence and the Concept of Commercial Law, 114 PENN ST. L. REV. 119, 123 (2009) (noting contributions of Hart and subsequent theorists, such as Joseph Raz); Thomas Schultz, Secondary Rules of Recognition and Relative Legality in Transnational Regimes, 56 AM. J. JURIS. 59, 78–79 (2011) (discussing Lon Fuller and Matthew Kramer).
67. See Tyler, supra note 65, at 375, 379.
68. See Joshua Karton, The Structure of International Arbitration Law and the Exercise of Arbitral Authority, 8 CONTEMP. ASIA ARB. J. 229, 247–48 (2015); Schultz, supra note 66, at 63–70.
69. See Michael Hunter Schwartz, Power Outage: Amplifying the Analysis of Power in Legal Relations (with Special Application to Unconscionability and Arbitration), 33 WILLAMETTE L. REV. 67, 88, 90 (1997) (noting the link between legitimacy and power and recognizing that force is the most elemental type of power).
clearly meets the Tyler test, based on empirical data showing that parties voluntarily comply with arbitral awards and orders well over 90% of the time. The fact that a very small number of parties (less than 3%, according to some commentators) seek the assistance of the courts to enforce arbitral awards does not change this conclusion, since parties also occasionally need judicial assistance in enforcing litigated outcomes. Furthermore, a number of legal philosophers, most notably Joseph Raz, have explicitly discussed the legitimacy of arbitration.

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

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

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

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

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


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

74. Delbrück, supra note 63, at 30.


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

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

Some assistance may be obtained from commentary considering the legitimacy of international courts, traditionally interpreted as permanent adjudicatory bodies such as the International Court of Justice ("ICJ"), the International Criminal Court ("ICC"), or the Permanent Court of Arbitration ("PCA").

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77. See Nathan Berman, Intervention in a "Divided World": Axes of Legitimacy, in FAULT LINES OF INTERNATIONAL LEGITIMACY 115, 118–19 (Hilary Charlesworth & Jean-Marc Coicaud eds., 2016).
78. See Jean-Marc Coicaud, Deconstructing International Legitimacy, in FAULT LINES OF INTERNATIONAL LEGITIMACY, supra note 77, at 29, 30–31 (noting key questions of international legitimacy); Jean-Marc Coicaud, The Evolution of International Order and Fault Lines of International Legitimacy, in FAULT LINES OF INTERNATIONAL LEGITIMACY, supra note 77, at 87, 100–01.
79. See Yves Dezalay & Bryant Garth, Fussing About the Forum: Categories and Definitions as Stakes in a Professional Competition, 21 LAW & SOC. INQUIRY 285, 299 (1996) ("The legitimacy of international commercial arbitration is no longer built on the fact that arbitration is informal and close to the needs of business; rather legitimacy now comes more from a recognition that arbitration is formal and close to the kind of resolution that would be produced through litigation—more precisely, through the negotiation that takes place in the context of U.S.-style litigation."); Rabinovich-Einy, supra note 59, at 26–27 ("As courts become more flexible and ADR procedures more formalized, new sources of legitimacy need to be developed and conceptualized. . . . [P]rinciples developed in the field of dispute systems design DSD as a framework for generating legitimacy in courts as well as ADR, based on the recognition that the formal-informal divide has lost much of its strength.").
80. RONALD DWORKIN, LAW'S EMPIRE 407 (1986); see also Priel, supra note 61, at 1–5 (discussing legitimacy in the context of the work of Ronald Dworkin and other positivists). Some classical theorists, most notably Thomas Hobbes, did not distinguish between the role of arbitrators and judges. David Dyzenhaus, The Very Idea of a Judge, 60 U. TORONTO L.J. 61, 68–69 (2010). Some commentators have gone so far as to suggest that positivists' real aim is to have law without judges, since the act of judging results in indeterminacy. See id. at 62.
82. See RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY 269 (2016) (calling for a more robust analysis of the structure of judicial decisions rather than their content). The one exception involves the legitimacy of judicial decisions imposed by illegitimate states (such as those with questionable international status) or by judges enforcing immoral laws (as was the case in Nazi Germany and Vichy France).
Grossman has suggested that these institutions can be considered legitimate if four criteria are met, stating:

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

These criteria appear largely applicable to international arbitration. For example, international arbitration requires procedures that allow both parties to present their positions to the tribunal,85 provides for third-party participation (amicus briefs) in cases where the outcome affects persons other than the litigants,86 and reflects the normative values contained in the governing law.87 Certain other principles (such as those relating to the incorporation of human rights considerations88 and respect for core principles of international public policy89)...

84. Grossman, Normative, supra note 83, at 104.
85. See BORN, supra note 1, at 2140–41.
86. This issue arises primarily in investment arbitration, which affects public interests in a way that international commercial arbitration typically does not. See Katia Fach Gómez, Rethinking the Role of Amicus Curiae in International Investment Arbitration: How to Draw the Line Favorably for the Public Interest, 35 FORDHAM INT’L L. J. 510, 523 (2012). Indeed, the quasi-public nature of investment arbitration has resulted in a hegemonic critique of international investment law that originates from a Marxist analysis of international law and views international investment law as an attempt by developed countries to impose their power on weaker, developing countries; and a more nuanced critique of the perceived unevenness created by a regime that protects property, investment, and foreign investors without sufficient regard to other non-investment-related interests of host states. Both strands consistently turn, however, around a common core: the criticism that investment treaties unilaterally favor the interests of investors over the host state’s competing interests, thus establishing an asymmetric legal regime that is detrimental to state sovereignty.


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


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

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

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

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


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

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

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

96. See Grossman, Legitimacy, supra note 62, at 115-16; see also Delbrück, supra note 63, at 33-34.
tation “is legitimate when it is (1) fair and unbiased, (2) interpreting and applying norms consistent with what states believe the law is or should be, and (3) transparent and infused with democratic norms.”

B. Putting Theory into Practice

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

Second, research strongly suggests that international arbitration complies with state-supported norms, both as a procedural and substantive matter.

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

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

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


103. See BORN, supra note 1, at 2130; Susan D. Franck, The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions, 73 FORDHAM L. REV. 1521, 1557 (2005) [hereinafter Franck, Inconsistent]; Franck et al., Legitimacy, supra note 5, at 78 (considering legitimacy
For example, international arbitration is as procedurally sophisticated as national court proceedings concerning similar types of disputes. Indeed, the most common criticism of international arbitration is not that it is too informal, but that it is too legalistic. International arbitration is equally competent in matters of substance. Indeed, some commentators believe that arbitrators may be better than national judges in some types of substantive decision-making, most notably in cases involving the application of a foreign country's mandatory rules of law, due to the heightened neutrality associated with arbitration. International arbitration is also more flexible than litigation with respect to the choice of applicable law, although states are seeking to expand party autonomy in judicial procedures to the same level seen in international arbitration through promulgation of the Hague Principles on Choice of Law in International Commercial Contracts.

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

104. See Born, supra note 1, at 2129–30.
105. See id. at 2127.
106. See id. at 2130.
110. See Andrea K. Bjorklund, The Emerging Civilization of Investment Arbitration, 113 Penn St. L. Rev. 1269, 1270–71, 1273 (2009) (describing the mixed public-private features of investment arbitration); Born, Generation, supra note 55, at 842–43 ("Investment arbitration has faced substantial criticism since the turn of the twenty-first century. Some of these complaints have been directed broadly at foreign investment and the basic premise of international investment protection, typically claiming that investment arbitration is skewed in favor of foreign investors. Other criticisms have focused on specific features of investment arbitration, including its lack of transparency, its insufficiently determinate legal standards, its lack of opportunities for amicus curiae participation, and its lack of appellate review.") (footnotes omitted).
112. See Transparency Convention, supra note 21.
public through live-stream technology, and on arbitral awards, which are now routinely published in full.

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

International arbitration is also capable of addressing other transparency-related concerns. For example, the long-standing tradition of requiring fully reasoned awards in both international commercial and investment arbitration provides the parties themselves with an excellent understanding of the reasoning underlying individual decisions. International commercial and investment arbitration are also both capable of resolving various types of large-scale injuries at a single time, in a single venue, which would overcome certain transparency-related concerns. For example, three ICSID proceedings have been opened to the public since the beginning of 2016. See Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21 (public hearing broadcast online from Sept. 7, 2016 to Sept. 14, 2016); Gabriel Res. Ltd. & Gabriel Res. (Jersey) v. Rom., ICSID Case No. ARB/15/31 (public hearing broadcast via close circuit television at the ICSID headquarters on Sept. 23, 2016); Vattenfall AB v. Fed. Republic of Ger., ICSID Case No. ARB/12/12 (public hearing broadcast online from Oct. 10, 2016 to Oct. 21, 2016, with a four-hour delay as agreed by the parties); Press Release, Vattenfall AB, International Arbitration Proceedings by Vattenfall Against the Federal Republic of Germany: Hearing Starts on Monday as a Video Stream (Oct. 6, 2016), https://corporate.vattenfall.com/press-and-media/press-releases/2016/international-arbitration-proceedings-by-vattenfall-against-the-federal-republic-of-germany-hearing-starts-on-monday-as-a-video-stream/; ICSID Holds Hearing in Mining-Related Dispute Filled Against Romania, LEXIS LEGAL NEWS (Sept. 21, 2016), http://www.lexislegalnews.com/articles/11329; Bear Creek Mining Corporation v. Republic of Peru (ICSID Case No. ARB/14/21)—Public Hearing, ISDS (Aug. 15, 2016), http://isds.bilaterals.org/?bear-creek-mining-corporation-v-see-also-ICSID-LIVESTREAM, https://livestream.com/ICSID (including other hearings). Since 2002, all U.S. international agreements involving investor-state dispute settlement, including those arising under the North American Fair Trade Agreement ("NAFTA"), must be open to the public via close-circuit television or live video. See, e.g., Hearing: Spence International Investments et al. v. Republic of Costa Rica (ICSID Case No. UNCT/13/2)—Public Hearing, LIVESTREAM (Aprt. 24, 2015), http://livestream.com/ICSID/events/3954046 (involving a case heard publicly in 2015 pursuant to the Central American Fair Trade Act ("CAFTA").


See Strong, Reasoned Awards, supra note 102, at 2.
related problems generated by bilateral procedures.\(^{120}\) Interestingly, the U.S. Supreme Court has not identified any concerns about transparency in this context and has instead explicitly adopted a rule that reduces transparency in matters involving class or collective claims.\(^{121}\)

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


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

\(^{122}\) Grossman, Legitimacy, supra note 62, at 115; see also Born, Generation, supra note 55, at 779; Delbrück, supra note 63, at 33–34; Grossman, Legitimacy, supra note 62, at 160.

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


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

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

III. THE STATUS QUO BIAS

In a rational world, debates about the merits of international arbitration would focus solely on the inherent utility of the procedure.128 Rational choice theory is popular among both legal scholars (particularly devotees of the law and economics movement) and political scientists129 and has been applied in a variety of settings, including international dispute resolution.130

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


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


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

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

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

133. Nyhan & Reifler, Roles, supra note 25, at 2; see also Samuelson & Zeckhauser, supra note 47, at 47. Some of the more frequently discussed phenomenon include "positive illusions, anchoring, the representativeness heuristic, hindsight bias, the framing of options, irrelevant information, and the structure of decision-making processes." Jean R. Sternlight & Jennifer K. Robbenmol, Psychology and Effective Lawyering: Insights for Legal Educators, 64 J. LEGAL EDUC. 365, 370 (2015) (footnotes omitted). Others include contrast bias and procrastination bias. See Zimmerman, supra note 47, at 1134.
135. See Samuelson & Zeckhauser, supra note 47, at 8; Zimmerman, supra note 47, at 1134. Although there are a number of key differences between individual and institutional (or group) decision-making processes, the status quo bias is not limited to individuals. See Samuelson & Zeckhauser, supra note 47, at 45; Ozan O. Varol, Constitutional Stickiness, 49 U.C. DAVIS L. REV. 899, 938 (2016). Instead, the principle also "influence[s] policymaking within organizations, both public and private. Once made, policies frequently persist and become codified implicitly or explicitly . . . ." Samuelson & Zeckhauser, supra note 47, at 45.
136. See Korobkin, Endowment Effect, supra note 47, at 1256–92 (citing examples).
140. See Solan, supra note 42, at 10.
aggregate pattern of behavior (and the reasons for it), but seemed unaware (and slightly skeptical) that they personally would fall prey to this bias.\textsuperscript{141}

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

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

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

\begin{footnotes}
\item[141] See Samuelson \& Zeckhauser, supra note 47, at 9.
\item[142] See id. at 10.
\item[143] See id. at 37–38.
\item[145] See Samuelson \& Zeckhauser, supra note 47, at 38–39.
\item[147] Although a great deal has been written about the financial self-interest of arbitrators, the concept of judicial self-interest has been considered far less frequently. See Joanna Shepherd, Measuring Maximizing Judges: Empirical Legal Studies, Public Choice Theory, and Judicial Behavior, 2011 U. ILL. L. REV. 1753, 1754–55. However, research suggests that judges are extremely interested in maintaining or increasing the rate of litigation in national courts. See id.; see also Tracey E. George \& Chris Guthrie, Induced Litigation, 98 Wn. U. L. REV. 545, 547 (2004) (noting how an increase in funding and judicial resources results in an increase in litigation). Although the status of the judiciary varies from country to country, judges are among the elite in many countries and would be loath to see that status eroded. See Thadd A. Blizzard, Gender and Judging, 25 HASTINGS WOMEN’S L.J. 267, 270 n.11 (2014) (book review).
\item[148] The judiciary has often responded to external threats by adopting strong-arm methods to defend the status quo. See Dana A. Remus, The Institutional Politics of Federal Judicial Conduct Regulation, 31 YALE L. \& POL’Y REV. 33, 38 (2012). Allowing parties to exit or avoid the judicial system is critically important given the difficulties of policing the judicial branch. See Margaret Tarkington, The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation, 97 GEO. L.J. 1567, 1606 (2009) ("[T]he punishment of speech critical of the judiciary ‘cannot safely be left to [the judiciary], who have an obvious vested interest in the status quo’ and in preserving their own reputations.") (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST 117 (1980)).
\item[149] See Samuelson \& Zeckhauser, supra note 47, at 39.
\end{footnotes}
how a particular procedure becomes the established norm. Indeed, Samuelson and Zeckhauser found that “individuals fail to discriminate to some degree between imposed actions, random selections, and choices voluntarily (and thoughtfully) undertaken.”

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

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

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

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

Yet the two practices—adjudication and arbitration—are coming to be styled as fungible options on a “dispute resolution” (DR) spectrum. An increasingly common parlance (crisscrossing the globe) replaces the phrase “alternative dispute resolution” (ADR) with DR, so as to put courts—now deemed “Judicial Dispute Resolution” (JDR) or “Judicial Conflict Resolution” (JCR)—on a continuum of mechanisms responding to conflicts. This formulation aligns courts with a range of options that clouds courts’ identity as a unique constitutionally obliged mode of decision making.
To some extent, these discussions arise because the legal community has never truly decided whether arbitration is an alternative to, or the equivalent of, litigation. However, it is also possible that this debate arises because of an unconscious belief that litigation must retain a position of superiority over arbitration, based solely on a bias in favor of the status quo.

IV. STATUS QUO BIAS AND STICKY DEFAULTS

A. Litigation as the Dispute Resolution Default

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

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

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


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


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

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

Penalty defaults, like policy defaults, can be considered a type of "nudge" to encourage parties to adopt certain types of behavior. According to Cass Sunstein, "default rules, even or perhaps especially if they appear to be invisible, count as prime 'nudges,' understood as interventions that maintain freedom of choice, that do not impose mandates or bans, but that nonetheless incline people's choices in a particular direction." Although states have other means of promoting individual or institutional behavior without limiting choice (such as through the use of positive incentives), defaults are perhaps the most powerful means of promoting a particular outcome, since they require parties to incur transaction costs to avoid the default position. Indeed, the transaction costs associated with negotiating for arbitration in international commercial and investment matters can be significant.
Defaults can be set to maximize whatever substantive or procedural values the choice architect wants to promote, and the default does not have to be visible or heavy-handed to have an effect. To the contrary, the cumulative nature of small individual nudges can have significant results in shaping social norms and expectations. As Russell Korobkin has observed:

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

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

Litigation’s status as the default norm is apparent, given that “the critiques on the seeming ‘unfairness’ of international arbitration apparently arise from ex-
pectations wed to a more judicial or structurally adjudicative paradigm of international dispute resolution.”

Some commentators have sought to resolve the tension between international litigation and international arbitration by calling for the creation of new “extraterritorial courts” to address evolving forms of international disputes, based on the assumption that, “when it comes to offering principled adjudication, public courts enjoy a number of structural advantages over private arbitration.” However, such mechanisms differ little from international arbitration in practice and indeed create a number of negative externalities of their own. Richard Thaler has noted that choice architects often adopt the status quo as their default without putting much thought into that decision. However, it is critically important to determine what type of default litigation does, or should, reflect. For example, litigation could be seen as a simple gap-filler that arises in the absence of party agreement to the contrary. Framing litigation as an ordinary default would suggest that the state has little to no interest in defending or establishing court proceedings as the preferred means of resolving legal disputes.

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

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

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181. Desierto, supra note 24, at 948.
182. Jens Dammann & Henry Hansmann, Globalizing Commercial Litigation, 94 CORNELL L. REV. 1, 4 (2008). Professors Jens Dammann and Henry Hansmann identified a number of alleged deficiencies of international arbitration based largely on a single empirical study of domestic U.S. disputes. See id. at 32; see also id. at 34 n.95. However, they do not discuss and do not appear to have considered more recent empirical studies focusing specifically on international disputes, even though there are significant differences between domestic and international arbitration. See STRONG, JUDICIAL GUIDE, supra note 19, at 2–5; see also supra note 23 and accompanying text (listing empirical studies of international arbitration). Furthermore, many of their conclusions—such as those relating to the alleged unpredictability of arbitration—fly in the face of well-established arbitral theory and practice. See BORN, supra note 1, at 86, 98.
183. See Dammann & Hansmann, supra note 182, at 4–31; see also BORN, supra note 1, at 73–94 (discussing benefits of international arbitration). Other scholars seek to improve the perception of international arbitration by noting the way in which courts continue to supervise arbitral proceedings, thereby “borrowing” from the legitimacy of the courts to increase the legitimacy of arbitration. See Christopher S. Gibson, Arbitration, Civilization and Public Policy: Seeking Counterpoise Between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law, 113 PENN ST. L. REV. 1227, 1265–67 (2009) (discussing the International Law Association’s 2002 interim report on public policy as a bar to enforcement of international arbitral awards).
184. See Thaler, supra note 164 ("The status quo is typically the default. And the choice architect typically doesn’t think very carefully about this.").
185. See infra notes 242–307 and accompanying text.
along with long-standing and widespread difficulties in international enforcement of foreign judgments and the real or perceived lack of neutrality among national court judges, explain why arbitration has become the preferred dispute resolution mechanism in international commercial and investment matters.187

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

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

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

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

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

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

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

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


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

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

194. Id. at 1157.
“stickiness” is affected by both background conditions and mechanisms meant to increase or decrease the power of the default.\(^\text{195}\) Indeed, mechanisms that give defaults power can be divided into three classes: transaction barriers, judgment and decision biases, and preference formation. “Transaction barriers” are obstacles to choosing options that reflect preferences, even when options and preferences are easily understood. “Judgment biases” skew perception and appraisal of options. “Decision biases” are reactions to uncertainty about options or preferences. ... In any particular situation, one or more of these three classes of mechanisms may make defaults powerful for different individuals to varying degrees depending on, for example, how clearly the individual understands her options and her preferences.\(^\text{196}\)

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

\(^\text{195.} & \text{Id. at 1161} ("Background conditions that contribute to the traction of defaults are a confusing decision environment and preference uncertainty.").} \\
\(^\text{196.} & \text{Id. at 1161–62.} \\
\(^\text{197.} & \text{See BORN, supra note 1, at 63–70. Interestingly, the concept of a transaction barrier can be used to describe the legal background involving international commercial and investment mediation, which is not as supportive as it is for international arbitration and which has led some commentators to call for additional measures to remove the remaining transaction barriers. See S.I. Strong, Beyond International Commercial Arbitration? The Promise of International Commercial Mediation, 45 WASH. U. J.L. & POL’Y 11, 32 (2014). These calls have led UNCITRAL to take up a proposal from the U.S. Department of State regarding a new treaty in this area of law. See Rep. of Working Grp. II on the Work of its Sixty-Sixth Session (New York, 6–10 February 2017), ¶ 13, U.N. Doc. A/CN.9/901 (Feb. 16, 2017) [hereinafter WGII Report]; Strong, Rationality, supra note 23, at 1985.} \\
\(^\text{199.} & \text{See, e.g., UNCITRAL Model Arbitration Law, supra note 118.} \\
\(^\text{201.} & \text{See BORN, supra note 1, at 73, 122; Born, Generation, supra note 55, at 827; Sergio Puig, No Right Without a Remedy: Foundations of Investor-State Arbitration, 35 U. PA. J. INT’L L. 829, 841 (2014).} \\
\(^\text{202.} & \text{See Willis, supra note 47, at 1165 (framing the status quo bias as a combination of judgment and decision biases). Lack of expertise regarding a particular issue increases decisional uncertainty and thus strengthens the status quo bias. See id. at 1161–62. Interestingly, arbitration may already be or may be becoming a sticky default in international commercial and investment settings. See infra notes 225–41 and accompanying text.}
“mega-regional” treaties like the TPP and the Transatlantic Trade and Investment Partnership ("TTIP"), even though investment arbitration has been in existence for decades and has developed into an extremely beneficial mechanism for states. Nevertheless, some of these latecomers speak of investment arbitration as if it were some sort of newly emergent phenomenon that threatens the very pillars of sovereignty and democracy.

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

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

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


206. See Varol, supra note 135, at 940-41.

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

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

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

210. See Born, supra note 1, at 2125-26.
Judicial proceedings may also enjoy a “first-mover advantage” as a result of the widespread perception that litigation constitutes the first formal means of resolving legal disputes. The “first-mover advantage” is related to the concept of an “anchor” that can be used to skew later decision-making by framing all alternatives as relative to the anchor. “Anchoring bias” is well documented in the legal and psychological literature and is similar, in ways, to the status quo bias.

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

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

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

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

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


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

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


218. Barendrecht & de Vries, supra note 192, at 83–84 (writing in the domestic context) (“[P]roviders of default dispute resolution services, such as courts and lawyers, are effectively shielded from competition . . . .”).
matter. For example, Ozan Varol has argued not only that “[t]he prevailing orthodoxies in the existing constitutional order occupy an 'almost monopolistic position'” in terms of status and influence but that “[t]he repeated application of existing constitutional provisions elevates them to a higher position” so that “[c]ompeting constitutional norms may thus be perceived as presumptively undesirable.” This phenomenon suggests that international arbitration suffers in comparison to litigation in terms of legitimacy because of the heightened respect given to judicial proceedings in most constitutional regimes.

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

B. Arbitration as the Dispute Resolution Default

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

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220. See U.S. CONST. art. III, §§ 1–2; see also infra notes 242–307 and accompanying text.
223. See Strong, Monism and Dualism, supra note 221, at 555–68.
224. See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 116 (“Individuals may be entrusted temporarily with the function of administering justice as jurors in criminal proceedings, as mediators or as arbitrators authorized by the parties to issue verdicts in law or in equity in [sic] the terms defined by the law.”); see also id. art. 29 (invoking due process); see also Strong, Constitutional, supra note 50, at 86–87, 93, 99–105 (discussing constitutional actions involving arbitration); Strong, Monism and Dualism, supra note 221, at 555–68.
225. See supra notes 2–3 and accompanying text.
226. See supra notes 6–7 and accompanying text.
stead, the preference for international arbitration may simply reflect the viewpoint of a particular epistemic group made up of specialists in international arbitration.\(^{227}\)

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

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

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

\(^{228}\) Willis, supra note 47, at 1161-62; see also Samuelson & Zeckhauser, supra note 47, at 40.

\(^{229}\) Samuelson & Zeckhauser, supra note 47, at 40.

\(^{230}\) See id.; Willis, supra note 47, at 1169-70.

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

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


through the adoption of a “strong” version of negative competence-competence.\(^{235}\) This latter suggestion would allow national courts to consider international arbitration to be the de facto choice of international commercial actors in the absence of a clear indication to the contrary.\(^{236}\)

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

V. LEGITIMACY AND THE SOVEREIGN PREROGATIVE

The final issue to consider involves the possible connection between the perceived legitimacy of international arbitration and what might be called “the sovereign prerogative.”\(^{242}\) Courts and commentators have long recognized that

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

\(^{236}\) See Graves, Litigation, supra note 162, at 114.

\(^{237}\) See Strong, Epistemic Communities, supra note 227, at 530–31.

\(^{238}\) See Strong, Alternative Facts, supra note 9, at 138–42.

\(^{239}\) See Samuelson & Zeckhauser, supra note 47, at 45.

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

\(^{241}\) See George & Guthrie, supra note 147, at 547–48; Resnik, Diffusing, supra note 156, at 2806–07; Varol, supra note 135, at 939.

\(^{242}\) See William J. Novak, Common Regulation: Legal Origins of State Power in America, 45 Hastings L.J. 1061, 1085 (1994) (“The 'lex prerogativa' stood for that complex and varied set of rights, powers, and privileges belonging to the Crown as sovereign. Included in this bundle of prerogatives were powers (and obligations) to regulate and promote the domestic life of the kingdom.”).
states have an inherent interest in the proper adjudication of civil disputes, including those heard in arbitration. For example, David Luban has suggested that litigation generates a variety of public goods, including the opportunity for nonlitigants to intervene in the action, identification and publication of facts important to the public, mechanisms for facilitating and enforcing settlements, creation of legal rules and precedents, and systemic transformation of various types of public and private institutions. However, other commentators, most notably John Lande, have argued that most, if not all, of these goals can be attained through means other than litigation.

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

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

247. See Strong, Section 1782, supra note 92, at 352. Some commentators have suggested that the state interest in promoting commerce is the primary driving force in international commercial arbitration. See Loukas Mistelis, Reality Test: Current State of Affairs in Theory and Practice Relating to “Lex Arbitri,” 17 AM. REV. INT’L ARB. 155, 178 (2006) (suggesting commercial interests overcome state interests in “subjecting arbitration proceedings to national law.”); see also Strong, Section 1782, supra note 92, at 360 (“Some authorities have attempted to distinguish state interests in investment arbitration from those in international commercial arbitration on the basis of the underlying substantive law, claiming that the state interest in investment arbitration is or should be more pronounced because investment disputes involve important issues of public or regulatory law.”).
Most analyses regarding the state interest in dispute resolution are framed in general terms, with broad, sweeping statements about judicial efficiency or the preservation of the fairness of the process. However, these concerns cannot be used to oppose the legitimacy of international arbitration because empirical studies have shown that international arbitration provides a fair and efficient procedure that is equal to litigation in many national systems and superior to litigation in numerous others.

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

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

250. See supra note 23 and accompanying text.

252. Various commentators have considered judicial jurisdiction and the sovereign prerogative to resolve disputes from the perspective of political theory, although such analyses are no longer in vogue, given the current emphasis on law and economics. See, e.g., MARTIN H. REDISH, FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY 3 (1991) ("[T]he questions of if and when a federal court is to adjudicate an issue of constitutional or federal law—questions traditionally answered by the doctrines of federal jurisdiction—will implicate principles of American political theory as much as how those substantive legal issues are ultimately resolved."); EUGENE V. ROSTOW, THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW XVI (1962); Charles Silver, American Political Theory Considered, 69 GEO. WASH. L. REV. 562, 563 (1992) ("There is no disputing [the] claim that deep questions of constitutionalism, political theory, and jurisprudence arise when one thinks seriously about the federal law of jurisdiction. To identify the set of cases federal courts should hear, one must offer a normative account of the role of the federal courts.").
254. See Kurland, supra note 254, at 582.
latter’s monarchal roots, conventional wisdom justifies the principle of popular sovereignty through reference to the social contract. As a result, contemporary commentators routinely claim that “democratic institutions, including courts, ought to be preferred sites for effecting changes in law and public policy.” Of course, as Carrie Menkel-Meadow has noted, arbitration is in many ways better situated than litigation to promote democratic values in dispute resolution, given the amount of autonomy and self-governance inherent in arbitration.

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

256. See Kornhauser, supra note 57, at 840 n.40 (citing Stephen M. Griffin, American Constitutionalism: From Theory to Politics 19–26 (1996)).

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

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

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


261. Each country structures its judiciary in its own unique manner. However, many civil law systems separate their courts by subject matter, with one branch devoted to constitutional matters. See Peter de Cruz, Comparative Law in a Changing World 72–76, 78–79, 86–88 (3d ed. 2007).


263. See John Brigham, The Cult of the Court 63 (1987) (quoting Walter Murphy, Elements of Judicial Strategy 13 (1964)). U.S.-style judicial review is not limited to common law countries. For example, Germany also allows “a posteriori constitutional review of legislation,” although Germany does not appear to have a “cult of the court” similar to that in the United States. Elaine Mak, Book Note, Judicial Transformations: The Rights Revolution in the Courts of Europe, 6 EUR. CONST. L. REV. 163, 169 (2010) (reviewing Mitchell Lasser, Judicial Transformations: The Rights of Revolution in the Courts of Europe (2009)). Conversely, the United Kingdom does not embrace U.S.-style judicial review (the term “judicial review” in England refers to a particular type of administrative review) but does hold judges in high regard. See Hiebert, supra note 262, at 1963–64.
as the "cult of the judge") and the "oracular myth of the judge as a high priest of justice with special talents for elucidation of "the law." A number of judges have explicitly embraced this perception of judicial infallibility, although others have explicitly recognized the limits of their role within the relevant constitutional structure.

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

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

264. See Brigham, supra note 263, at 63. The phrase "cult of the robe" appeared in the United States as early as 1828. Id.
265. Id. at 63 (quoting Walter Murphy, Elements of Judicial Strategy 13 (1964)).
267. See Brown v. Allen, 344 U.S. 443, 540 (1952) ("We are not final because we are infallible, but we are infallible only because we are final.") (Jackson, J., concurring), superseded by statute, 29 U.S.C. § 2254(d) (2012); Benjamin Cardozo, The Nature of the Judicial Process 141 (1921) ("The judge, even when he is free, is still not wholly free.").
268. See, e.g., Dworken, supra note 80, at 407; Kurland, supra note 254, at 581.
270. See Born, supra note 1, at 1049 (discussing the French approach to negative competence-competence); Cuniberti, supra note 217, at 418; Pinelli, supra note 269, at 12. Although such issues are beyond the scope of the current Article, it would be interesting to consider how national perceptions about the traditional role of the judiciary align with views about the legitimacy of international arbitration.
273. See Born, supra note 1, at 89–90.
in many arbitral proceedings. Furthermore, there are a variety of ways to provide the public with "the means to be informed about political issues" in arbitration, assuming that members of the public do indeed wish to take up that opportunity.

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

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

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

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


277. Id.

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


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

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

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

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

\begin{thebibliography}{1}
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\bibitem{283} See Alexander, supra note 282, at 647; Gensler, supra note 282, at 723; Macey, supra note 282, at 627.

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


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


\bibitem{289} See CALABRESI, supra note 288, at 5-7.

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

\bibitem{291} See Posner, supra note 82, at 76; see also Ryan C. Black et al., \textit{Upending a Global Debate: An Empirical Analysis of the U.S. Supreme Court’s Use of Transnational Law to Interpret Domestic Doctrine}, 103 \textit{Geo. L.J.} 1, 14 (2014) (“There are] diminishing returns to exhaustive documentation of every such source, especially when the goal is at least in part to write opinions that will be accepted as legitimate and binding.”).
\end{thebibliography}
factor that has led adherents of the law and economics movement to “question whether the benefits precedents confer on non-parties justify[es] the public subsidy for adjudication”292 and to suggest that certain types of claims should not be heard in court, but instead made subject to arbitration so as to free up valuable public resources for other purposes.293

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

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292. Ware, supra note 271, at 912.

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

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

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

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

297. See Born, supra note 1, at 2127 (“[P]articularly in major matters, elements of the procedures of an international arbitration can closely resemble proceedings in the commercial courts of some major trading states.”); Weintraub, supra note 209, at 455.
producing a widely enforceable outcome, and its capacity for facilitating Habermasian principles of autonomy.298

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

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

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

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298. See BORN, supra note 1, at 73–93 (listing benefits of international arbitration over international litigation); Menkel-Meadow, Deliberative Democracy, supra note 125, at 19.
299. See BORN, supra note 1, at 2127, 2129; WEINTRAUB, supra note 209, at 455; see also supra notes 272–75 and accompanying text (regarding Rawls).
300. Menkel-Meadow, Repeat, supra note 154, at 31–32.
303. Fiss, Regained, supra note 302, at 249.
304. See supra notes 6–16 and accompanying text.
contrary to the public good is either unnecessary or inappropriate. Instead, the better question is not whether one is "for or against" private dispute resolution, but "when, how, and under what circumstances" particular cases should be subject to something other than judicial adjudication, a process that has come to redefine "ADR" as involving "appropriate dispute resolution" rather than "alternative dispute resolution."

VI. CONCLUSION

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

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

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

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

308. See supra notes 128–58 and accompanying text.
309. See supra notes 128–58 and accompanying text.
310. See supra notes 159–241 and accompanying text.
311. See supra notes 159–241 and accompanying text.
312. See supra notes 233–36 and accompanying text.
313. See supra notes 242–307 and accompanying text.
with litigation for millennia\textsuperscript{315} and empirical evidence that contemporary forms of international arbitration proceed in a fair and evenhanded manner.\textsuperscript{316}

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

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

Efforts to identify and overcome the status quo bias may be facilitated by a heuristic known as the “Reversal Test,” which philosophers Nick Bostrom and Toby Orb developed to determine whether the status quo bias is affecting a particular decision.\textsuperscript{323} According to the Reversal Test:

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

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

\textsuperscript{315} See supra note 191 and accompanying text.
\textsuperscript{316} See supra note 23 and accompanying text.
\textsuperscript{317} See Thaler, supra note 164, at 83 (noting that legal default rules are often created without conscious thought, but that change is possible).
\textsuperscript{318} See supra note 140 and accompanying text (discussing the “bias blind spot”).
\textsuperscript{319} Samuelson & Zeckhauser, supra note 47, at 9.
\textsuperscript{320} See Bassett, supra note 139, at 1572–73 (surveying authorities); Varol, supra note 135, at 940–41.
\textsuperscript{321} See supra notes 34–35 and accompanying text.
\textsuperscript{322} See Solan, supra note 42, at 10.
\textsuperscript{323} See Bostrom & Ord, supra note 43, at 664–65.
\textsuperscript{324} Id.
According to the Reversal Test, the existence of a bias in favor of litigation can be tested by asking whether it would be better to eliminate all autonomy in the resolution of international disputes and require all matters to be heard in court, thereby prohibiting international arbitration as well as international mediation and conciliation.\textsuperscript{325} Given the current level of support for international arbitration among states (for example, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, more commonly known as the New York Convention, is the most successful commercial treaty in history, with 157 states parties\textsuperscript{326}) and among parties (for example, up to 90\% of all international commercial contracts currently include an arbitration provision,\textsuperscript{327} with similar mechanisms in place in approximately 93\% of the 3,000–5,000 international investment treaties now in effect\textsuperscript{328}), it is safe to say that any attempt to eliminate or even curtail international arbitration would be considered disastrous by both users and policy-makers.\textsuperscript{329} Thus, the Reversal Test strongly suggests the existence of an unconscious bias favoring litigation in international commercial and investment matters.

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

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

\textsuperscript{325} Mediation, conciliation and arbitration are all private (non-judicial) forms of dispute resolution based on party autonomy. See Strong, \textit{Rationality}, supra note 23, at 1980 n.18.
\textsuperscript{326} See New York Convention, supra note 118, at 1; Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Jan. 18, 2018); see also supra notes 198–200 and accompanying text (discussing other international instruments supporting international arbitration).
\textsuperscript{327} See Sandrock, supra note 2, at 37.
\textsuperscript{328} See OECD, supra note 3, at 7, 17; Strong, \textit{Mass Procedures}, supra note 3, at 300 n.271.
\textsuperscript{329} Attempts have been made to eliminate various forms of domestic arbitration, but, as previously noted, domestic arbitration is very different from international arbitration. See Thomas V. Burch, \textit{Regulating Mandatory Arbitration}, 2011 \textit{Utah L. Rev.} 1309, 1311 (2011) (discussing 139 anti-arbitration bills introduced in Congress between 1995 and 2010); see also supra note 29 and accompanying text.
\textsuperscript{330} See Bostrom \& Ord, supra note 43, at 665.
\textsuperscript{331} See id.
\textsuperscript{332} See supra notes 6–16 and accompanying text (discussing various challenges to the legitimacy of international arbitration).
\textsuperscript{333} See Strong, \textit{Epistemic Communities}, supra note 227, at 502 (discussing epistemic groups in international dispute resolution); see also supra note 23 and accompanying text.
Notably, Bostrom and Orb’s heuristic can be used to test other presumptions of procedural superiority in the field of international dispute resolution.\footnote{334} For example, the Reversal Test can be used to gauge whether there is a bias in favor of international arbitration and against international mediation and conciliation by specialists in international dispute resolution.\footnote{335}

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

Suppose it is thought that increasing a certain parameter and decreasing it would both have bad overall consequences. Consider a scenario in which a natural factor threatens to move the parameter in one direction and ask whether it would be good to counterbalance this change by an intervention to preserve the status quo. If so, consider a later time when the naturally occurring factor is about to vanish and ask whether it would be a good idea to intervene to reverse the first intervention. If not, then there is a strong prima facie case for thinking that it would be good to make the first intervention even in the absence of the natural countervailing factor.\footnote{337} Although it is beyond the scope of the current Article to consider fully the various ramifications of the Double Reversal Test, this mechanism provides a useful and objective response to arguments that certain procedural changes are too costly to adopt.\footnote{338}

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

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

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

\footnote{336} See Bostrom & Ord, \textit{supra} note 43, at 673.

\footnote{337} \textit{Id.}

\footnote{338} See \textit{id.}

\footnote{339} See Brekoulakis, \textit{supra} note 131, at 746.