MEASURING THE IMMEASURABLE?

THE FAIRNESS DISCOURSE IN INVESTMENT TREATY ARBITRATION

An invitation to participate confidentially in a Q methodology study on individual perspectives about fairness in investment treaty arbitration

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In April of 2009, Professor Jose Alvarez delivered a lecture to the Third Annual Juris Conference on Investment Treaty Arbitration titled *The Evolving BIT*. In that lecture, he stated that perceptions really matter in international legal development – whether or not they are 'right.' This simple observation was a statement that caused concern for some in the arbitration community who claimed that there is no place for these kinds of subjective concessions in the law; in fact, it was argued, they are antithetical to the very purpose and function of a rule of law. However, more recently, in his 2011 Freshfields lecture titled *Saving Investment Arbitration from Itself,* Toby Landau QC argued that the arbitration community must pay more attention to the criticisms of investor-state proceedings. Landau claimed that the lack of inclusivity and the failure to account for all relevant perspectives are negatively affecting the development of the system as a whole.

As a PhD researcher in the field of international investment law, I have always been struck by the fact that the discussion about international investment law spans not only doctrinal analysis, but also underlying values such as fairness, legitimacy, and justice. These values in turn comprise an unmistakable element of emotion, and are often grounded in ideas of individual and political morality.

As someone knowledgeable in this area of law, I would grateful if you would participate in this study by visiting the following website:

www.fairnessdiscourse.com

To complete the study, please click on the 'Start the Study' link, follow the instructions, and enter the following login code: **TDM**

If you have any questions, please feel free to email me at:

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Participation in this study will be conducted in strict confidence. At no time will participant identities be revealed.

Living in an era where dominant philosophical theories hold that values are both subjective and relative, claims that we can ever provide truly objective analysis about values tends to ring hollow. As such, attempting to gain reasonably objective knowledge about these considerations of fairness, legitimacy, and justice can be a challenge.

This study is not a typical questionnaire; rather, it asks the participant to sort through a number of subjective statements (a process called Q sorting) on issues of fairness in investment treaty arbitration and to rank order them in relation to each other.

An example of the kinds of statements you will be asked to sort through and rank order include:

"For all practical purposes, the 'investment' screen of the ICSID Convention should have no bite. There is not a single pending or concluded case that should be – or should have been – excluded on this ground."

"A state's decision to invoke 'essential security' to justify a measure, even if detrimental to a foreign investor's rights, should be a self-judging action that renders an investor's arbitration claim inadmissible."

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The goal of this project is not to provide definitive answers about which perspectives on fairness in investment treaty arbitration are right or wrong; rather, the idea is to provide sufficiently objective analysis about these human subjectivities in a way that the discourse can begin to move from 'perceptions matter' to 'this is how and why the various types of perceptions matter.'

In attempting to measure and understand the perspectives, underlying viewpoints, and worldviews that all legal decisionmakers and commentators use to inform and influence the way that they approach legal problems, I hope that such knowledge can assist in delineating points of overlapping consensus (among participants using the system) about issues of fairness in investment treaty arbitration. While Landau claims that we have failed both practically and scholastically in shedding light on these important aspects of legal understanding, this study seeks to remedy some of these failings by creating a methodology for the measurement of what many consider to be immeasurable: subjective value perspectives.

The study asks you to sort through statements made by actual participants in investment treaty arbitration. All of those statements reflect subjective perceptions about the diverse and complex issues currently under debate (such as, illustratively, the scope of MFN provisions or the definition of investment). The results of the study will look for the types of patterns that may emerge in the different ways that participants have rank ordered the statements.

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