2-6-2012

The (Lack of) Women Arbitrators in Investment Treaty Arbitration

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VALE COLUMBIA CENTER
ON SUSTAINABLE INTERNATIONAL INVESTMENT
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND
THE EARTH INSTITUTE AT COLUMBIA UNIVERSITY

Columbia FDI Perspectives
Perspectives on topical foreign direct investment issues by
the Vale Columbia Center on Sustainable International Investment
No. 59 February 6, 2012
Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)
Managing Editor: Jennifer Reimer (FDIPerspectives@gmail.com)

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by
Gus Van Harten*

Investment arbitration has a remarkably poor record on representation of women. This calls for reform of the appointments process for arbitrators, who make important policy choices in the context of global governance.

In 249 known investment treaty cases until May 2010, there were 631 appointments. Of these, 41 were appointments of women -- just 6.5% of all appointments. Worse, of the 247 individuals appointed as arbitrators across all cases, only 10 were women. Women thus comprised 4% of those serving as arbitrators.

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 (for more on the data, see the website version of this *Perspective*).

Representation of women is important, not because women would necessarily make different choices than men, but because arbitrators who make decisions of public importance should reflect the make-up of those affected by their decisions. Representation of women is among the most obvious components of this principle. Reflecting this, states have well-established obligations to take appropriate measures to ensure equality between women and men and to afford women the same employment opportunities as men.[1]

To their credit, a few states appear to have driven appointments of women arbitrators. These include Argentina (5 women of 29 appointments), Turkey (2 of 6), the United States (2 of 9), Bolivia (1 of 2), and Georgia (1 of 2).

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[1] CEDAW Convention, Articles 3 and 11b.

On the whole, though, the system's performance has been abysmal. By comparison, women have been much better represented among international (and many domestic) judiciaries. For example, women made up 32% of European Court of Human Rights appointees (26 of 82 judges) since 1995 and 19% of Appellate Body members (4 of 21 members) in WTO history. Incidentally, on a perusal of the data, the system's record on racial and regional representation also appears poor.

The record thus gives reason to doubt the existing appointments process in international investment arbitration. Based on that process -- which is ad hoc, partly-privatized and conducted under acute litigation pressure -- men have devoured the opportunities.

Although not the only option, a direct and practical solution is to adopt a mandatory roster system. This would permit a publicly accountable and deliberative process of appointments, free from the strategic pressures that arise after a dispute has been registered. It would also enable more detached attention by states to representation, including ways to overcome possible barriers to participation by women, such as the concentration of men in major law firms or differential family responsibilities of women.

Likewise, a roster system would improve quality, if based on an open and merit-based process, including consultation with investor organizations and other interest groups. Advice on suitable candidates could be sought from organizations such as the International Association of Women Jurists, the International Federation of Women Lawyers or Arbitral Women. Besides tapping the knowledge and networks of these organizations, involving them directly would help loosen the hold of the boys' club. If the roster itself did not achieve this end, then states could move to mandatory representation of particular groups on the roster.

Importantly, a roster system would enhance the independence and public accountability of the system, especially if all arbitrators had to be selected from the roster (preferably by lottery or rotation). Related to this, the roster would need to be kept to a reasonable size (unlike the ICSID roster) in order to ensure a reasonable distribution of appointments among its members.

Alternative options to enhance representation appear less effective or less comprehensive. For example, one could introduce annual quotas for the appointing bodies under the treaties, but this would require acceptance by a range of public and private bodies or would depend on a claimant's choices of arbitration rules. Also, this alternative would cover only some presiding members of tribunals and very few, if any, party-appointed arbitrators.

On the other hand, a roster could be designed to cover all investment treaty arbitrations based on a separate agreement to clarify or supersede existing investment treaties. An expert advisory body could be charged with recommending candidates based on merit. Further, to avoid possible frustration of the roster by one or a few states, an ultimate decision-maker -- such as the President of the International Court of Justice -- could be designated as the final appointing authority.

To summarize, the reliance on ad hoc appointments by the disputing parties has failed to ensure adequate representation of women. A mandatory roster would permit states to address this

directly. It would also enhance public accountability and independence by giving states the responsibility to select those eligible for appointment and by providing a degree of secure tenure for the arbitrators.

Of course, there would be challenges in designing and implementing a roster system. But, as an outside observer, I see no clearer way to address this and other problems plaguing the status quo.

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The Vale Columbia Center on Sustainable International Investment (VCC – www.vcc.columbia.edu), led by Ms. Lisa Sachs, is a joint center of Columbia Law School and The Earth Institute at Columbia University. It seeks to be a leader on issues related to foreign direct investment (FDI) in the global economy. VCC focuses on the analysis and teaching of the implications of FDI for public policy and international investment law.

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Appendix – Appointments of women arbitrators in known investment treaty cases, to May 2010

Note: Data were collected from all known investment treaty cases that had led, by May 1, 2010, to a confirmed award on jurisdiction or, in the case of the North American Free Trade Agreement, to the filing of a notice of claim. The data track changes in tribunal membership at the stage of the establishment of a tribunal, an award on jurisdiction, an award on the merits, and an award on damages. In some cases, it was not possible to identify who was appointed as arbitrator based on publicly available primary documents.

Arbitrator	**Appointment history**	**Total appointments**
Giuditta Cordero Moss	Bogdanov v Moldova (sole arbitrator)	1
Susana Czar de Zaluendo	Vieira v Chile (investor)	1
Tatiana de Maekelt	LG&E v Argentina (presiding)	1
Merit E. Janow	Mobil v Canada (unconfirmed)	1
Gabrielle Kaufmann-Kohler	Saipem v Bangladesh (presiding) Chemtura v Canada (presiding) Burlington Resources v Ecuador (presiding) Duke Energy v Ecuador (presiding) Noble Energy v Ecuador (presiding) Jan de Nul v Egypt (presiding) Bayinder v Pakistan (presiding) Austrian Airlines v Slovakia (presiding) AWG v Argentina (investor) CGE/ Vivendi v Argentina (No 2) (investor) EDF v Argentina (investor) Suez & InterAguas v Argentina (investor) Suez & Vivendi v Argentina (investor) Mobil v Venezuela (investor) PSEG v Turkey (state) Quiborax v Bolivia (unconfirmed, presumed presiding) Vattenfall v Germany (unconfirmed)	17
Carolyn Lamm	ADF v United States (state)	1
Lucinda Low	CCFT v United States (state)	1
Sandra Morelli Rico	Anderson v Costa Rica (presiding) Sempra v Argentina (state) Camuzzi v Argentina (No 1) (state)	3
Fern M. Smith	Apotex v USA (unconfirmed)	1
Brigitte Stern	Pheonix Action v Czech Republic (presiding) BP America v Argentina (state) El Paso v Argentina (state) Pan American v Argentina (state) Burlington Resources v Ecuador (state)	14

	Occidental Petroleum v Ecuador (No 2) (state) Jan de Nul v Egypt (state) Alapli Electrik v Turkey (state) Vannessa Ventures v Venezuela (state) Barmek v Azerbaijan (unconfirmed) Quiborax v Bolivia (unconfirmed, presumed state) Itera v Georgia (unconfirmed, presumed state) Gustav Hamester v Ghana (unconfirmed) AES Summit v Hungary (No 1) (unconfirmed, presumed state)	
Total appointments: 631 **Men: 590** **Women: 41** (16 state, 7 investor, 13 presiding, 5 unknown)		

Source: Gus Van Harten, www.iiapp.org.