National Academy of Arbitrators
75th Annual Meeting & Education Conference
Arbitration in a Changing World
May 11-14, 2022

Diversity Initiatives: From Idea to Implementation
Thursday, May 12, 2022
9:00 a.m. to 10:15 a.m.

CETA – Where Are the Women? Diffusing the Thought-Terminating Clichés That Impeded Diversity

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Date Written: March 6, 2022

This is a draft version of a chapter originally written for *Sustainable Diversity in International Arbitration* edited by Shahla Ali, Giorgio Fabio Colombo, Filip Balcerzak and Joshua Karton, forthcoming 2022, Edward Elgar Publishing Ltd.

Abstract

Given the enormity of the arbitrator's role, one might expect that appointers would create a robust new roster for each unique case. Focus would be placed on skills and talent, rather than proxies like race (white), gender (male), and age (old) to predict whether a neutral will do well.

This Chapter discusses merit-based roster-making by reference to Dr. Katherine Simpson's 2020 submissions to the EU and Canada in response to the under-representation of women in the List of Arbitrators under Article 29 of the CETA.

Dr. Simpson used a three-step approach based on "discretion elimination" to mitigate unconscious or implicit bias and, ultimately, to produce an alternative roster of 70 women whose credentials made them comparable, if not interchangeable, with those appointed to the CETA roster. Using this 3-step approach, researchers will give themselves the best chance of finding excellent neutrals for their disputes, without unintentionally excluding "diverse" candidates.

CETA – Where Are the Women?
Diffusing the Thought-Terminating Clichés That Impeded Diversity

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I. Introduction

As the saying goes, "an arbitration is only as good as its arbitrators."[1]

There are many theories for why parties, counsel, or institutions appoint someone as arbitrator.[2] Institutions want to appoint someone whose performance will reflect well on the institution. Counsel and the parties have different concerns, but they do not simply appoint someone "who they know." This would risk a lengthy, expensive, and potentially embarrassing independence and impartiality inquiry, while potentially communicating to the opposing side that one's own case is so weak that its best shot would be with someone counsel knows – a friend – on the bench. Like institutions, counsel and the parties appoint a neutral "who they know will do

[1] Equal Representation in Arbitration Pledge, "The ERA Pledge Constitution of the Arbitral Tribunal: Checklist of Best Practices for the Selection of Arbitrators" <https://assets.website-files.com/58a4313f62641fda6d995826/5fa3cfad308ce4cda9ba39ba_08424_PG_DR_ERA%20France%20guidelines%20pdf_V4.pdf> accessed 2 December 2021 (ERA Pledge).

[2] Michael Z. Green, "Arbitrarily Selecting Black Arbitrators", 88 Fordham L. Rev. 2255 (2020); Homer C. La Rue & Alan A. Symonette, "The Ray Corollary Initiative: How to Achieve Diversity and Inclusion in Arbitrator Selection", 63 Howard L.J. 215 (2020).

well."[3] To assist them in making this selection, appointers rely on a roster[4] – a slate or list containing the names of several candidates who they know will do well.

Given the enormity of the arbitrator's role, one might expect that appointers would create a robust new roster for each specific case. Owing in part to anxiety about the time and expense of conducting that research, and to the perceived risks of appointing someone who was not on a prior roster, they do not.[5] Even when appointers do not simply recycle a prior roster,[6] appointment rosters still exclude "diverse" neutrals or contain them in such scant numbers that the likelihood of their appointment is near zero.[7] Rather than rely on merit-based research, many appear to continue to use race (white), gender (male), and age (old) as proxies for whether a

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3 "Will do well" is subjective and relates to the myriad of outcomes that the appointer desires, whether winning (however defined) or to having an efficient procedure that leaves each Party feeling equally and fairly heard, and resulting in an enforceable Award or agreed settlement.

4 This article makes no differentiation between the terms "roster", "list", "short list", and "slate", each of which generally refer to a different type of list that an appointer might use to propose acceptable neutrals for a dispute. Law firms and arbitral institutions alike have internal rosters of neutrals that they draw from when appointing arbitrators, whether directly or to aid in the preparation of a separate short-list from which prospective neutrals will be stricken and/or appointed on a case-by-case basis. *Compare* Sarah Cole, "Arbitrator Diversity: Can it be Achieved", 98 Wash. U.L. Rev. 965 (2021).

5 *Green* (n 2) 2273 ("Deviating from the familiar can breed contempt if the result is a loss.").

6 Letter from European Commission Officer, Colin Brown, Deputy Head of Unit, Directorate General For Trade; Dispute Settlement and Legal Aspects of Trade Policy (Unit F2) (9 January 2020) <https://www.simpsonadr.net/files/2020.01.17CETALetterAnnexIV.pdf> accessed 6 March 2022 ("… we have largely relied on arbitrators included in rosters already in place in other free trade agreements…")

7 *La Rue & Symonette* (n 2) 233 ("… a lawyer might very well decide that a 'strike/rank' list that contains only one woman or person of color 'highlights how different … the woman or person of color is from the norm.' It follows that 'deviating from the norm can be risky for the decision [maker], as people tend to ostracize people who are different from the group. For women and minorities, having … [those] differences made salient can also lead to inferences of incompetence.'") (*quoting* Stefanie K. Johns, David R. Hekman, & Elsa T. Chan, "If there's Only One Woman in Your Candidate Pool, There's Statistically No Chance She'll Be Hired" (*Harvard Business Review*, 26 April 2016) <https://hbr.org/2016/04/if-theres-only-one-woman-in-your-candidate-pool-theres-statistically-no-chance-shell-be-hired> accessed 6 March 2022).

neutral will do well.[8] This favoring might explain the global phenomenon of repeat appointment of senior white males, regardless of their experience.[9]

While many excellent arbitrators have emerged from these rosters, current rostering and appointment practices do not guarantee that the best neutrals are put forward or appointed. It should come as no surprise that arbitration is plagued by complaints of inefficiency, excessive costs, incomprehensible awards, and other attacks on its legitimacy. Faced with similar criticisms of the U.S. judiciary, President Carter shifted the U.S. toward a merit-based appointment system for U.S. federal judicial posts and, in so doing, appointed more women and people of color than had all prior presidents, combined.[10] Merit-based appointments and deliberate action to counter racial and gender bias increased diversity in federal judicial appointments.[11] The inverse could be true in ADR: increased diversity in arbitration might

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8 In the US, arbitration has been an alternative to having a dispute resolved by a diverse judge who was appointed on the basis of merit. Katherine Simpson, "Diversity Dividend", 52 U. Toledo L. Rev. 447, 449 (2021); Dina Gerdeman, "Minorities Who 'Whiten' Job Resumes Get More Interviews" (*Harvard Business School*, 17 May 2017) <https://hbswk.hbs.edu/item/minorities-who-whiten-job-resumes-get-more-interviews> accessed 6 March 2022 ("companies are more than twice as likely to call minority applicants for interviews if they submit whitened resumes than candidates who reveal their race"); Benjamin Davis, "The Color Line in International Commercial Arbitration: An American Perspective", 14 ARIA 461 (2003).

9 Lucy Greenwood, "Unblocking the Pipeline: Achieving Greater Gender Diversity on International Arbitration Tribunals", International Law News ("William Tetley QC recounts that in 1982, he was approached by two acquaintances to act as chair of an ICC arbitration tribunal. He 'rushed to the McGill Law Library to ask what the ICC was.' He 'got the Rules, read them in the taxi driving back and found them to be brief, concise and the epitome of common sense.' His appointment as chair of a major international arbitration tribunal was confirmed."); *Green* (n 2), 2258; *La Rue & Symonette* (n 2); Megan Leonhardt, "The Huge Diversity Issue Hiding In Companies' Forced Arbitration Agreements" (*CNBC*, 6 Jun 2021) <https://www.cnbc.com/2021/06/07/arbitrators-are-male-and-overwhelming-white-heres-why-it-matters.html> accessed 6 March 2022; *Cole* (n 4) 971-974.

10 Mary Clark, "Carter's Groundbreaking Appointment of Women to the Federal Branch: His Other Human Rights Record, 11 J. of Gender, Soc. Pol'y & L. 1131, 1132 (2002); Griffin B. Bell, "'Merit Selection' and Political Reality (*Wash Post*, 25 February 1978) at A15; *Simpson* (n 8) 448.

11 *Simpson* (n 8) 449.

signal that arbitration is moving toward merit-based appointments and, with it, toward higher quality awards and more legitimate procedures and outcomes.[12]

This Chapter discusses merit-based roster-making by reference to Dr. Katherine Simpson's submissions to the European Union (EU) and Canada in response to the under-representation of women in the List of Arbitrators under Article 29 of the Comprehensive and Economic Trade Agreement ("CETA").[13] In that roster of sixteen arbitrators, the proposed Canadian sub-list achieved gender parity,[14] but the proposed sub-list for the EU contained four men and only one woman.[15] The jointly prepared sub-list of Chairpersons contained no women and five men.[16]

To find arbitrator candidates who were at least equally qualified to those who were nominated, Dr. Simpson used a three-step approach based on "discretion elimination." Originating in social science, discretion elimination uses deliberate steps to mitigate unconscious or implicit bias.[17] First, Dr. Simpson established and defined the required criteria for inclusion in the alternative roster.[18] Next, with the help of a research plan and log, Dr. Simpson searched for and contacted

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12 Ibid.

13 Simpson Dispute Resolution, "Pro Bono" < https://www.simpsonadr.net/pro-bono.php> (last accessed 5 Dec. 2021).

14 Annex to the Proposal for a Council Decision on the position to be taken on behalf of the European Union in the CETA Joint Committee as regards the adoption of the List of Arbitrators pursuant to Article 29.8 of the Agreement, <https://eur-lex.europa.eu/resource.html?uri=cellar:b775fcc3-321b-11ea-ba6e-01aa75ed71a1.0002.02/DOC_2&format=PDF> accessed 6 March 2022.

15 Ibid.

16 Ibid.

17 Anthony G Greenwald & Calvin K Lai, "Implicit Social Cognition" Annual Review of Psychology 71 (2020): 419–45; Aline Holzwarth, "How to Actually Hire for Diversity" (*Forbes*, 18 February 2021) <https://www.forbes.com/sites/alineholzwarth/2021/02/18/how-to-actually-hire-for-diversity/> accessed 6 March 2022.

18 Eric Luis Uhlman & Geoffrey L. Cohen, "Constructed Criteria: Redefining Merit to Justify Discrimination." *Psychological Science* 16, no. 6 (1 June 2005): 474–80, <https://doi.org/10.1111/j.0956-7976.2005.01559.x> accessed 6 March 2022

candidates who met the criteria for inclusion. At the final stage, Dr. Simpson critically evaluated the draft for objective evidence of implicit or unconscious bias, by applying metrics now used in business,[19] the Ray Corollary Initiative, and by adherents to the Equal Representation in Arbitration Pledge (ERA-Pledge). These steps enabled Dr. Simpson to produce an alternative roster of 70 women whose credentials made them comparable, if not interchangeable, with those appointed to the original CETA roster.[20] Using the approach outlined herein, those conducting arbitrator research and/or creating arbitrator rosters ("researchers"), and the appointers who rely on their work, will give themselves the best chance of finding excellent neutrals for their disputes, without unintentionally excluding "diverse" [21] candidates.

II. CETA – Where are the Women? Addressing Stereotypes and Thought-Terminating Clichés

Dr. Simpson's submission to the EU and Canada, later named "CETA-Where are the Women?"[22], began on 31 December 2019 with a candid post on OGEMID, an international dispute resolution list-serve:[23]

> "… *I am surprised by the list. The list appears inconsistent with the CETA's demands for gender equality, the European Commission's "Strategic Engagement for Gender Equality", and the EU's many other statements and policies on gender equality. While the Canadian side at least achieved parity, the CETA's*

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19 *Holzwarth* (n 17).

20 *Simpson Dispute Resolution* (n 13) (link "Annex II 70 Women with 'Specialised Knowledge of International Trade Law, <https://www.simpsonadr.net/files/CETAWherearetheWomen2020.pdf> accessed 6 March 2022).

21 American Bar Association Section of Dispute Resolution, Resolution 105 (ABA Resolution 105) (defining "[racial and ethnic] minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities" as "Diverse neutrals").

22 Dana MacGrath, "CETA List of Arbitrators – Where are the Women?" (*ArbitralWomen*, 28 January 2020) <https://www.arbitralwomen.org/ceta-list-of-arbitrators-where-are-the-women/> accessed 6 March 2022.

23 Transnational Dispute Management, "OGEMID" <https://www.transnational-dispute-management.com/ogemid/welcome.asp> accessed 6 March 2022.

> *express aims for gender equality appear to have been ignored by the European side and in the sub-list of Chairpersons.*
>
> *Frankly, I am troubled to see that "the European Union in the CETA Joint Committee", in a global search, was unable to find even a single female it could identify as a potential Chairperson. No doubt, most members of OGEMID could easily name several dozen non-European and non-Canadian women who would do well as Chairpersons. Likewise, many of us could name dozens of European and Canadian women who would serve well as arbitrators on this list, too! I'm sure those we would name would be at least equally qualified to the nominees on this list. …*
>
> *I trust that I am not alone in hoping that the CETA Joint Committee will reject this list and prepare another that reflects the Parties' express commitments to gender equality*."[24]

The responses were a stark reminder that research and advocacy related to equality is often undermined before it has a chance to even launch.[25] While the post was not met with outright opposition, its message faced subtle resistance in the form of logical fallacies and "thought-terminating clichés" that excused the Parties' rosters.

The term "thought-terminating cliché" features in psychiatry, journalism, and political science. It is defined as a "… brief, highly reductive, definitive-sounding phrase" that impedes critical thought about an issue and thereby contributes to how people react and respond to an issue.[26] A common example of a thought-terminating cliché is "let's agree to disagree" – a phrase meant to stop discussion of an issue, not resolve it. Thought-terminating clichés are often tautological and

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[24] Email from Dr. Katherine Simpson to OGEMID@OGEMIDOGELTDM.com (31 Dec. 2019, 7:56 a.m.)

[25] Owain Smolović Jones, Sanela Smolović Jones, Scott Taylor, and Emily Yarrow, "'I Wanted More Women in but …': Oblique Resistance to Gender Equality Initiatives", Vol. 35(4) Work, Employment and Society 2021, p. 640-642 (Equality movements and organizations challenge the *status quo* – the same *status quo* that has enabled every successful person's success in his or her field. Since overt opposition to equality is socially unacceptable, individuals engage in oblique or indirect resistance to equality efforts).

[26] Robert Jay Lifton, *Thought Reform and the Psychology of Totalism: A Study of "Brainwashing" in China*. Chapel Hill: University of North Carolina Press, 1989, p. 429.

easy to repeat, and they quell dissonance by undermining or avoiding further discussion of a topic. [27]

Several responded that there were few women in the "pool" of available candidates, and that, therefore, work was needed to improve the "pipeline" such that more candidates would become available. In this recurring metaphor, the "pool" is where the available talent can be found, and the "pipeline" is the recognized educational, career, or training pathway that everyone must transverse to enter the "pool." The "pool" / "pipeline" metaphor has featured on both sides of the equality discussion, at least since the 1970s. For example, in 1978, Attorney General Griffin B. Bell used it to describe the then-existing pathway to becoming a federal judge – a "who you know"-pipeline that did not guarantee that those appointed had the talent required:

> *"... A person could not expect to be considered for [an appointment as federal judge or U.S. attorney] unless he or she knew a senator personally, knew someone who did, or was owed some political favor by that senator. Exceptions from this mold were few. Notwithstanding, many excellent judges and U.S. attorneys have emerged ... from just such a process. Its deficiencies have been ... that the pool of potential candidates has been very limited and that there has been a general unevenness in the quality of candidates*."[28]

While it is used in many helpful articles that detail how improvements could be made in the field,[29] the "pool" / "pipeline" metaphor is also used as a thought-terminating cliché that stops discussion about the appointment of diverse neutrals. In arbitration, the "pipeline" invents a recognized career path in a space where none yet exists,[30] while supporting a presumption that all who have arrived in the "pool" are equally meritorious and qualified. It avoids discussion of

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27 Ibid.

28 *Bell* (n 10).

29 *See e.g. Cole* (n 4); *Green* (n 2); *La Rue & Symonette* (n 2) 234 ("get two in the pool effect").

30 *La Rue & Symonette* (n 2) 222 ("There is no pattern for one to become eligible to serve as a[n] … arbitrator").

the fact that, to be an arbitrator, one must first be appointed. To be appointed, one must be on the roster.[31] The "pipeline" to an arbitrator appointment, if any exists, is admission to the "pool" – the roster – itself![32]

The "pool" / "pipeline" metaphor also supports a presumption that the search for candidates was flawless and that the problem lies not with the skill of the researcher, but instead with the absence or deficiency of candidates.[33] It shifts blame onto the candidates and away from the researcher who, as the story often goes, "did the best he or she could with the limited resources available", but who defined the "pool" boundaries in the first place![34] In business[35] and in dispute resolution, the "pool"/ "pipeline" metaphor supports the clichéd lament that "there aren't any" diverse neutrals and excuses the researcher from looking further.[36]

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31 Darlene Ricker, *Jay-Z's ADR Problems: Mogul's Case Spotlights Lack of Diverse Arbitrators*, ABA Journal, (1 May 2019) <https://www.abajournal.com/magazine/article/jay-z-adr-problems> accessed 6 March 2022 ("Half the battle is to get your name on a roster because that is how you are selected to arbitrate a case.").

32 International Council for Commercial Arbitration (ICCA), "Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings" (*ICCA Reports No. 8*, 2020) p. 57 <https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Report-8-Gender-Diversity_0.pdf> accessed 6 March 2022.

33 Deborah L. Rhode & Lucy Buford Ricca, "Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel", 83 Fordham L. Rev. 2483 (2015).

34 Ibid.

35 Hamza Shaban, "Wells Fargo CEO apologizes after blaming shortage of Black talent for bank's lack of diversity" (*Wash Post*, 23 September 2020).

36 Letter from Dr. Katherine Simpson to President Ursula von der Leyen (26 Jan. 2020) <https://www.simpsonadr.net/files/2020.01.26CETALettertovdL.pdf> (accessed 5 Dec. 2021) ("(I)n response to the European Commission's stated concern, on 6 January 2020, that 'there are no women', I have prepared (the) attached lists of arbitrators whose credentials are an approximate match to the current CETA Arbitrators")

III. Finding "Comparable" Women "With Specialized Knowledge of International Trade Law"

The initiative faced early appeals to convention as to what a desired neutral looks like, which is among the top three oblique tactics to undermine equality discussion.[37] There was pressure to accept that the relevant, comparable female neutrals simply did not exist, or that the neutrals put forward would need to be more qualified than the comparison group, to be accepted as comparatively talented.[38] One commentator advised: "you will never find 12 women who have experience as a South African Judge and years on the WTO Appellate Body. Just drop it." In a way he was correct. Neither the EU nor Canada had found twelve people with that exact profile. Four of the five nominees to the Chairperson's roster lacked that precise profile, yet there was no allegation that they were unqualified. A major hurdle to finding diverse neutrals is accepting that they do not need to be twice as qualified to be half or equally as good as everyone else. [39]

A. Step 1: Establishing Criteria for Inclusion

The first step was to establish the relevant, objective qualifications that each proposed neutral would need to meet to be included in the alternative roster. Just as establishing the qualifications (and, thus, search criteria) for a commercial arbitrator would begin with the text of the contract, the journey to find arbitrators "with specialised knowledge of international trade law" began with Article 29.8(2) of the CETA:[40]

> "*2. The arbitrators must have specialised knowledge of international trade law. The arbitrators acting as chairpersons must also have experience as counsel or*

[37] *Jones et al* (n 25).

[38] Christopher D. DeSante, "Working Twice as Hard to Get Half as Far: Race, Work Ethic, and America's Deserving Poor." *American Journal of Political Science* 57, no. 2 (2013): 342–56.

[39] Ibid.

[40] *Compare*, Vienna Convention on the Law of Treaties (1969) Articles 31-33 ("VCLT").

> *panellist in dispute settlement proceedings on subject matters within the scope of this Agreement. The arbitrators shall be independent, serve in their individual capacities and not take instructions from any organisation or government, or be affiliated with the government of any of the Parties, and shall comply with the Code of Conduct in Annex 29-B*."[41]

The text "specialised knowledge of international trade law" was broader than the experience required of chairperson candidates, who must have additionally had "experience as counsel or panelist in dispute settlement proceedings on subject matters within the scope of this Agreement."[42] Attention, therefore, turned to those 16 neutrals that the Treaty Parties had proposed, as the best evidence of what the Treaty Parties considered to be "specialised knowledge of international trade law." [43]

> "*My analysis of the self-published CVs and personal statements of the CETA Arbitrators, downloaded on 4 January 2020, revealed that the CETA Arbitrators have had prestigious academic or legal careers, with all CETA Arbitrators reporting prior experience with or publications about the WTO:*
>
> > *(A) Four (4) CETA Arbitrators served on the WTO Appellate Body,*
> >
> > *(B) Five (5) CETA Arbitrators have experience as a panelist in dispute resolution proceedings at the WTO,*
> >
> > *(C) Four (4) CETA Arbitrators served as counsel to parties in a WTO dispute or to the WTO itself, and*
> >
> > *(D) Three (3) CETA Arbitrators have academic teaching and publications related to the WTO.*
>
> *The CETA List treats each of these experiences as equal to one another. …* " [44]

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41 Comprehensive Economic and Trade Agreement (CETA) Between Canada, of the One Part and the European Union, Article 29.8(2) <https://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf> accessed 6 March 2022.

42 *Compare Lex specialis derogat legi generali*.

43 *Compare* VCLT (n 32), Art 31(3).

44 *Simpson Dispute Resolution*, "Pro Bono" (n 20).

Review of the CVs showed no other common points among all of the proposed neutrals, outside of those experiences with the World Trade Organization (WTO). The essential criteria for inclusion in the alternative roster, therefore, were the experiences listed above, in (A) – (D).

Setting the "criteria: or "qualifications" for a search is an ethical minefield. The researcher or the appointer (who ultimately relies on the researcher's work) has the ability to set the required "criteria" or "qualifications" to exclude diverse candidates, albeit without doing so expressly. Whether explicit or implicit, such exclusion of neutrals would not improve the quality of the neutrals that could be appointed, because race, gender and other immutable characteristics are irrelevant to one's ability to perform well as arbitrator. Indirect criteria, such as those tied to years of practice, universities attended, and prior service as a law firm partner do not necessarily correlate to arbitration knowledge or skill, but instead risk prioritizing longevity and prestige, while reinforcing prior decades of gender and racial discrimination.[45]

The EU and Canada recognized that the required mastery of the subject matter can be demonstrated in a variety of ways.[46] For future rosters, they might also consider how publications or by service as mediator in the field might demonstrate subject matter expertise, while mastery of the arbitration process itself might also be proven by prior experience as Tribunal Secretary,[47] or Shadow or Associate Arbitrator[48], or by completion of coursework or

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[45] *Green* (n 2) 2269 ("(…) parties may need to recognize that successful arbitrators … need not be former partners or law firms or retired judges. Instead of focusing on a candidate's former status-based positions, it might be helpful for neutral service providers to put a premium on mastery of the subject matter at hand.").

[46] *CETA* (n 43) Article 29.8(2).

[47] *ICCA* (n 32) 96-97.

[48] *La Rue & Symonette* (n 2) 223; Code of Professional Responsibility for Arbitrators of Labor Management Disputes of the National Academy of Arbitrators, American Arbitration Association, and Federal Mediation and Conciliation Service, Section H,

professional certifications. Whatever criteria are chosen, they must relate directly to the skills and knowledge that one needs to perform well as a neutral. [49] With the criteria in place, the researcher is ready to begin to find candidates.

B. Step 2: Preparing a Research Log and Conducting the Search

A research log will enable the researcher to explain how the proposed neutrals were found, while supporting the search's overall efficiency. The log should record the researcher's goals and the criteria for inclusion in the roster, the search terms, the databases and resources consulted, referrals made, and notes of correspondence.[50] It should be written to enable a third person to evaluate the thoroughness of the search and credibility of results and even replicate the search with similar findings.[51]

There are factors that influence search results, even before the researcher presses "enter." Prominent search engines search results can be influenced by (1) previous research on a single device, (2) previously clicked links and web-browsing history, (3) geographic location, (4) use of a branded account, (5) device type, and (6) other filters.[52] Language also carries cultural and

https://www.adr.org/sites/default/files/document_repository/Code%20of%20Professional%20Responsibility%20for%20Arbitrators%20of%20Labor-Management%20Disputes_0.pdf.

[49] *Holzwarth* (n 17) ("Avoid overstuffing job descriptions with 'nice to haves.' Limit job descriptions to include only the responsibilities that are truly required of the role. By including "nice to haves", you restrict the number of people who are comfortable applying. For example, while men routinely apply to jobs where they only meet 60% of the requirements, women tend to only apply if they meet all 100% of the requirements.")

[50] Kristin Luker, *Salsa Dancing into the Social Sciences: Research in an Age of Info-Glut*. Cambridge, Mass: Harvard University Press, 2008, p. 242 (example of a research log).

[51] Adapted from Richard H. Kallet, "How to Write the Methods Section of a Research Paper." *Respiratory Care* 49, no. 10 (1 October 2004): 1229–32.

[52] Mike Mcevoy, "7 Reasons Google Search Results Vary Dramatically." Web Presence Solutions - Digital Marketing, (*SEO Services*, 29 June 2020 <https://www.webpresencesolutions.net/7-reasons-google-search-results-vary-dramatically/> accessed 6 March 2022.

historical biases. For example, a recent study found female names were less associated with professional career words and more often related to the arts than sciences.[53] Male-gendered terms, like "chairman" are often considered neutral, while female and gender-neutral terms like "chairperson" are regarded as carrying a bias.[54] Algorithms may also adopt a bias during the process of investigating and considering word associations. This and any combination of the above factors will influence search results. Researchers can mitigate factors by clearing cookies and changing settings such that results are not influenced by invisible factors.

Ironically, researchers should strive to make their searches as gender- and racially neutral as possible, as this might enable the research to find more diverse neutrals. The search for women with "specialised knowledge of international trade law" showed the importance of conducting a "neutral" search. Initial Google searches for "women in international trade law" yielded so few women that the entire search for women could have come to a frustrating halt there. The search yielded organizations dedicated to improving gender equality and a handful of articles explaining that women were underrepresented in international trade. To find women who were active in international trade law, gendered terms were omitted from the search.

The search for women with "specialized knowledge of international trade law" went beyond Google. Publicly available WTO resources were consulted to find potential arbitrators who had

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53 Aylin Caliskan, Joanna J. Bryson, & Arvind Narayanan. "Semantics Derived Automatically from Language Corpora Contain Human-like Biases." *Science* 356, no. 6334 (April 14, 2017): 183–86. https://doi.org/10.1126/science.aal4230; *Gerdeman* (n 8).

54 *Jones et al* (n 25) 640-644.

served on the WTO Appellate Body[55], or who had served as panelist[56] or counsel in a WTO dispute, all of which were criteria for inclusion. To find potential arbitrators who had academic teaching or publications related to the WTO, university programs in international trade law and professional and academic conferences in the field were reviewed. Finally, list candidates recommended other professions to join in the project and even made introductions and referrals.[57] The search was further broadened with the help of the membership rosters from the organizations dedicated to international trade law. Since the European Commission stated that it had used prior rosters in creating the CETA List,[58] reference was also made to the rosters that had been prepared for other treaties.[59]

Over the course of 10 days, Dr. Simpson contacted 310 women who had the required "specialized knowledge of international trade law." Seventy (70) of the women agreed to provide a short bio for inclusion in the alternative roster. They were each at least equally qualified to those nominated by the Treaty parties, with fifty-three (53) having relevant experience that would make them interchangeable with those who had been listed.

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55 World Trade Organization, "Appellate Body" <https://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm> accessed 6 March 2022.

56 World Trade Organization, "Current Status of Disputes", <https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm> accessed 6 March 2022.

57 While referrals can be helpful, they must be treated with caution as they risk forcing a "who you know"-bias, as well as a wealth of other biases into the search.

58 *Brown* (n 10).

59 Presence on a list is not an indication that one has the skills or qualities necessary to serve as arbitrator – it proves only that one was able to be added to a list. *Compare Bell* (n 10). At its minimum, recycling a list adopts and reproduces the bias involved in its original creation.

C. Step 3: Measuring Results (Using Pledges?) and Correcting for Bias

> *It makes me wonder whether anyone stepped back and thought "why are we only proposing men for this role?"*[60]

The time to test the roster and correct for unintentional bias is after the search and when presented with the initial (first) final draft. This is the moment when one can best evaluate whether and how a myriad of invisible and unintentional factors – elements or criteria that were not expressly written into one's search – may have shaped results. Looking at the results, one might discover that all or most of the proposed neutrals are attorneys, speak the same language(s), are trained mediators, received degrees from the same institution(s), have both common law and civil law training, live in a geographic reach that has similar business hours to the researcher, or even share the same gender, race, and/or ethnic identity, languages or approximate age. These commonalities indicate an implicit bias when they were not deliberately part of one's search. Unintentional commonalities can indicate further shortcomings in the research: if something as big as a required credential or as negative as racism or gender discrimination made its way into one's search undetected, what else may have? The research log may offer clues, and some may be easy to correct. For example, Dr. Simpson's research log revealed clues as to why she initially found fewer women from East Asia: her phone calls and outreach to people in that region initially did not correspond with East Asian working hours, due to time differences.

How one appreciates search results is as important as the search itself. After several days of searching for women for the CETA List, there was a moment when it appeared as if the entire field of international trade law consisted of approximately 310 women and 4 men. Although the

[60] *Simpson* (n 24).

exclusion of men from search results was deliberate, it nonetheless gave the impression that the field consisted of 310 women and only 4 men. The impression that the universe is reflected in one's search results is one that any researcher could have experienced, regardless of whether their search was governed by explicit or implicit bias. Although there were likely hundreds of male names that came up in the searches, Dr. Simpson only acknowledged the names of four men who had been appointed to the CETA List and skimmed past the rest. One might wonder – what if the search had been driven by implicit bias? If the bias had been toward white men, rather than toward women, the researcher would have paid attention to the white-sounding male names and acknowledged only a small fraction of minority candidates. Influenced by unconscious or implicit bias, the researcher might simply assume that the results were proof of a general absence of diverse neutrals from the field, rather than appreciate the skewed results as proof of any bias.

One might understand the handful of diverse candidates as proof of a limited "pool." The "pool" / "pipeline" metaphor enables researchers to stop searching for party neutrals or to limit their consideration to just a few well-known or established candidates.[61] It fits well with a related practice and series of diversity clichés – the "something is better than nothing", the "only one chair at the table" and the unicorn.[62] If a researcher is following these metaphors, even without

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[61] *See e.g.* the dissonance that executives demonstrate when discussing a shortage of candidates while recognizing that there are indeed many talented women. Claire Barnes, Rachel Lewis, Joanna Yarker, and Lilith A. Whiley. "Women Directors on FTSE Company Boards: An Exploration of the Factors Influencing Their Appointment." Edited by Gabriela Topa. *Cogent Psychology* 6, no. 1 (1 January 2019) <https://doi.org/10.1080/23311908.2019.1691848> accessed 6 March 2022.

[62] Lucy Greenwood on Unicorn Arbitrators and Greener Arbitrations (7 January 2021) <https://www.youtube.com/watch?v=oGUJ06Yy4qM> accessed 6 March 2022 (In response to the comment, "Good female arbitrators are like unicorns, they don't exist", Arbitrator Greenwood purchased hundreds of unicorn pins, which she sends to great female arbitrators as a reminder that "yes, talented female arbitrators do exist.").

realizing it, he or she might simply "find one and be done" and stop paying attention to diverse names once "that one" seat at the table or slot on the roster appears to be filled. This might help explain the perception that the field is overwhelmed by men, as well as the repeat appointment of only a small handful of "diverse" neutrals in disputes.[63]

It is not enough to evaluate results and be satisfied that one diverse neutral has been found. A better approach is to ask, "why did we find (almost) only men?" or "why are my panelists (mostly) white?", and then to apply objective and reasonable diversity metrics to the search results, to establish whether an "-ism" has crept into it. One's search and rostering should be corrected and repeated until unintentional bias is eliminated.

Census data and diversity pledges can be helpful in establishing benchmarks for how one's search should have come out, in the absence of an "-ism." For example, the ERA-Pledge aims for the equal participation of men and women on arbitral tribunals, which makes sense given that women and men each make up 50% of the population and, in the U.S., have been nearly equally represented in law school attendance for over a decade. Using the ERA-Pledge, one might assume that, if one's roster is dominated by either gender, that bias was present in the search and shaped its results. If diverse men were excluded in the initial search, however, this failure will not be remedied by application of a gender equality pledge. To address this, it is helpful to have

[63] *Simpson Dispute Resolution* (n 13) (link "Annex III EU Historic Appointments to Lists of Arbitrators" <https://www.simpsonadr.net/files/2020.01.19CETALetterAnnexIIIupdated.pdf> accessed 6 March 2022; Guillermo Garcia Sanchez, Diversity in International Arbitration – Online Colloquium hosted by Arbitrate.com and Texas A&M, <https://arbitrate.com/diversity-in-international-arbitration/> accessed 6 March 2022 (Of the 342 times that a woman has been appointed to an ICSID case as arbitrator, 143 of those instances (41%) belonged to two female arbitrators. This overrepresentation of two individuals can make diversity efforts look more successful than they are. If one excludes the top 5 female arbitrators (by appointments received), one sees that women are appointed to just under to 7.5% of available ICSID seats.)

additional goals to measure whether one's search inadvertently excluded neutrals with diverse backgrounds and to help one find the missing neutrals.

The Ray Corollary Initiative Pledge reminds researchers to consider multiple aspects of diversity recognized in ABA Resolution 105,[64] simultaneously. The Ray Corollary Initiative aims to increase diversity in arbitrator appointment, and thereby decrease the likelihood that implicit bias is influencing arbitrator selection, by requiring its pledgees to ensure that at least 30% of each roster is made up of "diverse" neutrals. [65] Social science research has demonstrated that, when there is only one diverse candidate for a position, there is almost no chance that that person will be hired.[66] Yet, when there were at least 2 female candidates in a pool of four, the chance that one would be hired was 79.14 times greater that one of the women would be hired. For race, the results were more dramatic – "the odds of hiring a minority were 193.72 times greater if there were at least 2 minority candidates in the finalist pool" of four.[67] The outcomes were uniform, irrespective of the side of the pool, provided that at least 30% of the roster was "diverse."[68] Because of the demonstrated effect that 30% diversity has on hiring and appointments, and consistent with the positive effect that the 30% metric has had on legal employment through the

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64 ABA Resolution 105 (n 21) (defining "[racial and ethnic] minorities, women, persons with disabilities, and persons of differing sexual orientations and gender identities" as "Diverse neutrals"); compare with American Arbitration Association, Arbitrators & Mediators, Roster Diversity & Inclusion; https://www.adr.org/RosterDiversity (despite making up only 73% of their panel, white males make up 80% of the AAA rosters that are submitted to parties, by default. They are overrepresented both in terms of their presence in the general population, as well as in the roster. The RCI's 30% Metric would be a 50% improvement over the standard set by the AAA).

65 *La Rue & Symonette* (n 2) 231-233.

66 Ibid.

67 Ibid.

68 Ibid.

Mansfield Rule, the Ray Corollary Initiative aims for 30% diverse participation in every arbitration roster.[69]

IV. Conclusion

It is not now, nor has it ever been, a question of whether arbitrators are being appointed because they are "diverse."[70] The concern, rather, is that many are excluded on the basis of their diverse characteristic. The merit-based appointment of arbitrators – i.e., based on learned skills – is essential to maintaining arbitration as a preferred method of dispute resolution, as well as a viable and valid career choice. [71]

The resources needed to create a robust roster of neutrals are neither overwhelming nor disproportionate to the value of having the best arbitrator for a dispute. The research that led to the alternate roster for the CETA List, including establishing the criteria for inclusion, searching for and interviewing candidates, and verifying results, lasted only 10 days and used publicly available resources. The process and approach used can enable any researcher to create a roster featuring the best neutrals. In response to Dr. Simpson's submission, Canada temporarily re-

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69 Ibid. 242, 245.

70 *Green* (n 2) ("Businesses … have no incentive to select an arbitrator solely because of the arbitrator's diversity profile.").

71 While many attorneys and arbitrators want to be #1 or the best in their field, almost none want to be #1 in a field that is segregated by race or gender. There is little value in prevailing in a career path where qualified participants are excluded on the basis of their race or gender. Practicing Law Institute, "Diversity in International Arbitration" (29 June 2021), on demand course: <https://www.pli.edu/programs/international-arbitration?t=ondemand&p=306115#SEG129474> accessed 6 March 2022.

opened its roster nomination process. The EU signed the ERA-Pledge[72] and created a new committee tasked with the establishment of future rosters.[73]

While Pledges are helpful, the key step to ensuring that all of the talent available is deployed to resolve disputes, is to ensure that no neutral is excluded on the basis of diversity. Success requires the nomination of diverse rosters, and appointment of diverse neutrals is the key step to ensure that all the talent available is deployed to resolve disputes, efficiently and effectively.

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[72] European Commission, "Gender Balance in Trade and Investment Arbitration," December 18, 2020. https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2485.

[73] European Commission, "Stepping up the enforcement of EU Trade Agreements: The European Commission Appoints Members of the Expert Panel Assisting in the Selection of Arbitrators" (24 Sept. 2021) https://trade.ec.europa.eu/doclib/press/index.cfm?id=2305 (appointing a panel of three men and one woman to a panel tasked with ensuring gender equality, further demonstrating the difficulty appointing authorities have in reaching even 30% diversity); Tweet by Colin Brown (24 Sept. 2021) https://twitter.com/BrownColinM/status/1441401974537146368 ("…last, but not least, this process of filling new and updating existing dispute settlement rosters permits @Trade_EU to work towards gender equality, fulfilling its commitment when signing up to the @ERApledge.")