



Canadian Council on International Law
Conseil canadien de droit international

Session 10A - "Diversity in International Dispute Settlement"
Saturday, November 7, 2015
13:30-15:00

Chair

Ms. Oonagh Fitzgerald, Centre for International Governance Innovation

Speakers

Ms. Courtney Dolinar-Hikawa, Sidley Austin LLP
Professor Debra Steger, University of Ottawa
Assistant Professor Cecily Rose, Leiden University
Professor Jennifer Hillman, Cassidy Levy Kent LLP

Reported by Rohan Mathai

INTRODUCTION

Ms. Oonagh Fitzgerald and Professor Debra Steger

Ms. Fitzgerald introduced the panel. She noted that Professor Susan Franck was unable to attend, but that Professor Steger would be presenting Professor Franck's slides and paper.

Ms. Fitzgerald stated that the panel's discussion would focus on the diversity of the adjudicators on international decision-making bodies and of the legal counsel appearing before them. She also noted that the panel would be discussing various kinds of diversity, including gender and nationality.

Professor Steger introduced the topic with quotes that highlighted the different attitudes towards diversity. With respect to gender parity, Lord Sumption of the U.K. Supreme Court said that "[t]hese things simply can't be transformed overnight, not without appalling consequence in other directions". On the other hand, Abdulqawi Ahmed Yusuf, the Somalian vice-president of the International Court of Justice (ICJ), stated that "[t]he legitimacy of investor-state arbitration in Africa depends on African arbitrators serving on tribunals and African states having more of a role in the formulation of bilateral investment treaties."

STATISTICS ON DIVERSITY

Ms. Courtney Dolinar-Hikawa, *Beyond the Pale: A Proposal to Promote Ethnic Diversity Among International Arbitrators*

Ms. Dolinar-Hikawa provided findings from her paper 'Beyond the Pale: A Proposal to Promote Ethnic Diversity Among International Arbitrators'¹ in which she studied 289 ICSID cases from 1972 to 2015.

With respect to the tribunals in these cases, the data highlighted that international arbitrators tend to be Anglo-European. Specifically, 45% of the tribunals were composed of Anglo-European arbitrators, 84% were composed of at least two Anglo-European arbitrators, and 4% had no Anglo-European arbitrators. The trend was the same for presiding and sole arbitrators, with Anglo-Europeans presiding or acting as the sole arbitrator 76% of the time.

The data indicated that party nationality did not affect this trend of predominantly Anglo-European arbitrators. For instance, in ICSID cases where one party was Anglo-European or partially Anglo-European, 40% were arbitrated by Anglo-Europeans, 81% by at least 2 Anglo-Europeans, and just 3% by non-Anglo-Europeans. Likewise, these cases had a presiding arbitrator of Anglo-European descent 72% of the time. In decisions where neither party was Anglo-European, 38% were decided by Anglo-Europeans, 83% by at least 2 Anglo-Europeans, and 11% by non-Anglo-Europeans. As well, the presiding or sole arbitrator in these cases was Anglo-European, 81% of the time.

Professor Debra Steger, *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*

Professor Steger outlined a number of statistics from Professor Frank's paper 'The Diversity Challenge: Exploring the "Invisible College" of International Arbitration'.²

This paper assessed diversity in international arbitration and included data from hundreds of counsel and arbitrators. It revealed that the median international arbitrator was male, fifty-three years old, from a developed state, had ten arbitral appointments, and was approximately ten years older than female arbitrators were. Male arbitrators composed 82.4% of all arbitrators. With respect to legal education, 38.5% of arbitrators were educated in common law, 33.8% in civil law, and 27.7% were educated in both legal systems. The nationality of the arbitrators was not diverse with OECD nationals comprising 82.4%. In particular, 48.2% were from Europe and 27.9% were from Canada or the United States.

¹ C. Dolinar-Hikawa "Beyond the Pale: A Proposal to Promote Ethnic Diversity Among International Arbitrators" TDM 4 (2015), www.transnational-dispute-management.com/article.asp?key=2249.

² Franck, Susan D. and Freda, James and Lavin, Kellen and Lehmann, Tobias A. and van Aaken, Anne, The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration (May 29, 2015). Columbia Journal of Transnational Law, Vol. 53, Page 429, 2015. Available at SSRN: <http://ssrn.com/abstract=2611214>.

Professor Steger also highlighted the paper's finding that the median counsel was a male who was forty-six years old, from a developed state, and had been counsel in fifteen cases. Male counsel composed 76% of all counsel. With respect to legal education, 44.6% of counsel were educated in common law, 29.1% in civil law, and 26.4% were educated in both legal systems. The nationality of counsel was not diverse with OECD nationals comprising 75.2%.

Assistant Professor Cecily Rose, *A Study of Lawyers Appearing before the International Court of Justice, 1999–2012*

Asst Prof Rose presented statistics from her paper 'A Study of Lawyers Appearing before the International Court of Justice, 1999–2012'.³ The paper examined the diversity of the 205 lawyers who had appeared before the ICJ in contentious cases from 1999 to 2012. Sixty-three of these lawyers appeared two or more times (the ICJ Bar).

Development status of states litigating at the court

Asst Prof Rose first discussed the development status of states litigating at the ICJ. From 1999 to 2012, there were 79 appearances by States before the ICJ with a number appearing multiple times. Of these appearances, 27 were by OECD member states and 52 were by non-OECD states. Applying the World Bank's classification system, 29 of the appearances were by high-income states, 23 by upper-middle income states, 18 by lower-middle income states, and 9 by low-income states.

Composition of legal teams

She then highlighted the composition of the legal teams appearing before the ICJ in terms of speaking time. For legal teams from OECD states, nationals of those states conducted the oral arguments 57% of the time. Out of the 43% that were non-nationals, 96.5% were from other OECD states.

For the legal teams of non-OECD states, nationals of those states conducted the oral arguments 15.1% of the time. Non-nationals conducted 84.9% of the oral argument with 97.1% of these nationals being from OECD states. This indicates that developing states hire a great deal of non-national lawyers from OECD states.

Gender

Asst Prof Rose noted the significant over-representation of male lawyers appearing before the ICJ. Only 23 of the 205 lawyers were female and they accounted for only 7.4% of the speaking time for oral arguments. Within the ICJ Bar, there were only four females who accounted for 2.9% of the total speaking time.

Nationality

She also highlighted the lack of national diversity of the 205 lawyers appearing before the ICJ. There were 42 nationalities of lawyers with 36.8% from the United States (15.4%), France (11.1%), and the United Kingdom (10.2%). The over-representation was more pronounced within the ICJ Bar, with 54.5% from the United States (20.6%), the United Kingdom (17.5%), and France (16.4%).

³ Kumar, Shashank P. and Rose, Cecily 'A Study of Lawyers Appearing before the International Court of Justice, 1999–2012' Eur J Int Law (2014) 25 (3): 893-917. Available at <http://ejil.oxfordjournals.org/content/25/3/893.short>.

Professional status

Asst Prof Rose also provided a breakdown of the professional status of the lawyers appearing before the ICJ. In particular, 44.9% were academics and 34.2% were government lawyers. Academics accounted for a greater proportion of the ICJ bar with 58.7% being from academia whereas only 15.9% were government lawyers.

Professor Jennifer Hillman, *Diversity at the WTO*

Professor Hillman talked about the diversity of the WTO Panel and the WTO Appellate Body. In reference to the WTO Panel, only 33 (14%) of the 240 WTO Panel members who have sat on completed panels were women. She noted that this does not take into account those who have served more than once.

She emphasized the disproportionate number of male appointments to the WTO Appellate Body. Regarding these appointments, 22 men and 4 women were appointed to the WTO Appellate Body. Of these men, 15 were appointed for two terms and seven for single terms. As for the women, one was appointed for 2 terms and three for single terms. To put this differently, male terms added up to a total of 148 years, whereas female terms only added up to a total of 20 years.

Professor Hillman also indicated that the lack of gender parity on the WTO Appellate Body does not appear to be improving. She showed a number of photos of this Body, which indicated that the number of women serving on this Body has declined in the last 5 years. She also referenced a speech delivered on 13 March 2012 by H.E. Elin Østebø Johansen who chaired the WTO Dispute Settlement Body.⁴ Ms. Johansen talked about female representation in the GATT, the WTO Settlement process, the ICJ, Investor-State international arbitration, and the International Criminal Court. Professor Hillman suggested that there are an increasing number of female judges in the ICJ, but that this is not the case in the WTO Appellate Body.

At this point, Ms. Fitzgerald facilitated a discussion with the panel on diversity.

THE IMPORTANCE OF DIVERSITY

Diversity can increase the legitimacy and integrity of international decision-making bodies

Professor Hillman and Asst Prof Rose suggested that a lack of diversity of adjudicators on a particular international decision-making body could affect the legitimacy and integrity of that body. As an example, Asst Prof Rose highlighted that ICJ hearings where the counsel are predominantly non-nationals and do not look like the population concerned would naturally raise questions on the ICJ's legitimacy and integrity.

Diversity can increase the quality of counsel's argumentation and the decision-maker's decision

Asst Prof Rose stated that increased diversity of counsel could increase the quality of counsel's argumentation. As an example, she noted that the dominance of law professors appearing before the ICJ might not be ideal. This is because law firm lawyers may be better suited to engaging

⁴ Elin Østebø Johansen, WTO Dispute Settlement Body developments in 2011, 13 March 2012, available at https://www.wto.org/english/tratop_e/dispu_e/speech_johansen_13mar12_e.htm.

with the facts in highly factual cases at the ICJ. She also suggested that as courts depend on the counsel's arguments, increased diversity amongst counsel could positively affect the quality of the court's reasoning.

Professor Hillman hinted that increased diversity amongst adjudicators might increase the quality of a decision-making body's decisions and reasoning. She referenced Carol Gilligan's book 'In a Different Voice',⁵ which indicates that women tend to think and speak in ways different to those of men. She noted that in her experience, female members wanted to give a decision that was practical and feasible for a given State.

Finally, Professor Steger suggested that diversity is important for the simple reason that, as Prime Minister Justin Trudeau said, 'because it's 2015'.⁶ That is, in this day and age courts should be representative of the faces of the people whose problems they are resolving.

CONTRIBUTING FACTORS TO THE LACK OF GENDER PARITY ON INTERNATIONAL DECISION-MAKING BODIES

The panel discussed the factors that contribute to the lack of gender parity on international decision-making bodies. Professor Hillman suggested that part of the problem stems from the lack of transparency in how the United States chooses whom to nominate for the position of WTO Appellate Body member. Professor Steger mentioned that since governments make the appointments to international decision-making bodies, they need to be more sensitive to the importance of gender diversity. Asst Prof Rose said that in relation to the ICJ, States prefer people who have appeared before, which may affect gender parity. Ms. Dolinar-Hikawa stated that the lack of gender parity stems from problems at the national level, as women are not advancing to positions, which would make them candidates for membership on an international decision-making body.

POTENTIAL METHODS FOR INCREASING THE DIVERSITY OF INTERNATIONAL DECISION-MAKING BODIES

The panel also discussed potential methods for increasing the diversity of international decision-making bodies. Professor Hillman brought up the United Nations' objective to promote gender parity in international decision-making bodies. The United Nations aims to achieve this objective through various initiatives that she agrees with, including the publication of data on gender distribution. Along the same lines, Asst Prof Rose and Professor Steger felt that increased awareness of diversity issues would help. In particular, Asst Prof Rose encouraged others to do research that compared gender imbalance in the ICJ to gender imbalance amongst partners in law firms, law faculty, and international arbitrators. Professor Steger also mentioned that increasing people's sensitivity to diversity would be beneficial. Similarly, Professor Hillman suggested that diversity might increase if people are vigilant about keeping their governments accountable regarding the diversity of its nominations to international decision-making bodies. Finally, Ms. Dolinar-Hikawa indicated that quotas for diversity in international institutions would increase diversity.

The panel then took questions from the audience, many of which related to avenues for change.

⁵ Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development*, 2003, Harvard University Press.

⁶ <http://www.cbc.ca/news/politics/canada-trudeau-liberal-government-cabinet-1.3304590>.

The CCIL thanks and congratulates all Rapporteurs for their participation in the program for this year's Conference.

Any opinions expressed herein do not necessarily reflect those of the CCIL.