

The Diversity Deficit

ISDS Academic Forum Working Group 5 Paper

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I. Introduction

The lack of diversity among adjudicators is particularly notable in international investment law, where 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 but made his home in London, and the third is from Costa Rica).¹ These are only two measures of diversity, of course; one of the challenges for this group is to broaden our understanding of what it would mean to have a truly diverse and inclusive set of adjudicators in international investment disputes.

Ensuring that decision-making bodies are inclusive and that decision-makers represent diverse constituencies serves multiple purposes. Social science literature shows that diverse decisionmakers are more likely to avoid cognitive biases and group-think in decision making.² One or more decision-makers might have the cultural knowledge to understand the dispute in context.³ The decision-making process is likely to be, and to be perceived, as fairer if the decision makers are more diverse. This latter factor in particular is likely to enhance the sociological legitimacy of an adjudicatory regime, and even its normative legitimacy. More

¹ Malcolm Langford, Daniel Behn, and Runer Hilleren Lie, 'The Revolving Door in International Investment Arbitration', (2017) 20 *Journal of International Economic Law* 301, 313.

² Won Kidane, *The Culture of International Arbitration* (Oxford 2017) 145 & n. 81 (collecting sources); 288-89.

³ *Id.* 145-47.

representativeness likely enhances democratic accountability. It should be noted here that diversity alone is insufficient – inclusiveness requires that all decision-makers be treated equally and have the same opportunities to contribute to outcomes.

Our proposed approach to this project can be divided into five sections. There is some overlap between them, but for ease of reference we have divided them into (1) a descriptive and empirical study of diversity; (2) a short section identifying and assessing the impact of a lack of diversity on legitimacy and the quality of justice; (3) a description of the features of the existing regime that perpetuate a lack of diversity; (4) general ideas to increase inclusiveness in the investment adjudicatory regime, whether it be arbitral or court-based; and (5) an examination of four proposed reform scenarios in light of their likely effects on diversity and inclusiveness.

1. What do we mean by diversity? How do we understand the extent and depth of the diversity deficit?

Diversity can be conceptualized around multiple factors. Above we mentioned gender and regional representation, yet these are only two features, and the latter 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 too broad, as it presumes that people within a region share the same experience whereas the regions into which people are often placed are quite diverse.⁴ 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. Nationality, ethnicity, race, educational attainment and experience, legal training (common and/or civil law expertise, Islamic law expertise, etc.), age,

⁴ “Nationality, however, is simply a poor indicator of political, ideological, or any other kind of bias.” Kidane (n. 2) 144.

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, and language proficiency are other factors that can contribute to inclusivity in decision-making.⁵

Several scholars are doing empirical research on investment treaty arbitration. We draw from their work to fill in some details about diversity. Some of the factors above are not readily available and we are limited in what we can assess on those fronts. Moreover, some factors, while important to an overall conceptualization of diversity, are less salient for the particular concerns that have been levied against investment arbitrators.

The lack of gender diversity is one of the most notable features of investment arbitration. Early studies found that between 3% and 7% of arbitrators in ICSID cases were female.⁶ 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.⁷ Yet two women – Kaufmann-Kohler and Stern – account for 57% of all appointments given to female arbitrators.⁸ The top 25 women

⁵ Personality, too, can make a difference. See Susan Cain, *Quiet: The Power of Introverts in a World That Can't Stop Talking* (Crown, 2012).

⁶ 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; Luch Greenwood and C. Mark Baker, ‘Is the Balance Getting Better? An Update on the Issue of Gender Diversity,’ (2015) 31 *Arbitration International* 413 (2015) 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.

⁷ Taylor St. John, Daniel Behn, Malcolm Langford, and Runer Lie, ‘Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration’ (2018) PluriCourts Working Paper.

⁸ Malcolm Langford, Daniel Behn, and Laura Létourneau-Tremblay, ‘Empirical Perspectives on Investment Arbitration: What do We Know? Does it Matter?’, ISDS Academic Forum Working Group 7 Paper (15 March 2019).

arbitrators have all arbitrated more than one case and they account for 86% of all female appointments.⁹

Investment arbitration is dominated by arbitrators from Western states. Through 1 August, 2018, only 35% of 695 individual arbitrators who have sat in at least one investment case were from non-Western states (as non-Western is defined by the United Nations).¹⁰ Half of non-Western arbitrators are from Latin America and the Caribbean. Only 2% of arbitrators and conciliators have been from Sub-Saharan Africa.¹¹ Non-Western arbitrators are predominantly appointed by respondent states or by institutions.¹² These numbers might be a bit misleading, however, in that most international arbitrators have elite educational backgrounds. Waibel and Wu looked at presiding arbitrators and found that 90% of them have received their higher education in OECD countries.¹³ In other words, even arbitrators from the Global South have likely spent a significant amount of time in the Global North.

Gender and nationality have been the two diversity factors receiving the most attention, because we have the most data on them we have focused largely on these factors as well. But other concerns are also at issue. In one study focusing on both commercial and international arbitrators, Professor Franck and her co-authors mapped diversity according to six factors: gender, nationality, age, linguistic capacity, legal training, and professional experiences.¹⁴ They concluded that the ‘median international arbitrator was a fifty-three year-old man who was a

⁹ Ibid.

¹⁰ Malcolm Langford, Daniel Behn, and Maksim Usynin, ‘Does Nationality Matter? Arbitral Background and the Universality of the International Investment Regime’, (2018) PluriCourts Working Paper.

¹¹ Won Kidane, (n. 2) 134-35.

¹² Langford, Behn, Létourneau-Tremblay (n. 8) 37.

¹³ Waibel and Wu (n. 6) p. 15.

¹⁴ 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).

national of a developed state and had served as arbitrator in ten arbitration cases.’¹⁵ We plan to do more work to update the statistics vis-à-vis some of the other factors listed above once the data become available.

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.¹⁶ A total of 951 arbitrators were appointed to ICSID Panels from 2012 to 2017; of those only three were female, non-white, and from a developing state.¹⁷

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 investment arbitrations, yet the same arbitrators tend to be re-appointed multiple times, while many are never re-appointed. They do not “enter” the field in a significant way. 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 investment arbitration case, 377 arbitrators have received only one appointment. Thus, 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.¹⁸

¹⁵ *Id.* 466.

¹⁶ 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

¹⁷ Karton and Polonskaya (n. 11).

¹⁸ PITAD, www.pitad.org (data on appointments up through 1 January 2019).

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. It 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 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 the North America and Europe made up the vast majority of appointments. 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.

The data summarized above, along with other findings, inform our presentation. They will also help us to assess what other kind of data would be helpful to gather to analyze further diversity problems.

2. What, if any, deficiencies of the legitimacy and quality of investment arbitration can be attributed to the lack of inclusiveness with respect to adjudicators?

This section intersects with the brief introduction on the benefits of inclusiveness in decision makers. The legitimacy concerns levelled against investment arbitration are primarily normative and sociological.¹⁹ The normative critique focuses on whether arbitral tribunals are justified in

¹⁹ 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 *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.

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 areas, and mutually reinforcing feedback: strong normative justification is likely to improve perceptions about the exercise of authority, while acceptance of the exercise of authority and acknowledgement of its effectiveness can reinforce efficacy and normative legitimacy.²⁰ Nienke Grossman has suggested three criteria by which to judge the sociological legitimacy of international tribunals: first is the perception that a tribunal is fair and unbiased; second is the 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; and third is the question of transparency and other democratic institutional norms.²¹ Assessing the diversity deficit in relationship to these factors sheds light on some of the reasons a lack of diversity is problematic.

The first criterion is the one most evidently challenged by a lack of inclusiveness in the pool of arbitrators, but diversity is relevant to all three. There has been a great deal of concern that tribunals are biased against developing states, and even though some empirical work casts doubt on those perceptions,²² they nonetheless remain and are exacerbated by the extent to which arbitrators are perceived as outsiders. For example, if a presiding arbitrator is from a low-income country parties are less likely to seek annulment.²³

²⁰ 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)

²¹ Nienke Grossman, ‘Legitimacy and international adjudicative bodies’, (2009) 41 *The George Washington International Law Review* 107, 121-122.

²² See, e.g., Susan D. Franck, ‘Development and Outcomes of Investment Treaty Arbitration’, 50 *Harvard Journal of International Law* 435, 459 - 464 (2009); Daniel Behn, Tarald Laudal Berge, and Malcolm Langford, ‘Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration’, *Northwestern Journal of Law and Business* (2017)

²³ Anton Strezhnev and Sergio Puig, ‘Diversity and Compliance in Investment Arbitration: Future Directions in Empirical Research on Investment Law and Arbitration’, (2019) LEGINVEST Conference Working Paper.

The underlying normative regime has been criticized extensively for its neo-colonial basis and 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 decisionmakers, if the norms themselves are perceived as one-sided and imposed by a dominant culture, and if the primary interpreters of those norms and decision-makers about cases brought under them are from that same culture, the feelings of exclusion in those who are not part of the dominant group are likely to be exacerbated.²⁴ As Gabrielle Kaufmann-Kohler has stated, in the context of commercial arbitration “We cannot claim that arbitration is the global dispute resolution method unless actors from all regions can participate.”²⁵ We do not know, with specificity, what difference in outcome there would be if there were more diverse arbitrators.²⁶ 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.

The third criterion regarding transparency and other democratic norms is also implicated. 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.²⁷ Second, if democratic institutional norms are construed as encompassing adjudicatory bodies that broadly reflect society, then investment arbitration would fall short (as would many municipal judiciaries, incidentally).

²⁴ Kidane (n. 2).

²⁵ Gabrielle Kaufmann-Kohler, (December 2018) *ICCA Newsletter*,.

²⁶ For an insightful analysis of the difficulties of maximizing the benefits of adjudication, see Jeffrey L Dunoff and Mark A. Pollock, ‘The Judicial Trilemma’, (2017) 111 *American Journal of International Law* 225.

²⁷ Catherine Rogers, ‘Arbitrator Intelligence: From Intuition to Data in Arbitrator Appointments’, (2018) 11(2) *New York Dispute Resolution Lawyer*; see also <https://www.arbitratorintelligence.org>.

We might consider whether supplementing the data with interviews of some key stakeholders would deepen our understanding of these concerns and the effect a lack of inclusiveness has on stakeholder views of investor-state dispute settlement.

3. What features of investment arbitration contribute to a lack of inclusiveness?

The typical appointment process leads to continued reliance on trusted and known arbitrators. In section one we outlined the preference in favor of experienced arbitrators. Moreover, the appointment process tends to perpetuate a lack of diversity. 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 that as an opportunity to appoint a “big name” who will likely be more influential than the other party-appointed arbitrator. The disputing parties or their arbitral appointees usually choose the presiding arbitrator. They are very likely to then want an arbitrator of similar experience to preside.

Moreover, because these appointments happen on a case-by-case basis, no one is working systemically to broaden the pool. This is not surprising; the ad hoc nature of investment arbitration means that it is no one’s job to “fix” appointments. Those in a better position to make an impact are the arbitral institutions, and it is no accident that all of the three non-white female arbitrators from developing countries mentioned above were appointed by ICSID. But ICSID makes only about 40% of arbitral appointments in ICSID-administered cases,²⁸ and the appointing authority is constrained to appoint from the ICSID roster in the absence of agreement

²⁸ ‘The ICSID Caseload – Statistics’ (Issue 2018-2), p. 20 (of 1453 total appointments, ICSID appointed 589).

of the parties. Arbitration institutions are also judged on the quality of their appointments, so they, too, do not want to take too many risks in appointing untried and untested arbitrators.

If one wants to compare the difference in diversity that an institution can make if it is so inclined, looking at appointments in ICSID annulment committees is a good place to start. 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-Western²⁹ arbitrators accounted for 45% of all appointments (167 appointments) and female arbitrators accounted for 12% of all appointments (45 appointments).³⁰ As we will see, both of these diversity indicators are stronger when ICSID is responsible for appointing the entire tribunal.

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) – and of these 10% approximately 55% went to two frequently appointed female arbitrators (Stern and Kaufmann-Kohler).

Taking these two diversity indicators (non-Western and female), we can also look to see if there is any difference in the parties appointing them. In the Table 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 by respondent states. This is an interesting finding because while the overall percentage of non-Western and female

²⁹ Non-Western is defined as all countries that are not North America, Western Europe or Australia/New Zealand. See Langford, Behn and Usynin (n. 10).

³⁰ PITAD, www.pitad.org (date on appointments up through 1 January 2019).

arbitrator appointments is low, it does appear that there is a difference in both institutional versus non-institutional (party) appointment (see the comparison with ICSID annulments above) but also *between* the party appointments (claimant versus respondent appointees).

<i>Indicator</i>	<i>Claimant</i>	<i>Resp</i>	<i>Chair</i>	<i>Annul</i>
<i>Non-Western Arbitrators</i>	265	330	195	167
<i>Female Arbitrators</i>	36	187	99	45

Disputing parties want to appoint the best and most experienced arbitrators. This is understandable. Selecting an adjudicator to consider a complex dispute means placing a great deal of trust in that person. Experience and age-brought wisdom, demonstrated educational attainment, expertise in specific legal areas or economic sectors, are all factors that parties unsurprisingly consider when appointing their arbitrators. Yet their perceptions and willingness to consider other options might be unnecessarily narrow – in other words, more people might have those skills than is readily recognized. 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 profile is less visible in Europe and North America have a hard time being appointed because they are unknown quantities.

Another factor which can come into play is language. English is the lingua franca of international arbitration, with some procedures conducted in other languages. To what extent is the need for English language acuity impeding some arbitrators from receiving appointments? Other factors – economic political, social, historical, and structural – that keep diversity numbers low

Party autonomy and party appointment have a tendency to reinforce a lack of inclusiveness. Greater inroads into diversity have been made by arbitral institutions than by parties. Yet party

autonomy and the ability to appoint arbitrators is usually seen as one of the great advantages of arbitration, and is one of the main complaints by investors in particular about reforms, especially if reform should come in the guise of a court (whether bilateral or multilateral).

There is some path dependence here. In other words, one can argue that nothing in the appointments process *requires* non-diverse appointments, but the strong tendency to favour those with the most experience and/or the most expertise tends to perpetuate a situation where those who have already attained premier status tend to keep it.

A failure in the ‘pipeline’ is sometimes mooted as a reason for the lack of diversity in arbitrators. If one looks at the pipeline in terms of gender, this argument does not pass muster. 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.³¹ According to the study, which maps all known actors involved in investment arbitration in different roles, while the percentage of women receiving appointments in investment cases is relatively low (10%), the overall number of women working in investment arbitration (as either arbitrators, experts, counsel or tribunal secretaries) is significantly greater (approximately 30%).

The question that arises is why so few women make the transition from legal counsel to arbitrator? In this context, and in many other professions, there is a commonly known phenomenon called a ‘pipeline leak’ that explains 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 in a dispute settlement system based on party-appointed adjudicators. Parties to disputes want to select arbitrators with known

³¹ St. John, Behn, Langford, and Lie (n. 7).

attributes. This is difficult to do without being able to assess an arbitrator's previous track record. The result is that repeat appointments are the norm. This practice also ties in to the few instances of women receiving appointments because there were virtually no women 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 exception of course is Kaufmann-Kohler and Stern. They both entered the system early.

The operation of the prior experience norm also means that the number of new entrants into the pool of arbitrators acting in investment arbitration cases is relatively low. In the past five years on average there are approximately 240 to 270 appointments to be filled (these numbers are based on an average of 80-90 new cases each year). Of these appointments, only about 10% went to arbitrators who have never sat in an investment arbitration previously. In other words, each year there are approximately 25 new spots to fill. Even if women were to fill 100% of these appointments, it would still take quite a long time to reach anywhere near gender parity among arbitrators sitting in investment arbitration cases. In reality, the number of these new spots going to women each year (on average over the last five years) was lower (7%) than the overall 10% of appointments that have gone to women overall to date. It will take a very long time at this rate to reach gender parity. We will also assess.

4. What solutions can we identify to bring more inclusiveness to investment adjudicators?

Offering ideas to combat the considerations that inhibit inclusiveness should be a core consideration within the larger picture of ISDS reform. Progress can be made on two fronts. On the one hand, those selecting arbitrators or tribunal members have significant power to effect

change. On other hand, increasing the size and breadth of the pool of decision-makers 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. Focusing on inclusiveness might be a better approach both strategically and in actual fact. As the open list of diversity factors above indicates, diversity along all fronts cannot be encapsulated in any single person, and ensuring an inclusive regime in which various factors are not excluded, or viewed as exclusionary, is a reasonable objective.

Some solutions to portions of diversity dearth have been raised by others in the arbitration field – the Equal Representation in Arbitration pledge, for example.³² This pledge addresses only gender diversity, of course, and thus addresses only one piece of the picture. Moreover, while the Pledge can be seen as a fine start to address the matter of gender diversity, its effectiveness has yet to be determined. Thus, other ideas need to be considered to increase diversity, facilitate inclusiveness, and thereby enhance the legitimacy of investor-state dispute settlement.

Should institutions or states adopt pledges like the Equal Representation in Arbitration pledge or like the recent declaration by the ICC not to appoint any arbitrator more than once in any one year, to appoint a greater number of candidates?

One idea to facilitate the creation of a broader and more representative pool of arbitrators is the development of be clearer and more objective lists of criteria against which we can judge expertise and skills for easier identification of potential arbitrators. In other words, what characteristics do we want in decisionmakers? Some of the more recent investment agreements emphasize experience in public international law and/or in international investment and trade

³² <http://www.arbitrationpledge.com>.

law. These might well be desirable characteristics, but other criteria might be relevant as well. Another question is whether there should be emphasis on attaining specific training in arbitration rather than in expertise regarding a particular subject matter, which might also be viewed more broadly than just encompassing public international law and international investment law. For example, many cases involve claims brought by investors in extractive industries; knowledge or experience in various extractive industries might be a desirable characteristic in at least some investment arbitrations.

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.

Another possibility is the establishment of regional arbitration centers, which can nurture 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.

In addition to looking at those choosing decision-makers and those who are available to be selected, the process of appointment matters. What kind of appointment process would lead to greater inclusiveness? In a traditional arbitration context, that might mean institutional appointments, or appointments from lists provided by an institution, or appointments from panels. What kind of information (nationalities, gender, age group etc.) might arbitral institutions provide about appointees they nominated in a list procedure to the parties to facilitate their selection of diverse arbitrators? In some cases of institutional appointment arbitrators are subject to the approval of both parties, but they are not viewed as party specific.³³

³³ Sergio Puig, 'Blinding International Justice', (2016) 56 *Virginia Journal of International Law* 647.

Which of these ideas is most salient depends on what kind of reform states select. These considerations are discussed in the next section.

5. Interaction of diversity and inclusivity with various reform scenarios

Improving diversity and inclusiveness in the international adjudicative setting requires sustained commitment by states. This is true for all of the options set out below, though one – no ISDS – would have as one possibility decision-making by national courts, which would place responsibility for diversity squarely in the hands of that state 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 panel of arbitrators offers an opportunity to craft a diverse cohort, but successful doing so will take time and attention. It will also take agreement on what kinds of diversity to emphasize.

If states are appointing decision makers to an investment court, what criteria should they consider in making those appointments? To the extent that diversity is a proxy for representativeness, how can a multilateral court ensure sufficient diversity among its members? What kinds of representativeness are important?

Alternatives to the status quo could help, but also might actually make the situation worse. A standing court, for example, might well be populated with decision-makers who comport with the prior experience norm – and currently, these are mostly 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.

	ISDS Improved	ISDS + Appeal	MIC	No ISDS
Diversity	X	~	~	~

A. ISDS Improved

From both the statistics and the structural issues relating to a system based on party-appointed adjudicators, it is relatively obvious that parties themselves are unlikely to be capable of increasing either gender or nationality-based diversity on their own. Solutions for creating greater inclusivity and diversity will come from elsewhere. 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 habits of investors and of states in selecting arbitrators.

Eliminating or amending the party appointment process could help. Treaties could require that appointments be made by institutions, rather than by the parties themselves. 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 honour the obligation to appoint diverse panels.

A second option could be to require that all appointments be made from a roster made up of diverse individuals. 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 broad representation.

B. ISDS + Appeal

In an ISDS+ appeal scenario, there is no reason to believe that the arbitral panel appointment process would change, although some ideas along the lines of those described in Part A above could help. An appellate court could be created to be diverse and inclusive. This result might not be that easy to achieve, however, given the limited number of people likely to sit on it. With attention and careful selection of judges, an appellate bench could be crafted to have something approaching gender parity and to represent both the Global North and the Global South. Yet given the limited number of judges, the breadth of their representativeness would necessarily be limited. Furthermore, the selection process would have to be managed in order to achieve diversity. 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.

C. Multilateral Investment Court

Establishing a multilateral investment court (MIC) raises many of the same concerns addressed 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

imbalance we see in ISDS now. And 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. Achieving diversity in a MIC scenario thus depends on the choices states make. States would have the power to select an inclusive and diverse set of decisionmakers, but they would have to use that power.

D. No ISDS

If there is no ISDS then presumptively disputes will either be resolved in national courts or in state-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 bench, but investment law would not have influence on that question.

Overall one would not expect enhanced diversity with domestic court adjudication. 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.³⁴ They might be an

³⁴ 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, <https://www.cepal.org/notes/75/Titulares2.html> (March 2013).

improvement from the numbers that we see in current ISDS practice, but there would be no guarantees that such would be the case.

As far as state-state arbitration is concerned, the states involved would be responsible for selecting judges in a particular case. 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.