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Is the Truth in the Eyes of the Beholder? The Perils and Benefits of Empirical Research in International Investment

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Is the Truth in the Eyes of the Beholder? The Perils and Benefits of Empirical Research in International Investment Arbitration

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* Assistant Professor of Law, Richmond University School of Law, LLM, JSD (Yale). This paper builds on my commentary to Catherine Roger's paper and presentation at The Law and Politics of Foreign Investment Symposium, held at Santa Clara University School of Law on February 1-2, 2013. I greatly benefitted from the discussions and presentations at the Symposium and I would like to thank all its participants. I am particularly thankful to Catherine Rogers for her excellent and insightful presentation, and to my co-panelist, Michael Waibel.

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Empirical research is the new hot trend in international law.¹ An increasing number of publications include empirical data that aim at strengthening their author's argument.² Indeed, empirical data are used to make an argument less fallible, as the author's conclusions are transformed from subjective to objectively proven by the empirical wrap.

Professor Catherine Rogers' novel article, *The Politics and Empirics of International Investment Arbitrators*, highlights important limitations that empirical data may produce in international investment law research.³ As such, it is a needed and important contribution to the understanding and development of this type of scholarship, and generally to the study of international investment arbitration.

The first part of my commentary evaluates the perils and benefits of empirical research in international investment arbitration, and concludes that – to be useful – empirical research must respect certain standards. In the second part, this paper assesses empirical research based on objective variables to conclude that it can be a useful tool to study and strengthen international investment arbitration, if properly used.

I. Empirical Research in International Investment Arbitration

Critics of international investment arbitration routinely affirm that international arbitration is plagued by irremediable weaknesses.⁴ They claim that the system either intrinsically favors the investor, or it is overwhelmed by biased arbitrators, whose decisions are essentially guided by personal motives.⁵ For these reasons, they call for major changes on the core attributes of international investment arbitration.⁶

Of late, these criticisms have been supported by new empirical data.⁷ In her paper, Rogers assesses the state of empirical research relating to investment arbitrators and

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1. Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J INT'L L. 1 (2012).
 2. Tracey E. George, *An Empirical Study of Empirical Legal Scholarship: The Top Law Schools*, 81 IND. L. J. 141 (2006).
 3. Catherine Rogers, *The Politics of International Investment Arbitration*, SANTA CLARA J. INT'L L. 223 (2013).
 4. Pia Eberhardt & Cecilia Olivet, *Profiting from injustice: how law firms, arbitrators and financiers are fueling an investment arbitration boom*, CORPORATE EUROPE OBSERVATORY (Nov. 12, 2012), <http://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf>.
 5. Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1 (2008).
 6. Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REV. 339 (2010) (arguing for a change from party-appointed arbitrator to a list method or neutral-appointing authority).
 7. See, e.g., Gus van Harten, *The (Lack of) Women Arbitrators in Investment Treaty Arbitration*, 59 COLUMBIA FDI PERSPECTIVES, (Feb. 6, 2012), http://www.vcc.columbia.edu/files/vale/content/FDI_Perspectives_eBook_v2_-_Nov_2012.pdf; Irene Ten Cate, *Binders Full of Women . . . Arbitrators?*, INTLAWGRRLS (Nov. 2, 2012),

criticizes the use of certain empirical data for this purpose.⁸ Importantly, she highlights the weakness of the data used and the methodology that produced them.⁹

In the following part of this paper, I first discuss the benefits and then the perils of empirical research.

A. *The Importance of Empirics*

The increasing reliance on empirical data in legal scholarship focused on international investment arbitration is recent.¹⁰ It is especially interesting given that international investment arbitration itself is a relatively new field, and it signals a keen interest in the complexity of the subject, from both academics and practitioners. As Rogers suggests, “[e]mpirical data could, at least theoretically, provide a more firm basis for systematically evaluating the functioning of investment arbitration.”¹¹

Empirical research on international investment arbitration provides support for the proposition that arbitrators are not merely “*bouchés de la loi*” but carry with them their own experiences when making decisions.¹² It, therefore, seeks to answer how these personal experiences help shape the results of the case.¹³ Importantly, it also seeks to examine the appropriateness of any such influence.¹⁴

<http://www.intlawgrrls.com/2012/11/binders-full-of-women-arbitrators.html> (noting that Brigitte Stern was appointed 51.61% of the time and Gabrielle Kaufmann-Kohler 22.58%); *ICSID Caseload Statistics Issue # 1* (2013) <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English41>.

8. Rogers, *supra* note 3, at 229.

9. *Id.* at 232-38.

10. See generally, Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435 (2009), and Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. REV. 1 (2007) (demonstrating the seminal, recent work regarding the reliance of empirical data in international investment arbitration scholarship).

11. Rogers, *supra* note 3, at 232.

12. Montesquieu proclaimed that judges are merely the “mouth that pronounces the words of the law,” asserting that the judge did not create or interpret the law, but rather, it only mechanically applied general principles to concrete situations.

13. Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 TEX. INT'L L.J. 59, 62 (1995); Giorgio Sacerdoti, Is the party-appointed arbitrator a “pernicious institution”? A reply to Professor Hans Smit, 35 COLUMBIA FDI PERSPECTIVES, 1, 2 (Apr. 15, 2011), <http://www.vcc.columbia.edu/content/party-appointed-arbitrator-pernicious-institution-reply-professor-hans-smit> (writing that rather than being “agents”, arbitrators are “trustees.”).

14. Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J INT'L L. 53, 56-57 (2005) (arguing that “the mirage of absolute judicial impartiality becomes more distorted when it is superimposed onto the arbitrator.”); See also David Branson, *Sympathetic Party-Appointed Arbitrators: Sophisticated Strangers and Governments Demand on Them*, 25 ICSID REV. FOR. INV. L. J. 367, 368 (2010) (noting that party-appointment of arbitrators is subject to “moral hazard” if “one party-appointed arbitrator sees a ‘duty’ to act for the benefit of the appointing party and the other follows the dictates of the law and remains neutral, then there is imbalance, the process can be unfair and it can produce injustice.”);

Indeed, empirical data try to shed light onto the legitimacy crisis of international arbitration.¹⁵ Therefore, it serves a fundamental function of validating the decisions made by arbitrators.

The problems that arise from the use of empirics in this context are discussed in the next section.

B. *The Innate Weakness of Empirics*

The draw to use empirical data to validate an argument is strong. However, its pitfalls are numerous.¹⁶ As discussed below, Rogers describes well the methodological challenges of empirical research.

First, empirical data used in international investment arbitration often misses the most essential variable.¹⁷ Most often, empirical research relating to investment arbitration aims at measuring if and how extra-legal factors have contributed to the outcome of the decision. This research, however, is based on the assumption that it is somehow possible to control for the correct legal outcome.¹⁸ In other words, the research assumes that there is a correct answer (in the form of a judicial decision) and assumes that, if and when that desired outcome is not obtained, then external factors have entered the adjudicative equation.¹⁹ But who decides if the correct judicial decision was taken? The fallacy of this logic is apparent.

Second, too often, international arbitration empirics confound a finding of correlation with a finding of causation.²⁰ In other words, they perpetuate the “*post hoc ergo propter hoc*” logical fallacy. Event B is not caused by Event A only because it occurs after Event A. Thus, while there may be a correlation between two events, there are many factors that must be taken into account before causation can be established. Similarly, though

See also Alexis Mourre, *Are Unilateral Appointments Defensible? On Jan Paulsson's Moral Hazard in International Arbitration*, KLUWER ARBITRATION BLOG (Oct. 14, 2010), <http://kluwarbitrationblog.com/blog/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulsson%E2%80%99s-moral-hazard-in-international-arbitration/>.

15. See, e.g., Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 821, 824 (Mahnoush H. Arsanjani et al. eds., 2010); Jan Paulsson, *Moral Hazard in International Dispute Resolution*, 25 ICSID REV.: FOREIGN INVESTMENT L.J. 339 (2010); but see Charles N. Brower & Charles B. Rosenberg, *The Death of the Two-Headed Nightingale: Why the Paulsson-van den Berg Presumption that Party-Appointed Arbitrators are Untrustworthy is Wrongheaded*, 29 ARB. INT'L 7 (2013).
16. Jason Yackee, *Do States Bargain Over Investor-State Dispute Settlement? Or, Toward Greater Collaboration in the Study of Bilateral Investment Treaties*, SANTA CLARA J. INT'L L. (forthcoming 2013).
17. Rogers, *supra* note 3, at 233.
18. *Id.* at 234.
19. Gus Van Harten, *Arbitrator Behavior in Asymmetrical Adjudication: An Empirical Study of Investment Arbitration*, 50 OSGOODE HALL L.J. 211 (2012).
20. Rogers, *supra* note 3, at 234.

there may be a correlation between an event (*e.g.*, the appointment of an arbitrator with a certain background) and the outcome of a particular arbitration, the proof of causation is an altogether different matter.

Third, empirical data in international arbitration are often embedded by ideology and policy preferences.²¹ In fact, the researcher can predetermine the outcome of the study by attaching certain subjective qualities on the questions asked. Thus, questioning whether someone or something is “pro-investor” or “pro-State” is already attaching a value judgment on the issue studied. The truth may indeed just be in the eyes of the beholder.²²

Fourth, outcomes can be over-simplified.²³ The translation and reading of empirical data is a complicated and difficult task. This is particularly important because, as Rogers explains well, in international investment arbitration the content of the decisions is as much, if not more, important than the outcomes of which empirical research is based.²⁴

In sum, while empirical research can be a very important instrument to understand and reform international investment arbitration, to be useful, its limitations must be understood and internalized. Indeed, it is important to note that most empirical data used in international investment arbitration research may be faulty because they pertain essentially to subjective criteria. The empirical studies related to arbitration try to analyze the qualities of arbitrators or the possible outcomes.

Importantly, these data can be interpreted differently, depending on who does the reading.²⁵ Indeed, empirical data that try to capture personal qualities of arbitrators can simply be interpreted as a demonstration that arbitrators’ selection in fact works.²⁶ They also demonstrate that a well-prepared party can ensure that he or she selects an arbitrator that has a certain predisposition to issues that are important to the appointing party.²⁷

As recently declared by an arbitral tribunal deciding – and rejecting – an arbitrator’s challenge

No arbitrator and, more generally, no human being of a certain age is, in absolute terms, independent and impartial. Simply put, every individual is conveying ideas and

21. *Id.* at 237.

22. *Id.* at 238; *See also* Dan M. Kahan and Donald Braman, *Cultural Cognition and Public Policy*, 24 *YALE L. & POL’Y REV.* 147 (2006).

23. Rogers, *supra* note 3, at 238.

24. *Id.*

25. *Id.* at 237-38.

26. C. Giorgetti, *Who Decides Who Decides? Party Appointed Arbitrators In International Investment Arbitration And Two Ideas To Improve The System* (forthcoming) (on file with the author).

27. *See* Martin Hunter, *Ethics of the International Arbitrator*, 53 *ARB.* 219, 223 (1987) (stating “when I am representing a client in an arbitration, what I am really looking for in a party-nominated arbitrator is someone with the maximum predisposition towards my client, but with the minimum appearance of bias.”).

opinions based on its moral, cultural, and professional education and experience. What is required, when it comes to rendering judgment in a legal dispute, is the ability to consider and evaluate the merits of each case, without relying on facts having no relation to such merits.²⁸ [note that this is quote, please apply the appropriate formatting]

These observations do not imply that empirical research is not useful, on the contrary. They do imply, however, that we must pay attention to what kind of empirical research is useful. The next section examines what kind of empirical research is needed; and namely research that test for objective, not subjective, data.

II. What Empirical Research Is Useful?

When we internalize Rogers' criticism of empirical data, the issue that remains to be addressed is how empirical research can still be useful, and what data it should provide. In the remaining section of this paper, I address this question. This section demonstrates that empirical research can still be useful; when a question that can only have a yes/no answer is posited and objective criteria are evaluated.

A. *Objective Empirical Research: the example of diversity data*

Aside from possible systemic biases, a chief complaint of party-selected arbitrators is their limited demographic.²⁹ Arbitrators have been typecast as "pale, male and stale."³⁰ Whether arbitrators lack diversity is an assertion that can be proven empirically.

In fact, data is available to analyze the profile of those who have been selected to sit on international investment tribunals, taking into consideration gender, nationality, professional background, legal education, and method of appointment.³¹

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28. Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Decision on Claimants' Proposal to Disqualify Professor Campbell McLachlan, Arbitrator, ¶ 40 (Aug 12, 2010); See also Susan Franck, *The Role of International Arbitrators*, 12 ILSA J. INT'L & COMP. L. 499, 505-507 (2006) (noting that "Modern international arbitration requires the objective application of rules to facts and the exercise of bounded discretion to ensure that the process and final outcome is warranted. While parties may pick arbitrators with particular cultural and legal backgrounds and specific personal experiences, arbitrators also generally have an obligation to disclose those matters that would call into question their independence. Although all humans are inevitably influenced by the various experiences in their lives, in international arbitration, parties ask arbitrators to put aside biases – and fairly and impartially exercise their independent judgment to apply their expertise to the facts on the record and render a decision based upon the law.").
29. Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L. J. 435, 458 (2009).
30. Susan D. Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 N.C.L. REV. 1, 75 (2008) (citing Michael D. Goldhaber, *Madame La Présidente: A Woman Who Sits As President of a Major Arbitral Tribunal Is a Rare Creature. Why?*, AM. LAW: FOCUS EUR (2004) ("[A]rbitration is dominated by a few aging men, many of whom pioneered the field. In the words of Sarah François-Poncet of Salans, the usual suspects are 'pale, male, and stale.'").
31. See Giorgetti, *supra* note 26.

For example, in relation to geographic diversity, the most recent statistics from the International Centre for Settlement of Investment Disputes (ICSID) show that 68% of all appointments in cases registered and administered by ICSID are from Western Europe and North America.³² Specifically, the appointment of arbitrators, conciliators, and *ad hoc* Committee Members appointed in cases registered under the ICSID Convention and the Additional Facility Rules were geographically distributed as follows: 46% from Western Europe; 22% from North America (Canada, Mexico and the U.S.); 11% from South America; 10% from South and East Asia and the Pacific; 5% from the Middle East and North Africa; and 2% each from Central America and the Caribbean and Sub-Saharan Africa.³³

Conversely, only about 6% of all cases registered under the ICSID Convention and Additional Facility Rules include a State Party from North America or Western Europe.³⁴ The data show the following geographical distribution for all ICSID cases by State Party involved: 1% from Western Europe; 5% from North America (Canada, Mexico and the U.S.); 30% from South America; 9% from South and East Asia and the Pacific; 10% from the Middle East and North Africa; 6% from Central America and the Caribbean; and 16% from Sub-Saharan Africa.³⁵

The data are further strengthened by an additional set of data collected by Professors Michael Waibel and Yanhui Wu.³⁶ In their data set they find that, interestingly, about 85% of the cases are brought by an investor from a developed country against a developing country.³⁷ Conversely, only about one third of the arbitrators come from developing countries.³⁸

In addition to data relating to geographical diversity, it is also possible to collect hard data on gender diversity. For example, data collected by Gus van Harten show that, as of May 2010, only 6.5% of all arbitrators appointed in investment treaty arbitration were women.³⁹ He further notes that the 249 known investment treaty cases until May 2010 generated 631 arbitral appointments.⁴⁰ Only 41 of these were appointments of women --

32. These include 704 arbitrators appointed by parties and 230 appointed by ICSID. ICSID, THE ICSID CASELOAD – STATISTICS (ISSUE 2013-1) 18-19 (2013), <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&CaseLoadStatistics=True&language=English41> (last visited Aug. 1, 2013).

33. *Id.* at 11.

34. *Id.* at 18.

35. *Id.* at 11.

36. Michael Waibel & Yanhui Wu, *Are Arbitrators Political?*, U. OF BONN (2012), <http://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/dateien/waibelwinter11-12>.

37. *Id.* at 27.

38. *Id.*

39. Van Harten, *supra* note 7, at 1.

40. *Id.*

just 6.5% of all appointments.⁴¹ “Worse,” he says, “of the 247 individuals appointed as arbitrators across all cases, only 10 were women. Women thus comprised only 4% of those serving as arbitrators, showing a striking lack of gender balance.”⁴² The percentage falls even more to 5.63% when considering ICSID’s more recent appointments.⁴³ Significantly, available data also show that 75% of all female arbitrator appointments went to two women.⁴⁴ Without counting their appointments, the percentage of women arbitrators would be even lower.⁴⁵ Women account for only 3.49% of appointments made by the Chairman of the Administrative Council of ICSID for all *ad hoc* annulment committee members appointed since 2008.⁴⁶

Aside from data related to diversity, other datasets can prove important for policy consideration in international investment arbitration.⁴⁷ For example, data recording specific preferences by users could inform policy makers.⁴⁸ In October 2012, for example, the School of International Arbitration at Queen Mary, University of London, and White & Case LLP released the results of the *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* a global survey on practices in international arbitration which comprised responses from more than 700 practitioners. The survey showed that, among other things, 76% of respondents preferred selection of two co-arbitrators by each party unilaterally in a three-member arbitral tribunal.⁴⁹

Hard data of diversity and data that collect the direct opinion of final users do not attach value judgments that can result in their subjective interpretations. As discussed below, they are, therefore, particularly useful guides to policy makers.

41. *Id.*

42. *Id.*

43. C. Mark Baker & Lucy Greenwood, *Getting a Better Balance on International Arbitration Tribunals*, 28 *ARB. INT’L* (2012).

44. See Van Harten, *supra* note 7, at 1 (also observing that “the story is also almost entirely that of two women, Gabrielle Kaufmann-Kohler and Brigitte Stern, who together captured 75% of appointments of women. In contrast, the two most frequently appointed men accounted for 5% of the 593 appointments of male arbitrators.”).

45. Irene Ten Cate, *Binders Full of Women . . . Arbitrators?*, *INTLAWGRRLS*—(Nov. 2, 2012), <http://www.intlawgrrls.com/2012/11/bindings-full-of-women-arbitrators.html> (noting that Brigitte Stern was appointed 51.61% of the time and Gabrielle Kaufmann-Kohler 22.58%).

46. *Id.* (noting “[o]ne might expect to encounter more women in annulment committees, whose members are appointed by the Chairman of the Administrative Council of ICSID. After all, doesn’t ICSID have greater incentives than parties to consider gender balance? Perhaps not. Women account for only 3.49% of annulment committee members appointed since 2008.”).

47. C. Giorgetti, *Who Decides Who Decides in International Investment Arbitration*, 35 *U. PA. J. INT’L L.* (forthcoming).

48. John Templeman, *Looking behind the closed doors of international arbitration*, *PRACTICAL LAW COMPANY*, Nov. 2012, <http://www.whitecase.com/articles-11302012/>.

49. School of International Arbitration at Queen Mary, University of London, and White & Case LLP, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, available at <http://arbitration.practicallaw.com/6-522-2998>.

B. The Usefulness of Empirics: Policy Guidance and Reform

Data of diversity and users' preference give support to the concern expressed in recent literature as to whether, given the lack of diversity that results from party-selection, the existing selection procedures result in the selection of the best decision makers.⁵⁰ They also provide the overall/outside contour of the policy decision, which support party-appointment of arbitrators.

1. Policy Guidance: Understanding the Data

First, this kind of data can provide useful guidance for policy makers wishing to assess the viability of international investment arbitration.

It is generally accepted both at the domestic and international level that "a diverse judiciary is an indispensable requirement of any democracy."⁵¹ Indeed, the need for geographical representation is even more important in an international dispute resolution setting.⁵² Chief Justice Beverly McLachlin of Canada argued specifically that a better gender balance between female and male judges would better reflect the composition of our society and thus more women judges would increase the legitimacy of the courts, reflect the commitment to equality of our society, be the best use of available human resources, bring new perspectives, and route out stereotypes.⁵³

The same can be said in support of other types of diversity. Diversity can be beneficial for several reasons. First, diversity brings more points of view in deliberation, so that a more comprehensive understanding of the parties' positions is granted. Thus, diversity brings better judgments. Second, diversity enhances legitimacy because a more diverse tribunal better mirrors the composition of society.⁵⁴ Hence, diversity also results in stronger judgments.⁵⁵ Additionally, the lack of diversity, seen together with the increased

50. Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 475 (2008-2009) (stating that the perceived shortcoming of investment arbitration – including the ad hoc appointment of arbitrators – have led to call for the replacement or "radical redesign of investor-state dispute-settlement mechanisms.").

51. Lady Hale, *The Appointment and Removal of Judges: Independence and Diversity* Center, Presented at the International Association of Women Judges 8th Biennial Conference (May 3-7, 2006), in *SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS AND POLITICS: DISCUSSION PAPER 47* (Int'l Courts & Tribunals Ser. 2010).

52. *Id.* at 37.

53. Beverly McLachlin, *Why We Need Women Judges*, Presented at the International Association of Women Judges 8th Biennial Conference (May 3-7, 2006), in *THE IAWJ: TWENTY YEARS OF JUDGING FOR EQUALITY*, 3 (Mary-Ann Hedlund et al. eds., 2010), www.iawj.org/JUBILEE_BOOK_IAWJ_WEBSITE_FINAL_1_.pdf; see also Van Harten, *supra* note 38, at 8; see also Van Harten, *supra* note 7, at 8.

54. McLachlin, *supra* note 53, at 3.

55. See *id.* See also Daniel Bodansky, *The Concept of Legitimacy in International Law*, 194 LEGITIMACY IN INTERNATIONAL LAW 309 (Rüdiger Wolfrum and Volker Röben eds., 2008) (analyzing the difficulties of defining the concept of legitimacy in international law); and Nienke

use of arbitration, will inevitably result in more real or perceived conflicts by selected arbitrators and thus in more challenges by the parties.⁵⁶ Indeed, lack of diversity is also identified as a cause of concern by non-party stakeholders.⁵⁷

This combination of new data, intense criticism, and increased awareness and practice of international arbitration has resulted in a call for a reassessment and modification of the practice of party-appointments.⁵⁸ Policy reform that can be supported by diversity data is examined below.

2. Policy Reform: Ensuring Diversity

Having established that party-appointment of arbitrators is preferred by the users of arbitration, the issue is then how to respond to the specific criticisms of lack of diversity – both geographic and gender. This criticism is recognized empirically.⁵⁹

A measure to better the arbitration system, therefore, would be to increase diversity by enlarging the pool of selected arbitrators. More arbitrators from outside Europe and North America, and more women are needed. Diversity could be incorporated in the applicable legal instruments. However, amending the ICSID Convention, and amending UNCITRAL and PCA rules to mandate diversity, would hardly be possible.⁶⁰

Possibly, other methods could be adopted to enhance diversity. First, several actions to enlarge the pool of arbitrators can be taken directly by the neutral appointing authorities when making selection. Second, the parties can also play a role in reaching that goal.

i. Actions By Appointing Authorities and Secretariat

The neutral authorities that participate in the selection of arbitrators can directly adopt several targeted measures to enhance diversity, and at different stages in the

Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107 (analyzing legitimacy in international courts and tribunals involving States as litigants).

56. Jeremy Sharpe, *Introductory Note*, 51 ILM 350 (2012).

57. See Corporate Europe Observatory, PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM (Nov. 2012), <http://corporateeurope.org/sites/default/files/publications/profitting-from-injustice.pdf>.

58. Jan Paulsson, *Are Unilateral Appointments Defensible?*, KLUWER ARBITRATION BLOG (Apr. 2, 2009), <http://kluwerarbitrationblog.com/blog/2009/04/02/are-unilateral-appointments-defensible/> (criticizing the mechanism of appointment of arbitrators by party and suggesting possible alternatives, including selection by a neutral institution or the use of list for the appointment of all arbitrators, following the example of the Court of Arbitration for Sport); and Alexis Mourre, *Are Unilateral Appointments Defensible? On Jan Paulsson's Moral Hazard in International Arbitration*, KLUWER ARBITRATION BLOG (Oct. 5, 2010), <http://kluwerarbitrationblog.com/blog/2010/10/05/are-unilateral-appointments-defensible-on-jan-paulsson-s-moral-hazard-in-international-arbitration/>.

59. See *supra* Part II.A.

60. Experts agree that it would be impossible to amend the ICSID Convention and to gather support for an amendment mandating stricter selection rules.

proceedings that do not require any specific mandate by Member States. Three measures are particularly relevant.

First and foremost, appointing authorities should promote diversity when they select co- and presiding arbitrators or members of *ad hoc* annulment committees. Specifically, for example, the Administrative Council Chairman, the ICSID Secretary General and the PCA Secretary General can include new and diverse candidates in the lists of three candidates given to the parties for selection.

Second, the Chairman of the ICSID Administrative Council more specifically can further diversity by selecting the ten members of the Panel of Arbitrators he or she has the right to select. In his last selection in 2012, the Chairman designated only three women out of ten designations.⁶¹ Though other diversity requirements were considered, more could be done at the institution level.

Third, the Secretary General of ICSID could urge ICSID Contracting States to nominate the arbitrators in the ICSID Panel of Arbitrators with the objective of advancing diversity. Each Contracting State has a Convention right to nominate four people in the Panel of Arbitrators, who do not necessarily have to be nationals of the nominating State.⁶² Members of the Arbitrator Panels are important; the Chairman of the Administrative Council must select members of the panel to nominate the presiding arbitrators, if the parties fail to agree. Panel members are also used to nominate members of *ad hoc* annulment committees and arbitrators that the parties have failed to nominate. Thus, a list that contains more names of potential arbitrators will offer the Chairman of the Administrative Council more choice. At the moment, about a third of the parties to the ICSID Convention do not avail themselves of that right and nominate members to the List of Arbitrators.⁶³ If more parties to the Convention nominated diverse arbitrators, diversity would increase substantially. For example, there could be a yearly reminder sent to parties urging them to make selections.

61. See *supra* Part II.A.

62. Under the ICSID Convention “The Centre maintains a Panel of Conciliators and a Panel of Arbitrators pursuant to Articles 12-16 of the ICSID Convention. Each ICSID Contracting State may designate up to four persons to each Panel. The designees may, but need not, be nationals of the designating country. In addition, up to ten persons may be designated by the Chairman of the ICSID Administrative Council. Each designee normally serves for a renewable term of six years.” See INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES, available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=Announcements&pageName=Announcement129>.

63. At present, 108 out of the 158 member states have made some forms of arbitrators’ selection. See ICSID, *Members of the Panels of Conciliators and of Arbitrators*, ICSID/10 at 3-5 (Jan. 2013), available at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&reqFrom=ICSIDPanels&language=English>.

ii. Actions By Parties

Although most of the new nominations will likely result from appointments by the neutral appointing authority, parties can also be urged to include diversity in their choice. Many governments, which by definition are one of the parties to the dispute, have policies mandating diversity.⁶⁴ These policies should also be used for the selection of arbitrators and the nomination of members of the panel of arbitrators. Further, best practices given to parties can provide background and reinforce the importance of diversity and new appointments.

Although these measures will take time to ensure concrete results, these soft measures would ensure that a larger pool of arbitrators is available. Importantly, because they have been vetted by practice, these arbitrators will find support within the international arbitration practitioner circle.

III. Conclusion

Empirical research can provide useful data to understand international investment arbitration and guide its reform. It is important, however, that empirical data is used correctly.

Rogers' important article gives a valuable warning of the challenges that empirical research can face. She describes and assesses well the methodological pitfalls of empirical research and how they can influence reform proposals.

This commentary seeks to push the discussion one step forward, and guide reform on the issue of diversity, based on available empirical findings.

64. For the UK policy, for example, see Lord Chief Justice of England and Wales and Senior Presidents of Tribunals, *Equality and Diversity Policy for the Judiciary* (Oct. 2012), http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/equality_diversity.pdf.

