

# The Diversity Deficit in International Investment Arbitration

*Andrea K.  
Bjorklund*

*Won Kidane*

*Daniel Behn*

*Arnaud de  
Nanteuil*

*Susan Franck*

*Emilia Onyema*

*Chiara Giorgetti*

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# The Diversity Deficit in International Investment Arbitration

*Andrea K. Bjorklund*  
McGill University Faculty of Law  
andrea.bjorklund@mcgill.ca

*Daniel Behn*  
Queen Marys University  
d.behn@qmul.ac.uk

*Susan Franck*  
Washington College of Law  
sfranck@wcl.american.edu

*Chiara Giorgetti*  
University of Richmond School of Law  
cgiorget@richmond.edu

*Won Kidane*  
Seattle University School of Law  
kidanew@seattleu.edu

*Arnaud de Nanteuil*  
University of Paris Est Créteil (Paris 12)  
arnaud.de-nanteuil@u-pec.fr

*Emilia Onyema*  
SOAS University of London  
eo3@soas.ac.uk

## Abstract

The work of UNCITRAL Working Group III considers issues of adjudicator diversity to be an area of concern for the legitimacy of the ISDS system. Studies show that nearly all of the most prominent and repeatedly appointed arbitrators in ISDS cases are men from the Global North with significant prior experience in ISDS cases. Looking at these attributes of gender, geography, and experiences, critics claim this lack of diversity has implications not only for the quality and rigor of the decisions rendered but also for the way in which decisions are perceived. Rather than being seen as fair, just, and devoid of bias, they are sometimes suspected to be the products of adjudicators who share a particular world view. This article focuses first on four key issues surrounding diversity: (1) how a lack of decision-maker diversity affects the real and perceived legitimacy of the ISDS system; (2) empirical evidence on the current extent of the diversity problem in ISDS; (3) the causes for the perpetuation of the diversity deficit in ISDS; and (4) what can be done to improve diversity in ISDS. The article then evaluates how diversity will be affected by the various

reform options currently under consideration by UNCITRAL Working Group III. Conclusions are that a variety of structural barriers perpetuate the lack of diversity under the current ISDS system and it is not clear whether any of the reform options will ensure a diverse, inclusive, and representative set of adjudicators.

## **Keywords**

Arbitrator Selection – Arbitrator Appointment – Diversity – Gender – Investment Arbitration Reform – Legitimacy and ISDS – Nationality – UNCITRAL Working Group III

## **1. Introduction\***

The lack of diversity among adjudicators is particularly notable in investment arbitration; according to a recent study, only two of the 25 most influential arbitrators are women, 22 are from either North America or Europe (of the other three one is from New Zealand, one was from Chile, and the third is from Costa Rica).<sup>1</sup> These are only two measures of diversity of course, and one of the challenges is to broaden our understanding of what it would mean to have a truly diverse and inclusive set of adjudicators resolving investor-state dispute settlement (ISDS) cases. The work of UNCITRAL Working Group III on ISDS Reform has consistently considered issues of adjudicator diversity central to any reform effort. According to early reports of the Working Group, “the lack of diversity was said to be exemplified by a concentration of arbitrators from a certain region, a limited age group, one gender and limited ethnicity”;<sup>2</sup> “there was general support for diversifying and expanding the pool of arbitrators qualified to serve as arbitrators in ISDS cases”;<sup>3</sup> and “the view was generally shared that the current lack of diversity in decision makers in the field of ISDS contributed to undermine the legitimacy of the ISDS regime.”<sup>4</sup>

Given the current efforts of UNCITRAL Working Group III, we will focus this paper on adjudicator diversity, and more particularly on the lack of diversity, among arbitrators selected to

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<sup>1</sup> Malcolm Langford, Daniel Behn & Runer Hilleren Lie, ‘The Revolving Door in International Investment Arbitration’ (2017) 20 *Journal of International Economic Law* 301, 313.

<sup>2</sup> Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018), A/CN.9/935, para. 70.

<sup>3</sup> *Ibid*, para. 72

<sup>4</sup> Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), A/CN.9/964, para. 92.

hear ISDS disputes. We will attempt to be both critically analytical about the current ISDS system, as well as constructive in mapping avenues that could enhance adjudicator diversity and inclusivity in both current and possible future systems for resolving foreign investment disputes.

It is commonly accepted that decision-making bodies should be inclusive and that decision-makers should represent the diverse constituencies of the stakeholders subject to their decisions. This feature serves multiple purposes. Social science literature shows that diverse decisionmakers are more likely to avoid cognitive biases and group-think in decision making;<sup>5</sup> moreover one or more decision-makers might have the cultural knowledge to understand the dispute in context.<sup>6</sup> Diversity among decision-makers may improve the quality and rigor of the decisions they render, and in doing so effect or enhance the normative legitimacy of a particular system. Further, diverse decision-makers are likely to be perceived as capable of producing fairer decisions, which is likely to enhance the sociological legitimacy of a particular system. Adjudicative systems with decision-makers that are diverse, inclusive, and representative are more likely to be perceived as legitimate, their decisions are more likely to be complied with, and they are more democratically accountable. However, and despite the importance of perceived legitimacy, it should also be noted that symbolic diversity alone is insufficient to make a system legitimate or even to be perceived as legitimate – genuine inclusiveness requires that all decision-makers have equal opportunity to shape the outcome of a case.

In this paper, we will approach adjudicative diversity in five parts; while there will be some overlap, the sections are as follows: (1) a definitional, descriptive, and empirical analysis of the diversity deficit in the current ISDS system; (2) an identification and assessment of the impact of the diversity deficit on both legitimacy and quality of justice in the current ISDS system; (3) a description of the features under the current ISDS system that perpetuate a diversity deficit; (4) a proposal for increasing diversity and inclusiveness in both current and future ISDS systems, whether they be arbitration or court-based; and (5) an examination of the diversity and inclusiveness implications of four proposed ISDS reform scenarios.

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<sup>5</sup> Won Kidane, *The Culture of International Arbitration* (Oxford 2017) 145 & fn. 81 (collecting sources); 288-89.

<sup>6</sup> *Ibid.* 145-47.

## 2. Defining diversity and mapping the extent of the diversity deficit

Diversity can be conceptualized around multiple factors and categorized according to different types. The Secretariat at UNCITRAL appears to define diversity primarily as geographic representativeness with some discussion of gender diversity.<sup>7</sup> Given the international character of the ISDS reform process, it is unsurprising that the focus is on geographic diversity; above we mentioned gender and regional representation as two features to consider when discussing diversity in the context of ISDS. It should be noted that regional or geographic representativeness in particular needs to be disaggregated as it: (1) is often a proxy for multiple considerations, such as presumed political ideological alignment, educational and other formative experience, and experience with and expectations of governmental authority; and (2) is overly broad, as it presumes that people within a region share the same experience whereas the regions into which people are often placed can be quite diverse.<sup>8</sup>

For example, Africa is full of wide variations, as are Asia and Latin America. An arbitrator from Nigeria, while African, is nonetheless very different from an arbitrator from South Africa, or Tanzania, or Egypt. Moreover, there are important differences in legal culture in Africa. One relic of colonization is that some states have adopted a civil law system (such as, inter alia, former French colonies like Senegal and Ivory Coast), while others are closer to common law systems (such as, inter alia, former British colonies like Ghana or Tanzania). Europe, too, is not monolithic. Differences in character between, for example, the culture of French and British arbitrators can be profound, as are the differences in their respective legal systems.

People are multifaceted – and their unique attributes, especially in regard to differences in decision-making, cannot always be reduced to simple categories such as geographic region. Thus

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<sup>7</sup> For example, in regarding to a possible standing court, the Secretariat states: “ensuring that an adjudicative body reflects broad geographical representation appears to be an important concern for many States when setting up a standing mechanism. This is shown in several existing statutes of international courts that refer to ‘equitable geographical representation’ or ‘distribution’ for the selection of adjudicators. Issues for consideration would include whether a standing adjudicative body should achieve a balance of representation between developed, developing and least developed countries, as well as between capital exporting and capital-importing countries.” Possible reform of investor-State dispute settlement (ISDS) Selection and appointment of ISDS tribunal members, Note by the Secretariat, A/CN.9/WG.III/WP.169, para. 47.

<sup>8</sup> “Nationality, however, is simply a poor indicator of political, ideological, or any other kind of bias.” Kidane (n 5), p. 144.

nationality, ethnicity, race, educational attainment and experience, legal training (common and/or civil law expertise, Islamic law expertise, etc.), age, work experience (government, private sector, or both of these), social and economic class, development status of the arbitrator's home state, repeat appointments by either investors or host states, religion, disability, and language proficiency are other factors that can be used to signal and define diversity and inclusivity in adjudicative decision-making.<sup>9</sup>

An increasing number of scholars are doing empirical research on investment arbitration. In this paper, we draw from their work to fill in some details about diversity, while noting that not all of the factors identified above have been analyzed equally and we are therefore limited in what we can assess on those fronts. Moreover, some factors, while important to an overall conceptualization of what constitutes diversity, are less salient for the particular concerns that have been raised about ISDS arbitrators. Overall, the data summarized below, along with other findings, inform our understanding of the diversity conundrum. They also help us to assess what other kind of data would be helpful to gather to analyze further diversity problems.

The lack of gender diversity is one of the most notable features of investment arbitration. Studies in the early 2000s found that between 3% and 7% of arbitrators in ICSID cases were female.<sup>10</sup> A more recent study (including a sample period up to 2017) covering arbitrators in ICSID as well as non-ICSID cases found that 11% of arbitrators were female.<sup>11</sup> Yet two women – Kaufmann-Kohler and Stern – account for 57% of all appointments given to female arbitrators.<sup>12</sup> If one looks at those women who have been the most active, the top 25 women arbitrators have all arbitrated more than

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<sup>9</sup> Personality, too, can make a difference. See Susan Cain, *Quiet: The Power of Introverts in a World That Can't Stop Talking* (Crown 2012).

<sup>10</sup> Susan D. Franck, 'Empirically Evaluating Claims about Investment Treaty Arbitration' (2007) 86 North Carolina Law Review 1 measured 3% in 2006; Lucy Greenwood and C. Mark Baker, 'Getting a Better Balance on International Arbitration Tribunals' (2012) 28 Arbitration International 653 found 5.63% in 2012; Gus Van Harten, 'The (Lack of) Women Arbitrators in Investment Treaty Arbitration' (2012) 59 Columbia FDI Perspectives measured 4% in 2012; Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25(2) EJIL 387 found nearly 7% in 2014; Lucy Greenwood and C. Mark Baker, 'Is the Balance Getting Better? An Update on the Issue of Gender Diversity' (2015) 31 Arbitration International 413 found 5.61% 2014, and Michael Waibel and Yanhui Wu, 'Are Arbitrators Political? Evidence from International Investment Arbitration' (2017) Working Paper 2017 found less than 10% in 2017.

<sup>11</sup> Taylor St. John, Daniel Behn, Malcolm Langford, and Runer Lie, 'Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration' (2018) PluriCourts Working Paper.

<sup>12</sup> Daniel Behn, Malcolm Langford and Laura Létourneau-Tremblay, 'Empirical Perspectives on Investment Arbitration: What do We Know? Does it Matter?' (2020) 22 Journal of World Investment and Trade, \*-\*.

one case and they account for 86% of all female appointments.<sup>13</sup> The lack of gender diversity continues to be remarkable; while there have been more women in recent years coming into the system, the overall numbers remain very low.

Similarly, investment arbitration is demonstrably not geographically diverse. It is dominated by arbitrators from Western states. Through August 2018, only 35% of the 695 individual arbitrators who have sat in at least one ISDS case were from non-Western states (non-Western as defined by the United Nations).<sup>14</sup> Half of non-Western arbitrators are from Latin America and the Caribbean. Only 2% of arbitrators are from Sub-Saharan Africa.<sup>15</sup> Non-Western arbitrators are predominantly appointed by respondent states or as institutional appointments.<sup>16</sup> These numbers might be a bit misleading, however, in that most international arbitrators (and particularly investment arbitrators) have elite educational backgrounds. One study looked at presiding arbitrators and found that 90% of them received their higher education in OECD countries.<sup>17</sup> In other words, even arbitrators from the Global South have likely spent a significant amount of time in the Global North.

Gender and geography have been the two diversity factors receiving the most attention; while this attention is attributable to their relevance in the context of ISDS cases, it is also the case that these are the factors on which there is the most data. It may be important, however, to consider other factors for diversity as well; future research might want to diversify itself and broaden the scope beyond gender and geography. For example, in one study focusing on surveys of both commercial and international arbitrators, Franck and her co-authors mapped diversity according to six factors: gender, nationality, age, linguistic capacity, legal training, and professional experiences.<sup>18</sup> Assessing the 262 international arbitrators who participated (of which 67 were investment

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<sup>13</sup> Ibid.

<sup>14</sup> Daniel Behn, Malcolm Langford & Maksim Usynin, 'Does Nationality Matter? Arbitrator Background and Arbitral Outcomes' in Daniel Behn, Ole Kristian Fauchald and Malcolm Langford (eds), *The Legitimacy of Investment Arbitration: Empirical Perspectives* (Cambridge University Press, forthcoming 2020).

<sup>15</sup> Won Kidane, (n 5) 134-35.

<sup>16</sup> Behn, Langford and Létourneau-Tremblay (n 12), p. 37.

<sup>17</sup> Waibel and Wu (n 10), p. 15.

<sup>18</sup> Susan D. Franck et al, 'The Diversity Challenge: Exploring the 'Invisible College' of International Arbitration' (2015) 53 Colum J Transnatl L 429 (dataset: 413 subjects who served as counsel and 262 who acted as arbitrators, including 67 investment treaty arbitrators).

arbitrators), they concluded that the “median international arbitrator was a fifty-three year-old man who was a national of a developed state and had served as arbitrator in ten arbitration cases.”<sup>19</sup>

While different characteristics are frequently taken in isolation, they also intersect. Cultural diversity encompasses many of the factors set forth above. Looking at any one of these dimensions in isolation is overly simplistic. People who belong to more than one group that is historically disadvantaged face different struggles from those who are categorized in only one group.<sup>20</sup> For example, of a total of 951 appointments that were made to constitute ICSID tribunals from 2012 to 2017, only three were female, non-white, and from a developing state.<sup>21</sup>

One of the key findings by the PluriCourts team is not just who is receiving appointments, but who is receiving *re*-appointments. More than 700 arbitrators have been appointed in ISDS cases, yet the same arbitrators tend to be re-appointed multiple times, while many are never re-appointed. Recent descriptive statistics taken from the PluriCourts Investment Treaty Arbitration Database (PITAD) show that of the 716 arbitrators who have sat in at least one ISDS case, 377 arbitrators have received only one appointment. Thus, most never ‘enter’ the field in a significant way. Out of the 3519 appointments known to have been made, single-appointment arbitrators represent approximately 10% of all appointments. This is in stark contrast to the 50 arbitrators who have received the most appointments in investment arbitration cases. This group of 50 arbitrators accounts for 1710 appointments, which is nearly 50% of all the appointments on offer to date.<sup>22</sup>

One can thus immediately see that this system of party-appointed adjudicators is dominated by parties that are choosing arbitrators who have prior experience. This focus on prior experience necessarily limits the ability of new entrants to come in to the system each year. Currently, about 10% (about 25 individuals) of appointments annually go to first-time ISDS arbitrators.<sup>23</sup> This low percentage of new entrants also has an effect on the type of individuals receiving the vast majority of appointments. Arbitrators with the most experience began arbitrating investment disputes in the

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<sup>19</sup> Ibid, 466.

<sup>20</sup> See Joshua Karton and Ksenia Polonskaya, ‘True Diversity is Intersectional: Escaping the One-Dimensional Discourse on Arbitrator Diversity’, (10 July 2018) *Kluwer Arbitration Blog*; Ksenia Polonskaya, ‘Diversity in the Investor-State Arbitration: Intersectionality Must Be Part of the Conversation’ (2018) 9 *Melbourne J Intl L* 259

<sup>21</sup> Karton and Polonskaya (n. 20).

<sup>22</sup> PITAD, [www.pitad.org](http://www.pitad.org) (data on appointments up through 1 January 2019).

<sup>23</sup> St. John et al. (n 11).



1990s and early 2000s. At that time, there was little public exposure in investment arbitration and the appointments tended to go to a relatively un-diverse group: white men from North America and Europe. This historical and structural problem has resulted in a system that reinforces its un-diverse origins. This problem is difficult to correct in the short term.

### **3. Diversity (or lack thereof) and its effect on legitimacy and quality of justice**

This section delves more deeply into the benefits of diversity and inclusiveness among decision-makers, as already briefly discussed in the introduction. The legitimacy concerns levelled against investment arbitration are primarily normative and sociological.<sup>24</sup> The normative critique focuses on whether arbitral tribunals are justified in exercising the authority they do. The sociological critique focuses on *perceptions* about the exercise of that authority.

To be sure there is overlap between these two types of legitimacy, which often provide mutually reinforcing feedback loops: a sound normative justification is likely to improve perceptions about the exercise of sociologically legitimate authority, while strong perceptions about the legitimacy of a system may improve how well authority is exercised, reinforcing the system's normative legitimacy.<sup>25</sup>

Grossman has suggested three criteria by which to judge the sociological (perceived) legitimacy of international tribunals: (1) there must be a perception that a tribunal is fair and unbiased; (2) there must be an identifiable commitment to the underlying normative regime, which will be affected by the quality of the decisions made about the norms in addition to the norms themselves;

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<sup>24</sup> We exclude 'legal' legitimacy because the ICSID Convention and bilateral investment treaties are unquestionably in place. Even though some have questioned the knowledge with which developing countries signed investment treaties, especially in the 1980s and 1990s prior to the increase in the number of investment arbitrations, no credible allegations of duress to invalidate treaties have been raised. See Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969), art 52 (Coercion of a State by the threat of use of force) "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." Individual cases could raise legal legitimacy concerns, such as whether the provisional application of the Energy Charter treaty should be viewed as binding Russia to arbitrate disputes under the treaty. See e.g. *Yukos Universal Ltd. v. Russian Federation*, PCA Case No. AA 227, Interim Award on Jurisdiction and Admissibility, 30 Nov. 2009, pp. 88-147; *Russian Federation v. Yukos Universal Ltd.*, C/09/477162/ HA ZA 15-2, Hague District Court, 20 April 2016, paras. 5.6-5.96.

<sup>25</sup> For a discussion of legitimacy factors, see Andrea K. Bjorklund, 'The Legitimacy of ICSID', in Nienke Grossman et al. (eds), *Legitimacy of International Courts* (Cambridge 2018).

and (3) there must be some commitment to transparency and other democratic institutional norms.<sup>26</sup> Assessing the diversity deficit in relationship to these factors sheds light on some of the reasons a lack of diversity is problematic. It also suggests a possible venue for future research, where one might consider whether supplementing the data on diversity with interviews of users of the ISDS system in order to deepen our understanding of how the lack of diversity and inclusiveness among adjudicators affects stakeholder views about investment arbitration.

### ***3.1 Perceptions of fairness and impartiality***

The first criterion – perceptions about fairness and bias – is the one most evidently weakened by a lack of diversity and inclusiveness in the pool of ISDS arbitrators. There has been a great deal of concern that ISDS tribunals are biased against developing states, and even though some empirical work casts doubt on those perceptions, or at least shows that the perceptions are not very nuanced,<sup>27</sup> they nonetheless persist and are exacerbated by the extent to which arbitrators are perceived as outsiders. While it is hard to measure the extent to which *actual* bias exists in the system, a recent diversity-related study might be viewed as confirming some bias. According to the study, if an ISDS case has a presiding arbitrator from a developing state and the respondent state is also a developing state, the parties are less likely to seek annulment in ICSID cases.<sup>28</sup> In other words, if the initial ISDS tribunal has a presiding arbitrator who is from a developing country, the decision is more likely to be accepted by both investors and host states.

In the context of international commercial arbitration, Kaufmann-Kohler has stated, “[w]e cannot claim that arbitration is the global dispute resolution method unless actors from all regions can participate.”<sup>29</sup> We do not know, with specificity, what difference in outcome there would be if

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<sup>26</sup> Nienke Grossman, “Legitimacy and international adjudicative bodies” (2009) 41 *The George Washington International Law Review* 107, 121-122.

<sup>27</sup> See e.g. Susan D. Franck, “Development and Outcomes of Investment Treaty Arbitration” (2009) 50 *Harvard Journal of International Law* 435, 459-464; Daniel Behn, Tarald Laudal Berge & Malcolm Langford, “Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration” (2017) 38(3) *Northwestern Journal of Law and Business* 333.

<sup>28</sup> Anton Strezhnev & Sergio Puig, “Diversity and Compliance in Investment Arbitration: Future Directions in Empirical Research on Investment Law and Arbitration” (2019) LEGINVEST Conference Working Paper.

<sup>29</sup> Gabrielle Kaufmann-Kohler, (December 2018) ICCA Newsletter,

there were more diverse arbitrators.<sup>30</sup> But we also do not know there would be no difference. A further consideration is the need to be wary of attributing a likely bias or leaning on the basis of one-dimensional factors – presumptions about particular characteristics can lead to unwarranted presumptions about who people are and what they are likely to think. Perception, however, remains nearly as important as reality.

### ***3.2 Commitment to the underlying normative regime***

The second criterion for assessing sociological legitimacy is that there must be some commitment to the underlying normative regime. Here, investment arbitration may show a commitment to a normative regime, but that underlying regime is itself criticized. The rules and norms in the field of international investment law have been challenged for their neo-colonial roots and their perpetuation of the values of the Global North to the exclusion of others. While perhaps less clearly linked to the existence of a non-diverse group of decision-makers, if the norms themselves are perceived as one-sided and imposed by a dominant culture, and if the primary interpreters of those norms in ISDS cases are decision-makers from that same culture, the feelings of exclusion in those who are not part of the dominant group are likely to be exacerbated.<sup>31</sup>

Normative critics base their appraisal on the historical genesis of modern substantive investment norms. As the European Commission categorically stated in its 2015 Concept Paper on international investment law, “[i]nternational investment rules were invented in Europe.”<sup>32</sup> Vattel’s advocacy of the superior treatment of foreign capital<sup>33</sup> and the Calvo doctrine’s opposition to it<sup>34</sup> are matters of historical record. As Miles documents, however, the European nations’

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<sup>30</sup> For an insightful analysis of the difficulties of maximizing the benefits of adjudication, see Jeffrey L. Dunoff & Mark A. Pollock, ‘The Judicial Trilemma’, (2017) 111 *American Journal of International Law* 225.

<sup>31</sup> Kidane (n 2).

<sup>32</sup> European Commission, Concept Paper, ‘Investment in TTIP and Beyond – the Path for Reform’1, <[http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.pdf](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.pdf)>

<sup>33</sup> See Muthucumaraswamy Sornarajah, *The International law on Foreign Investment* (Oxford 3d 2010) 19 (analyzing Emer de Vattel’s work in the Law of Nations).

<sup>34</sup> Andreas F. Lowenfeld, *International Economic Law* (Oxford, 2d edition, 2008) 473 n. 13 (quoting Donald R. Shea, *The Calvo Clause* (U. of Minnesota Press 1955) 17-19 (discussing the idea that “[f]oreigners merit more regard and privileges more marked and extended than those accorded even to the nationals of the country where they reside. The principle is intrinsically contrary to the law of equality of nations.”). See Joost Pauwelyn, “Rational Design or Accidental Evolution? The Emergence of International Investment Law” in Zachary Douglas, Joost Pauwelyn & Jorge E. Viñuales (eds), *The Foundations of International Investment Law: Bringing Theory Into Practice* (Oxford 2014)

“process of applying these [original Eurocentric] standards to non-European states[, which] became inextricably linked with colonialism, oppressive protection of commercial interests, and military intervention,”<sup>35</sup> moved the norms from “a base of reciprocity, to one of imposition.”<sup>36</sup> By Sornarajah’s reckoning:

[i]n the eighteenth and nineteenth centuries, investment was largely made in the context of colonial expansion. Such investment did not need protection as the colonial legal systems were integrated with those of the imperial powers and the imperial system gave sufficient protection for the investments, which went into the colonies. In this context, the need for an international law on foreign investment was minimal. Within the imperial system, the protection of investment flowing from imperial state was ensured by the imperial parliament and the imperial courts.<sup>37</sup>

According to the historical appraisal of the normative evolution acute relevance for the indeterminacy and fragmentation of contemporary international investment law, Salacuse argues that “[g]iven the asymmetric nature of bilateral negotiations between a strong, developed country, and a usually much weaker developing country, the bilateral setting allows the developed country to use its power more effectively than does a multilateral setting, where the power may be much diluted.”<sup>38</sup>

The normative critics thus suggest that perhaps the fragmentation and indeterminacy<sup>39</sup> of the existing substantive norms are not entirely unintended inasmuch as the interpretation kept is that

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21, who attempts to offer a more balanced account: “[h]ost states abused their territorial power against aliens, discriminating, expropriating, or expelling them. Home states even more so, used their power to expand their territory, through conquest or colonialism, imposing their laws and courts for the benefit of nationals abroad (e.g. the British capitulation regime in China) and protected those nationals and their assets by use or threat of force including invasions, gunboat attacks, and blockade.

<sup>35</sup> Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge 2013) 21.

<sup>36</sup> *Ibid.*

<sup>37</sup> Sornarajah (n 26) 19-20.

<sup>38</sup> Jeswald W. Salacuse, “The Emerging Global Regime for Investment” (2010) 51 *Harvard International Law Journal* 427, 464.

<sup>39</sup> “Fair and equitable treatment is the clearest example of how vaguely the standard clauses in international investment treaties are formulated. It is characterized by a lack of clarity concerning not only of its scope, but its underlying normative concept.” Stephan W. Schill, “General Principles of Law and International Investment Law” in Tarcisio Gazzini & Eric De Brabandere (eds), *International Investment Law: The Sources of Rights and Obligations* (Brill 2012) 157-158.

of the ‘creditors.’<sup>40</sup> Arbitral tribunals composed wholly or predominantly of members from historically capital exporting nations sited in the capitals of those same nations thus sustain the narrative of foreign tribunals holding developing nations responsible for violations of uncertain foreign laws.

### ***3.3 Transparency and other democratic institutional norms***

The third criterion for assessing sociological legitimacy is related to transparency and other democratic norms against which the diversity deficit is sometimes assessed. First, the appointment process is often opaque. Knowledge about arbitrators is considered valuable, and is not readily available; ‘inside’ players are able to amass and compile information that is not available to all.<sup>41</sup> Second, if democratic institutional norms are construed as encompassing adjudicatory bodies that broadly reflect society, then ISDS would fall short (as would many municipal judiciaries, incidentally).<sup>42</sup>

## **4. Features contributing to a lack of diversity and inclusiveness**

We now turn to some of the features of the current ISDS system that contribute to the perpetuation of a diversity deficit among ISDS adjudicators. Primarily we focus on gender diversity in this section, but mechanisms preventing an increase in gender diversity are often similar to those preventing more variation with regard to nationality or geographic distribution. Most features limiting diversification are structural and relate both to the way in which the current ISDS system appoints adjudicators and the underlying reverence for party autonomy in arbitration. The importance of party autonomy, of which the ability to appoint one’s arbitrators is a key component,

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<sup>40</sup> The normative critique is not solely rhetorical. It has informed several practical policy decisions. A recent example is India’s renunciation of its BITs and revision of its domestic investment law. For a discussion of the particulars of the changes that India has made and its historical genesis and policy predicate, see generally, Won Kidane, “China and India’s Investment Treaty Approaches and Implications for Africa” (2018) 49 *Loyola of Chicago Law Journal* 406, 428-461.

<sup>41</sup> Catherine Rogers, ‘Arbitrator Intelligence: From Intuition to Data in Arbitrator Appointments’, (2018) 11(2) *New York Dispute Resolution Lawyer*; see also Arbitrator Intelligence <[www.arbitratorintelligence.org](http://www.arbitratorintelligence.org)>; Tom Ginsburg, “International substitutes for domestic institutions: Bilateral investment treaties and governance” (2005) 25(1) *International Review of Law and Economics*, 107-123

<sup>42</sup> Matthias Kumm, “On the Representativeness of Constitutional Courts: How to Strengthen the Legitimacy of Rights Adjudicating Courts without Undermining their Independence” in Christine Landfried (ed), *Judicial Power: How Constitutional Courts affect Political Transformations* (Cambridge University Press 2019), 281

not only reinforces and justifies the continuation of a system where experience almost always trumps other considerations, including diversity, but also makes more potentially diversity-friendly reform options (such as institutional appointment) more likely to be resisted by those continuing to prefer traditional arbitration due to their allegiance to party appointment.

In investment arbitration, the typical appointment process leads to reliance on trusted and known arbitrators who have significant experience. Moreover, the mechanics of the appointment process itself tend to perpetuate a lack of diversity. The process works like this: the claimant first selects its arbitrator. Usually, though not always, the claimant chooses someone well-known by reputation and name. The respondent then has the opportunity to choose its arbitrator. If the claimant has chosen a well-known, ‘big-name’ arbitrator, the respondent is very likely to respond in kind. If the claimant has chosen a less well-known arbitrator, the respondent will often see this as an opportunity to appoint an experienced ‘big name’ who is then going to be assumed to have more gravitas and influence within the tribunal than the less-experienced arbitrator on the other wing. The disputing parties or the arbitrators they have appointed usually then choose the presiding arbitrator. Typically, though not always, the parties will seek to appoint a presiding arbitrator with as much or more experience than the party-appointed arbitrators. In terms of ways for more diverse newcomers get appointed, it is clear that the system does not provide a wide-open door.

Moreover, because these appointments happen on a case-by-case basis, no one actor is tasked with working systemically to broaden the adjudicator pool. This is not surprising; the ad hoc nature of investment arbitration means that it is no one’s job (at least formally) to ‘fix’ the diversity deficit. Those in a better position to make an impact are the arbitral institutions administering ISDS disputes (such as ICSID, PCA, SCC, ICC, LCIA etc.), and it is no accident that all of the three non-white female arbitrators from developing countries mentioned above were appointed by ICSID. The good news is that ICSID makes about 40% of the arbitral appointments in ICSID-administered cases.<sup>43</sup> Most of these appointments are made in ICSID annulment committee cases, when the appointing authority is constrained to appoint from the ICSID roster (which does tend to have more geographic and gender diversity). However, the percentage of institutional appointments at other institutions is much smaller and, in any event, arbitration institutions are

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<sup>43</sup> ‘The ICSID Caseload – Statistics’ (Issue 2018-2), p. 20 (of 1453 total appointments, ICSID appointed 589).

also judged on the perceived quality their appointments, which puts pressure on institutions to be risk averse by avoiding untried and untested arbitrators. Overall, there does seem to be an indication that institutional appointments will be more diverse than party appointments, but it is not inevitably true.

For a dramatic example of the (gender and nationality) diversity effect that an institution can have, one only need look at appointments in ICSID annulment committees. In these cases, the ICSID secretariat makes all three appointments to the committee. Of the 124 ICSID annulment committees (372 appointments) that had been constituted through the end of 2018, non-Western<sup>44</sup> arbitrators accounted for 45% of all appointments (167 appointments) and female arbitrators accounted for 12% of all appointments (45 appointments).<sup>45</sup> Overall, at least in the context of ICSID annulment committees, institutional appointments are having a positive effect on these two types of diversity.

In contrast, if one were to look at all of the known investment arbitrations (not including ICSID annulment proceedings) through the end of 2018 (1149 cases representing 3147 known appointments), we find that the percentage of non-Western arbitrators was 25% of all appointments (780 appointments) and female arbitrators accounted for 10% of all appointments (322 appointments), recalling that approximately 55% of the appointments to women went to two of them – Kaufmann-Kohler and Stern.

Taking these two diversity indicators (non-Western and female) into account, we can also look to see if there is any difference in the parties appointing them. In Table 1 below, we find the number of female arbitrators and non-Western arbitrators by type of appointment. For both indicators, it is clear that more women and non-Western arbitrators are being appointed more frequently by respondent states. This is an interesting finding because, while the overall percentage of non-Western and female arbitrator appointments remains low, it does appear that there is a not only a difference between institutional and non-institutional (party) appointments (see the comparison

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<sup>44</sup> Non-Western is defined as all countries that are not North America, Western Europe or Australia/New Zealand. See Behn et al (n 14).

<sup>45</sup> PITAD, [www.pitad.org](http://www.pitad.org) (date on appointments up through 1 January 2019).

with ICSID annulments above), but also *between* the types of party appointments (claimant versus respondent appointees).

**Table 1. Non-western and female arbitral appointments in ISDS cases<sup>46</sup>**

<i>Indicator</i>	<i>Claimant</i>	<i>Resp</i>	<i>Chair</i>	<i>Annul</i>	<i>Total</i>
<i>Non-Western Arbitrators</i>	265	330	195	167	957/3327
<i>Female Arbitrators</i>	36	187	99	45	367/3327
<i>Total</i>	301/1002	587/995	294/973	212/352	

It is clear that disputing parties in ISDS cases want to appoint experienced arbitrators. This is understandable. Selecting an adjudicator to consider a complex dispute means placing a great deal of trust in that person – and the more the appointing party knows about an arbitrator the better.<sup>47</sup> Age-brought wisdom, demonstrated educational attainment, and expertise in specific legal areas or economic sectors are unsurprising reasons why experience predominates when parties appoint arbitrators.<sup>48</sup> Yet appointers’ perceptions and willingness to consider other options might be unnecessarily narrow – in other words, more people might have those skills than is readily recognized: numerous individuals may possess the skills attributed to those who have prior experience but who have not yet sat as an arbitrator in an ISDS case.<sup>49</sup> The hub of investment arbitration activity has been Europe and North America, and getting appointments requires being known by those who are doing the appointing – primarily counsel. Thus, people whose profiles are less visible in Europe and North America may have a harder time being appointed simply because they are unknown.

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<sup>46</sup> Behn et al (n 14).

<sup>47</sup> While experience is important, there are also some other factors which, when considered by appointing parties, then to exclude more diverse individuals. One factor of particular note is language. English is the lingua franca of investment arbitration, with only a limited number of ISDS cases being conducted in other languages. Lack of English acuity may thus impede appointments of arbitrators who lack that facility. Other factors limiting diversity and inclusion are economic, political, social, historical, and structural. Catherine Rogers, “The vocation of the international arbitrator” (2004) 20 Am. U. Int’l L. Rev 957

<sup>48</sup> Ibid.

<sup>49</sup> There are, of course, exceptions to this rule, and a number of parties (especially respondent states) have been willing to look outside the network of arbitrators with prior experience in ISDS. Two particular examples are the United States and Spain, where a larger percentage of new (and more diverse) new entrants has been selected.



One issue that arises out of the importance of the ‘prior experience’ norm in selecting arbitrators is that of path dependency. In other words, there is nothing in the appointments process that per se *requires* non-diverse appointments (or party appointments at all – one could envision exclusively institutional appointments). But we know that experience trumps diversity and so long as diversity is not prioritized (voluntarily or not), parties are not likely to select diverse arbitrators who do not have experience. This path dependency is exacerbated by a so-called ‘pipeline leak’ (especially in regard to gender diversity). A ‘pipeline leak’ is a commonly known phenomenon that operates everywhere, and the metaphor is often used to explain why women fail to achieve positions at the upper echelons of a particular profession. In the context of investment arbitration, the leak can be explained by the ‘prior experience’ norm that dominates the current ISDS system.

There is a leak in the pipeline in investment arbitration, A recent study by PluriCourts concluded that there is no shortage of women working in the field of investment arbitration. Rather, the problem is that very few women are becoming arbitrators.<sup>50</sup> According to the study, which maps all known actors involved in investment arbitration in different roles, the percentage of women receiving appointments in ISDS cases is low (approximately 11%) but the overall number of women working in investment arbitration (as either arbitrators, experts, counsel or tribunal secretaries) is significantly greater (approximately 30%).<sup>51</sup>

The question that arises is why so few women make the transition from legal counsel to arbitrator? Parties to disputes want to select arbitrators with known attributes. This is difficult to do without being able to assess an arbitrator’s previous track record. The result is that arbitrators are selected on the basis of their prior experience, and there were virtually no female arbitrators receiving appointments in the early days of the system (the late 1990s and early 2000s). Thus, there are very few women with known track records from whom to select: the exceptions are Kaufmann-Kohler and Stern, who both entered the system early.

The operation of the ‘prior experience’ norm means that the number of new entrants (both men and women) into the pool of existing arbitrators acting in ISDS cases is relatively low. As mentioned above, in the past five years, there were approximately 270 appointments to be filled in

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<sup>50</sup> St. John et al (n 11).

<sup>51</sup> Ibid, p. 22.

ISDS cases (these numbers are based on an average of 90 new ISDS cases each year).<sup>52</sup> Of these appointments, only about 9% (about 25 individuals) go to arbitrators who have never previously sat in an ISDS case.<sup>53</sup> Encouragingly, the number of appointments going to female new entrants in the past five years (23%) is about twice that of the percentage of appointments that have previously gone to women overall (11%).<sup>54</sup> However, on the basis of women receiving about 23% of the new-entrant spots each year (which is the average over the past five years), it would likely take until 2250 for there to be gender parity in appointments in all new ISDS cases.<sup>55</sup> If women were to hypothetically fill 100% of the new entrant spots (about 25 per year), it would still take quite a long time (about 30 years) to reach gender parity in all new ISDS cases.<sup>56</sup>

## 5. Proposals for improving diversity and inclusiveness

Offering ideas for improving diversity and inclusiveness in ISDS should be a core component of status quo scenarios, as well as of all the various structural reforms options being proposed through the UNCITRAL process. Indeed, UNICTRAL Working Group III on ISDS Reform has repeatedly identified the lack of diversity among ISDS adjudicators as problematic and in need of reform.<sup>57</sup> It also appears likely that no matter what the ultimate outcome of the reform process is, there will be a set of proposals for improving diversity.<sup>58</sup> The UNCITRAL Secretariat has in fact focused recently on how different selection and appointment processes under the various reform options would affect diversity.<sup>59</sup>

Here, under our assessment, we see progress can be made on two fronts in regard to the *current* ISDS regime. First, those selecting arbitrators or tribunal members have significant power to effect change, so encouraging them to exercise that power is potentially efficacious. Second,

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<sup>52</sup> Ibid, p. 16.

<sup>53</sup> Ibid, p. 20.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid, Annex 4. Of course, this is not a reasonable prediction model because nothing remains constant, but the exercise is nonetheless useful in pointing out the structural limitations to gender diversification in the current ISDS system.

<sup>57</sup> See e.g. Report of Working Group III (Investor-State Dispute Settlement Reform) (n 2).

<sup>58</sup> Ibid.

<sup>59</sup> Possible reform of investor-State dispute settlement (ISDS): Selection and appointment of ISDS tribunal members, Note by the Secretariat (n 7) (focusing on how different reforms would affect, inter alia, diversity of adjudicators with, however, most focus on nationality-based diversity).

increasing the size and breadth of the pool of adjudicators eligible to sit in ISDS cases (and making that pool known to those entities appointing arbitrators (counsel and arbitral institutions primarily)) would facilitate that selection process. Speaking about diversity and lack of diversity is sometimes perceived as a criticism of or a challenge to the status quo. Therefore, focusing on inclusiveness might be a better approach both strategically and in actual fact. As the open list of diversity factors or types above indicates, diversity along all factors or types cannot be encapsulated in any single person, but ensuring that ISDS mechanism is inclusive, and that no type of diversity is viewed as exclusionary, is a reasonable objective. Furthermore, as we posit ideas, we must keep in mind that formalistic criteria, or piecemeal solutions, can lead to moral licensing – if you have met the formal requirements, you have the freedom to appoint anyone who fulfills the criteria without regard to diversity.

Some proposals for improving diversity have been private-sector initiatives developed by members of the arbitration community – the Equal Representation in Arbitration Pledge, for example.<sup>60</sup> The purpose of the Pledge is to get commitments from those in the arbitration community (such as law firms, companies, and institutions) to increase women’s profiles and to appoint women as arbitrators on an equal opportunity basis. The Pledge, however, addresses only gender diversity and thus responds only to one piece of the diversity matrix. Moreover, while the Pledge can be seen as a good start and should be commended, its effectiveness has yet to be determined; thus, there is still room for other proposals or institutional reforms to increase diversity and facilitate inclusiveness.<sup>61</sup>

Other proposals include increased focus or attention to the qualities that one should be looking for in an ISDS adjudicator. To create a more diverse and inclusive pool of arbitrators, a clearer and more objective list of criteria for assessing an arbitrator’s skills and expertise could be developed. In other words, what characteristics do we want in ISDS adjudicators? Some recent international investment treaties emphasize experience in public international law and/or in international investment and trade law. These might well be desirable characteristics, but other criteria might

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<sup>60</sup> The Equal Representation in Arbitration Pledge <[www.arbitrationpledge.com](http://www.arbitrationpledge.com)>

<sup>61</sup> One type of proposal focuses on broadening the scope of the pool: for example, could arbitral institutions or states sign on to the Equal Representation in Arbitration Pledge, or might there be more initiatives at the institutional level like the recent declaration by the ICC not to appoint any arbitrator more than once in any one year in order to appoint a greater number of candidates and broaden the pool.

be relevant as well. A related question is whether there should be an emphasis on attaining specific training in the adjudicative *process* of arbitration rather than on just having an expertise regarding a particular *legal* subject matter, such as in public international law or international investment law. And is only public law knowledge useful in ISDS cases? What about *commercial law* expertise or *sector-based* expertise or expertise in *accounting* or mathematics? Nearly all ISDS cases involve quantification of damages and yet it is a well-known ‘secret’ that many arbitrators have very little training in or formal expertise on the subject. Many ISDS cases involve the extractive industries; why would it not be desirable for some arbitrators to have knowledge about specific sectors?

Another proposal to increase diversity is the establishment of regional arbitration centers, which can nurture local talent. While regions should not be viewed as monolithic entities, regional centers and regional administrators might have a greater capacity to identify promising arbitrators and help them to succeed. Of course, even if there is a regional arbitration center, the arbitrators working with the center might still be white males from Western countries. We have examples in ICSID where the arbitrators designated by the states in ICSID panels are not always nationals of that state.<sup>62</sup> Thus one must also take into account the fact that the mere existence of a regional arbitration center is not necessarily a guarantee that local arbitrators will be appointed unless it is thus stated in the applicable rules. This also raises the issue of education; in some regions, States or institutions will in most cases appoint Western arbitrators simply because they do not themselves offer the necessary education and thus the number of locally qualified candidates is small or nonexistent.

In addition to looking at the selection of adjudicators and at those who are available to be selected, the *process* of appointment also matters, and should be the subject of reform discussions. What kind of appointment process would lead to greater inclusiveness? In a traditional arbitration context, more inclusiveness might mean institutional appointments, or appointments from lists provided by an institution, or appointments from panels. In some cases of institutional appointment, arbitrators are subject to the approval of both parties, yet the arbitrators themselves

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<sup>62</sup> To name just a few, Nicolas Angelet (Belgian) is on the list of Burundi <<https://icsid.worldbank.org/en/Pages/arbitrators/ViewProfile.aspx?cvid=480>> and Brigitte Stern is on the list of Georgia <<https://icsid.worldbank.org/en/Pages/arbitrators/ViewProfile.aspx?cvid=91>>.

are not party-specific choices.<sup>63</sup> In addition, what kind of information (nationality, gender, age group etc.) might arbitral institutions provide about adjudicators on a list or roster that would facilitate the consideration of diversity factors in the selection of adjudicators by appointers?

Another tool that would help increase knowledge about potentially worthy candidates would be to have appointing authorities – which are primarily institutions (such as the PCA, ICSID, SCC) – make public the lists of possible ISDS arbitrators they circulate to the parties as nominees for appointment. This tactic would: (1) provide evidence of the efforts that institutions/appointors are putting into diversification of ISDS tribunals; (2) help locate where the weak links in terms of enhancing diversity are (most likely it is the disputing parties and their legal counsel); (3) provide those wishing to appoint ‘new names and faces’ some degree of assurance and encouragement to appoint new entrants who have been nominated (but not appointed) in the past; and (4) put some wind in the sails of such nominees and encourage new entrants to remain in the field – they are needed to maintain a diverse and expanding pool. For now, however, no appointing authority provides such a list. Which of these proposals are most salient will depend on what kind of reform options state delegates to the UNCITRAL process ultimately select. These considerations are discussed in the next section.

## **6. Diversity and inclusiveness implications of various reform scenarios**

Improving diversity and inclusiveness in ISDS will require a sustained commitment by states. This is true for all of the options set out below, though one – no ISDS – would still have the possibility of decision-making by municipal or national courts, which would place responsibility for diversity squarely in the hands of the state in whose courts the dispute is being heard and outside the realm of influence of international investment law. In addition, the greater the number of possible adjudicators, the easier it is to create an inclusive and diverse set of decision-makers. The smaller the number of individuals, the greater the challenge. Creating a standing court might offer an opportunity to craft a diverse cohort of adjudicators, but successfully doing so will take time and attention. It will also take agreement on what kinds of diversity to emphasize.

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<sup>63</sup> Sergio Puig, “Blinding International Justice” (2016) 56 Virginia Journal of International Law 647.

If states are appointing decision-makers to a multilateral standing court, what criteria should they consider in making those appointments? To the extent that diversity is a proxy for representativeness, how can a multilateral standing court ensure sufficient diversity to satisfy all of the state parties subject to the jurisdiction of that court, and what kinds of representativeness are important? Alternatives to the current ISDS regime could help, but might also make the situation worse. A multilateral standing court, for example, might well be populated with decision-makers who comport with the ‘prior experience norm’ – and currently, these are mostly (older) white men from the Global North. In short, there is nothing in the design of any reform scenario that *requires or that necessarily leads to* greater diversity; achieving it depends on the decisions states make when choosing adjudicators. That said, it appears that the treaties proposing bilateral investment courts, such as CETA and the free trade agreement between the EU and Vietnam, have given consideration to diversity in terms at least of nationality, providing for equal numbers of judges from each side and for ‘neutral’ arbitrators from third countries. Yet if one looks at the proposed indicative list of adjudicators for potential state-to-state disputes arising under the free trade agreement between the EU and Japan, the hurdles become clear.<sup>64</sup> The EU proposed four arbitrators, two of whom are women. Japan proposed six arbitrators, all of whom are men. They agreed on six chairpersons, two of whom are women. Thus, out of 15 roster members, four (less than 25 percent) are women. One is from a developing country (South Africa), which might not be so unsurprising, given that the agreement is between the European Union and Japan. These are all exceptionally well qualified people, yet all are quite senior with significant experience: there are certainly no ‘new entrants.’<sup>65</sup>

## **6.1 ISDS Improved**

From both the statistics and the structural issues relating to a system based on ad hoc party-appointed adjudicators, it is relatively obvious that disputing parties themselves face significant

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<sup>64</sup> Proposal for a Council Decision on the position to be taken on behalf of the European Union in the Joint Committee established under the Agreement between the European Union and Japan for an Economic Partnership as regards the adoption of the List of Arbitrators, COM(2019) 313 final, 2019/0147 (NLE), Brussels, 3 July 2019

<sup>65</sup> The Article 29 roster to hear state-state disputes under the CETA was recently released and shows a similar tendency; Canada proposed six arbitrators, of whom three are women; the European Union proposed five, of whom one is a woman, while the five neutrals are men. <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1404723846895&uri=CELEX:32019D2246>

pragmatic and legacy constraints to be capable of improving either gender or nationality-based diversity on a case-by-case basis. Solutions for creating greater inclusivity and diversity would require purposeful political reform of the system. In the meantime, small amendments to the current system could nonetheless help to enhance diversity. Any progress is, however, likely to be only incrementally achieved given the large number of existing treaties and the well-entrenched race-to-the-top habits of investors and of states in selecting arbitrators.

Most of these proposals were discussed above, but eliminating or amending the party appointment process might be considered as one possible solution. International investment treaties could require that appointments be made by institutions, rather than by the parties themselves. This is, for example, the case in the new Dutch model BIT. In conjunction with this, the appointing authority could be mandated to apply certain criteria that enhance diversity when making appointments, for example in terms of new arbitrators, and geographical and gender diversity. Additionally, appointing authorities could also be direct to avoid reappointments. Parties could be given some input in the process. They could, for example, be given the ability to reject the arbitrators selected by the institution a limited number of times. In this scenario, institutions would have to be amenable to honor the obligation to appoint diverse ISDS tribunals. Should the political will exist, there does not appear to be any insurmountable technical obstacle to achieving the same result by appending an additional protocol to the ICSID Convention rather than hoping for the amendment of thousands of international investment treaties inasmuch at least as ICSID and ICSID Additional Facility arbitrations are concerned.

A second option could be to require that all appointments be made from a roster made up of diverse individuals.<sup>66</sup> This alternative might work either with party appointment or with institutional appointment. This would improve the possibility of having tribunals that include a variety of perspectives and experiences. That roster would also have to be complemented by an appointment practice that ensures a range of experience in any given case; appointment by an institution that would balance the characteristics desired in each circumstance would enhance the possibility of

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<sup>66</sup> Malcolm Langford, Daniel Behn & Maria Chiara Malaguti, “The Quadrilemma: Appointing Adjudicators in Future Investor-State Dispute Settlement” Academic Forum on ISDS Concept Paper 2019/12,13 October 2019.

broad representation.<sup>67</sup> Again, as far as the treaty mechanics of achieving these goals are concerned, several options could be conceived, such as amendment of the existing investment treaties and appending an additional protocol of the sort indicated in the previous paragraph. The technical details would obviously have to be carefully worked out.

## **6.2 ISDS + Appeal**

In an ISDS+ appeal scenario, there is no reason to believe that the arbitral panel appointment process would necessarily change, although some ideas along the lines of those described in Section 6.1 above could help. An appellate mechanism could be created to be diverse and inclusive through the amendment of existing instruments or the creation of new treaty instruments. At the most practical level, however, this result might not be that easy to achieve, given the limited number of people likely to sit on it. With attention and careful selection of judges and with the passage of time, an appellate bench could be crafted to have something approaching gender parity and to represent both the Global North and the Global South. There are examples of international courts where these requirements exist and are applied, including for example at the International Criminal Court and at the Appeals Panel of the WTO;<sup>68</sup> it will be for the reform process to include mandatory guidelines to achieve such a result. Yet given the limited number of judges, the breadth of their representativeness would necessarily be limited. In any case, the selection process would have to be carefully coordinated and managed in order to achieve the objective of meaningful diversity. Theoretically, for example, if certain states, or groups of states, were each able to choose a judge, but they did not coordinate those choices, one could have an appellate body that is all male or even (though this is much less likely) all female. States have a slightly better track record than investors in appointing judges from the Global South, but the difference is only slight. All of the states participating in the creation of the appellate body would have to work together to create a diverse appellate body.

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<sup>67</sup> Andrea Bjorklund, Marc Bungenberg, Manjiao Chi & Catharine Titi, “Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform” Academic Forum on ISDS Concept Paper 2019/11, 17 September 2019.

<sup>68</sup> Olof Larsson, Theresa Squatrito, Øyvind Stiansen, & Taylor St John, ‘Selection and Appointment in International Adjudication: Insights from Political Science’, Academic Forum on ISDS Concept Paper 2019/10, 17 September 2019.



### 6.3 *Multilateral Investment Court*

Establishing a multilateral investment court (MIC) raises many of the same concerns addressed in Section 6.2 above in the discussion about the creation of an appellate body. A MIC would be comprised of a limited number of adjudicators. If one had a first-instance tribunal of 15, and an appellate body of six (as envisaged in the CETA), there would be 21 people to be named to the bench. Assuring that those 21 people are balanced around considerations of gender, nationality, experience, race, legal training, experience would be facilitated by the centralized creation of a slate of candidates taking into account the factors that states wish to emphasize. Given the likely desire to appoint judges of renown, it is entirely possible that the MIC could simply replicate the imbalance we see under the current ISDS regime; furthermore, if states or groups of states have independent authority to select judges, and they do not coordinate those selections, each judge could have similar characteristics. The roster in the free trade agreement between the EU and Japan, as described above, is a good example of the challenges inherent in creating a diverse set of adjudicators when the responsibility for selecting individuals is dispersed, when the pool is small or perceived to be small, and when there is a strong focus on prior experience

In other words, achieving diversity in a MIC scenario thus depends on the choices that states make. States would have the power to select an inclusive and diverse set of decisionmakers, but they would have to use that power. Achieving some degree of diversity might have the best chance in this scenario. With the creation of a multilateral standing court, looking at statutes of existing international courts may be instructive. In terms of gender diversity and expertise, the Rome Statute of the International Criminal Court might be helpful, as it requires a balance of gender and of expertise in different kinds of law.<sup>69</sup> Requirements of geographical diversity are found in the statute of many permanent international courts, often in terms of representation of specific systems, which has then concretely been applied as a geographical representation. Such requirements exist, for example, at the International Court of Justice. As highlighted above though, what is essential and needed is a commitment by states to inclusivity.

Another issue related to a potential MIC as it stands is that it stems from an EU initiative. If it is actually established, the most likely scenario is that it will build upon an investment court system

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<sup>69</sup> Ibid.

first put into place between the European Union and its current free trade agreement partners (Canada, Mexico, Singapore, and Vietnam). The European Union envisages building on these mechanisms, yet they seem likely to be heavily weighted in favour of the Global North as the origin of the institution will be found there. Is this really the ideal ground from which to spawn diversity?

#### **6.4 *No ISDS***

If there is no ISDS, then presumptively disputes will either be resolved in national courts or in state-to-state arbitration. How diverse the bench in any given state is will depend on that state's practices. International instruments such as the Convention on the Elimination of Discrimination Against Women or the European Convention on Human Rights might have some effects on the state in terms of promoting diversity on the domestic court. Whether or not international investment law would have any influence on the question of diversity depends on any given state's domestic investment laws and related dispute settlement laws and the treaties to which that state is party.

Overall one would not expect enhanced diversity with domestic court adjudication, with the possible exception of specialized courts created for this particular purpose. Judges on a national court will almost by definition not be diverse in terms of nationality. While it is possible that some judges would have different national origins, qualifying to be a judge in a particular municipal legal system would likely mean significant steeping in that country's legal traditions; in many places nationality of the state in question is likely to be a requirement to be a judge. Exposure to multiple legal systems or cultures would not necessarily be enhanced. Gender diversity, too, will depend on the practices of the state in question.<sup>70</sup> They might be an improvement from the numbers that we see in current ISDS practice, but there would be no guarantees that such would be the case.

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<sup>70</sup> For example, as of 2013, the average number of women on the highest court of law in Latin American countries was 22.6%, though half of Latin American countries had rates above that regional average: the Bolivarian Republic of Venezuela (44%), Puerto Rico (43%), Costa Rica (35%), El Salvador (33%), Colombia (30%), Nicaragua (29%), Dominican Republic (27%), Cuba (27%) and Chile (25%). ECLAC Notes, Number of Female Judges in the Region's Courts Doubles in a Decade <[www.cepal.org/notes/75/Titulares2.html](http://www.cepal.org/notes/75/Titulares2.html)>

As far as state-to-state arbitration is concerned, ordinarily the states involved would be responsible for selecting arbitrators on a case-by-case basis. The number of arbitrators and the mechanism for appointment would vary, but there is no reason to believe that the dynamics discussed above in relation to traditional ISDS, which tend to favor repeat appointments of experienced arbitrators, would change, although the public international law nature of the dispute could possibly introduce a different kind of diversity into the system by bringing more public international law scholars and practitioners who are not necessarily repeat players in traditional investor-state disputes. It is important to note here that if ISDS is replaced by domestic court litigation followed by state-to-state arbitration there could be an overnight explosion of state-to-state arbitrations – moving from the current levels of zero to WTO levels or even more within a relatively short period of time. Therefore, the issue of diversity in state-to-state investment arbitration requires the same level of attention if it emerges as a meaningful alternative to ISDS.

**7. Conclusion**

ISDS reform efforts must pay particular attention to the mechanisms of ensuring diversity among decision-makers in ISDS or any other mechanisms of international dispute settlement that will come to amend, supplement, or supplant it. As this paper outlines, the chronic diversity deficit has a multitude of complex and deep historical roots that make its resolution profoundly challenging. In regard to ISDS reform options, only ISDS-improved has the clear potential to improve diversity and inclusivity but even it would require significant reform in order to make meaningful progress towards a truly diverse and inclusive system of adjudication.

*Table 2. ISDS reform scenarios and potential impact on adjudicator diversity*

	<b>ISDS Improved</b>	<b>ISDS + Appeal</b>	<b>MIC</b>	<b>No ISDS</b>
<b>Diversity</b>	X	~	~	~

Compounded with the other equally deep challenges of the ISDS system discussed in the accompanying Working Papers, the lack of diversity has considerably undermined the legitimacy of the system. This study explains how real and perceived diversity deficits have reinforced the

criticisms of both the normative and adjudicative dimensions of the international investment law regime. It has also explored how various possibilities for reform could take into account this piece of the conundrum in order to create a more accountable, legitimate, and fair system of global economic governance that breaks from tradition without breaking traditional notions of fair play, equal treatment, and substantial justice.