Arbitrators and the Rule of X

by

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Introduction

Thank you. It is a pleasure to be back in Geneva and to return to the Graduate Institute and the University of Geneva.

From 1996 to 2003 I served as a Commissioner with the United Nations Compensation Commission making 50 trips from San Francisco to the city of Geneva. Several of my colleagues from those years are here tonight and I thank them for attending. Horace Mann, the great champion of public education, is remembered in stone at Antioch College for saying "Be ashamed to die until you have won some victory for humanity." The UNCC not only adjudicated but delivered compensation to some four million individuals and to an environment deeply twisted – to my UNCC colleagues I do not suggest we are near death, but I do say we need not avoid meeting Horace Mann in the afterlife. I have not been to the Institute and University as many times but I began visiting much longer ago; most recently, to deliver the 2011 Lalive Lecture.[2] It is a sincere pleasure to return to this great institution – the faculty have always been at the forefront of innovation in education and they and the alumni have made tremendous contributions to the world, I wish it well at a time when reason in public life is needed more than at any other time in my life.

Finally, I note members of the international arbitration bar in attendance and I thank them for coming out tonight. Let me assure you and the broader audience that my remarks tonight

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[2] "International Courts and Tribunals: Their Roles Amidst A World of Courts," 26 ICSID REVIEW FOREIGN INVESTMENT LAW JOURNAL 1-13 (2011).

which are critical of the practices of some arbitrators are aimed at – if anyone -- myself and most certainly not at anyone in this room.

I thank Professor Kaufman-Kholer for the invitation to be here tonight and Professor Douglas for the kind introduction. When Professor Kaufman-Kholer invited me to give the "Opening Lecture of the MIDS academic year" she indicated that both the incoming students and many graduating from this past year would be present.

Reflecting on this important moment both for those just arriving and those graduating, I recalled an inscription over one of the main entrances to the law school at the University of California. There are several graduates of Berkeley here tonight – and I thank them for attending -- who will all recognize the inscription and the fact that it was for a very long time blocked by several trees and new students would crane their necks to read and possibly even transcribe it. Its reads:

You will study the wisdom of the past, for in a wilderness of conflicting counsels, a trail has there been blazed. You will study the life of mankind, for this is the life you must order, and to order with wisdom, must know. You will study the precepts of justice, for these are the truths that through you shall come to their hour of triumph. Here is the high enterprise, the fine endeavor, the splendid possibility of achievement, to which I summon you and bid you welcome.

A teacher of mine at Berkeley was Professor Stefan Albrect Resienfeld, an émigré from Germany who has now passed. He once deconstructed that quote, I can not repeat his whole disquisition but he, for example, read the first phrase "You will study," paused and then stated "so far, so good."

The quotation is interesting in several respects. Note that it is not per se a welcome to Berkeley (nor could it be since it is ascribed to Cardozo who was not a part of Berkeley), but rather it is a welcome to anyone embarking on the study of law, on the wish to join the world of law, both academic and professional. It is not the statement of a Dean, but rather it is the statement of someone speaking on behalf of the entire legal community. It is

not the promise of a job, but rather a statement of how fascinating and important the study and the work of law is. So when I thought of MIDS and international dispute resolution, it occurred to me that Professor Kaufman Kholer could certainly welcome you to MIDS, but it is not clear who can welcome you to the world of international dispute resolution. For – as an initial matter -- make no mistake, you are welcomed by the individuals who make up this far-flung community. None of them promise you a job, but they all know that from this group will emerge some of their future colleagues and that your imagination and energy will be critical to the future of international dispute resolution. The international dispute settlement mechanisms are paradoxically being employed in an unprecedented fashion and to an unprecedented extent while simultaneously also being subject to intense criticism and thus seeking sounder footing. None of these far-flung individuals, and certainly not me, have authority by virtue of position to welcome you, but I am sure that all of us do so; all of us "bid you welcome to this high endeavor."

I. My Focus This Evening

My topic tonight is the far-flung array of individuals who serve as international adjudicators, arbitrators, commissioners and judges.

I have given a great deal of thought in my research to this group. For me, it is the most difficult group in international courts to predict, to give a logic to. Some academics say they seek reappointment; that is true of some but most certainly not of all and not the primary driver in my experience for most. My focus tonight concerns international arbitrators who are appointed for only one matter; who are reappointed by virtue of their reputation, if not first-hand knowledge.

There has been much debate in several dimensions concerning this pool of arbitrators over the past two decades.

At the outset, I wish to emphasize that this discussion is only starting and in my view presents a much deeper agenda then currently set out. A segment of a course on arbitration addresses the identity beliefs and conduct of arbitrators, but only the minimum parties may expect from them in terms of law (that is,

challenges). That course may also discuss the minimum parties should expect in terms of ethics. Unaddressed to my knowledge is a discussion not of minimums but of what arbitrators professionally should demand of themselves and each other.

Much of the academic and professional discussion today focuses on the identity of arbitrators, the search for a more diverse pool in terms of gender and nationality.

A few quotes illustrate this debate:

- For the 341 ICSID arbitrators sitting between 1978 and 2011, 66% of ICSID arbitrators were nationals of OECD states[3]
- On the basis of a survey conducted at ICCA in 2014, "The 'median international arbitrator' was a fifty-three year-old man who was a national of a developed state and had served as arbitrator in ten arbitration cases"[4] According to the same survey, "Less than eighteen of the arbitrators were women, twenty percent (or less) were from non-OECD or non-High Income states, and HDI scores reflect that the median arbitrator was from one of the top twelve most developed states in the world. These results suggest that: (1) women's presence in international arbitration has been relatively small; and (2) the proportion of developing world arbitrators has been relatively small."[5]
- An "important measure that can be taken to strengthen the international arbitration system is to enlarge the pool of arbitrators. More arbitrators from outside Europe and North America, and more women, are needed."[6]

These indications rightly point to the absence of, one, women arbitrators; and two, arbitrators from developing countries. Thus, diversity initiatives tend to focus on improving the

[3] Michael Waibel & Yanhui Wu, 'Are Arbitrators Political?' (December 2011) Working Paper, 27-41 <http://www.wipol.unibonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/dateien/waibelwinter11-12>.
[4] Susan D. Franck et al., 'The Diversity Challenge: Exploring the "Invisible College" of International Arbitration' (2015) 53 Columbia Journal of Transnational Law 429, 466.
[5] ibid, 470-471.
[6] Chiara Giorgetti, 'Who Decides Who Decides in International Investment Arbitration' (2014) 35 University of Pennsylvania Journal of International Law 431, 480-481.

representation of women, culture, and geography in the pool of arbitrators.

The initiative that has probably garnered the most attention recently is the Equal Representation in Arbitration Pledge, commonly known as the Pledge. It asks that actors within international arbitration commit to increase, on an equal opportunity basis, the representation of women in international arbitration. A number of actionable steps are provided to set this about, including the increased appointment of women as arbitrators. As we speak, the Pledge has garnered close to 2000 signatories, from counsel to leading arbitral institutions, such as the LCIA and the ICC.

Making more diverse the pool of international arbitrators and simultaneously developing a shared sense of not only the minimums expected of arbitrators but also a sense of the professionalism expected of arbitrators presents a tremendous agenda of work for the coming decade. I can't address all of the questions surrounding international arbitrators today. Instead, I wish to do two things tonight. I seek (1) to put to the side what I view as an overstated claim and (2) to turn your attention instead to what I see as a major issue and to the rule of x as a possible way of mitigating that issue. In other words, there are aspects of the arbitrator world that are troubling but they may not be what you think.

II. The Overstated Claim of the Existence of a Mafia

Let me begin with identifying an overstated claim concerning international arbitrators – in particular the view that arbitrators are not a far-flung array of individuals but rather are best described as a mafia or a club. In brief, my view is (1) this is not only overstated but on its face false and (2) more provocatively, to point out that it can be argued that certain aspects of a club would be desirable to improving both the diversity and conduct of arbitrators.

First, to explore the claim we need ask what is meant by observers using the term "Mafia."

The exponential growth of international arbitration following the end of the Second World War meant there were more cases to be decided. But writing in 1996, Yves Dezalay and Bryant Garth in "Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order" asserted that the deciding appeared to continue being in the hands of a limited group of individuals. Yves Dezalay and Bryant Garth, at that point famously described international arbitrators as members of a mafia, a club where people appoint one another.[7]

They write:

- "And it was clear that this international arbitration community was relatively small and linked together pretty closely. Members of the inner circle and outsiders often referred to this group [of international arbitrators] as a 'mafia' or a 'club'."[8]
- "Now why is it a mafia? It's a mafia because people appoint one another. You always appoint your friends—people you know."[9]
- "The career of these notable [arbitrators] … recall accounts of the medieval church. The son of nobleman could become a bishop of the church simply because of family background and social prominence. Others would shave their heads, take vows of celibacy, devote everything to the church, and yet have no chance to rise to a position of eminence."[10]

At the outset, we must note that the word Mafia is being used in a rather specific manner. It is not the first definition of Mafia as "an organized international body of criminals, operating originally in Sicily and now specially in Italy and the US and having a complex and ruthless behavioural code…" Rather it is similar to a second definition as a group regarded as exerting a

[7] Yves Dezalay and Bryant Garth, *Dealings in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996), 10.
[8] Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration in the Constitution of a Transnational Legal Order* (University of Chicago Press 1996), 10.
[9] ibid, 50.
[10] ibid, 23.

hidden sinister influence with the example being "the British literary mafia"

Most on point is the Collins dictionary definition of Mafia as referring "to an organized group of people of whom the speaker disapproves because they use unfair or illegal means in order to get what they want."

The suggestion implicit in use of the Mafia therefore is that there exists a group in the sense that it is organized, that it is likely closed in the sense that the group controls who are a part of it, and that it works for and so as to perpetuate the group's self-interest, namely future appointments.

I disagree with this view, and am most concerned that the simplicity of it leads us to avoid focusing on other issues present.

I resist this characterization, and tend to agree with Sergio Puig's rebuttal and I quote, "Running a mafia implies some level of coordinative mastermind, or capos; the arbitrators' network seems, more likely, the result of different actors behaving rationally and independently in a convenient and constantly evolving environment."[11]

Nevertheless, the image of international arbitration as a club or a mafia continues to be echoed in more recent critiques of international arbitration. In 1986, a dissenting opinion to an award of the Iran-United States Claims Tribunal criticized international arbitration as a system dominated by "a group of 'professional' arbitrators" who formed "an exclusive club in the international arena".[12] One author, in a variation on this theme, compared international arbitrators to a cartel, where "participants attempt two things: they divide up proceedings and mandates among each other, and at the same time, make access

[11] Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25:2 European Journal of International Law 387, 425.

[12] Dissenting Opinion of the Iranian Arbitrators in Case A/18 Concerning the Jurisdiction of the Tribunal over Claims Presented by Dual Iranian-United States Nationals Against the Government of Iran in Iran and United States, Case No. A/18, Decision No. DEC 32-A18-FT (10 Sept. 1984), reprinted in 5 Iran-U.S. C.T.R. 275, 336.

for outsides difficult".[13] Cartel, club, mafia, are all terms used to describe international arbitration and the international arbitrators at its center.

Let us examine this claim. In practice, two members of the vast majority of panels are appointed by counsel coordinating with their clients and are not appointed by other arbitrators. Indeed, when I decline an appointment, I have never been asked for a recommendation by the counsel approaching me.[14] I have been called by counsel to ask whether I have any experience regarding a particular candidate, but this is primarily a call looking for a reason not to appoint a particular person they have already placed on their short list.

That means two thirds of appointments right off the bat are not made by the mafia.

As for the last third, the chairs are under some rules may be appointed by the two party appointed members of the tribunal. In my experience, there are several reasons why these arbitrators do not operate to appoint other members of the group (assuming one can say such a group exists). First, such an appointment in my experience is done in discussion with the counsel representing the two parties who tend to rule out anyone who has a connection to the other party's appointed arbitrator thus throwing such choice back into the same category as the party appointed arbitrators. Second, I have not – with one exception – ever sat with the same person twice – the pool is big and getting bigger. Third, the selection of chairs in my experience have tended ultimately to be done by the appointing authority within the applicable institution.

Now we might ask where is the "group" that makes up the cartel. It is entirely correct that each institution with its roster of

[13] Ralf Michael, 'Roles and Role Perceptions of International Arbitrators' in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance* (Oxford University Press 2014), 54.

[14] Now, one might argue that some inasmuch as of such counsel also serve as arbitrators, the separation of these choices from the arbitrator community is not clear cut. This is worth further consideration. However, an important point to incorporate in such consideration is that unless counsel plans to retire soon so as to serve an arbitrator, counsel are not seeking reappointment in the sense of a mafia and, moreover, whoever they appoint potentially may lead to reciprocation.

arbitrators may be said to form a group and may be more or less closed in membership. However, the interest of the institutions in general is to promote their reputation as a center which makes appropriate appointments thereby seeking to increase the likelihood that the institution will be chosen by the arbitrating parties.[15]

The claim thus becomes a question of whether arbitration selection is (1) primarily the situation of a market where users select arbitrators with limited information as to potential appointees thus relying heavily on reputation or (2) primarily the situation of a cartel where the arbitrators even loosely control membership and seek to appoint each other.

It may be that in certain nations where the pool is particularly small and there is only one arbitral institution that there may exist a more mafia like control of appointments. It also may be that Dezalay and Garth are correct that within Europe after WWII, the operating system reflected more of a club than a market. But I would urge caution in extending one's national experience on to the global stage.

In my experience that the claim of a mafia is not the global situation. Shakespeare's Iago is certainly correct that "Reputation is an idle and most false imposition, oft got without merit and lost without deserving." But no arbitrator can maintain an underserved reputation for long.

As for my more provocative assertion that there are desirable aspects to the existence of a club, we need bear in mind that it is the many arbitral institutions (the parts of the international arbitration system that are most club like) that are advancing the diversity of the arbitrator pool, that are offering training to arbitrators and are developing in a disjointed fashion standards as to the conduct to be expected of arbitrators.

[15] This market reason stemming from competition among institutions is also arguably the reason why many institutions will include a few globally known individuals on their roster.

III. Over Commitment and the "Rule of X"

Although I contest the description of the international array of arbitrators being a Mafia, there is – I would suggest – significant issues for the far-flung arbitrator group to work at. Let me shift to those.

What are some of the expressions of discontent concerning international arbitration today from its uses? Again, let me offer a few quotations:

- "[T]hey say that today's arbitral process has become so over-sophisticated, over-lawyered and suffocated by a plethora of detailed laws, rules and guidelines that arbitration is hardly any more efficient than state court proceedings in trusted jurisdictions."[16]
- "[A]rbitrations have become significantly more expensive and time-consuming, […] this has something to do with a new level of sophistication of the arbitral process, especially from the side of parties' counsel."[17]
- "A recent study of the Corporate Counsel International Arbitration Group (CCIAG) found that 100% of the corporate counsel participants believe that international arbitration 'takes too long' (with 56% of those surveyed strongly agreeing) and 'costs too much' (with 69% strongly agreeing)."[18]

There are several concerns packed into these statements, and a difficult task is to pull out which of these we can say is the consequence of the international arbitrator, as opposed to counsel, the arbitral institution or organizations that produce more and more, longer and longer, guidelines or supplementary procedural rules.

A disruptive practice by international arbitrators I have witnessed is that arbitrators can overcommit themselves and that this

[16] Dirk-Reiner Martens and Heiner Kahlert, 'Back to the Roots of Arbitration' (26 October 2015) Kluwer Arbitration Blog < http://kluwerarbitrationblog.com/2015/10/26/back-to-the-roots-of-arbitration/>.
[17] TBA
[18] Cited in Lucy Reed, 'More on Corporate Criticism of International Arbitration' (16 July 2010) Kluwer Arbitration Blog <http://kluwerarbitrationblog.com/2010/07/16/more-on-corporate-criticism-of-international-arbitration/>.

directly contributes to the unnecessary length of proceedings and more subtlety can contribute to a decrease in quality as well as contribute in more extreme cases to loss of opportunities for new arbitrators.

The criticism is manifested in several situations. One situation focuses on the panel opening their calendars at the case management conference at the outset of a proceeding and finding it difficult to identify times even as far off as two years in the future that they are all available and thus pushing by default the needed meeting another six or nine months into the future. Another focus is on the difficulty of having a panel arrive a day before a planned two-week hearing so they can discuss the case or staying a day after such hearing so that they can commence deliberations because the packed schedules require one or more members to be on planes immediately. A third manifestation simply focuses on the extraordinary length of time that is taken to render an award following a final hearing. A final view speaks of the danger of having a hearing postponed -- not for the needed month – but for nine or twelve months to accommodate packed schedules.

Now some of you at this point may be imagining that I am referring to the very limited set of arbitrators who sit on many panels at once.[19] But the situation I described is more nuanced and widespread than simply that experienced and caused by particularly busy arbitrators. It includes the practitioner who has only two arbitrations he or she sits on but which are difficult to mix with the unrelenting demands of clients. It likewise includes the academic who has only one or two arbitrations he or she sits on but which are difficult to accommodate within teaching schedules.

Why does such over commitment happen? There are many reasons, but let me identify two reasons. First, it is often said to not be wise to say no to the offer of an appointment. There are some arbitrators overcommitted to the point that it is clear to many close to that individual that there exists a risk in terms of

[19] My daughter more generally refers to such situations as focusing on problems of the privileged, as first world problems. She and her friends would collect examples of such complaints from friends—one I cherish is "I have a bruise from acupuncture."

health. One such individual was approached by friends and encouraged to slow down, to decline some appointments, and he replied "but if say no, they won't come back." In asking arbitrators about their practice, I have found this reaction commonplace. Second, some arbitrators do decline appointments. It is not common, but also not infrequent, that an individual approached declines. But in my experience, such instances involve the situation where that person is already in extremis – in other words where they are trying to dig themselves out of over commitment.

The over commitment possibility has been noticed and there have been external responses. The ICC, for example, not many years ago implemented as a part of their disclosure form the requirement that the selected arbitrator indicate how many panels he or she is a member or chair of. These statements of availability correctly are not intended to operate as an externally imposed uniform limit on service as an arbitrator given that the individual circumstances and capacities of arbitrators vary tremendously. Rather they aim to provide increased information to the parties so that informed choices can be made as to such appointments,

I consider this and other similar requirements to be external efforts that should and need to be taken. But, in my view, for these external commitments to be rendered more effective, another commitment, this time internal, needs to be made. This commitment implicates a key actor of the international arbitration community, the international arbitrator.

In the same way that certain actors have made a commitment to promote diversity, I suggest that arbitrators, even the students here without any appointments yet, need to reflect on the amount of appointments they are reasonably able to handle. For the issue posed by over commitment, the needed internal commitment is gained by what I call the Rule of X.

I will present its simple form first, then I will complicate it to match the difficulties in adopting such a rule.

My suggestion is that all of us, and particularly existing arbitrators set a number – X -- as the upper limit of cases that he or she is capable of responsibly sitting on at the same time.

Of course, X is a number that varies with individuals. Circumstances vary – what is their age and their experience? Are they full time arbitrators or are they practitioners occasionally taking on an arbitration? Even full time arbitrators will have widely different "X"s depending upon their capabilities, their energy, their age. Indeed, it may depend on the legal culture they come from – do they believe it is acceptable to build a support framework in which they are assisted appropriately by secretaries or do they come from a legal culture which views the task more in terms of an individual mandate? All of what I have just said indicates that one's number, one's X, also varies over time, going up or down as one's circumstances change or one gains more knowledge of one's limits.

That is the simple form of X. The big complication in X is that there is a significant difference between being a chair and being one of the other two members of the panels in terms of workload. Although – importantly – both positions are similar in the number of days blacked out on one's calendar. To address this, there are actually two Xs' – the total number of arbitrations, and the subset of that total in which one may serve as Chair. There ae other potential complications to the Rule of X. For example, sometimes an arbitration can go into an inactive state for years at a time. But these other complications in my view are relatively minor.

Admittedly, coming to a value for "X" is an entirely subjective exercise. Yet I believe that if an arbitrator has mentally settled on an upper limit of appointments, then it is probable that he or she will at least be hesitant to accept any appointment that puts her or him above X, at X+1, or X+2. Importantly, arbitrators that benchmark themselves will be less likely to take on an irresponsible number of appointments, far beyond what they are able to handle, from which they must then dig themselves out.

The consequences of having an X are profound.

First, imagine you are at X minus 1, then the last arbitration you accept is very important because who knows what will come the month after. I found I began to think very seriously about the characteristics of the arbitrations I most seek to be a part of – is a state or government agency a party, who are the other arbitrators, the counsel, what is the issue? Importantly, you will begin to down arbitrations that are no longer most of interest to you. Gunnar Lagergren once remarked to me long ago: "David, I only take big ones." In contrast, I recently spoke one with leading arbitrator who had a quite small commercial arbitration and I was surprized. I asked why he took the appointment. To which he replied with the same line previously mentioned -- "David, if I said no, then they won't come back." The important point here is that this smaller arbitration should go to the next generation of arbitrators, that is the opportunity that may increase the pool – and increase the diversity of the pool of arbitrators.

A second beneficial consequence, suppose you are at X arbitrations (the full number) and – following the rule -- you have in the last six months turned down two appointments. Well, the good news for arbitration and the parties in the X arbitrations is that you have a clear strong incentive to more promptly finish some of the X arbitrations before you.

Third, the adoption of an X that allows not only for the minimum time to handle X arbitrations but also allows one to serve as an arbitrator within a more robust conception of what that job requires and that will improve the quality of the arbitration and arbitration generally.

This last beneficial consequence crosses into the true cost of over commitment – namely over commitment in the number of arbitrations is under commitment to any particular arbitration. Is the arbitrator prepared for the hearing? Does the party appointed member contribute in a full-throated manner – for example sending comments, even catching typos, on draft orders. Very troublingly, if true, I was advised that one major institution sent out a questionnaire to chairs asking whether the contribution of party appointed arbitrators was changing in their experience – to which the answer was a strong yes and in the wrong direction. Most troubling to me, does over commitment

mean that a party appointed member knows the whole record or does the member focus on only a few arguments.

Perhaps when the busiest arbitrators start declining appointments, then the parties and the arbitral institutions will be free to appoint new additions to the arbitrator pool. This could serve to reinforce a virtuous circle: less cases in the hands of a few, and a few cases in the hands of many, with new arbitrators rising from more diverse backgrounds.

Closing

I have tried to illuminate a dark corner of the world of arbitration offering a mitigating solution. The Rule of X may seem like a small step, but it is one that may trigger in the long-run a more fundamental reshaping of the faces of arbitration.

Professor Douglas at the outset mentioned my service as an Judge ad hoc with International Court of Justice. Having illuminated a dark corner in my remarks, let me say that nothing is more inspiring or comforting than to sit in a room with judges who represent the majority of, if not all, races, who are in some cases male and in others female, whose lives developed around the world in very different cirucmstances, and yet who come together using the language of law I either French or English with a great commitment to understanding one another. I have recommendations there as well, but that awaits another lecture.

I end where I began, I bid you welcome, learn everything you can this coming year, we will be waiting for you to take the system by the collar and give it a good shake.

Thank you

Annex – Select Quotations Concerning Arbitrators

The Pool is not diverse

- "[T]he faces of the counsel leading the legal teams, and of the arbitral tribunals deciding the disputes, remain - with the exception of a couple of high-profile exceptions - overwhelmingly white, Caucasian and male."[20]
- "15 arbitrators have decided 55 percent of international investment arbitration cases"[21]
- "[A]rbitration is dominated by a few aging men, many of whom pioneered the field. In the words of Sarah Francois-Poncet of Salans, the usual suspects are 'pale, male, and stale.'"[22] This expression has been cited extensively. See for example, BLP, "The historic perceived lack of diversity among arbitrators is forever captured in the description 'pale, male and stale'."[23]
- "In other words, 95% of participants in ISDS tribunals are men – not far off the rate at the Bullingdon Club."[24]
- "A club of mainly European, grey-haired and well-connected men"[25]
- "[O]nly around 6 percent of appointments to international arbitration tribunals are female arbitrators."[26]
- "[I]t can be posited that the main culprit for the scarcity of female arbitrators is the effect of pipeline leak. In the

[20] Louise Barrington and Rana Rasha, 'Editorial' in Louise Barrington and Rana Rasha (eds), *Dealing with Diversity in International Arbitration* (Transnational Dispute Management Special Issue 2004).
[21] Citing statistics reported at the 2014 ICCA Congress in Kathleen Claussen, 'Keeping up Appearances: the Diversity Dilemma' in Louise Barrington and Rana Rasha (eds), *Dealing with Diversity in International Arbitration* (Transnational Dispute Management Special Issue 2004), 1.
[22] Michael D. Goldhaber, 'Madame La Présidente: A Woman Who Sits As President of a Major Arbitral Tribunal Is a Rare Creature. Why?' (2004) 1 Transnational Dispute Management.
[23] BLP, 'Diversity on Arbitral Tribunals: Are We Getting There?' (10 January 2017), 2.
[24] Robert Kovacs and Alex Fawke, 'An Empirical Analysis of Diversity in Investment Arbitration: The Good, The Bad, and the Ugly' (2015) Transnational Dispute Management, 12
[25] Michael Waibel & Yanhui Wu, 'Are Arbitrators Political?' (December 2011) Working Paper, 18 <http://www.wipol.unibonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/dateien/waibelwinter11-12>.
[26] Lucy Greenwood, 'Unblocking the Pipeline: Achieving Greater Gender Diversity on International Arbitration Tribunals' (2013) 42 International Law News 2, 1

international arbitration field, once a female associate makes it through the pipeline to partnership, she is likely to find that almost nine out of ten of her partner colleagues are male, a stark comparison to when she started work, when only around four out of ten of her trainee colleagues would have been men."[27]

- "ICSID arbitrators, who are usually commercial and not public lawyers, will pay less attention to the public policy consequences of their awards for developing states than to the plain words of treaties devised by dominant treaty parties."[28]
- ISDS "does not employ independent judges" but rather "highly paid corporate lawyers."[29]
- "An observer from planet Mars may well observe that the international arbitral establishment on Earth is white, male and English speaking and is controlled by institutions based in the United States, England and mainland European Union. For the most part, arbitrators and counsel appearing actively in international arbitral proceedings originate from these countries. The majority in a multi-member international arbitral tribunal is always white. The red alien from Mars will be puzzled in his own way because the majority of the published disputes before international arbitral tribunals involve parties from the developing countries and nearly three-quarters of the people on Earth live in those countries and are not white and more than half the total population are women."[30]
- "International arbitration has failed to achieve diversity in the fullest sense. For example, while 32% of parties to International Chamber of Commerce (ICC) arbitration in 2013 were from Africa, Asia and the Pacific, less than 3% of

[27] Lucy Greenwood and C. Mark Baker, 'Getting a Better Balance on International Arbitration Tribunals' (2012) 28 Journal of the London Court of International Arbitration 653, 657-658.
[28] Leon Trakman, 'The ICSID Under Siege' (2012) 45 Cornell International Law Journal 603, 609 referencing Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007), 122-151.
[29] Elizabeth Warren, 'The Trans-Pacific Partnership clause everyone should oppose' (25 February 2015) The Washington Post.
[30] K.V.S.K. Nathan, 'Well, Why Did You Not Get the Right Arbitrator?' (2000) 15 Mealey's International Arbitration Reports 24 (July 2000).

arbitrators appointed in ICC arbitrations that year were African and less than 12% from Asia and the Pacific."[31]

- "The available data on this issue supports a conclusion that international arbitration still suffers from an overrepresentation of AngloEuropean arbitrators and an underrepresentation of arbitrators from developing countries."[32]

Responses to the Diversity Situation

- Equal Representation in Arbitration Pledge ("The Pledge"):[33] a commitment to improve the representation of women in international arbitration on an equal opportunity basis. The Pledge "[b]egan with a suggestion made at ICCA 2014 by Jacomijn van Haersolte-van Hof, director general of LCIA."[34]
- In accordance with the Pledge, the ICC, the HKIAC, and the LCIA, now disclose information on the gender balance of tribunals.[35]
- As a next step to The Pledge, the LCIA and the SCC have proposed several additional actions to improve diversity. These include suggestions that counsel provide arbitrator profiles to clients where gender is not disclosed.[36]
- The International Institute for Conflict Prevention & Resolution created a Task Force on Diversity in ADR whose mission is "to devise practical strategies to increase the

[31] John Gaffney, 'The Equal Representation in Arbitration Pledge: Two Comments on its Scope of Application' (27 March 2017) Columbia FDI Perspectives.
[32] Lucy Greenwood, 'Tipping the Balance – Diversity and Inclusion in International Arbitration (2017) 33 Arbitration International 99, 103.
[33] See <http://www.arbitrationpledge.com/take-the-pledge>.
[34] Mireze Philippe, 'Equal Representation in Arbitration (ERA) Pledge: A Turning Point in the Arbitration History for Gender Equality' (2 June 2016) Kluwer Arbitration Blog.
[35] International Chamber of Commerce, 'Diversity in Arbitration' <https://iccwbo.org/global-issues-trends/diversity/diversity-in-arbitration/>, London Court of International Arbitration, < http://www.lcia.org/LCIA/reports.aspx>, Hong Kong International Arbitration Centre, < http://hkiac.org/about-us/statistics>.
[36] London Court of International Arbitration, 'Equal Representation in Arbitration Pledge – What's next?' < http://www.lcia.org//News/equal-representation-in-arbitration-pledge-whats-next.aspx>.

participation of women and minorities in mediation, arbitration and other ADR processes."[37]

- Public arbitrator listings such as Arbitration Intelligence, whose mission is to "promote transparency, accountability, and diversity in arbitrator appointments."[38]
- Organizations such as ArbitralWomen whose objective is "advancing the interests of women and promoting female practitioners in international dispute resolution."[39]

Arbitration mafia / They pick each other

- "[F]requency of elite arbitrators sitting side-by-side as co-arbitrators … keep investment arbitration cases in the family"[40]
- "Just 15 arbitrators, nearly all from Europe, the US or Canada, have decided 55% of all known investment-treaty disputes. This small group of lawyers, referred to by some as an 'inner mafia', sit on the same arbitration panels, act as both arbitrators and counsels and even call on each other as witnesses in arbitration cases. This has led to growing concerns, including within the broader legal community, over conflicts of interest."[41]
- "International arbitration can be compared to a cartel insofar as its participants attempt two things: they divide up proceedings and mandates among each other, and at the same time, make access for outsides difficult."[42]
- "It would have been particularly essential to the success of such a process [international arbitration] that highly qualified, independent, and eminent arbitrators undertake this extremely delicate and sensitive task, for only then could the

[37] International Institute for Conflict Prevention & Resolution, 'Diversiy in ADR Task Force' <http://www.cpradr.org/PracticeAreas/NationalTaskForceonDiversityinADR.aspx>.
[38] Arbitrator Intelligence, 'About' < http://www.arbitratorintelligence.org/about/>.
[39] ArbitralWomen, 'AW Outline' < http://www.arbitralwomen.org/AboutUs>.
[40] Pia Eberhardt and Cecilia Olivet., 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom' (Corporate Europe Observatory and Transnational Institute 2012), 42.
[41] ibid, 8.
[42] Ralf Michael, 'Roles and Role Perceptions of International Arbitrators' in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance* (Oxford University Press 2014), 54.

'neutrality' of arbitration have been assured. Regrettably, the task has now fallen into the hands of a group of 'professional' arbitrators who, forming an exclusive club in the international arena, are automatically brought into almost any major dispute by the operation of predetermined methods. These 'professional' arbitrators are concerned, not with the quality of their decisions, or with the rights and wrongs of the parties, but with the quantity of their decisions, made to satisfy their political and materialistic inclinations."[43]

- "[T]he field continues to be dominated by an elite group of insiders who are variously, though not without objection, referred to as a 'cartel,' a 'club,' or a 'mafia'."[44]
- "Arbitrator selection is often in the hands of members of the same 'club,' who are either operating in the institutions or already appointed as party-appointed arbitrators. In either situation, they are likely to favor other 'members' of their 'club.'"[45]

Pro-corporate bias / A cognitive predisposition to favor the appointing party

- "Given the one-sided nature of the system, where only investors can sue and only states are sued, a pro-business outlook could be interpreted as a strategic choice for an ambitious investment lawyer keen to make a lucrative living."[46]
- "[A]rbitrators are dependent on those investors that have enough foreign wealth and access to legal resources to contemplate claims"[47]

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[43] Dissenting Opinion of the Iranian Arbitrators in Case A/18 Concerning the Jurisdiction of the Tribunal over Claims Presented by Dual Iranian-United States Nationals Against the Government of Iran in Iran and United States, Case No. A/18, Decision No. DEC 32-A18-FT (10 Sept. 1984), reprinted in 5 Iran-U.S. C.T.R. 275, 336.

[44] Catherine A. Rogers, 'The Vocation of the International Arbitrator' (2005) 20 American University International Law Review 957, 967.

[45] ibid.

[46] Pia Eberhardt and Cecilia Olivet., 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom' (Corporate Europe Observatory and Transnational Institute 2012), 36.

[47] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007), 172.

- "The Businessman's Court"[48]
- "[A]rbitrators making politically and fiscally important decisions are often moonlighting corporate lawyers."[49]
- "If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe."[50]
- "Arbitrators are paid $600-700 an hour, giving them little incentive to dismiss cases out of hand"[51]

[48] Gus Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford University Press 2007), Chapter 7.

[49] 'A Better Way to Arbitrate' (11 October 2014) The Economist <https://www.economist.com/news/leaders/21623674-protections-foreign-investors-are-not-horror-critics-claim-they-could-be-improved>.

[50] 'The Arbitration Game' (11 October 2014) The Economist <https://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration>.

[51] 'The Arbitration Game' (11 October 2014) The Economist <https://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration>.