As the popularity and authority of international arbitral tribunals has greatly been expanding in the last 30 years, their function and role has come under scrutiny, and often under intense criticism, to the point that international tribunals are too often perceived to be biased fora for the resolution of investment and commercial disputes.

There are two fundamental objections commonly raised against arbitration. First, that the rules and laws applicable by tribunals are biased. Second that the dispute resolution paradigm of arbitration is structurally biased. While the former is primarily substantive and is mainly associated with the politics of investment and commercial law, the latter is primarily procedural and is associated with the dispute system design of arbitration.

The view that arbitration is a structurally biased dispute resolution system is often explained by reference to some fundamental differences between national courts and arbitration, such as the difference in the status of arbitrators and judges, and the difference in the process for their selection. Judges are selected and promoted on the basis of a rigorous system of review of their skills and competences in law. By contrast, anyone can theoretically be selected and appointed as an arbitrator, even if he or she is not a lawyer. Tenured judges are public servants and financially dependent on the State. By contrast, arbitrators are private adjudicators who have a contractual duty toward the parties that selected them, and they have no allegiance to a public institution or society. Thus, the party-selection process is viewed as giving arbitrators an incentive to favour repeat arbitration players, which are largely assumed to be the big corporations or investors. Sternlight for example argues that “claims brought in federal court are required to be heard by a judge who, having been appointed for life and ensured no diminution in compensation, [is] more insulated from bias than an elected decision maker...The arbitrators selected need not be lawyers nor need they follow the law. They may even be affiliated with the company's line of business.”

Similar views have been expressed by Professor Van Harten who also argues that arbitrators when they decide are “influenced by a need to appease actors who have power or influence over specific appointment decisions or over the wider position of the relevant arbitration industry”, which again is assumed to be investors and large corporations.

These views however are largely anecdotal and empirical studies provide us with inconclusive evidence on whether the decision-making behaviour of
arbitrators differs from that of judges, or whether international tribunals statistically favour a certain party over another. For example, an empirical study conducted by Susan Franck found that in investment treaty arbitration States tend to be more successful (58%) than private investors (39%). The study further shows that investors even when successful, they tend to receive a relatively small portion of the damages claimed, namely US$10 million on average, with the average amount of claim being at US$ 343 million.

Similarly, Professor Drahozal has conducted surveys dawning on experimental studies on bias in decision making and has studies three different groups of decision makers: judges, arbitrators and jurors. Professor Drahozal has concluded that while jurors are more susceptible to at least some cognitive illusions (e.g. heuristics, anchoring, representativeness heuristic, extremeness aversion) than judges, arbitrators are not, or at least they are as much susceptible to cognitive illusions as judges are.

Not only there is no evidence that arbitrators are more susceptible to cognitive bias than judges, but there are studies that show that the procedural paradigm of that the paradigm of state judiciary is highly politicised and conducive to collective biases.

There are studies for example that have found that judiciary systems with a structured hierarchy and a central authority, either the State or intergovernmental political bodies, that exercises political control over the appointment, promotion and financial remuneration of the judges are conducive to collective biases. In many of these works it is further demonstrated that the process of the selection, appointment and promotion of the judges within such a structured judiciary system is actually informed and governed by clear political considerations.

The appointing processes and structure of judiciaries, which shape its political function and ideology, should be contrasted with those of arbitral tribunals. The lack of tenured arbitrators and the selection of the members of the tribunal by the parties make international arbitration an adjudication paradigm of diffused biases. As is well known, in international arbitration each party will typically appoint one arbitrator, with the presiding arbitrator being appointed by the two party-appointed arbitrators and very often with the agreement of the parties. Normally, there is no central authority in international arbitration that collectively selects and appoints all members of a tribunal on the basis of a single set of political criteria and influences. It is the parties that determine *ad hoc* the synthesis of the tribunal on the basis of self-interested and therefore often conflicting considerations.

Arguably, this unique forum design of arbitration makes it likely that tribunals will represent the biases of all the parties in a dispute. Thus, individual cognitive biases and prejudices of the members of a tribunal are expected to cancel each other out, or at least lead to a balanced and moderate approach.