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Lecture

**International Arbitration – Between
Myth and Reality**

-9th John E.C. Brierley Memorial Lecture-

Susan Franck

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A Word on John E.C. Brierley

Professor John E.C. Brierley held a B.A. from Bishop's University, a B.C.L. from McGill University, and a doctorate in law from the Université de Paris. He was appointed as a teaching fellow at the McGill University Faculty of Law in 1960. He later became assistant professor (1964), associate professor (1968) and full professor (1973). He taught Canadian and Quebec private law, focusing on civil law property, comparative law, and foundations of Canadian law. He also served as dean of the Faculty of Law from 1974 until 1984, and as the acting director of the Institute of Comparative Law, McGill University, in 1994. He was named the Sir William Macdonald Professor of Law in 1979 and was the Wainwright Professor of Civil Law from 1994 until 1999.

Professor Brierley was frequently invited as a speaker or a visiting professor to other law faculties, including the Université de Montréal, University of Toronto, Dalhousie University, and the Institut de droit comparé of the Université de Paris II. Following his retirement from McGill University in 2000, he was named Emeritus Wainwright Professor of Civil Law. He passed away in 2001.

Professor Brierley wrote and co-authored numerous articles and books in both English and French, destined for publication in Canada as well as internationally. Noteworthy co-authored publications include *Quebec Civil Law: An Introduction to Quebec Private Law* with Professor R.A. Macdonald et al. (1993), *Civil Code 1866-1980 – An Historical and Critical Edition* with Professor P.-A. Crépeau (1981), *Private Law Dictionary and Bilingual Lexicons* with Professor R.P. Kouri et al. (1991), *Dictionnaire de droit privé et lexiques bilingues* with Professor P.-A. Crépeau et al. (1991) and *Major Legal Systems in the World Today. A Comparative Study of Law* with Professor René David, contributing to the first (1968), second (1978), and third editions (1985). He was a prominent figure in the discipline of comparative law internationally and the leading Canadian expert on arbitration.

Professor Brierley received many awards for his accomplishments. In 1965, he obtained the Prix Robert Dennerly from the Faculté de droit, Université de Paris, and one of his articles won first prize in the Concours de la Revue du Notariat in 1992. He was named trustee for the Fondation Jean-Charles Bonenfant by the Quebec National Assembly (1981-1988). He was also elected for a number of positions, namely as a member of the Board of Editors for the *American Journal of Comparative Law* (1989), associate member of the *International Academy of Comparative Law* (1991), member of the *International Academy of Estates and Trusts Law, San Francisco* (1992), and later member of its executive committee (1994-1999). He was elected a Fellow of the *Royal Society of Canada (Academy I)* in 1995.

This public lecture on international arbitration has been established to commemorate his life and work.

Un mot sur John E. C. Brierley

Le professeur John E.C. Brierley détenait un baccalauréat des arts de Bishop's University, une licence en droit de l'Université McGill, et un doctorat en droit de l'Université de Paris. En 1960, il fut nommé teaching fellow à la Faculté de droit de l'Université McGill. Il deviendra plus tard professeur adjoint (1964), professeur agrégé (1968) et professeur titulaire (1973). Il a enseigné le droit privé canadien et québécois, particulièrement le droit des biens, le droit comparé et les fondements du droit canadien. Il a aussi été doyen de la Faculté de droit de 1974 à 1984 et directeur intérimaire de l'Institut de droit comparé de l'Université McGill en 1994. Il fut nommé Sir William Macdonald Professor of Law en 1979; puis, de 1994 à 1999, il a été titulaire de la chaire Wainwright en droit civil.

Le professeur Brierley a souvent été invité à prononcer des conférences et à visiter des facultés comme professeur invité, notamment l'Université de Montréal, la University of Toronto, la Dalhousie University, et l'Institut de droit comparé de l'Université Paris II. Suite à sa retraite de l'Université McGill en 2000, il fut nommé titulaire émérite de la chaire Wainwright en droit civil. Il est décédé en 2001.

Le professeur Brierley est l'auteur ou le co-auteur d'un grand nombre d'ouvrages et d'articles, tant en anglais qu'en français, destinés au public canadien et au public international. On remarquera, parmi les publications avec d'autres auteurs, Quebec Civil Law: An Introduction to Quebec Private Law avec le professeur R.A. Macdonald et al. (1993), Code Civil 1866-1980 – Une édition historique et critique avec le professeur P.-A. Crépeau (1981), Private Law Dictionary and Bilingual Lexicons avec le professeur R.P. Kouri et al. (1991), Dictionnaire de droit privé et lexiques bilingues avec le professeur P.-A. Crépeau et al. (1991), ainsi que Les grands systèmes de droit contemporains. Une approche comparative avec le professeur René David, en contribuant à la première (1968), la deuxième (1978), et la troisième édition (1985). Il fut une figure marquante de la discipline du droit comparé à travers le monde et l'expert incontesté de l'arbitrage au Canada.

De nombreuses institutions ont publiquement reconnu la contribution du professeur Brierley. En 1965, il a obtenu le Prix Robert Dennery de la Faculté de droit de l'Université de Paris, et l'un de ses articles lui a valu le premier prix du Concours de la Revue du Notariat en 1992. L'Assemblée nationale du Québec l'a nommé fiduciaire de la Fondation Jean-Charles Bonenfant (1981-1988). Il a été élu à plusieurs postes, notamment comme membre du conseil de rédaction de l'American Journal of Comparative Law (1989), membre associé de l'Académie internationale de droit comparé (1991), membre de l'International Academy of Estates and Trusts Law, San Francisco (1992) et plus tard membre de son exécutif (1994-1999). Il a été élu fellow de la Société Royale du Canada (Académie 1) en 1995.

Cette prestigieuse conférence sur l'arbitrage international fut instaurée pour commémorer sa vie et son œuvre.

International Arbitration – Between Myth and Reality

-9th John E.C. Brierley Memorial Lecture-

Susan Franck*

The first woman to deliver the John E.C. Brierley Memorial Lecture in November 2016, Susan Franck explores common but flawed accounts of international arbitration based on anecdotes and myths while encouraging the audience to pay more attention to scientific facts. While acknowledging the challenges of living in a “post-factual” society, she argues that international arbitration, whether commercial or investment-based, is caught within a larger geo-political maelstrom which includes a backlash against globalization, the popularization of populism, and a turn toward nationalism. Rather than permitting decisions to be affected by an emotive torrent of intuitive forces that facilitate decisions based upon fear or easily accepted cognitive narratives, she recommends proceeding based upon rationality, data analysis, and with an eye towards evidence-based reform. In an effort to connect data and normative choices, Professor Franck explores existing empirical research on international arbitration, with a focus on cognitive illusions and how intuitive decision-making impairs quality both decision-making and the implementation of appropriate reform of international arbitration. She ultimately challenges stakeholders to move past ideological debates in an effort to find common ground in the valuation of vetted facts and rule of law values.

I. Prelude

It is a pleasure to be here at McGill delivering the John E.C. Brierley Memorial Lecture.

During his time as a professor and dean at McGill, John Brierley was a prominent figure in the discipline of comparative law and a leading Canadian expert on international arbitration who seamlessly bridged divides between common and civil lawyers. In preparing for this lecture, I had the good fortune of reading some of his scholarship, and particularly enjoyed his article on *Equity and Good Conscience* in Canadian arbitration law.¹

* Professor Susan Franck is a Professor at American University in Washington, D.C. and an expert in international arbitration and economic law. She has made over 120 presentations and written over forty articles in leading journals. She was a scholar-in-residence at the United Nations Conference on Trade and Development and has offered expert commentary to developing states, developed states, and organizations like the Asian-Pacific Economic Cooperation. Professor Franck is the immediate past Chair of the Academic

Former lecturers include people who have either mentored me or whom I have admired for years, including Yves Fortier, the late Andy Lowenfeld, Jan Paulsson, Emmanuel Gaillard, George Bermann, and Gary Born, amongst others.

It is therefore with great pleasure that I accepted the invitation to give this lecture. I recognize that the honor is a great one, as I am the first woman and, I believe, the youngest person to ever deliver this lecture. The honor is acute, particularly as you have at your own faculty one of the most distinguished female arbitration scholars in the world—Professor Andrea Bjorklund. So I would like to give thanks to McGill and Professor Fabian Gélinas for this invitation, and to Dean Robert Leckey for his Twitter-based welcome last week. I hope these remarks will provide a solid foundation for those who come after me.

II. Introduction

I speak to you, however, during uncertain times. Uncertain times for the world, and uncertain times for the role that the rule of law, international dispute settlement generally, and international arbitration in particular will play in the future.

When I was drafting aspects of this speech in October 2016, I decided to use this presentation as an opportunity to identify the risk of creating international dispute settlement norms in an evidence-free vacuum. At present, there are forces encouraging reliance on intuitive decision-making instead of evidence-based decision-making, thereby fostering the creation of a post-factual world. After the recent U.S. elections, I am afraid those concerns have not dissipated; rather, they have grown.

This makes my job today simultaneously simple and difficult. It is simple because reliance on data and evidence is something that is intuitive for lawyers and should generate a degree of cognitive ease. This in turn should make my presentation relatively easy for you to grasp and accept. But it is also complex, as there are concepts that I wish to share that do *not* come from the law. Rather, they come from science generally and psychology in particular. Some of these considerations may require you to test what you think you know in a way that is psychologically uncomfortable or will require you to acknowledge your own limitations.

The good news is that this difficulty confirms that we are all hu-

Council of the Institute for Transnational Arbitration, an active member of the American Society of International Law and a former member of the Executive Council, and an elected member of the American Law Institute.

1 John E.C. Brierley, “Equity and Good and Amiable Composition in Canadian Arbitration Law” (1991) 19 Can Bus LJ 461.

man beings. I readily accept the limitations of the human condition, which include my own errors. But much like Sisyphus pushing his boulder for eternity, I am determined to make the effort to move the dialogue forward because I know what happens if I step aside. The rock will roll down the hill, and there will be negative downstream consequences. So, in the spirit of Albert Camus and his famous essay, I choose to imagine Sisyphus happy.²

What does this all have to do with the title of my talk today—“International Arbitration – Between Myth and Reality”? My thesis is that international arbitration, whether commercial or investment-based, is currently caught within a larger geo-political maelstrom which includes a backlash against globalization, the popularization of populism, and a turn toward nationalism and isolationism that rejects the reality of our globalized world. Rather than permit our decisions to be affected by this emotive torrent of intuitive forces that facilitate decisions based upon fear or easily accepted cognitive narratives, we should recognize our emotional impulses but proceed based upon rationality, data analysis, and with an eye towards establishing evidence-based reform of international dispute settlement. In the words of Lin Manuel Miranda, we are “in the eye of the hurricane.”³ It is now time to “write our way out” or—at a minimum—reason our way out with data to test assumptions.

Moving between myth and reality has everything to do with evidence. Lawyers can and should love evidence, and international arbitration is no exception. We have arbitration rules and soft law protocols for dealing with the collection and assessment of evidence before tribunals when adjudicating disputes. Facts matter—and they can and should make a difference in the choices that we make. Yet we now live in a post-factual society where evidence can easily be ignored or discounted; where there is a focus on gut reactions and the use of intuitively appealing choices—ones with real-world implications. The zeitgeist is overpowering the facts.

To begin, I will provide three examples which may be fresh in mind. They are certainly fresh in mine as I consider the future of global economic integration and what it means for international arbitration.

First, there was the June 2016 Brexit vote, the bases for and implications of which are complex and ongoing. Indeed, the data re-

² Albert Camus, “The Myth of Sisyphus” in *The Myth of Sisyphus and Other Essays*, translated by Justin O’Brien (New York: Vintage Books, 1991) 119 at 123.

³ Lin-Manuel Miranda, *Hurricane, HAMILTON: AN AMERICAN MUSICAL* (2015).

veals the real economic cost of leaving the EU is non-trivial. The former EU Trade Commissioner Lord Peter Mandelson recently estimated that the costs of leaving the EU could be roughly 1.2 billion GBP per year.⁴ In whipping up the public to vote for Brexit and against economic integration, a regular theme was a rejection of experts, the abandonment of economic evidence, and a focus upon intuitive decision-making.⁵ I am not alone in this view. The Nobel-prize winning cognitive psychologist Daniel Kahneman stated, “[t]he major impression one gets observing the [Brexit] debate is that the reasons for exit are clearly emotional...The arguments look odd: they look short-term and based upon irrationality and anger.”⁶

The second example is the recent challenges to the Canadian-European Union Comprehensive Economic Trade Agreement (CETA) and the more general debate about international investment law and dispute settlement. I see a discourse where a political subdivision of one country nearly undid a trade deal years in the making—a trade deal whose future remains uncertain primarily because of the desire to re-assert national sovereignty and prevent international dispute resolution.⁷

There are undoubtedly challenges with striking the right balance among rights, remedies, and retained sovereignty in any international economic law treaty. It is vital to have a civil discourse about those things that we believe are improper or constructive. Yet, since 2010, I have slowly watched the discourse move toward emotive extremes—whether it is a public exorcism of lawyers practicing international arbitration, or commentators suggesting investment treaty arbitration (ITA) is a “legal monster”⁸ that involves “profiting from injustice” since “agreeing to arbi-

4 Zlata Rodinova & Ashley Cowburn, “Brexit: UK businesses ‘face an extra 1.2bn in costs if it loses access to trade deals’” *The Independent* (14 November 2016), online: <<https://www.independent.co.uk/news/business/news/brexit-latest-costs-trade-deals-access-uk-eu-a7415941.html>>. At the time of editing these remarks in June 2018, Airbus was exploring how to cease core operations in the United Kingdom. Francis Elliott, “Airbus prepares to move from Britain over Brexit Fears”, *The Times* (22 June 2018), online: <<https://www.thetimes.co.uk/article/airbus-prepares-to-move-business-from-britain-over-brexit-fears-f6jnc7x2j>>.

5 Michael Deacon, “EU referendum: who needs experts when we’ve got Michael Gove?”, *The Daily Telegraph* (6 June 2016) at paras 6-7, online: <<https://www.telegraph.co.uk/news/2016/06/06/eu-referendum-who-needs-experts-when-weve-got-michael-gove/>>; Henry Mance, “Britain has had enough of experts, says Gove”, *The Financial Times* (3 June 2016), at para 1, online: <<https://www.ft.com/content/3be49734-29cb-11e6-83e4-abc22d-5d108c>>.

6 Ideas Desk, “This Brexit Comment Has the World’s Attention”, *Time Magazine* (24 June 2016), online: <<http://time.com/4381520/brexit-lament/>>.

7 The Canadian Press, “5 reasons Belgium’s Walloons won’t sign the Canada-EU trade pact”, *The Toronto Star* (24 October 2016), online: <<https://www.thestar.com/business/2016/10/24/five-facts-about-belgiums-walloons-and-the-canada-eu-free-trade-deal.html>>.

8 Mahnaz Malik, “The Legal Monster that lets Companies Sue Countries”, *The Guardian* (4 November 2011), online: <<https://www.theguardian.com/commentisfree/2011/nov/04/bilateral-investment-treaties?>>; The Transnational Law Institute “Discover the Dark Side of Investment” (27 June 2012), online: <<https://www.tni.org/en/article/discover-dark-side-investment>>; Corporate Europe Observatory, “A Response to the Critic of ‘Profiting From

tration [means] states have accepted to be sued by the devil in hell.”⁹ Some South Korean parliamentarians, meanwhile, have been involved in physical altercations over arbitration policy.¹⁰ ITA (or ISDS, as the press calls it) has even become a popular Halloween costume with *Politico* reporters.¹¹

On one side, then, there has been the inflammation of public mood, a cherry-picking of horror stories, and a focus on fear. On the other, there has been a triumphalist narrative about institutional success. More often than not, there has been an inability to focus on legitimate critiques on both sides of the increasingly polarized debate. Balanced data-driven analysis and cost-benefit assessment is rare. Even a balanced analysis might be misconstrued as reactionary, rather than balanced or progressive.

This means that reform efforts that are based upon data, and thereby less emotively charged, are not necessarily at the forefront of debate or policymaking. Indeed, in what was arguably unprecedented “legal scrubbing”, the investment arbitration provisions of CETA were replaced wholesale with an international court proposal.¹² This is not to say that the normative reform was unmerited, but by moving quickly toward reform in a politically-charged environment, core data was arguably overlooked. Requiring that all judges have public international law experience,¹³ for instance, ignores existing data suggesting that

Injustice” (4 January 2013), online: <<https://corporateeurope.org/trade/2013/01/response-critics-profiting-injustice>>; George Monbiot, “This transatlantic trade deal is a full-frontal assault on democracy”, *The Guardian* (4 November 2013), online: <<https://www.theguardian.com/commentisfree/2013/nov/04/us-trade-deal-full-frontal-assault-on-democracy>>.

9 Cecilia Olivet & Pia Eberhardt, “Profiting from injustice - How law firms, arbitrators and financiers are fuelling an investment arbitration boom”, *Corporate Europe Observatory and the Transnational Institute* (November 2012), online: <<https://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf>>.

10 Associated Press, “South Korea Passes U.S. Free-Trade Agreement, Lawmaker Sets Off Tear Gas Canister in Protest” *Fox News* (22 November 2011), online: <<http://www.foxnews.com/world/2011/11/22/south-korea-passes-us-free-trade-agreement-lawmaker-sets-off-tear-gas-canister.html>>; Alison Ross, “Arbitration clause sparks protests in Korea” (29 November 2011), online: Global Arbitration Review <<https://globalarbitrationreview.com/article/1030808/arbitration-clause-sparks-protests-in-korea>>.

11 Ryan Heath “Pics from POLITICO’s Halloween Party”, POLITICO Brussels Playbook (2 November 2015), online: <<https://www.politico.eu/newsletter/brussels-playbook/politico-brussels-playbook-presented-by-alde-group-erdogans-big-win-brexits-turning-point/>>.

12 Wolfgang Alschner “Legal scrubbing or renegotiation? A text-as-data analysis of how the EU smuggled an investment court into its trade agreement with Canada” (24 March 2016), *Wolfgang Alschner* (blog), online: <mappinginvestmenttreaties.com/blog/2016/03/legal%20scrubbing-ceta/>.

13 European Commission, Press Release, “EU finalises proposal for investment protection and Court System for TTIP” (12 November 2015), online: European Commission Trade

those individuals with that type of requisite experience will likely be of a narrow, non-diverse group.¹⁴ This contrasts with what I anticipate was a hoped for general expansion of the pool of adjudicators to include those with expertise in public law and an appreciation of delicate balance of state sovereignty.

As a third and final example, the recent U.S. elections demonstrate that—while there were a variety of complex reasons to vote for Trump or not vote for him—the United States electorate has put a man in power who ran a campaign that, in core respects, has embraced anti-intellectualism and the post-factual society.¹⁵ This is a man who, among other things, put an anti-globalization agenda at the forefront of his campaign. This is a man whose Gettysburg address in October 2016 correctly cited the chapter and verse of NAFTA¹⁶ that will permit him to withdraw from the treaty; a man who stated that on his first day in office he would announce his “intention to renegotiate NAFTA or withdraw from the deal”; and a man whose second priority is to withdraw from the Trans-Pacific Partnership.¹⁷ This is the same President-Elect that—as Lucy Reed noted in her Freshfields Lecture in London last month—has claimed that a US Federal Judge born and raised in the USA was biased simply because his parents were originally from Mexico, using this as a basis to disparage the court’s legitimacy.¹⁸

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- policy and news archives <trade.ec.europa.eu/doclib/press/index.cfm?id=1396>.
- 14 Susan D Franck, et al., “The Diversity Challenge: Exploring the “Invisible College” in International Arbitration” (2015) 53:3 Colum J Transnat’l L 429; Nienke Grossman, “Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts” (2012) 12:2 Chicago J Intl L 647; Shashank P Kumar & Cecily Rose, “A Study of Lawyers Appearing before the International Court of Justice 1999-2012” (2014) 25:3 Eur J Intl L 893; see also José Augusto Fontoura Costa, “Socio-Legal Aspects of Adjudication of International Economic Disputes” (2011), 1:4 Oñati Socio-Legal Series (1st) 3.
- 15 Timothy Egan, “Post-Truth Presidency”, *The New York Times* (4 November 2016), online: <https://www.nytimes.com/2016/11/04/opinion/campaign-stops/the-post-truth-presidency.html?_r=0>; “Art of the lie”, *The Economist* (10 September 2016), online: <<https://www.economist.com/leaders/2016/09/10/art-of-the-lie>> (“Mr Trump is the leading exponent of ‘post-truth’ politics—a reliance on assertions that ‘feel true’ but have no basis in fact.”).
- 16 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 art 2205 (entered into force 1 January 1994) [NAFTA].
- 17 Donald J. Trump, *Donald J. Trump Contract with the American Voter*, Oct. 22, 2016, Gettysburg, PA, https://assets.donaldjtrump.com/CONTRACT_FOR_THE_VOTER.pdf. After this speech was drafted, Trump re-announced his intent to abandon TPP on his first day in office. Ana Swanson, “Trump just announced he’d abandon the TPP on day one. This is what happens next”, *The Washington Post* (22 November 2016), online: <https://www.washingtonpost.com/news/wonk/wp/2016/11/22/trump-just-announced-hed-abandon-the-tpp-on-day-one-this-is-what-happens-next/?utm_term=.9f184a6c8c97>; The American Presidency Project (APP), “A message from President-Elect Donald J. Trump” (21 November 2016), online: YouTube <https://www.youtube.com/watch?v=7xX_KaStFT8> at 00:00:m:59s; After this speech was made, Trump issued an Executive Order withdrawing the United States from the TPP. C-SPAN, “Trump EO TPP Trump signs EO removing US from TPP” (24 January 2017), online: C-SPAN <<https://www.c-span.org/video/?c4651802/trump-eo-tpp&start=24>> at 00h:00m:18s.
- 18 Alison Ross, “Reed condemns Trump approach to due process” (1 November 2016), online:

Let us pause for a moment to think this through. If the President of the United States believes that placing decisions in the hands of a life-tenured judge from his own country cannot insulate an adjudicator from nationalistic or racial bias, why should he support international dispute settlement in international courts and tribunals possessing diversity in nationality, race, gender, and religion? This likely is not the end of international dispute settlement as we know it, but I anticipate that we are moving toward an era of change, with a major world leader who appears to disregard data that conflicts with his worldview and appears to selectively consume evidence supporting his intuitive pre-determination without testing those assumptions.

This is the problem of a politics of intuition in a post-factual world: when decision-making is left to our intuition, we tend to hear only what we want to believe. The voices of other perspectives and contradictory facts are drowned out, along with the capacity for critical analysis.¹⁹ Matters are made worse—not better—by echo chambers created by ‘Google Bubbles’ or ‘Facebook Fortresses’, where technology gives us what we think we want to hear and what is intuitively appealing, rather than what is correct.²⁰

This is where science can and must step in. Facts gathered in a cherry-picked or deceptive way can create the inaccurate impressions or be flat-out wrong. This is why, today, if you leave with no other memory, it should be that international arbitration can and must continue to strive to have an evidence-based future. This is not merely about using evidence at trial or how evidence affects dispute outcomes; it is about the promise of using evidence to guide the normative choices in shaping the future of international arbitration.

International arbitration has always had a deep and rich tradition of what political theorists, including those in the Frankfurt School of Critical Theory, would call praxis—the blending of theory and practice in generating a real-world impact. Theoretical debates about the meaning of *kompetenz-kompetenz*²¹ and *lex mercatoria*²²—to which Professor Brierley mean-

Global Arbitration Review <<https://globalarbitrationreview.com/article/1070112/reed-condemns-trump-approach-to-due-process>>.

19 Andy Boynton & William Bole, “Three Potentially Fatal Words: ‘My Gut Says’”, *Forbes* (16 June 2015), online <<https://www.forbes.com/sites/andyboynton/2015/06/16/three-potentially-fatal-words-my-gut-says/#64d6d0071153>>.

20 See, e.g. Farhad Manjoo, *True Enough: Learning to Live in a Post-Fact Society* (Hoboken, N.J.: Wiley, 2008) at 198; see also Eli Pariser, *The Filter Bubble: What the Internet is Hiding From You*, Lecture notes (London School of Economics and Political Science, 2012) at 3, 8-9. (exploring how website algorithms selectively guess what users which to see based upon previous user information, including platforms such as Google and Facebook).

21 George A. Bermann, “The ‘Gateway’ Problem in International Commercial Arbitration” (2012) 37:1 *Yale J Intl L* 1; Ash Ashley Cook, “Kompetenz-Kompetenz: Varying Approaches and a Proposal for a Limited Form of Negative Kompetenz-Kompetenz” (2014) 42:1 *Pepp L Rev* 17; Ben H. Sheppard, Jr., “The Moth, the Light and the United States’ Separability Doctrine” (2006) 23:5 *J Intl Arb* 479; Robert H. Smith, “Separability and Competence-Competence in International Arbitration: Ex Nihilo Nihil Fit? Or Can Something Indeed Come from Nothing?” (2002) 13 *Am Rev Intl Arb* 19.

22 See e.g. Gilles Cuniberti, “Three Theories of Lex Mercatoria” (2014) 52 *Colum J Transnatl L*

ingly contributed²³—involve rich conversations about the meaning of law in a transnational commercial culture, and thoughtful discourse about the power of people (whether arbitrators or judges) to adjudicate disputes. These dialogues cannot and should not stop, particularly as international arbitration continues the tradition of blending theoretical concepts into practical application. Dating back to Greek and Roman law,²⁴ international arbitration has historically been borne from practical reality—and in the knowledge that entities (whether people, corporations, or states) who trade and interact economically with each other need some way to resolve their disputes so that all can experience the joint gains of effective and efficient commerce.

Yet we can still do more, and it is only by collecting data properly—and by using and analyzing the evidence with respect for its limitations²⁵—that we can assess conventional wisdom, thereby filtering out myth and filtering in reality to make optimal decisions about the future of international arbitration. In this post-factual era, we must work even harder to ensure that there is a re-focusing upon facts, rather than political spin.

III. Practical Reality: Experience with the Data Void

This may sound high and lofty – or perhaps just abstract and theoretical—so let me offer a personal example that demonstrates the need, value, but also the deep challenges, of using evidence to inform the future of international arbitration.

Early in my academic career, I attended a conference with panelists who were arbitration luminaries. One in particular spoke about the increasing volume of investment treaty arbitration cases. It is important to remember that, not that long ago, one could count the num-

369; Bruce L. Benson, “The Spontaneous Evolution of Commercial Law” (1989) 55 S Econ J 644.

23 Brierley, *supra* note 1.

24 See e.g. Randall Lesaffer, “Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription” (2005) 16 Eur J Intl L 25; Henry S. Fraser, “A Sketch of the History of International Arbitration” (1926) 11 Cornell L Q 179, at 179, 185-90; Sabra A. Jones, “Historical Development of Commercial Arbitration in the United States” (1928) 12 Minn L Rev 240 at 242-43.

25 The author has written separately about the promise and peril of using empirical data to inform decision-making, the standards for conducting quality scientific research, and the appropriate application of empirical insights in international arbitration. See e.g. Susan D Franck, “The Promise and Peril of Empiricism and International Investment Law Disputes” in *CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION* (Andrea Bjorklund, Franco Ferrari & Stefan Kröll eds. forthcoming 2018).

ber of investment treaty disputes on two hands; this was now starting to shift, and more hands were required to speak holistically about investment treaty arbitration. Yet, how the speaker ultimately described the landscape of arbitration awards was contradictory to my own most recent practice of arbitrating cases in London.

Science, however, taught me to be careful about discounting information merely because it differed from my experience. It also taught me to be aware of case selection effects: namely that experience could be unusual rather than representative. Cognitive psychology, which is informed by scientific research, also taught me lessons. First, I knew about the potential for error from “recency” biases,²⁶ whereby one more easily calls the most recently observed phenomena rather than recalling accurate and wholistic memories. Second, I was cognizant of the risk of bias blind spots²⁷ and the resulting need for caution, as there is a risk that I might be unaware of my own blind spots. Armed with these tools, I wondered about which information was most accurate and representative. The tools of science and cognitive psychology helped me remember that people can have pure motives and nevertheless be tricked by cognitive impulses that inadvertently fool us into believing things that are untrue, inaccurate, or unrepresentative.

Cognitive illusions can be adaptive. Often, when things feel correct, they are. Indeed, quick intuitive reactions such as the ‘fight or flight’ response mean that we may live to fight another day. Yet our intuition can also betray us, and our assessments can sometimes be wrong. Using what Stephen Colbert would call “truthiness”²⁸—relying upon what we feel to be true, rather than what the facts will support²⁹—is problematic. Things that *feel* true, while not necessarily being accurate, create cognitive ease in human beings. This means that narratives that feel normal, that help us feel confident, and that do not disrupt our world view are more likely to be be-

26 See e.g. Robert L. Greene, “Sources of Recency Effects in Free Recall,” (1986) *Psychol Bull* 221; Dirk D. Steiner & Jeffrey S. Rain, “Immediate and Delayed Primacy and Recency Effects in Performance Evaluation,” (1989) 74 *J Applied Psychol* 136.

27 David Dunning, *Self-Insight: Roadblocks and Detours on the Path to Knowing Thyself* (London: Psychology Press, 2005); Joyce Ehrlinger et al., “Peering into the Bias Blind Spot: People’s Assessments of Bias in Themselves and Others” (2005) 31 *Personality & Soc Psychol Bull* 680; Emily Pronin, “The Introspection Illusion” (2009) 41 *Advances Experimental Soc Psychol* 1.

28 See The Late Show with Stephen Colbert, “Post-Truth’ Is Just A Rip-Off Of ‘Truthiness’” (18 November 2016), online: < <http://bit.ly/2f031qt> > at 5:26 (providing a 2005 definition of “truthiness” as “the belief in what you feel to be true rather than what the facts will support”); Manjoo, *supra* note 20 at 198 (discussing truthiness); Rick Hayes-Roth, *Truthiness Fever, How Lies and Propaganda are Poisoning Us* (St. Petersburg, FL: Booklocker.com, 2011) at 5-6.

29 The Oxford Dictionary’s 2016 word of the year also refers to this as “post-truth”, namely “the quality of preferring concepts or facts one wishes to be true, rather than concepts or facts known to be true. Tori Bolt, “Post-Truth’ is Oxford Dictionaries’ Word of the Year for 2016” *NBC News* 2 (17 November 2016), online: < <http://bit.ly/2fhFtmp> >; see also Caroline Framke, “2016 is the year of “post-truth,” according to the Oxford Dictionaries,” *Vox* (16 November 2016), Online: < <http://bit.ly/2foPUul> >.

lieved and acted upon—even if they are flat out wrong.³⁰

This is why making certain choices—particularly choices likely to have millions or billions of dollars of economic impact or implicate state sovereignty—should *not* be rushed, ruled by intuition, or based upon untested facts. Think about what it might mean for the future of commercial or treat-based arbitration. If we are making high-stakes decisions based on what feels right and what is intuitively satisfying (but possibly wrong)—and without (1) testing our theories systematically, (2) using data to provide a baseline, and (3) considering the down-stream implications—consider the harm that we could be doing to international dispute settlement.

IV. Turning International Arbitration Towards Psychology

International arbitration is not alone in being exposed to this risk, and concerns about ‘truthiness’ are not new. Worries like this have been part of the human condition for centuries. The impact of popular opinion and intuitive influence has shaped law for some time.

In the Socratic Dialogue *Crito*, Socrates is in his prison cell awaiting execution when his old friend Crito comes to rescue him. Socrates asks his friend to reject the populist pull of emotion, then poses this provocative question: “in questions of justice and injustice, and of the base and the honorable, and of good and evil...ought we to follow the opinion of the many and fear, or the opinion of the one man [or woman] who understands these matters?”³¹ Socrates calls for a rational, rule-of-law-oriented, and evidence-based approach, stating: “we must not think so much of what the many will say of us; we must think of one the one man who understands justice and injustice, and what truth herself will say of us.”³²

Science generally, and psychology in particular, lets us test conventional wisdom and separate myth from reality. Using scientific methodology and data to inform our analysis, our conversations, and our choices can aid the evolution of international arbitration. We can also take comfort in knowing that using psychology is historically grounded in international law. In the 1920s, Roscoe Pound observed a “functional critique of international law” urging the incorporation of social psycholo-

³⁰ Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011); Christopher Chabris & Daniel Simons, *The Invisible Gorilla: How our Intuitions Deceive Us* (New York: Harmony Books, 2010).

³¹ Plato, *Euthyphro, Apology, Crito, Phaedo: The Death Scene*, translated by F.J. Church 2nd ed by Robert D. Cumming, (Indianapolis: Bobbs-Merrill Educational Publishin, 1988) at 56.
³² *Ibid* at 57.

gy.³³ Sir Geoffrey Butler likewise encouraged international law to explore psychological perspectives.³⁴ Howard Lasswell, a political scientist and social science legend,³⁵ lead a collaboration with Myres McDougal and Michael Reisman that served as a catalyst for the “New Haven School” of international legal theory.³⁶ Later, Soia Mentschikof tried to use then-current psychological insights to explore the behavior of international arbitrators.³⁷

Yet the embrace of psychology was historic, and international law has not yet caught up with modern science, and particularly cognitive psychology. Cognitive psychology provides a promising prism for evaluating, understanding, and perhaps even improving decision-making. If nothing else, it makes the process more-evidence based and thus more legitimate. In particular, a core aspect of cognitive psychology involves exploring how our brains can trick us and identifying deviations between what decision-makers *should* do and what they *actually* do.

For the remainder of my time, I would like to endeavor to do this in two ways. First, I will provide an overview of psychological concepts to explore how cognition inadvertently facilitates our clinging to myths and how testing our assumptions against data offers an antidote to truthiness. Second, I will provide an overview of some pertinent research to aid the evolution of international arbitration.

33 Anthony Anghie, James Crawford & John Bell, *Imperialism, Sovereignty and the Making of International Law* (New York: Cambridge University Press, 2004) at 129.

34 Geoffrey Butler, “Sovereignty and the League of Nations”(1920) 1 *Brit YB Intl* 35 at 42.

35 See e.g. W. Michael Reisman et al, “The New Haven School: A Brief Introduction” (2007) 32 *Yale J Intl L* 575 at 575, n3; Harold Lasswell, *Politics, Personality and Social Science in the Twentieth Century: Essays in Honor of Harold D. Lasswell*, ed by Arnold Rogow (Chicago: Chicago University Press, 1969).

36 See e.g. Harold Lasswell & Myres McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy*, vol 1 (New Haven: New Haven Press, 1992; Harold D. Lasswell & Myres S. McDougal, “Legal Education and Public Policy: Professional: Professional Training in the Public Interest” (1943) 52 *Yale LJ* 203; Myres S. McDougal et al, “The Intelligence Function of the World Public Order” in Myres S. McDougal & W. Michael Reisman, eds, *International Law Essays: A Supplement to International Law in Contemporary Perspective* (St. Paul, MN: Foundation Press, 1981) 287; W. Michael Reisman, “The View from the New Haven School of International Law” (1992) 86 *Am Soc Intl L Proc* 118.

37 Soia Mentschikoff & Ernest A. Haggard, “Decision Making and Decision Consensus in Commercial Arbitration”, in June L. Tapp & Felice J. Levine, eds, *Law, Justice and the Individual in Society: Psychological and Legal Issues Law Journal* 295 (New York : Holt, Rinehart and Winston, 1977); see also Christopher Drahozal, “A Behavioral Analysis of Private Judging” (2004) 67 *Law & Contemp Probs* 105 (exploring the theory of cognitive psychology on arbitrators); Giacomo Elgueta, “Understanding Discovery in International Commercial Arbitration Through Behavior Law and Economics: A Journey Inside the Minds of Parties and Arbitrators” (2011) 16 *Harv Negot L Rev* 165.

V. Exploring the Role of Cognitive Illusions on Decision-making and International Arbitration

In 1969, Daniel Kahneman and Amos Tversky began researching how cognitive illusions affect expert decision-makers. They found that even experts, including mathematicians and statisticians, used intuition to make inaccurate assessments.³⁸ They identified cognitive illusions—or quick, unconscious mental shortcuts that facilitate intuitive thinking (rather than slower, more deliberative assessments)—which created the risk of systematic deviations and error. Their cognitive research also identified gaps between what we believe rational decision-makers should do and how those individuals behaved in reality.³⁹

First, I will start with a cognitive illusion that is neutral but demonstrative of a fundamental flaw in human decision-making: that of availability. Availability involves a mental shortcut that relies on the immediate examples that spring to mind when evaluating an issue. The premise is if something can be easily recalled, it must be important—or at least more important than other options. In Kahneman and Tversky's classic study on availability,⁴⁰ participants were asked whether, in the English language, it was more likely for the letter 'K' to be the first or third letter in a word. Since they could more readily think of words that began with K than words with K as their third letter, participants concluded that words beginning with K were more frequent. However, a survey revealed that, numerically, the letter K occurs *more* frequently in the third than first position.⁴¹ Similar results occurred in experiments when participants were asked about other letters—name-

38 Daniel Kahneman & Amos Tversky, "Subjective Probability: A Judgment of Representativeness" (1972) 3 *Cog Psychol* 430 [hereinafter *Subjective Probability*]; see also Daniel Kahneman & Shane Frederick, "Representativeness Revisited: Attribute Substitution in Intuitive Judgment," in Daniel Kahneman et al, eds, *Heuristics and Biases: The Psychology of Intuitive Judgment* (New York: Cambridge University Press, 2002) at 49 [Kahneman, "Representativeness Revisited"].

39 See e.g. Cass Sunstein ed, *Behavioral Law & Economics*, (New York: Cambridge University Press, 2000); Christine Jolls et al, "A Behavioral Approach to Law and Economics" (1998) 50 *Stan L Rev* 1471; Russell Korobkin & Thomas Ulen, "Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics" (2000) 88 *Calif L Rev* 1051; Jeffrey Rachlinski, "The Psychological Foundations of Behavioral Law and Economics" [2011]:5 *U Ill L Rev* 1675 at 1679–81; Cass Sunstein, "Behavioral Analysis of Law" (1997) 64 *U Chicago L Rev* 1175.

40 Amos Tversky & Daniel Kahneman, "Availability: A Heuristic for Judging Frequency and Probability" (1973) 5 *Cog Psychol* 207.

41 Mark E. Mayzner & Mary E. Tresselt, "Tables of single-letter and Diagram Frequency Counts for Various Word-Length and Letter-Position Combinations"(1965) 1 *Psychol Monograph Supplement* 13.

ly L, N, R and V—suggesting there was nothing special about a particular letter. In all, the intuitive (but mistaken) belief that words beginning with a letter were more numerous was tied to ease of recall. Correspondingly, difficulty in recalling words with a letter in the third position was mentally translated into the mistaken belief that those words occurred less frequently.⁴²

Applying this cognitive illusion concept now to a different context—the public debate involving international arbitration—one can ask how availability contributes, for instance, to discourse about arbitral appointments. Prior to conducting my initial empirical research, I, like many, believed there existed a very limited ‘club’ of arbitrators composed of only the most famous who spring readily to mind due to their frequent appearances at conferences, in academic publications, or in press stories or award ceremonies. I presumed that they resolved most of the cases to the exclusion of other arbitrators. I was thus surprised to find a breadth and depth to the arbitrator pool, even prior to 2007, with over 145 different arbitrators appointed in treaty cases.⁴³ Other empirical research has also demonstrated that this number is growing, including Sergio Puig’s counting of 419 ICSID arbitrators in 2014.⁴⁴ ICISD’s recently published data itself reveals that, in 2016 alone, it appointed 119 different arbitrators, which included 27 (or 23%) arbitrators who were first-time appointees.⁴⁵

However, data must keep things in perspective. While there is a deep bench of potential arbitrators and evidence of a growing heterogeneity of the arbitrator pool, there are also many repeat appointments. This phenomenon of repeat players is not exclusive to international arbitration. Cecily Rose and Shahank Kumar’s study of the International Court of Justice bar, for example, reveals that a small cadre of lawyers are responsible for roughly 75% of all international cases—and those lawyers tended to be men from developed states.⁴⁶ Perhaps some international ar-

42 Norbert Schwarz, et al, “Ease of Retrieval as Information: Another Look at the Availability Heuristic”(1991) 61 *J Personality & Soc Psychol* 195 at 195.

43 Susan Franck, “Empirically Evaluating Claims about Investment Treaty Arbitration” (2008) 82 *NCL Rev* 1 at 77.

44 Sergio Puig, “Social Capital in the Arbitration Marketplace” (2014) 25 *Eur J Intl L* 387 at 403; see also Daphna Kapeliuk, “The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators” (2010) 96:1 *Cornell L Rev* 47; Daphna Kapeliuk, “Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration” (2012) 31:2 *Rev Lit* 267.

45 International Centre for Settlement of Investment Disputes, *2016 Annual Report* (2016) at 7, 26, online: <icsid.worldbank.org/en/Pages/resources/ICSID-Annual-Report.aspx>.

46 Kumar, *supra* note 14 at 902-906; see also Allain Pellet, “The Role of International Lawyer in International Litigation” in Chanka Wickremainsghe, ed, *The International Lawyer as Practitioner* (London, UK: British Institute of International and Comparative Law, 2000) at 147-48.

bitration trends are not necessarily unusual, then, when examined within the broader universe of public international law and international courts and tribunals.

Cognitive illusions (like availability) may also be affecting discourse surrounding investment arbitration. Many disputes are recent or controversial, and may be easy to recall. The ease of recall risks making these cases feel more prominent within the overall population, as well as representative of the larger whole. This means that despite the appearance of bias toward investors within these cases—which I would distinguish from the creation of substantive treaty rights that were designed by states to only benefit investors but provide no reciprocal protections for states—the myth about pro-investor bias in arbitration outcomes is not borne out. My research has identified that states have won more than investors, and that the difference is now statistically meaningful.⁴⁷ A recent study conducted by the team at Pluricourts in Norway has thoughtfully replicated aspects of this research. The draft analysis revealed that—although our unit of analysis and measurement systems are different—states were winning in their research at a roughly 53% rate.⁴⁸

Those studies do not necessarily differentiate among disputes to parse the variance and permit isolation of the types of government conduct that are likely to create risk of liability. Thus, I am pleased to see that researchers are starting to ask more sophisticated questions so that we can get better data about how the system functions. Nathan Jensen & Jeremy Caddell, for example, have begun exploring which branches of government are likely to generate the risk of a treaty claim—finding that most investment treaty disputes involved an alleged abuse by executive branch officials.⁴⁹ Likewise, Zoe Phillips Williams⁵⁰ and Julie Maupin⁵¹ have independently worked to classify, in a more nuanced way, the type of regulatory activity triggering disputes. In a slightly different vein, Tomer Brode and his team have started the rather challenging task of quantifying

47 Susan D Franck & Lindsey Wylie, “Predicting Outcomes in Investment Treaty Arbitration” (2015) 65:3 Duke LJ 459.

48 Daniel Behn, Tarald Laudal Berge & Malcolm Langford, “Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration” Rev L & Economics, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2978546 at 23-24>.

49 Jeremy Caddel & Nathan M Jensen, “Which host country government actors are most involved in disputes with foreign investors?”, (28 April 2014) Colum FDI Persp 120 online: <<http://ccsi.columbia.edu/files/2013/10/No-120-Caddel-and-Jensen-FINAL-WEBSITE-version.pdf>>.

50 Zoe Phillips Williams, *Risky Business or Risky Politics: What Explains Investor-State Disputes?* (Doctoral thesis, Hertie School of Governance, 2016), online: <opus4.kobv.de/opus4-hsog/frontdoor/index/index/docId/2369>.

51 Julie A Maupin, “Differentiating Among International Investment Disputes” in Zachary Douglas, Joost Pauwelyn, & Jorge E Viñuales, eds, *The Foundations of International Investment Law* (Oxford, UK: Oxford University Press, 2014).

the definition of “state regulatory space,”⁵² to ensure that stakeholders understand an otherwise nebulous term that has the capacity to become an emotive political ‘buzz phrase’.

My theory, ultimately, is this: cognitive illusions—including availability—affect the debate about international arbitration. They possess the capacity to skew how stakeholders gather information, form conclusions, and make decisions. Availability and perceived representativeness may lead people to presume that memorable experiences are representative, even when they are not. Confirmation bias may encourage people to avoid information that tends to disrupt their beliefs. Compounding these potential effects is the bias blind spot preventing people from being aware of the impact and influence of cognitive illusions. Thus, together, cognitive illusions may create a ‘perfect storm’ of misperception about international arbitration. Moreover, if intuitive assessments are indeed affecting decision-making about international arbitration reform, it may partially explain current polarization.

Data offers a de-biasing opportunity: to identify where facts are correct, to test perceptions, and to aid the evaluation of normative choices. Focusing on balanced facts—rather than unrepresentative examples or skewed models—facilitates conversations likely to remedy actual problems, rather than improperly tailoring solutions that exacerbate these existing difficulties.

But those are theories. As you might have gathered, I prefer data. Perhaps this is why, in 2007, I began planning an experiment to test how cognitive illusions affect international arbitration. My idea was both to explore whether international arbitrators (like other experts) are influenced by intuitive cognition and, where possible, compare their decision-making skill to judges. To test this, I formed a research team in 2012 to engage in one of the most unusual opportunities of my professional life. The organizers of the 2014 the International Council for Commercial Arbitration (or ICCA) offered me unrestricted access to conduct a live experiment to test arbitrator decision-making. The results of this study are forthcoming in the *Emory Law Journal*.⁵³

52 Tomer Broude, Yoram Z Haftel & Alexander Thompson, “Who Cares About Regulatory Space in BITs? A Comparative International Approach” (2 May 2016) Hebrew U Jerusalem Leg Studies Research Paper Series (No 16-41), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=2773686>.

53 Susan D Franck et al, “Inside the Arbitrator’s Mind” (2017) 66:5 *Emory LJ* 1115.

VI. Testing the Intuitive Override Model in International Arbitration

In doing the research, some of my theories were confirmed and others were found wanting. One was that international arbitrators, like other experts, were not necessarily fully rational or fully intuitive in their decision-making. Rather, like research on other experts and national court judges has shown, I hypothesized that international arbitrators would use an intuitive-override model of decision-making whereby some (but not all) would demonstrate the ability to move past a snap-judgment and make a more considered and accurate analysis.⁵⁴ To test this theory, we used the three item Cognitive Reflection Test (or CRT) to assess whether international arbitrators had the ability to avoid an intuitively appealing answer which would readily spring to mind but would nevertheless be wrong.⁵⁵

The CRT asks three questions. For each question, there is an intuitive but incorrect answer, as well as a correct answer that is easy to discern upon reflection. The first CRT question was:

A bat and a ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the ball cost?" The intuitive response, 10¢, is mathematically incorrect. If the bat costs US\$1 more than 10¢ (US\$1.10) and the ball is 10¢, the total cost is US\$1.20. The correct answer is 5¢, with a bat costing US\$1.05 and a ball costing 5¢.⁵⁶ The calculation is relatively easy, but the analysis requires deliberation to avoid generating inadvertent error.

The second CRT question was:

If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets?"⁵⁷ The intuitive answer is 100, but this is wrong. Deliberation reveals that if five machines make five widgets in five minutes, then each machine makes a single widget in five minutes, which is called the "base rate." With that base rate, one can calculate it takes five minutes for 100 machines to make 100 widgets.⁵⁸

54 See e.g. Chris Guthrie, Jeffrey J Rachlinski & Andrew J Wistrich, "Inside the Judicial Mind" (2001) 86:4 Cornell L Rev 777; Chris Guthrie, Jeffrey J Rachlinski & Andrew J Wistrich, "The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice" (2009) 58:7 Duke LJ 1477 [Guthrie et al, "Hidden Judiciary"]; Chris Guthrie, Jeffrey J Rachlinski & Andrew J Wistrich, "Blinking on the Bench: How Judges Decide Cases", (2007) 93:1 Cornell L Rev 1 [Gurthie et al, "Blinking"]; Kahneman, "Representativeness Revisited", *supra* note 36 at 49-50.

55 See e.g. Shane Frederick, "Cognitive Reflection and Decision Making" (2005) 19:4 J Econ Persp 25 [Frederick].

56 *Ibid* at 26-27.

57 *Ibid* at 26-27.

58 Guthrie et al, "Blinking", *supra* note 52 at 10-11.

The final CRT question asked:

In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take the patch to cover half of the lake?⁵⁹ The intuitive (and incorrect) answer is 24 days. Using slower cognition to override snap judgments reveals the correct answer is 47 days. If the rate of growth means the amount doubles every day, compounding means half the lake was covered the day before (i.e. day 47, not day 48).

Now, if you were answering these questions in your head, I am sure that you all got them correct. The more important question, however, is how our subjects did, and how those international arbitrators compared to judges.

The results were both surprising and unsurprising. The bottom line was that no one did particularly well; not the judges, and not the arbitrators. The only people who tended to excel were MIT students and the St. Gallen Law and Economics students we did some beta-testing on (although some of that credit may go to the economic teaching skills of my co-author Anne van Aaken).

International arbitrators' average CRT score was 1.47, which exceeds mean CRT scores of judges participating in prior studies. But lest we make inferences that are unwarranted, I suggest a degree of caution. Every number you will see in empirical research contains some variance—including my own. These 'standard deviations' provide the degree of potential error, which means that for every number that looks like it is a fixed value, there is inevitably a range of grey around the edges. Thus, simply because numbers *look* different on their face does not mean that they are *actually* different in a meaningful way. As Ian Ayres put it thoughtfully in his book *Supercrunchers*—where he told the story of how his eight-year old daughter could understand the risk of error in any number—“[t]here’s a 95 percent chance that a normally distributed variable will fall within two standard deviations (plus or minus) of its mean.”⁶⁰ Put another way, the “Two Standard Deviation Rule” (or 2SD Rule) means that every number is correct, plus or minus two standard deviations from that number.

For our purposes, the 2SD Rule means that international arbitrators must not get overly excited about their numerical outperformance of some judges. Ultimately, it was *not* statistically possible to conclude that arbitrators reliably outperformed US domestic administrative law judges. While it was possible to conclude that internation-

⁵⁹ Frederick, *supra* note 53 at 27, 37.

⁶⁰ Ian Ayres, *Super Crunchers: How Anything can be Predicted* (London, UK: John Murray, 2008) at 212-14.

al arbitrators reliably outperformed Florida state judges, I must provide three independent cautions. First, it remains unclear how representative Florida state court judges are compared to judges in other jurisdictions. Thus, the findings do *not* mean that international arbitrators are superior to all types of judges. Second, the two sets of adjudicators were tested at different points in time, and the temporal lapse could be an intervening variable disrupting the value of direct comparison. Third, and more importantly, to the extent that there was a statistically meaningful difference with one set of judges, the effect size was statistically small. To use an analogy I give my students, a small effect size means there is a difference, but it may not be of practical importance: Mahnoloblanik and Christian Louboutin are two different types of shoes, but both are high-end designers with impeccable style.

The capacity of international arbitrators to deploy an intuitive-override model within the context of *actual adjudication* is also potentially different than within the context of the CRT. To test this possibility, we experimented with other cognitive illusions by giving arbitrators a series of disputes to resolve that more closely mirror real disputes. The two illusions that I would like to focus on for the remainder of my time are anchoring and framing.

VII. Exploring Anchoring in International Arbitration

Anchoring is a form of intuitive decision making involving numerical estimates. When people make estimates, they tend to rely upon an initial numerical value that is readily available, which then ‘anchors’ subsequent numerical estimations.

This can happen even where the initial figure is irrelevant. Kahneman & Tversky’s ‘wheel-of-fortune’ experiment demonstrated the impact of irrelevant anchors on estimates.⁶¹ In that study, a wheel of fortune generated a random number, and subjects were then asked to estimate the percentage of African states in the United Nations. Responses were biased toward the value derived from the wheel-of-fortune, even though that number had nothing to do with reality.

Anchors are pervasive and difficult to dislodge, even with

⁶¹ Amos Tversky & Daniel Kahneman, “Judgment Under Uncertainty: Heuristics and Biases” (1974) 185:4157 *Science* 1124.

subsequently acquired information.⁶² For this reason, getting your anchor right the first time—and having it be relevant and non-deceptive—is fundamental. In our study, one thing we identified is that *irrelevant* anchors sometimes affected damage awards. This was discernable because the only thing that we manipulated was the value of a wholly irrelevant anchor that involved an independent dispute in a different country under a different applicable law. Even though the anchor had nothing to do with the merits of the case, it nonetheless influenced damage assessments when the irrelevant anchor was of a sufficiently high value—say US\$50 to US\$300 million. In international arbitration, arbitrators appeared to discount anchors of US\$1 million, suggesting that international arbitration may be insensitive to the influence of lower awards. But these results also demonstrated that—once again—international arbitrators were not dissimilar to their judicial counterparts who were also affected by the pernicious influence of irrelevant damage assessments.⁶³

This brings me to relevant anchors. Anchors that are relevant – closely connected to law and facts—can be adaptive and helpful to adjudication. One of the best examples of a relevant anchor (whether in litigation or arbitration) is an expert report. A common myth in international arbitration is that arbitrators fail to adhere to rule of law norms⁶⁴ when they opt to “split the baby” and render

62 Jennifer K Robbenolt & Jean R Sternlight, *Psychology for Lawyers: Understanding Human Factors in Negotiation, Litigation, and Decision Making* (Chicago: American Bar Association, 2012) at 72; Gretchen B Chapman & Eric J Johnson, “Incorporating the Irrelevant: Anchors in Judgments of Belief and Value” in *Intuitive Judgment*, *supra* note 36 at 125-26; Fritz Stack & Thomas Mussweiler, “Heuristic Strategies for Estimation Under Uncertainty: The Enigmatic Case of Anchoring” in *Foundation of Social Cognition* (Mahwah, New Jersey: Lawrence Erlbaum Associates, 2003) at 79-81.

63 Guthrie et al, “Hidden Judiciary”, *supra* note 52 at 1502-04.

64 See e.g. William W Park, “Arbitration of International Business Disputes: Studies in Law and Practice (2006) at 560 (describing bankers’ “herd mentality” and suggesting arbitration in an “unnecessary invitation” to render “split the difference” awards); Douglas Shontz, Fred Kipperman & Vanessa Soma, *Business-to-Business Arbitration in the United States: Perceptions of Corporate Counsel*, *Rand Institute for Civil Justice* (Santa Monica, CA: Rand corporation, 2011), online: https://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR781.pdf at x; 11-13 (identifying that parties’ “overwhelmingly believe that arbitrators tend to ‘split the baby’ with their rulings—that is, they are unwilling to rule strongly for one party”); Richard A. Posner, “Judicial Behavior and Performance: An Economic Approach”, (2005) 32 Fl St L Rev 1259 at 1261 (“We can expect, therefore, a tendency for arbitrators to ‘split the difference’ in their awards”); but see Christopher Drahozal, “Busting Arbitration Myths”, (2008) 56:3 U Kan L Rev 663 at 665, 673-77 (identifying the “split the baby” myth of arbitration but providing contradictory em-

compromise damage awards that fall midway between parties' damage assessments. There are also related concerns about who appointed the arbitrator, and that arbitrators may have "an incentive to render compromised judgments that do not badly offend either party."⁶⁵

To separate the myth from reality, we gave arbitrators a brief vignette about a beach front property, where a government indirectly expropriated the land to support legitimate local ecological objectives. We explained the financial bases of the divergent expert reports, which used relevant underlying data and credible models to assess valuation. We then instructed the arbitrators on the applicable law. In all versions, the respondent asserted the land value was US\$1 million. In the low anchor condition, the developer claimed damages of US\$10 million, and in the high anchor condition the developer claimed US\$50 million. The relevant anchors *did* affect amounts awarded, and the property owner's expert's claim always set an upper limit for compensation. There were also few arbitrators that awarded *less* than what the respondent conceded was due. The nature of the hypothetical thus permitted us to test the "split the baby hypothesis" in both anchoring conditions.

What we found was that, irrespective of the experimental condition, arbitrators awarded damages in a similar fashion. Damage awards—in both conditions—might have appeared to support a "baby splitting" theory, as average awards and proportions were roughly in the middle of the two expert valuations. But those blunt numbers hid the reality of the matter. Peeking under the rocks demonstrated that the story is much more complicated. There was in fact real variance in how international arbitrators decided cases. The data revealed three groups with different propensities—not one bunch of baby-splitters. One group tended to validate the claimant, awarding 100% of requested damages. As that group was big with little dispersion, they were: (a) easy to identify, and (b) memorable. A second group were akin to "baby splitters", but only two subjects actually provided a pure 50/50 split. The third group was more pro-respondent, but their awards were relatively dispersed—making them easier to miss as a group.

These experimental results should not at all be surprising. They mirror outcomes in real arbitration cases.⁶⁶ For example, research into

pirical) [Drahozal].

65 Jens Dammann & Henry Hansmann, "Globalizing Commercial Litigation" (2008) 94:1 Cornell L Rev 1 at 34; see also Kapeliuk, "Repeat Appointment", *supra* note 42 at 49, n 4, 54, 87-89 (identify the "split the baby myth" but finding that awards rendered by elite arbitrators are less likely to "split the difference" more likely to provide "all or nothing" outcomes or balanced decision-making over time).

66 See e.g. Franck & Wylie, *supra* note 45 at 495 (observing that, for successful claims, there tends to be a more pro-respondent outcome of damages awarded with measures of central tendency around 27-35%); Kapeliuk, "Repeat Appointment", *supra* note 42 at 54, 81 (describing how "arbitration tribunals involving elite arbitrators do not have a tendency to render compromise awards.").

commercial arbitration awards by Christopher Drahozal,⁶⁷ as well as Stephanie Keer and Richard Naimark,⁶⁸ shows that what can appear to be a 50/50 compromise (if one only focuses on raw means) could conceal the fact that arbitrators actually tend to make decisions at either end of the spectrum. Compromise awards are actually the exception, rather than the rule.⁶⁹

To say the least, then, it is sad and disappointing that, despite experimental and archival data from real cases, the public seems ambivalent and predisposed to believe a critique of international arbitration that is emotionally appealing but factually flawed. Public discourse should, at the very least, concede that there is variance in arbitrator propensity to decide cases in certain ways.

VIII. Cognitive Framing in International Arbitration

I promised one more cognitive illusion, and this will be the framing of disputes. The framing of outcomes as a win or a loss can influence how people make decisions.⁷⁰ Natural asymmetries between parties in transactions—be they buyers or sellers, claimants or respondents, or other parties involved in disputes—make this an area ripe for testing.

At the ICCA, we tested framing in multiple ways. We found that framing the dispute as a loss or a gain affected the assessments of international arbitrators in multiple contexts. Arbitrators, however, are not the only expert decision-makers susceptible to this cognitive illusion. Rather, they are part of an illustrious group that includes golf pros, physicians, and judges.⁷¹

The hypothetical I will focus on here asked arbitrators about rescinding a contract based upon mutual mistake. In one version of the vignette, the parties to a concession contract thought they were contracting for a gold mine when, in reality, it was for fool's gold. In another con-

67 Drahozal, *supra* note 62 at 675-676.

68 Stephanie E Keer & Richard W Naimark, "Arbitrators Do Not "Split the Baby": Empirical Evidence from International Business Arbitrations", (2008) 18:5 J Intl Arb at 573-75.

69 See e.g. American Arbitration Association, "Splitting the Baby: A New AAA Study" (9 March 2007), online: <<http://bit.ly/2fFwizK>>; Carter Greenbaum, "Putting the Baby to Rest: Dispelling a Common Arbitration Myth" (2015) 26:1 Am Rev Intl Arb 101 at 101, 121.

70 See e.g. Daniel Kahneman & Amos Tversky, "Prospect Theory: An Analysis of Decision Under Risk" (1979) 47:2 *Econometrica* 263; Daniel Kahneman & Amos Tversky, "The Framing of Decisions and Psychology of Choice" (1981) 211:4481 *Science* 453; Daniel Kahneman & Amos Tversky, "Choices, Values and Frames" (1984) 39:4 *Am Psychologist* 341.

71 See Guthrie et al, *Judicial Mind*, *supra* note 52 at 796-97 (framing affects judges); Barbara J. McNeil et al, "On the Elicitation of Preferences for Alternative Therapies" (1982) 306:21 *New Eng J Med*. 1259 at 1262 (framing affects physicians); Devon Pope & Maurice Schweitzer, "Is Tiger Woods Loss Averse? Persistent Bias in the Face of Experience, Competition, and High Stakes" (2011) 101:1 *Am Econ Rev* 129 at 155 (framing affects professional golfers).

dition, the parties thought they made a concession contract involving mineral extraction for fool's gold when, due to the survey mistake of an independent expert, it turned out to be a gold mine. We told the arbitrators the applicable law was that a contract "is voidable when 'a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of promises.'" The applicable law meant that, because both parties in both scenarios mistook the nature of the contract due to the error of a third-party, the contract should have been voided.

What we found was a reliable effect, albeit a small one. When the seller of the mineral rights attempted to rescind, there was a slight preference to enforce the contract and hold the seller to its bargain—enforcing the contract, and ignoring the law (i.e. a gain). By contrast, when the buyer tried to rescind, there was a slight preference for rescission, letting the buyer walk away, and following the loss (i.e. a loss).

One variation in this hypothetical might be of interest. Although it is not a cognitive illusion in the psychological literature, the 'Fool's Gold' hypothetical gave us a chance to explore a framing-like aspect of arbitration; namely, the role of party outcome on appointment conditions. We randomly assigned every arbitrator to one of three appointment conditions and told them that they were appointed by either the claimant, the respondent, or a neutral institution. What we found truly surprised me. Given the debate within the literature about arbitral appointment, I would have expected that, when arbitrators were told they were appointed by the party, they would have had an intuitive pre-disposition to find in favor of the party who made the appointment. That was not what we found. Rather, irrespective of appointment condition, roughly 90% of the arbitrators properly applied the law and rescinded the contract. It was not possible to identify a reliable link between appointment type and resolution of the contract dispute.

I must caution you, however, that this was a null-result, meaning that we could not conclude that the effect is absent. It is possible that the effect was present and that we simply needed a larger sample (in this case, we would have needed several hundred more arbitrators for a confirmation). It is also possible that the experimental methodology had insufficient external validity for failing to sufficiently approximate the real world, and/or provide exposure to partisan arguments over extended periods of time in a three-member tribunal. Nevertheless, I was intrigued to see that, when the law was clear, the baseline that we appeared to have found is that most arbitrators appeared inclined to follow the law, when the law was clear and was pre-

cisely put the arbitrators, and the influence of party appointment was arguably constrained.

However, I want to contrast these findings with research different from my own. It produced different results, but does not necessarily create an inconsistent picture. Rather, together, these experiments demonstrate the challenge in providing a nuanced understanding of arbitral decision-making. By this I am referring to recent experimental research by Sergio Puig (and his co-author Anton Strezhnev), who also explored the influence of appointment effects.⁷² Puig's subjects were similar to the ICCA participants on core fundamentals, namely: (1) participants were from a variety of countries and legal backgrounds, but (2) tended to be men from Europe and North America. There were, however, a few differences, notably: (1) the inclusion of arbitration practitioners who might become arbitrators in the future but had no arbitrator appointments, and (2) and less diversity in the sample, particularly with fewer civil law trained lawyers.

Puig's experiment explored appointment effects on decisions. Rather than focusing on the substantive law, however, he focused on an area of wide discretion, and cost allocation in particular. In a scenario involving an ICSID arbitration concerning an infrastructure project, a concession contract, and claims of expropriation under an investment treaty, both parties requested a 100% cost shift for both fees and tribunal expenses. Subjects were told that counsel for both parties behaved professionally and ethically during the proceeding. The core variable Puig manipulated was who appointed the arbitrators. Participants were randomly assigned to one of four groups: (1) appointment by the respondent, (2) appointment by the claimant, (3) appointment by the parties, and (4) no information about appointment (i.e. a "blind" appointment). A major finding was that, in the assessment of costs, appointment could influence outcomes. When arbitrators were told the winning party appointed them to the case, for instance, those arbitrators were more likely to have the losing party pay 100% of costs, as opposed to the losing party paying for only a portion of costs.⁷³ Variations across other appointment conditions (including

⁷² Sergio Puig & Anton Strezhnev, "Affiliation Bias in Arbitration: An Experimental Approach" (2017) 46:2 J Le Rev 371 (copy on file with author).

⁷³ *Ibid* at 24-25. Puig's independent variables were: (1) appointment = four conditions [claimant, respondent, joint, and bind appointment a]; (2) investor devel-

the blind appointment condition), however, failed to detect a reliable effect on cost decisions.

It is possible that those statistically significant results are confounded by something I discovered in my own research, where my data showed me I was wrong about something and that Stephen Schill was correct: that, given the scope of discretion in costs despite having a uniform legal standard to apply, there has been a reliable pattern whereby successful investors reliably had costs shifted in their favor, while successful states did not. The core point from Puig's research, however, puts front and center the possibility that there could be an "appointment effect" influencing outcomes on costs and other areas of where there is less legal precision and more broad discretion.

I nevertheless believe that this provides a basis for a degree of cautious optimism for international arbitration. For parties—be they individuals, private corporations, or states—who want more rule-of-law based decisions, they can and should inject clearer rules and standards into both the arbitral procedure and the applicable substantive law. If parties wish to act in their capacity as principals to constrain the discretion of their agents—in this case the arbitrators—they can and should act to do so. But parties should nevertheless be mindful of the fact that arbitrators, like other adjudicators, are human with the capacity for error. Principals should design their dispute resolution systems⁷⁴ with a view towards creating safeguards to de-bias decision-making, incentivize principled decision-making, and (where they wish to outsource discretion) be prepared for the consequences, be they pernicious or constructive.

IX. Conclusion

Thus, when we think about jurisdiction stripping and the proper allocation of adjudicative authority, the data tells us that we should have no illusions. Whether the elite decision-makers wear a suit or a robe, they will be prone to making errors.

I am not the only one who has criticism for *both* judges and arbitrators. In October 2016, Seventh Circuit Court of Appeals judge and

opment status = two conditions [high and medium]; (3) respondent development = two conditions [middle and low]; and (4) outcome = four conditions [claimant wins, respondent wins summarily, respondent wins on jurisdiction, respondent wins on merits]. *Id.* at 24-25. This means there was a 4x2x2x4 design, or a sixty-four condition experiment creating a risk of interaction effects that hides variance. Preliminary experimental studies typically manipulate one or two variables to eliminate risk of conflation and permit tracing of variance.

⁷⁴ Susan D Franck, "Integrating Investment Treaty Conflict and Dispute Systems Design" (2007) 92:1 Minn L Rev 161; Andrea Kupfer Schneider, "The Intersection of Dispute Systems Design and Transitional Justice" (2009) 14 Harv Neg L Rev 289.

prolific law and economics scholar Richard Posner made the following comment: “I think the [U.S.] Supreme Court is awful. I think it’s reached a real nadir. Probably only a couple of justices, Breyer and Ginsburg, are qualified. They’re okay, [but] they’re not great.”⁷⁵ Even John Oliver’s assessment of elected judges in the United States demonstrates the variance that comes from placing too much faith in national court judges.⁷⁶

Put simply: no one is perfect; not arbitrators, not judges, and certainly not law professors giving speeches, as I believe that I have more than exhausted the time. The only way we can improve is by acknowledging our flaws, finding ways to avoid error, and doing better at making informed choices. I therefore propose that we abandon a paradigm of discourse where we pillory adjudicators as devils or glorify them as angels. The truth is far more nuanced.

Ultimately, I am asking for a turn in international arbitration toward a greater focus on evidence and data. The data may confirm some things and may challenge other aspects of narratives that may feel ideologically soothing. I challenge us to move past ideological debates and try to find common ground in vetted facts and fundamental values related to rule of law. In this bizarre age—one I never thought to see in my lifetime—of deliberately disregarding facts in favor of emotionally appealing narratives, we owe it to ourselves, our students, our clients, and our children to do more. I encourage us all to stand our ground with facts and think of what ‘truth herself’ would say to us.

⁷⁵ David Lat, “Judge Richard Posner On SCOTUS: “The Supreme Court is Awful””, *Above the Law* (24 October 2016), online: <abovethelaw.com/2016/10/judge-richard-posner-on-scotus-the-supreme-court-is-awful/?rf=1> citing C-SPAN, “Richard Posner” (4 October 2016), online: <<https://www.c-span.org/video/?415557-1/william-domnarski-discusses-richard-posner>> (comments around 17:00). Judge Posner made a later qualification. See David Lat, “Judge Richard Posner Judge Richard Posner Corrects The Record Regarding His Supreme Court Comments”, *Above the Law* (28 October 2016), online: <abovethelaw.com/2016/10/judge-richard-posner-corrects-the-record-regarding-his-supreme-court-comments/> (“The second correction I’d like to see made has to do with my saying that none of the sitting Justices (plus Scalia) is “qualified” for the Supreme Court except Ginsburg and Breyer. This could be misunderstood to mean that I think the others lack the necessary paper credentials, of which the most important are graduating from a law school and passing the bar exam (though one of our greatest Justices, Robert Jackson, had just a year of law school, and did not graduate). That was not my intention in using the word “qualified” (if I did use it). I meant good enough to be a Supreme Court Justice. There are something like 1.2 million American lawyers, some of whom are extremely smart, fair minded, experienced, etc. I sometimes ask myself: whether the nine current Supreme Court Justices (I’m restoring Scalia to life for this purpose) are the nine best-qualified lawyers to be Justices. Obviously not. Are they nine of the best 100? Obviously not. Nine of the best 1,000? I don’t think so. Nine of the best 10,000? I’ll give them that.”).

⁷⁶ LastWeekTonight, “Elected Judges: Last Week Tonight with John Oliver” (25 February 2015), online: YouTube <<https://www.youtube.com/watch?v=pL7l-Uk3I8>>.