EMPIRICISM IN THE INDIAN ARBITRATION LANDSCAPE

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Abstract

The role of empiricism in international arbitral scholarship is now well recognised. The recent increase in empirical works is correlated with the trend towards greater transparency in both commercial and investment arbitration. Empirical methodology is now commonly used to test or supplement normative reasoning. In this context, this editorial aims to gauge the extent to which India has adapted to empiricism. Though the number of empirical studies in arbitration is on the rise, India still lacks an institutional culture conducive to empiricism. The author argues that recent trends of institutionalism, transparency, inter-disciplinarity and prominence of arbitral discourse in India can be harnessed to support greater appreciation of empirical methodology. Given the increased use of empirical studies globally and the recent instances of systematic stakeholder consultations in Indian arbitral policy making, the need for effective engagement with empiricism seems indicated.

I. Introduction

The systematic use of empirical methods in international legal scholarship has been formally recognised for at least four decades.[1] The drive towards the use of scientific methodology is now prominent in law and even gave shape to a specific branch called 'empirical legal studies' which has an established role within the legal discipline in the United States. Empiricism as understood in legal scholarship has several connotations. In its widest scope, any observation about the real world is empirical.[2] According to this understanding, only that which is purely normative is excluded from the scope of an empirical study.[3] On the other hand, some consider the reliance on quantitative statistical methods as the key feature of empiricism.[4] Franck describes empiricism as a spectrum with quantitative analyses of variables on one end and qualitative descriptive works on the other, where the common objective is to draw inferences from collected data on phenomena one cannot observe and/or otherwise make inferences about.[5]

Though earlier predominantly 'anecdotal', international arbitration research has increasingly seen the use of empirical methodology.[6] The early empirical works in the field were qualitative, including the well-known and oft cited *Dealing in Virtue* by Dezalay & Garth.[7] Now quantitative

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1 Lee Epstein & Gary King, *The Rules of Inference*, 69(1) U. CHI. L. R. 1, 3 (2002).

2 *Id.* at 2.

3 *Id.* at 3.

4 *See* Leslie A. Gordon, *The Empiricists*, 82 STAN. LAW. (May 17, 2010), *available at* https://law.stanford.edu/stanford-lawyer/articles/the-empiricists/ ("*A hallmark of the empirical legal studies movement is the application of statistical methodology - including "Bayesian" data analysis - to questions of description, prediction, and causation.*"); *See also* Epstein and King, *supra* note 1, at 2.

5 *See* Susan D. Franck, *Empiricism and International Law: Insights for Investment Treaty Dispute Resolution*, 48 VA. J. INT'L L. 767, 785 (2008). While the observations made in this editorial can apply to empirical work of both qualitative and quantitative nature, some effects (especially the limitations) are more dominantly felt in quantitative analytical work.

6 Christopher R. Drahozal, *Arbitration by the Numbers: The State of Empirical Research on International Commercial Arbitration,* 22(2) ARB. INT'L 291, 291- 292 (2006) [*hereinafter* "Drahozal (2006)"]; *See also* Christopher R. Drahozal, *The State of Empirical Research on International Commercial Arbitration: 10 Years Later*, THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION: THE NEXT 30 YEARS 453 (Stavros L. Brekoulakis et al eds., 2016) [*hereinafter* "Drahozal (2016)"].

7 YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996), *cited in* Drahozal (2006), *supra* note 6, at 292 and Christopher R. Drahozal *Empirical Findings on International Arbitration: An Overview* 1 (December 21, 2016), *in* OXFORD

work of both descriptive and analytical nature is prevalent in the field and their contribution to research is recognised by the arbitral community.

The aim of this editorial is to discuss the role of empiricism in arbitral research and policy making in India. Although the observations made here are in the context of international commercial and investment arbitration, they may be extended to research on purely domestic arbitration. The author describes the suitability of empirical methods to international arbitration and its increasing relevance in the field (**II**). This serves to contextualise a discussion on the scope for empirical methodology in India both in arbitration research and policy making (**III**). The author concludes with some thoughts on how empiricism can aid India's goal of promoting itself as an arbitration destination (**IV**).

II. Empiricism in International Arbitration

Arbitration has traditionally seen, by nature and necessity, a certain dependence on 'anecdote based' research. [8] Naimark criticised the lack of a "*comprehensive, or overall empirical, fact-based*" outlook on arbitration.[9] Due to its separation from the judicial mechanism and its emphasis on confidentiality, systematic information essential to an empirical analysis was (and still is) often unavailable.[10] The rarity of empiricism was due to the "*inability to generate useful empirical data, particularly on the process or the inner workings of international commercial arbitration*".[11]

In the past decade, research on international arbitration has acquired an empirical dimension.[12] In a study of quantitative work on international arbitration since 2006, Drahozal characterised this growth as an explosion.[13] This trend is correlated with an increase in the availability of data and the receptiveness of arbitration institutions towards empiricists seeking information.[14] Further, as discussed below in this section, several inherent characteristics of arbitration also make it suitable for empirical study.

A. Characteristics conducive to empirical research

It has been identified that while every sub-sect of international law may not be suited for empirical analysis, specific areas indicate particular suitability for the application of empirical methodology. Franck specifically mentions international investment dispute resolution as one area that exhibits this synergy.[15] Extending this statement to international arbitration as a whole, it seems indicated that it has certain characteristics which make empirical research not only feasible but also advisable.

HANDBOOK ON INTERNATIONAL ARBITRATION, *available at* SSRN: https://ssrn.com/abstract=2888552 or http://dx.doi.org/10.2139/ssrn.2888552.

8 Drahozal (2006), *supra* note 6, at 291, 292.

9 Richard W. Naimark, *What We Don't know About Arbitration and Conciliation*, 20(1) J. INT'L ARB. 7, 8 (2003).

10 Drahozal (2006), *supra* note 6, at 291.

11 Christian Bühring-Uhle et al, *The Arbitrator as Mediator,* 20(1) J. INT'L ARB. 81 (2003).

12 Drahozal (2016), *supra* note 6, at 453; Drahozal (2006), *supra* note 6, at 291-292.

13 Drahozal (2016), *supra* note 6, at 453.

14 Drahozal (2006), *supra* note 6, at 292.

15 Franck, *supra* note 5, at 773.

The first of these characteristics is the internationality itself. As Shore observed, "*the arbitral process circulates in the bloodstream of world culture; it is international and nowhere*".[16] "Nowhere" was here clarified to indicate that because of the "*inherent flexibility, variability, tendency to implicate multiple legal systems and […] procedure*" and the consequent difficulties to access basic information, any additional knowledge could be very useful.[17] The internationality of arbitration leaves its participants in need of a large amount of information regarding specific systems and cultures. This information is variable in its availability and accessibility and is often provided in multiple languages and varying formats. While lawyers experienced in handling disputes in multiple jurisdictions can very easily navigate these informational labyrinths, newer participants of the process would be greatly benefited by descriptive empirical studies of procedure, both qualitative and quantitative. For instance, a broad based study of study of successful challenges of awards in a jurisdiction could be of great interest to the entire arbitral community.

Increasing diversity in arbitral practice also supports of a case for increased empiricism. The need for diversity is now widely perceived, as reflected in both literature and practice.[18] In its earlier characterisation as an elite club, the members of the 'club' would have an idea, born out of their own extensive experience and that of the other members, of variations in the process of arbitration and the prominence of these variants. Without empiricism, newer entrants could be left out of this knowledge.[19] In the increasingly diverse arbitral community, empirical research, by systematically compiling anecdotes from a large cross-section of practitioners, can act as an equaliser.[20] It can give newer entrants access to a wealth of information gained from experienced practitioners, which has been systematically analysed to draw inferences. As Drahozal held, "*The problem with anecdotes […] is that it is difficult to evaluate*".[21] While experienced participants may be able to instinctively evaluate the relative value of an anecdote, an empirical study can provide a new entrant context to any anecdote to help determine whether it is the norm or a statistical outlier i.e. "*whether the event described by the anecdote is typical or atypical, frequent or infrequent, ordinary or*

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16 Laurence Shore, *What Lawyers need to know about International Arbitration*, 20(1) J. INT'L ARB. 67, 74 (2003). Here, Shore adapted to international arbitration, Duncan Fallowell's observation about Venice ("*Venice circulates in the bloodstream of world culture. It is international, that is to say, nowhere.*"), *See* Duncan Fallowell, *On Not Seeing Venice*, AM. SCHOLAR 77 (2000), *cited by* Shore, *id.* at 67.

17 *Id.* at 67.

18 Academic literature extensively address issues related to the promotion of diversity. In keeping with the world trend, several articles in this Issue raise important points dealing with the different aspects of the diversity debate. *See* in this regard, David Arias, *Soft Law Rules in International Arbitration: Positive Effects and Legitimation of the IBA as a Rule-Maker*, 6(2) INDIAN J. ARB. L. 29 (2018); Stephan Wilske et al, *The Emperor's New Clothes: Should India Marvel at the EU's New Proposed Investment Court System?,* 6(2) INDIAN J. ARB. L. 79 (2018); Paolo Marzolini, *Counsel Ethics in International Arbitration: Is There Any Need for Regulation?*, 6(2) INDIAN J. ARB. L. 124 (2018).

19 A similar argument has also been made to advocate for increased transparency, *See* Avinash Poorooye & Ronan Feehily, *Confidentiality and Transparency in International Commercial Arbitration: Finding the Right Balance*, 22 HARV. NEGOT. L. REV. 275, 301 (2017) ("*The present situation also means that only the big international law firms with a large practice in international commercial arbitration are able to review the latest developments in commercial law within the arbitral system, while other practitioners are left to operate relatively in the dark. The certainty and predictability which the law strives for is essentially restricted to a number of privileged insiders, with relevant information effectively being monopolized by a small elite.*").

20 In this Issue, David Arias discusses the benefits of soft law for the increasingly diverse arbitral community, making a link between diversity and the role of soft law in counter-balancing the effects of extensive experience. These arguments apply with equal force in the promotion of empiricism, which similarly provides new entrants the collected and contextualised benefits of anecdotes and experience. *See* Arias, *supra* note 18, at 34, 35.

21 Christopher R. Drahozal, *Of Rabbits and Rhinoceri: A Survey of Empirical research on International Commercial Arbitration*, 20(1) J. INT'L ARB. 23, 23 (2003) [*hereinafter* "Drahozal (2003)"].

extreme".[22] For instance, surveys not only provide information that was previously only available through personal discussion but also contextualise it for easier determination of the value of any particular experience or anecdote.

The party centric nature of arbitration also makes it well suited to empiricism. It seems indicated that arbitration should evolve with changes in party needs. A reliable quantification of changes in users' demands would be of use to counsel, arbitrators and institutions in making case management decisions. Such studies could be taken into account in the formulation of arbitration legislation, institutional rules and soft law. The inherent flexibility of arbitration also demands that it be sensitive to the changing priorities of its participants, if such can be reliably measured.

The above characteristics render empiricism particularly useful to the arbitral community. Outside of the community, empirical research can also benefit the wider participants: parties, judges, legislators and academics.[23] It can also help the press and the public gain a better idea of the arbitral process.[24] This is especially important, as the private nature of arbitration renders it especially prone to speculation and misinformation. Empirical surveys can test myths and correct misinformation. For instance, Drahozal used empirical studies to test three prevalent myths about arbitration, in an approach similar to the popular Australian-American television show 'Mythbusters'.[25] Combating misinformation is especially important in investment arbitration, seeing as how the investor-State dispute settlement system has in the recent years seen heightened criticism by the media and public.[26] A solution to this sometimes vastly exaggerated criticism is to widely disseminate fact based, empirically tested information.[27] Empirical studies can identify legitimate concerns and bring them to the notice of the policy-makers while ousting entrenched myths.

B. Limitations of the empirical approach

The aim of this editorial is not to suggest that empiricism is infallible or even superior to doctrinal research. To engage with empiricism is to also know its limits. Errors and biases can arise during an empirical study, which while impossible to eliminate entirely, need to be properly acknowledged so that the consumers of the research are aware of the limitations of the

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22 *Id.* Drahozal gives as example, Hilmarton Ltd. v. Omnium de traitement et de valorization (OTV) where the Paris Cour d'Appel enforced a vacated award. Here knowledge of the case by itself does not provide any information about whether such an occurrence is common or rare in international arbitration.

23 *See* Richard W. Naimark, *Building a Fact-Based Global Database*, 20(1) J. INT'L ARB. 105, 109 (2003).

24 *Id.*

25 Christopher R. Drahozal, *Busting Arbitration Myths*. 56(3) KANSAS L. REV. (2008). Here Drahozal tested three common assumptions: That new arbitration laws attract more arbitration business (confirmed), that parties commonly agree to have arbitrators apply the Law Merchant (in lieu of national law) in resolving disputes (busted) and that arbitrators often 'split the baby' i.e. make compromise awards (busted).

26 For an instance of the criticisms raised against ISDS, *see Chapter 4: Who guards the guardians? The conflicting interests of investment arbitrators*, CORP. EUR. OBSERVATORY (Nov. 27, 2012), *available at* https://corporateeurope.org/trade/2012/11/chapter-4-who-guards-guardians-conflicting-interests-investment-arbitrators [*hereinafter* "Corp. Eur. Observatory"]; Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST., Feb. 25, 2015, *available at* https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html?utm_term=.e3be1d875dbf.

27 Naimark, *supra* note 23, at 106, 107.

inferences drawn.[28] Any empirical study, whether qualitative or quantitative, has its accompanying set of limitations, many of which are impossible to avoid. In this section the author addresses those limitations that of significance in international arbitration research. While these limitations exist, to differing degrees, in all types of empirical research, their effects are most acutely felt in quantitative empirical studies. The general limitations of the survey method will also be discussed since it is the most popular form of empirical research in international arbitration.

i. Confidentiality and Availability of Data

Data is the starting point of an empirical research.[29] Both qualitative and quantitative empirical research depends on the availability of the requisite data. Morantz explains the challenges faced in data collection in legal empiricism in general, which astutely applies to data collection difficulties faced in international arbitration:[30]

"*Availability of data, or the lack thereof, determines what we as scholars can actually study. […] There are two approaches. One is to be a data scavenger. This is the car-keys-under-the-streetlight approach that says 'Okay, the light is shining on the census, so what questions can I answer with that data?' But there are a lot of important questions about which pertinent data are not readily available. To explore those questions, you have to spend time waging a campaign to figure out how to get your hands on the right data. And sometimes you lose. Sometimes you find the perfect dataset, but you can't convince the people who have it to collaborate with you.*"

The fact that confidentiality is one of the most valued attributes of arbitration does throw a spanner in the works. This is especially the case in international commercial arbitration. The public has very limited access to the arbitral proceedings and the publication of the award is generally dependant on party consent. The private nature of arbitration is commonly (and incorrectly) perceived as implying an automatic confidentiality obligation.[31] Naimark points out that while international commercial arbitration is a huge market, it lacks "*comprehensive market data*".[32] However, recently the calls for transparency has gained prominence in investment arbitration and (to a lesser extent) in commercial arbitration.

Transparency concerns are more acute in investment arbitration because of the involvement of significant public interest. Here, policy measures undertaken by the host government can be challenged by a foreign investor and a loss by the government would result in the transfer of public funds of the host State to the foreign investor. The public is an important stakeholder in the activities of the State,[33] and, by extension, in investment arbitration. Greater transparency concerns have manifested in broader transparency mandates in rules governing investment arbitration. For instance, ICSID Rules provide for the publication of the award with consent of the parties. Under rule 48(4), publication of the excerpt can be done even without party

28 For details on common biases and errors that can arise in empirical research, *see generally* Epstein & King, *supra* note 1; *See also* Franck, *supra* note 5, at 796, 797, 804-806.
29 Drahozal (2003), *supra* note 21, at 24.
30 Gordon, *supra* note 3 (*quoting* Alison D. Morantz, James and Nancy Kelso Professor of Law, Stanford University).
31 Poorooye & Feehily, *supra* note 19, at 281.
32 Naimark, *supra* note 23, at 105.
33 Poorooye & Feehily, *supra* note 19, at 312.

consent.[34] Further, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (2014) ["**UNCITRAL Transparency Rules**"] makes provisions for greater transparency, *inter alia,* through publication of information related to the arbitration, public access to hearings, third party participation and the creation of a repository of awards.[35] These Rules shall have automatic application to UNCITRAL arbitrations under treaties entered into after April 1, 2014, while their applicability to arbitrations under treaties concluded before this time is predicated on party consent.[36] Investment treaty awards are also commonly available on publically accessible websites and subscription based data-bases. It is therefore natural that this greater transparency is correlated with a greater number of empirical studies in this field when compared to commercial arbitration.[37]

However, broader transparency provisions in investment arbitration should not be seen as heralding a move towards full transparency in the near future. The requirement of consent for publication of the full award under ICSID Rules and the present limited applicability of the UNCITRAL Transparency Rules (and its exceptions) indicate that confidentiality is still a very important consideration. Considering the inherent nature of arbitration, full transparency is perhaps neither likely nor desirable.

Turning to commercial arbitration, the last decade which saw an "explosive" increase in the number of empirical surveys,[38] also saw a drive towards greater transparency in commercial arbitration.[39] While this trend is less significant when compared to that in investment arbitration, the transparency drive in commercial arbitration developed through the cooperation of the participants of the system, instead of as response to external criticism.[40] This move towards transparency manifests, *inter alia*, in a substantial increase in the information published by arbitral institutions. To take the instance of publication of awards, the ICC publishes awards (after removal of participant names and confidential information) even without party consent.[41] The ICDR Rules allow for publication of select awards after removal of identifying details, unless the parties opt out of this requirement.[42] Other institutions like SIAC also publish awards in full or limited forms subject to party consent.[43] On the other hand, institutions such as the SCC and the

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34 ICSID Arbitration Rules, r. 48 (4).

35 Esme Shirlow, *A Step toward Greater Transparency: The UN Transparency Convention*, KLUWER ARB. BLOG (Mar. 30, 2015), *available at* http://arbitrationblog.kluwerarbitration.com/2015/03/30/a-step-toward-greater-transparency-the-un-transparency-convention/.

36 Audley Sheppard & Paul Coates, *The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, CLIFFORD CHANCE (May 11, 2014), *available at* https://www.cliffordchance.com/briefings/2014/05/the_uncitral_rulesontransparencyi.html.

37 Drahozal, *supra* note 7, ¶ 32.2.

38 Drahozal (2016), *supra* note 6, at 1.

39 Poorooye & Feehily, *supra* note 19, at 304.

40 Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1323 (2006).

41 *See* in this Issue, Doug Jones, *Arbitrators as Lawmakers*, 6(2) INDIAN J. ARB. L. 18,27 (2018); Stephen R. Bond et al, *ICC Rules of Arbitration, Awards, Article 34 [Notification, Deposit and Enforceability of the Award]*, *in* CONCISE INTERNATIONAL ARBITRATION (Loukas Mistelis ed., 2d ed. 2015).

42 ICDR International Arbitration Rules, art. 30(3). ("*An award may be made public only with the consent of all parties or as required by law, except that the Administrator may publish or otherwise make publicly available selected awards, orders, decisions, and rulings that have become public in the course of enforcement or otherwise and, unless otherwise agreed by the parties, may publish selected awards, orders, decisions, and rulings that have been edited to conceal the names of the parties and other identifying details.*") (emphasis added).

43 *See* SIAC Arbitration Rules, r. 31.12.

HKIAC lay more emphasis on confidentiality and do not publish the award in any format unless the parties agree otherwise.[44] Similarly, there also exist considerable variations in the publication of other information relevant to the arbitral process.

In addition to arbitration institutions, other sources of arbitral data are increasingly available. For instance, the Arbitrator Intelligence (AI) and the Global Arbitration Review's Arbitrator Research Tool (ART) aim to provide systematic information about arbitrators to aid panel selection and could be useful data sources for empiricists.

Despite the fact that a large quantity of data is now available, there are inherent limitations in effectively using it for an empirical survey. There are both gaps in the data (all institutions do not publish information/awards, nor do they publish to the same extent) and lack of standardisation in the data published.[45] Ad hoc arbitration awards remain relatively inaccessible.[46] Further, since publication is generally predicated on varying degrees of party consent, many awards never see the light of day. In this Issue, in a different context, Doug Jones discusses the need for greater publication of awards and highlights the difficulty of getting consent for publication, even where the award and its reasoning are thought as likely to have a significant impact on future tribunal decisions.[47]

In fact, in the context of the determination of effects of variables on arbitral outcomes, Franck & Wylie estimate that it would take years or even decades to acquire a pool of awards comprehensive enough to run sophisticated statistical analyses to make accurate inferences.[48] A global database as was envisaged by the Global Centre for Dispute Resolution Research would have been a significant step towards making available a comprehensive and reliable information source.[49]

Since inferences are drawn on this limited data, their validity can be affected. In any study done on the basis of published awards, the fact that there can be variations in unpublished awards indicates that published awards may not be representative of the entire population of arbitral awards.[50] This 'case selection bias' as it is commonly known, is pervasive and acknowledged in quantitative analytical empirical surveys.[51]

On the other hand, the effect of the existence of unpublished data is not uniform or absolute. Some scholars provide reasons for why the case selection bias need not affect the validity of their inferences. In a study of the effect of investor-State arbitration clauses, claims and cases on investment treaty making, Alschner clarified that the problem of unpublished awards need not

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44 *See* SCC Rules, art. 3 ("*Unless otherwise agreed by the parties, the SCC, the Arbitral Tribunal and any administrative secretary of the Arbitral Tribunal shall maintain the confidentiality of the arbitration and the award.*"); HKIAC Rules, art. 42 ("*An award may be published, whether in its entirety or in the form of excerpts or a summary, only under the following conditions: (a) a request for publication is addressed to HKIAC; (b) all references to the parties' names are deleted; and (c) no party objects to such publication within the time limit fixed for that purpose by HKIAC. In the case of an objection, the award shall not be published.*").

45 Naimark, *supra* note 23, at 105, 108.

46 *Id.* at 106.

47 *See* in this Issue, Jones, *supra* note 41, at 16.

48 Susan D. Franck & Linsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L. J. 459, 520 (2015).

49 Naimark, *supra* note 23, at 105.

50 *See* Franck, *supra* note 5, at 797, n. 136; Franck & Wylie, *supra* note 48, at 519.

51 Franck, *supra* note 5, at 797, n. 136.

arise since: first, BIT texts are largely homogenous, second, since texts are bilateral, every country is in effect represented by one or the other published treaty, and third, even where texts were not in English, the English translation is extensively relied on.[52]

However, as a general rule, a significant lack of published information is more likely than not to affect the validity of inferences drawn – since the published data need not be representative of the whole (published and unpublished material). Further, if very little information is available on a specific question, the sample size of data may be too small to draw an inference.[53] In such cases, other forms of empirical research should be preferred.

Full transparency will never be achieved in international arbitration.[54] While the confidentiality versus transparency tussle evolves over time, giving one or the other more prominence, both will always have some value to the participants of the system.[55] Qualitative research including case studies, interviews and surveys, which need not rely on existing published information, will be of value where the published data set is too small to permit drawing of inferences.[56]

ii. Temporal and Geographic Scope

Empirical studies are done in the context of a specified time and place. Both of these therefore impose limits on the inferences drawn. Scholars should be cautious in importing the inferences from other work, especially if intended for a different population or a different time period.[57] Trends can and do change with time, and the validity of inferences drawn could be affected by new data that becomes available.

However, there are instances where some inferences have remained constant and confirmed by later studies. For instance, in the Survey on Arbitration and Settlement in International Business Disputes conducted by Bühring-Uhle in 1996 to examine the advantages of arbitration, neutrality of the forum and ease of enforcement were found to be the most significant advantages of international arbitration.[58] In the Queen Mary and White & Case survey of 2015, these remained at the top of the list as the most valuable characteristics of international arbitration.[59] However, some invariable inferences however should not be mistaken as a general indicator of the constancy of empirical inferences.

The effect of a geographic scope or limit is similar. To illustrate, inferences from a study of challenges to an arbitral award in England may not be imported into a work on the same subject

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52 Wolfgang Alschner, *The Impact of Investment Arbitration on Investment Treaty Design: Myths versus Reality*, 42 YALE J. INT'L L. 1 (2017).

53 *See* Franck, *supra* note 5, at 809.

54 Poorooye & Feehily, *supra* note 19, at 322.

55 *See id.* at 323.

56 Drahozal (2003), *supra* note 21.

57 For details on the limitations of research in this context, *see* Franck, *supra* note 5, at 811 ("*The data must be used carefully, however, and with the knowledge of the limitations of the research and a particular sensitivity to the gap in the generalizability of research results to a particularized political, economic, cultural, and historical context that may be markedly different in critical ways*.") (emphasis added).

58 *Id. citing* CHRISTIAN BÜHRING-UHLE, ARBITRATION AND MEDIATION IN INTERNATIONAL BUSINESS 129 - 34 (1996).

59 Queen Mary University of London & White & Case LLP, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, 6 (2015), *available at* http://www.arbitration.qmul.ac.uk/docs/164761.pdf.

in India. Temporal and geographic limitations are not specific to empirical surveys. Doctrinal studies too often do not apply to changed circumstances of a later time, though these limitations are more commonly identifiable in doctrinal studies. In any case, the need to constantly test and update findings is common in all types of research.

iii. Variability of Inferences

Not all aspects of arbitration are equally suited for an empirical study. Shore identifies, for instance, that studies that analyse and influence jury selection will not in the same manner be applicable to arbitrator selection.[60] On the other hand, party expectations are and have been effectively studied using empirical methods.[61]

The nature of the empirical research, the methodology and (as discussed above) the data available can all affect the inference drawn from an individual study.[62] A difference in any of these aspects will therefore likely translate to a difference in the inference drawn. For instance, in the determination of arbitral bias, a study based on content analysis and that based on outcome analysis lead to varying conclusions regarding the existence of pro-investor bias.[63] Each methodology comes with its set of limitations, and no one method can be considered as a sole or conclusive determination.

Furthermore, such variance is to be expected between attempts to quantify any aspect of a complex process such as arbitral adjudication.[64] To take an example of a difficulty faced, in the context of an outcome analysis, Franck highlights that the lack of de jure precedent affects the ability to measure this correctness of outcome.[65] Inability to incorporate the correctness of the award affects any inference drawn on the influence of the tested variable on the outcome.[66] Similarly, it is difficult to hold constant all the variables that can affect a determination. Therefore, while using inferences from an empirical study, no matter how thorough, one has to exercise caution keeping in mind the limitations of that type of research.

iv. Limitations of the survey method

The survey method is the most common in international arbitration.[67] Surveys are not necessarily affected by some of the limitations described above. For instance, the lack of published information need not affect surveys which involve collecting specific material. Furthermore, it is easier to manage unnecessary variables in the designing of survey questions. However, this method comes with its own set of limitations. For one, this method measures what respondents

60 Shore, *supra* note 16, at 68.

61 *Id.*

62 *See* Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L. J. 211, 251 (2012). Here these limitations are discussed with regard to empirical research on the possibility of bias.

63 *See id.* (where the author through a systematic analysis of the legal content of the treaties, found tentative evidence of pro-investor bias); *Contra see* Franck & Wylie, *supra* note 48, where the authors analysed outcomes to find against a pro-investor bias, though preliminary evidence of a modest state bias was indicated.

64 Van Harten *supra* note 62, at 232.

65 Franck & Wylie, *supra* note 48, at 486.

66 *Id.*

67 Drahozal, *supra* note 7, ¶ 32.4.

say they do, which need not necessarily be what they actually do.[68] Omissions, exaggerations and biases need all be expected in surveys and some research questions can be more susceptible to these than others.[69] Survey respondents need not necessarily be representative of the entire population.[70] Further, getting responses from the survey participants can be challenging, especially getting a large percentage of the sample group.[71]

Despite the limitations of empirical studies, they are increasingly accepted and used in international arbitration. This is not surprising since, as demonstrated above, several characteristics of arbitration make the use of such methods necessary as a supplement for doctrinal research. In the next section, the author discusses the extent to which India has embraced empirics in comparison with the world trend. Given the recent empirical dimension that international arbitration research has acquired, it seems important that India too use empirics in promoting itself as an arbitration hub.

III. Empiricism in the Indian Arbitral Landscape

The need for empiricism in Indian arbitration research and policy making has been highlighted in previous literature. In early 2017, Srinivasan reiterated an earlier expressed need for empiricism.[72] In the broader context of judicial reform, Krishnaswamy et al in 2014 emphasised that policy making and reform in India needs to be systemic, normative and empirical.[73] Empirical research (especially of the qualitative nature) has increased in recent years, though this increase is slower when compared to the world trend. Both quantitative and qualitative studies are likely to increase in the future, given the benefits of empiricism outlined above and increasing exposure to, and use of empirical research in international arbitration. However, we still lack a general academic and institutional culture conducive to empiricism in arbitration research.

Supply side factors like inadequate resources for empirical research in legal institutions and non-availability of information are major reasons for this lack,[74] and will have to necessarily be addressed. In policymaking too, the role of empiricism has traditionally been limited, though recent trends are promising. For instance, as discussed below, the recent High Level Committee to Review the Institutionalisation of Arbitration Mechanism ["**Sri Krishna Committee**"] undertook surveys among stakeholders to help draw conclusions. Greater impetus to empiricism

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68 *Id.* ¶ 32.8; Jack Coe, *From Anecdote to Data: Reflections on the Global Center's Barcelona Meeting*, 20(1) J. INT'L ARB. n. 47 (2003).

69 Coe, *supra* note 68, n. 47.

70 Drahozal (2006), *supra* note 6, at 296.

71 For a detailed analysis of the merits and challenges of the survey method, *see* Thomas J. Stipanowich & Marcio Vasconcellos, *Chapter 35: The Interplay between Empirical Studies and Commercial Arbitration Practice*, *in* THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION 471 (Vol. 37, Stavros L. Brekoulakis et al. eds., 2016).

72 Badrinath Srinivasan, *Empirical Findings in International Arbitration: Part I*, PRACTICAL ACADEMIC (Jan. 16, 2017), *available at* http://practicalacademic.blogspot.in/2017/01/empirical-findings-in-international.html [*hereinafter* "Srinvasan (2017)"]; *See also* Badrinath Srinivasan, *Are We Groping in the Dark? The Need for Empirical Research on Arbitration in India,* PRACTICAL ACADEMIC (June 28, 2011), *available at* http://practicalacademic.blogspot.in/2011/06/are-we-groping-in-dark-need-for.html?m=1 [*hereinafter* "Srinivasan (2011)"]; Badrinath Srinivasan, *The (Immediate) Future of Research on Indian Arbitration* (Nov. 23, 2011), *available at* http://practicalacademic.blogspot.in/2011/11/immediate-future-of-research-on-indian.html.

73 Sudhir Krishnaswamy et al, *Legal and Judicial Reform in India: A Call for Systemic and Empirical Approaches*, 2 J. NAT'L L. U. DELHI 1 (2014).

74 Srinivasan (2011), *supra* note 72.

in academia is likely to translate into its more effective adaptation in policy-making. Empirics can effectively measure stakeholder response to reform, thereby promoting responsiveness to stakeholder perceptions which can go a long way in transforming India into a hub for arbitration.

Harnessing empirical methods in arbitration research is not just important to address asymmetries or gaps in knowledge. The need to engage with empiricism also arises due to the increasing amount empirical works available internationally. As consumers of these works, scholars will need to effectively evaluate them. This is especially important since scholars routinely use empirical data to support their doctrinal or normative statements. It is therefore vital that scholars be able to effectively judge methodologies and inferences used in existing data and be aware of errors, biases and other limitations that any specific work could be susceptible to.[75]

A. Inadequacies in academic culture

Measures suggested by Franck to increase the supply of researchers proficient in empiricism include promotion of inter-disciplinarity in research, provision of funding and infrastructural support for scholars and conduct of classes/training programmes in empirical methodology.[76] These suggestions, suitably modified, can go a long way in promoting empirics within the legal academia in India.

Legal curricula in India do not commonly include options for courses on empirical research methods or statistics. While premier law schools offer integrated programmes where law is taught with social sciences, inter-disciplinarity in legal research itself is not generally promoted. This should be corrected, since inter-disciplinarity is an established method to increase the quality of empirical research among faculty and students.[77] The availability of integrated programmes indicates that these resources can be effectively harnessed to promote inter-disciplinary and empirical research.

Further, all types of empirical research do not require graduate level knowledge of statistics.[78] An understanding of common methodologies of empirical research and the rules of inference will allow for the conduct of effective empirical research. A study of research methodologies (with or without statistics) may be made part of legal curricula. More sophisticated quantitative research may require knowledge of statistics, funding and the requisite technological support, which don't seem in the cards for the legal profession or academia at present.

B. Confidentiality

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75 For a discussion of common errors arising in use of empirical methodology in legal research, *see* Epstein & King, *supra* note 1. For a similar discussion in the context of international investment disputes, *see* Jason Webb Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 33 BROOK. J. INT'L L. 405 (2008); Van Harten, *supra* note 62.

76 Franck, *supra* note 5, at 807-808. In the context of investment dispute resolution, Franck proposed a five step method to integrate empirics into legal research. These steps include: "(*1) building research capacity, (2) obtaining data, (3) designing the research methodology, (4) conducting the research and analyzing the results, and (5) disseminating the results to stakeholders for consideration*". These steps are valuable in the promotion of quality empirical research and a general empirical culture within the academia. *See generally* Franck, *id.* at 807-812.

77 *See* Franck, *supra* note 5, at 786; Epstein & King, *supra* note 1, at 117, 118.

78 Franck, *supra* note 5, at 786, 803.

Confidentiality and non-availability of data haunts empirical research world-wide, and is also very prominent in India. Preference for ad hoc arbitration is one reason for the lack of data on the arbitral process.[79] Further, even in the case of institutional arbitration, there is a great degree of variability in the amount of information published about the conduct of arbitration, leading to a "dearth of information" on the working of many institutions.[80]

A drive towards institutionalisation of arbitration is seen in the report of the Sri Krishna Committee.[81] However, even a successful shift toward institutionalisation need not translate into greater availability of data. For one, the Sri Krishna Committee has not specifically recommended increased publication of information relating to proceedings and awards (with party consent). Furthermore, the Committee has recommended the insertion of a provision for confidentiality in the Arbitration and Conciliation Act, 1996 which is at present silent on the issue.[82] The general nature of the suggested reforms of the Committee seems more in favour of confidentiality.

However, an interesting recommendation of the Sri Krishna Committee is the creation of a "statutory depository" for all awards rendered in India – both ad hoc and institutional.[83] This repository is to be maintained by the proposed Arbitration Promotion Council of India ["**APCI**"].[84] The limited purpose of this repository is to allow courts access to awards while considering setting aside applications under Section 34 of the Arbitration and Conciliation Act, 1996.[85] The contents of the depository will otherwise be completely confidential.[86] The recommendations in this regard as are follows:[87]

"1. A provision may be inserted […], requiring the APCI to maintain an electronic depository of all arbitral awards made in India and such other records as may be specified.

2. Parties to an arbitration seated in India may be required to file such arbitral awards and such other records as may be specified […] within 45 days of the award being given.

3. Courts may access the depository for obtaining a copy of the arbitral award certified by the APCI."

Notwithstanding concerns of practicality, this system is coincidentally aligned to international proposals for a repository of awards and related data. The UNCITRAL Transparency Rules

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79 Srinivasan (2017), *supra* note 72.

80 B.N. Sri Krishna et al, *Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India* 22 (July 30, 2017), *available at* http://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf [*hereinafter* "Sri Krishna Committee"]. However, some institutions publish information relating to costs and caseloads and even make provisions for the publication of the award in their rules. For instance, *see* MCIA Rules 2016, r. 30.13 ("*The MCIA may publish any Award with the names of the parties and other identifying information redacted.*").

81 *Id.*

82 *Id.* at 6.

83 *Id.* at 77, 78.

84 *Id.* at 78. The Arbitration Promotion Council of India is proposed as an autonomous body to be established by statute and comprising representatives from all stakeholders, whose function is to monitor the working of arbitral institutions. (*see id.* at 50).

85 *Id.* at 77.

86 *Id.*

87 *Id.* at 78.

establishes such a repository, to be maintained by the UNCITRAL Secretariat to collect all published material rendered under the Rules (as discussed above).[88] While it presently contains very little material, it aims to promote institutionalisation in the collection and dissemination of information in investment arbitration,[89] and is therefore likely to be an important database for future empirical research. In international commercial arbitration as well, there have been proposals for creation of an international depository of awards.[90] The role of the proposed international repository would be to sift through and publish redacted versions of awards.[91]

While the aim of the APCI's depository is different from the international bodies, the working of the international repositories is likely to share some similarity. Although the recommended purpose of the APCI's statutory depository is very limited, the data collected could be very useful for future empirical study. The APCI could, for instance, publish with party consent, full or partial versions of awards. Redacted versions of awards could be released in a staggered manner. This could eventually move towards an opt-out system whereby awards in redacted formats would be published unless parties specifically agree not to publish them, a transparency measure suggested in context of international commercial arbitration.[92] Such a system would have to be accompanied by clear rules to protect the confidential information in the award for greater participant confidence in the system.[93] Further, the Sri Krishna Committee Report also recommends the creation of standing committee within the purview of the APCI to review the developments in arbitration law.[94] This committee shall maintain a depository of awards challenged in courts for research purposes.[95] This could also be a significant database for future empirical studies.

While information regarding arbitral proceedings is very limited, data on other aspects including the role of courts in arbitration can be accessed much easier. The courts' role in the conduct of arbitral proceedings, for instance in applications for interim relief, setting aside or enforcement of the award, is a matter of immense interest to arbitration practitioners worldwide. Any empirical survey on these aspects would be very well received by the international arbitration community.

Commentators have also criticised the lack of transparency in investment arbitration, mentioning for instance, lack of publication of information related to claims of information regarding stakeholder consultations in the reform process.[96] While India is not a signatory to the United

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88 Esmé Shirlow, *Dawn of a new era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration*, 31(3) ICSID REV. - FOR. INV. L. J. 622,628-629 (2016).

89 *Id.* at 637-638.

90 For more details, *see* in this Issue, Jones, *supra* note 41, at 27.

91 *Id.*

92 *See* Poorooye & Feehily, *supra* note 19, at 315-316. Poorooye & Feehily discuss this opt out requirement in the context of the application of the UNCITRAL Transparency Rules to international commercial arbitration.

93 *Id.* at 316.

94 Sri Krishna Committee, *supra* note 80, at 79.

95 *Id.*

96 Prabhash Ranjan, *As India's New Bilateral Investment Strategy Sputters out, the Secrecy and Opaqueness Must Go*, THE WIRE (May 1, 2017), *available at* https://thewire.in/130524/bits-investment-strategy-failure/. Here transparency concerns in recent BIT practice were classified into three, "*first the lack of transparency related to BIT termination; second, the lack of transparency associated with BIT claims brought against India; third, the lack of transparency in the handling of the Model BIT and related developments.*".

Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention), the 2016 Model BIT contains extensive procedural transparency obligations, *inter alia* requiring the publication of notice of dispute, submissions and order/award (subject to the protection of confidential information).[97] These provisions, if retained in future Indian BITs, can significantly increase the amount of information on investment disputes and thus greatly benefit empirical research in the field.

Therefore, while the information presently available is limited and asymmetric, the recent developments discussed above indicate that more information could be available in the future, in more uniform formats.

C. Promoting Empiricism through discourse

A clarity regarding what issues need empirical research can be obtained through international arbitration conferences and seminars. As Epstein and King put it, research is a social enterprise and the researcher is best served to work on areas which are of active interest to the community.[98] Cities in India now increasingly play host to international arbitration conferences. These events can be used as platforms to disseminate existing empirical work and can also allow experts to identify areas particularly suited to empirical research. For instance, at the first Conference organised by the Indian Journal of Arbitration Law (IJAL) and the Centre for Advanced Research and Training in Arbitration Law (CARTAL) on International Arbitration in 2016, in the context of a discussion of transparency in international arbitration, Mr. Rishabh Gupta briefly explained a unique database he helped create to identify the world's most influential arbitrator.[99] Diversity and inclusiveness in international arbitration were also prominent themes in the second edition of the CARTAL Conference in 2017, where several current issues were introduced and debated upon, within the overall theme of arbitration in the Asian age. Since arbitration conferences in India increasingly see prominent experts from around the world, they are excellent forums to identify issues to be addressed both doctrinally and empirically. The Barcelona Convention of 2003 was an instance where the specific agenda of the convention was identifying issues and areas for future empirical research in international arbitration.[100] Since all issues need not be equally suited to empiricism, these discussions can help researchers suitably channel their energies to best benefit the arbitration community and address gaps in existing information.

D. Empiricism in Policymaking

The role of empiricism in legislative reform too is limited. Among the recent developments in arbitral policymaking, neither the Arbitration and Conciliation (Amendment) Act, 2015 ["**Amendment Act**"], nor India's Model Text for the Indian Bilateral Investment Treaty ["**2016 Model BIT**"] was preceded by broad-based empirical surveys or tested empirically on their effectiveness to meet their intended goals.

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97 2016 Model BIT, arts. 22.1 & 22.3.

98 Epstein & King, *supra* note 1, at 45, 48, 55-56.

99 For details of this study, *see Who is the most influential arbitrator in the world?*, GAR NEWS (Jan. 14, 2016), *available at* http://www.allenovery.com/SiteCollectionDocuments/Who_is_the_most_influential_arbitrator_in_the_world_.pdf.

100 Howard S. Bellman, *Barcelona Symposium on International Commercial Arbitration*, 20(1) J. INT'L ARB. 3 (2003).

The lack of empiricism in policy-making is especially of concern in investment arbitration. For most of the history of bilateral investment treaties ["**BITs**"], there was no established empirical link between signing of BITs and increase in investment.[101] Therefore India's entry into the BIT regime to attract foreign investment was largely influenced by global wave of BITs at the time rather than empirical research of the effects of such treaties on investment.

Over these two decades, there have been changes in India's position vis-à-vis foreign investment in that India is now also a significant exporter of investment.[102] Further, a few empirical studies specific to India, show a positive correlation between signing of BITs and FDI inflows.[103] However, while the 2016 Model BIT is more comprehensive when compared to its predecessor, it too is more influenced by the prevailing global thought than scientific data particular to the Indian context. The 2016 Model BIT was largely prompted by the developments that arose out of the loss in the *White Industries* case.[104] Though the current global trend favours a conservative approach to BITs, (India specific) empirical studies on the effect of BITs and the costs and benefits of conservatively defined investment protections would have helped accurately assess the extent of changes required. Critics point out that the 2016 Model BIT is more pro-State than it needs to be, considering India's interests in attracting more investment and its need to protect its outward investment.[105] Broad-based empirical studies (when used keeping in mind their inherent limitations) would aid the policymakers avoid overcorrections and tailor investment policy to best adapt to its competing interests. It is to be noted that no reform or policymaking should exclusively be based on empiricism.[106] Instead, empirical methodology should be used in conjunction with other research methods for well informed and targeted reform.

However, this is not to state that there was no stakeholder consultation preceding these policy changes. In case of the Amendment Act, the Ministry of Law and Justice and later the Law Commission undertook extensive consultations with stakeholders *inter alia*, by publishing a consultation paper, inviting comments from industry experts and holding conferences and seminars on the subject.[107] A limited form of stakeholder consultation was also seen in the drafting of the 2016 Model BIT. The Draft Model BIT of 2015 was finalised after two years of inter-ministerial consultations.[108] Thereafter, it was put open for public consultation and concurrently assessed by the Law Commission (which also undertook multiple stakeholder consultations).[109]

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101 Yackee, *supra* note 75, at 459.

102 Prabhash Ranjan & Pushkar Anand, *The 2016 Indian Model Bilateral Investment Treaty: A Critical Deconstruction*, 38 NW J. INT'L L. & BUS. 52 (2018).

103 Niti Bhasin & Rinku Manocha, *Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India*, 41(4) VIKALPA: J. DECISION MAKERS 275 (2016); Luke Nottage & Jaivir Singh, *Does ISDS Promote FDI? Asia-Pacific Insights from and for Australia and India*, ASIA PACIFIC FORUM FOR INTERNATIONAL ARBITRATION (AFIA) (Nov. 17, 2016), *available at* http://afia.asia/2016/11/does-isds-promote-fdi-asia-pacific-insights-from-and-for-australia-and-india/ *cited in* Ranjan & Anand, *supra* note 102, at 52.

104 Sri Krishna Committee, *supra* note 80, at 100.

105 Ranjan & Anand, *supra* note 102, at 53.

106 *See* Van Harten, *supra* note 62, at 233.

107 Law Commission of India, *Report No. 246 Amendments to the Arbitration and Conciliation Act 1996*, 6, 7 (2014), *available at* http://lawcommissionofindia.nic.in/reports/report246.pdf.

108 Sri Krishna Committee, *supra* note 80, at 100.

109 *Id.*

Conferences and other forms of stakeholder consultations, popular in arbitral reform in India, are useful in assessing policy instruments and identifying general areas of reform. However, structured empirical studies (qualitative or quantitative) can provide more nuanced information, allow broader participation and facilitate the collection of results that can be replicated by future researchers.[110]

Recently however, stakeholder participation in policy making was made more systematic by the Sri Krishna Committee.[111] To augment the process of stakeholder consultation, and taking into account the limited availability of information on the working of arbitral institutions in India, the Committee circulated two questionnaires among the stakeholders. The first was sent to arbitral institutions and the second to other stakeholders, comprising parties, lawyers, in-house counsel and arbitrators.[112] Both questionnaires have been annexed as part of the Committee's report. Questionnaires were sent to both institutions and practitioners and the responses taken into account in the deliberations of the Committee.[113] The results of these surveys are presented in the report of the Committee.[114] This is a significant step for systematised stakeholder participation. However, as acknowledged by the report,[115] the small number of responses impedes the ability to draw reliable inferences. Additionally, greater clarity on methodology is desirable to aid replication in future reform (for instance, presentation of responses in percentage terms would help assess the value of the responses).

IV. Conclusion

As an important player in both international commercial and investment arbitration, the Indian arbitral community could benefit well from a culture more conducive to empirical methodology. At the least, an understanding of empiricism would help scholars more efficiently evaluate existing research and use it in their own. At best, empirical methods can be used to study the effectiveness of normative policies. Recent developments indicate that arbitral policymaking is becoming more attuned to changing global trends. Systematic stakeholder consultation is also acquiring greater prominence. As India continues to combat its traditional 'arbitration unfriendly' tag, empirical research will be exceedingly useful in evaluating existing strategies and identifying new areas for reform. In investment arbitration, empirical surveys can be used to tailor reform to achieve the correct balance between the competing goals of protection of outward investment, limitation of State liability and promotion of inward investment.

Sole reliance on empirical research in policy-making would be unwise, given the limitations inherent in empirical methods. The keywords are therefore effective engagement with empirical

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110 For instance, after the end of the time period for consultations for the Draft Model BIT 2015, 185 comments were received on the website. Of these, many were vague or non-related opinions. Out of the targeted suggestions received, very few addressed many or all provisions of the Draft Model BIT. The commentators were not representative and insufficient data was obtained to draw descriptive inferences on any point of reform. A survey, on the other hand, would allow for the collection of more structured responses from a more representative set. For the comments made, *see Draft Indian Model Bilateral Investment Treaty Text*, MYGOV, *available at* https://www.mygov.in/group-issue/draft-indian-model-bilateral-investment-treaty-text/.

111 *See* Sri Krishna Committee, *supra* note 80.

112 *Id.* at 9. The consultation process is described in detail in Chapter IV of the report.

113 *Id.* at 8, 9, 22-32.

114 *Id.* at 22-32.

115 *Id.* at 22.

methods, in conjunction with normative and doctrinal research for a more comprehensive assessment of the state of play and responsive policy-making.