ISSN : 1875-4120
Issue : Vol. 12, issue 4
Published : July 2015

This paper is part of the TDM / ArbitralWomen special on "*Dealing with Diversity in International Arbitration*" edited by:

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An Empirical Analysis of Diversity in Investment Arbitration: the Good, the Bad and the Ugly

by R. Kovacs and A. Fawke

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An Empirical Analysis of Diversity in Investment Arbitration: the Good, the Bad and the Ugly

Robert Kovacs[*] and Alex Fawke[**]

Abstract: *The rise of investment arbitration has attracted heightened scrutiny of the individuals who sit on the tribunals. One criticism is that the arbitrators are drawn from a narrow pool of essentially male, elite, Western corporate lawyers. While the attacks are frequent, there has been few attempts to empirically study and quantify the issue. This article is based on the authors' original dataset and statistical analysis of the most frequently appointed arbitrators in investor-state disputes. The study has examined cases, with a total of 1,969 separate appointments. Of these, the authors have analysed the background of all arbitrators who have been appointed on 10 or more occasions (a total of 52 individuals) and considered: (i) gender; (ii) nationality; (iii) the legal tradition in which they are trained (i.e. civil or common law); (iv) the universities they attended; (v) their professional experience; (vi) language skills; and (vii) expertise in public international law other than investment law. The article concludes that, although the arbitrators are a more diverse group than commonly thought in some respects, there is a clear need for greater diversity of gender and more participation of arbitrators from low-income countries.*

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The views expressed in this article are exclusively those of the authors and do not necessarily reflect the views of Linklaters LLP.

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Introduction

After any revolution, there is the inevitable counter-revolution. The rapid rise of investor-state dispute settlement ("ISDS") was a revolution in international law, and the system now faces a backlash. Venezuela, Bolivia and Ecuador have withdrawn from the major ISDS treaty (the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention")),[1] more recently, significant opposition in Europe and Australia has seen national governments call for its removal from all future trade and investment treaties, jeopardising two of the most ambitious trade negotiations in history: the Transatlantic Trade and Investment Partnership and the Trans-Pacific Partnership. Germany and France have been particularly fierce in their opposition[2] and, while the Obama Administration supports ISDS, Democratic heavyweights such as Hillary Clinton and Elizabeth Warren have voiced concerns.[3]

This article assesses just one of those concerns: the claim that the key actors in ISDS – the arbitrators – are drawn from a narrow pool of essentially male, elite, Western corporate lawyers. If true, it represents a severe shortcoming of the system, which rightly threatens its legitimacy as a part of the global governance framework. This is, as far as we are aware, the first comprehensive attempt to map and examine the diversity of the most frequently appointed ISDS arbitrators. We have examined the backgrounds of the most frequently appointed ISDS arbitrators to assess the diversity of the group in seven areas: (i) gender; (ii) nationality; (iii) legal tradition (i.e. civil or common law); (iv) university; (v) professional experience; (vi) languages; and (vii) public international law expertise outside investment law. This examination is intended to determine whether the critics' assertions are borne out by the numbers, or whether the criticisms are unfounded or exaggerated.

The article proceeds as follows. We first consider the diversity critique of ISDS and explain the serious implications if substantiated. This includes a brief review of current behavioural studies research on the value of diversity in group decision-making (Part 1). We then review the existing empirical analysis in the field, and set out the methodology we have used in this study (Part 2). The quantitative results of our study across the seven diversity criteria are then presented, as well as a qualitative analysis of those figures (Part 3). The next part briefly examines possible reforms to address the shortcomings identified, and suggests areas for future research (Part 4). We conclude that the diversity picture of ISDS arbitrators is mixed. In some areas, particularly professional experience, legal

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1 The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 UNTS 159, 4 ILM 524 (1965).

2 For a summary of France's objections and proposals, see Richard Hiault, "Tribunaux d'arbitrage entre entreprises et Etats: ce que defend la France", *Les Echos*, 2 June 2015.

3 See Hillary Rodham Clinton, *Hard Choices* (Simon & Schuster UK, 2014), 509-510; Elizabeth Warren, "The Trans-Pacific Partnership clause everyone should oppose", *The Washington Post*, 25 February 2015. It should be noted that Senator Warren's criticism is far more strident than Secretary Clinton's, who expresses a more nuanced view.

tradition, languages and public international law expertise, ISDS boasts impressive diversity. In others, most strikingly gender and the participation of low-income countries, the situation appears grave enough to undermine both the quality of arbitral decision-making and the legitimacy of ISDS as a system.

1. The diversity critique and why it matters

The criticisms of ISDS are numerous. It is said to be biased in favour of foreign investors;[4] lack transparency;[5] undermine national sovereignty;[6] prevent governments from pursuing legitimate public policy in health, the environment and human rights;[7] and lack consistency in its decisions.[8] More extreme critiques, apparently drawing on "world systems theory," characterise it as anti-democratic and the outright exploitation of under-developed countries.[9] Though immensely important – and there is clearly a legitimate debate to be had as to the remit and practice of ISDS – it is beyond the scope of this article to address these arguments. We do not intend to make an assessment of the merits of ISDS as a whole.

Rather, this article focuses on another oft-cited critique, which concerns the arbitrators themselves. They are said to be drawn from a narrow pool of essentially male, elite, Western corporate lawyers. A relatively recent article in *The Economist*, for example, claimed that ISDS arbitrators are "moonlighting corporate lawyers",[10] suggesting that they have inadequate or inappropriate professional experience to make such important decisions, which often affect state budgets and policy making. Senator Warren has asserted that ISDS "does not employ independent judges", but rather "highly paid corporate

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4 See, e.g., Gus Van Harten, "Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration" (2012) 50(1) *Osgoode Hall Law Journal* 211.

5 See CIEL and IISD, "Ensuring Transparency in Investor-State Dispute Resolution under the UNCITRAL Arbitration Rules, UNCITRAL Working Group II, Vienna, October 4-8, 2010 <http://www.iisd.org/pdf/2010/unicitral_ensuring_ transparency.pdf>; Julie A. Maupin, "Transparency in International Investment Law: The Good, the Bad and the Murky" in Bianchi and Peters (eds) *Transparency in International Law* (Cambridge University Press, 2013).

6 Corporate Europe Observatory and Transnational Institute, *Profiteering from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, November 2012 <http://corporateeurope.org/trade/2012/11/ profiting-injustice>

7 See Nathalie Bernasconi-Osterwalder et al, *Investment Treaties and Why They Matter to Sustainable Development: Questions and Answers* (International Institute for Sustainable Development, 2011); Valentina Vadi, *Public Health in International Investment Law and Arbitration* (Routledge, 2013). See also Bruno Simma, "The Present – Investment Arbitration as a Governance Tool for Economic International Relations? Foreign Investment, Human Rights and Global Governance" in van den Berg (ed), *Arbitration: The Next Fifty Years, ICCA Congress Series Volume 16* (Kluwer Law International, 2012) 161.

8 See, e.g., Susan D. Franck, "The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions" (2005) 73 *Fordham Law Review* 1521.

9 See Corporate Europe Observatory and Transnational Institute, *Profiteering from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, November 2012 <http://corporateeurope.org/trade/2012/11/ profiting-injustice>

10 "A better way to arbitrate" *The Economist*, October 11 2014.

lawyers",[11] while others have advanced the more nuanced argument that many seem to have a background stronger in private, rather than public, international law.[12] Certain NGOs have put it more bluntly, describing them as "pro-business, males and from the rich North".[13] Scathing rebukes come from within the arbitration profession too, such as the following from Dr KVSK Nathan:

> "An observer from planet Mars may well observe that the international arbitration establishment on Earth is white, male and English speaking and is controlled by institutions based in the United States, England and mainland European Union."[14]

It would not doubt strike the alien observer as a little odd, given that (i) most humans are not white; (ii) most are not from those three regions; and (iii) about half are female. Although not always articulated as such, one way of interpreting these critiques is that investment treaty tribunals lack diversity. If true, the issue is a serious one. Diversity is important, and it is worth briefly explaining why.

Diversity is a concept that is often championed as a virtue without any explanation or, one might suspect, understanding of why this is so. The concept is both broader and more nuanced than many realise. To understand its merit, it is useful to distinguish between different manifestations of diversity, their respective benefits, and how each might be relevant to ISDS tribunals. Three aspects stand out as particularly relevant in our context.

First, and most obviously, there is diversity of expertise. Any body engaging in a complex undertaking needs this attribute. It is why building a house needs not only builders, but also architects, engineers, accountants and, yes, lawyers.[15] Arbitration counsel often draw on economists, forensic accountants, law professors, paralegals and administrative assistants, to name just a few, to help them make their case. And, naturally, a tribunal may benefit when its members have expertise in different bodies of law, sectors and jurisdictions. Most relevantly to ISDS, it may be desirable that tribunals be composed of arbitrators with a mix of government and private sector experience, from different legal systems, with knowledge of both private and public international law.

Second, there is a body of evidence in behavioural studies and judicial studies which suggests that social diversity can improve the quality of group reasoning and decision-making. That is, a group of people of varying ethnicities, gender and social background appear – by reason of their diversity alone – to make more informed and better decisions. This is a less obvious benefit, so it deserves closer attention.

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[11] Warren, above n 3.

[12] Anthea Roberts, "Power and Persuasion in Investment Treaty Arbitration: The Dual Role of States" (2010) 104 *The American Journal of International Law* 179, 207n134

[13] Corporate Europe Observatory and Transnational Institute, *Profiteering from Injustice*, above n 6.

[14] Dr. K.V.S.K. Nathan, "Well, Why Did You Not Get the Right Arbitrator?", 15 *Mealey's International Arbitration Reports* 24 (July 2000).

[15] See Katherine W. Phillips, "How Diversity Makes Us Smarter" (2014) 311(4) *Scientific American*.

Representative examples of this research can be readily found both inside and outside adjudicatory bodies. The typical experiment entails a small ethnically diverse group discussing a controversial topic. Remarkably, when a dissenting opinion comes from a person of a different ethnicity, that view is considered more novel and leads to more extensive consideration of the issues than when the same dissenting opinion comes from a person whose ethnicity the listener shares.[16] The field of "judicial studies" in the US has identified similar trends, examining the gender, ethnic and ideological composition of US courts. For example, the results of one study indicate that the presence of a female judge or judge from a minority ethnic group on a three-judge panel has a "deliberative effect". That is, it appears to shift the views of the male and non-minority judges by comparison to their previous decisions and cause them to explore a wider range of arguments.[17] It does, in other words, what John Rawls neatly described as "combining information and enlarging the range of arguments".[18] Cass Sunstein has gone even further, concluding that the diverse ideological composition of a court actually moves its decision in the direction of what the law requires.[19]

ISDS faces the charge that there is insufficient diversity of gender and nationality, as well as a kind of socioeconomic assertion that the arbitrators come from a global, Western elite. There appear to be no comparable empirical studies on social diversity in the context of investment arbitration; therefore we must extrapolate based on research on national judiciaries. The limitations on that extrapolation should be noted. Most obviously, the vast majority of these studies come from only one jurisdiction: the US. There may be differences which mean the findings do not hold elsewhere. Moreover, "judicial studies" tend to focus on particularly controversial areas of law, where social diversity may be more significant, such as affirmative action, death penalty and pornography cases. It may be, as Joshua Karton has suggested, that this is less important in international commercial arbitrations, which rarely involve such "politically-charged issues".[20]

But investment arbitration may be different as it often concerns contentious issues relating to the limits of government action, the role of the state in a crisis, public health, environmental regulation and human rights. Moreover, the "judicial studies" findings have

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[16] See, e.g., Anthony Lising Antonio et al, "Effects of Racial Diversity on Complex Thinking in College Students" (2004) 15 *Psychological Science* 507.

[17] See Donald R. Songer and Kelley A. Crews-Meyer, "Does Judge Gender Matter? Decision-Making in State Supreme Courts" (2000) 81(3) *Social Science Quarterly* 750; Charles M. Cameron and Craig P. Cummings, "Diversity and Judicial Decision-Making: Evidence from Affirmative Action Cases in the Federal Courts of Appeals, 1971-1999" (2003) *Columbia Law Review.*

[18] John Rawls, *A Theory of Justice* (Harvard University Press, 2009), 359.

[19] Professor Sunstein's study covered three-judge panels on the Federal Court of Appeal for the District of Columbia Circuit from 1970 to 2002 and took into account whether the judge was appointed by a Democratic or Republican president. See Cass R. Sunstein, *Why Societies Need Dissent* (Harvard University Press, 2003).

[20] Joshua Karton, "International Arbitration Culture and Global Governance" in Mattli and Dietz (eds) *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press, 2014), 13.

an intuitive appeal. The approach of all adjudicators is informed by their life experience and personal inclinations. It is thus unsurprising that debating a complicated issue with a person with different experience and inclinations might lead to a more wide-ranging exploration of the arguments. Accordingly, it is a reasonable assumption that diverse ISDS panels would benefit from this deliberative effect.

Third, any organisation exercising public or quasi-public authority must be concerned with its own legitimacy. Research on national judiciaries in the US and UK indicates a correlation between judicial diversity and the public's belief in the fairness of those courts. Specifically, ethnic minorities which are under-represented in the judiciary report significantly lower trust in courts, and many court staff cite greater diversity in the judiciary as the best measure to increase public confidence.[21] The analogy that can be drawn between these studies and ISDS is not perfect. In the US, where many such studies are in the context of criminal matters, disparities in conviction and imprisonment rates probably play an exacerbating role in undermining public trust among minority groups.[22] That said, the findings reflect a centuries-old phenomenon: confidence is likely to be lower in institutions which do not appear representative of those over whom they exercise power. This may be a greater concern to ISDS than it would be for many national judiciaries. The US Supreme Court is unlikely to be abolished any time soon, but investment treaties can expire or be terminated much more easily. If public backlash and state scepticism are sufficient, investment arbitration could disappear within a few decades. So if a lack of diversity is feeding into legitimacy issues for ISDS, the problem is an urgent one.

Certainly, diversity is not the only factor which affects a regime's legitimacy and should not be thought a panacea. The ISDS debate in Australia is illustrative of this. Australia has been party to only one investment treaty dispute, which concerns its tobacco plain packaging legislation. The tribunal is, at least by ISDS standards, fairly diverse. But this is seemingly irrelevant. The public outcry against ISDS focuses on a perception that ISDS limits the Government's ability to enact a legitimate public health policy and that a foreign tobacco company has an avenue of legal redress not available to domestic companies.

Similarly, bear in mind that diversity is just one value among the complex mix of factors which can make up a good tribunal, and a tribunal is not necessarily bad because it lacks diversity in a particular respect. Moreover, it has certain costs in a system like ISDS. Specifically, a large and diverse group of people ruling on similar treaties probably increases the likelihood of inconsistent decisions. The senior national and international courts tend to have no more than 15 members, who serve for many years. Their decisions are inevitably more consistent than a group of 500. Critics of ISDS sometimes emphasise

[21] See Cheryl Thomas, *Judicial Diversity in the United Kingdom and other Jurisdictions: A Review of Research, Policies and Practices*, Report for the Commission for Judicial Appointments (2005), 56-60.

[22] Ibid, 57.

this on one hand (pointing to inconsistent decisions),[23] while ignoring on the other the diversity benefit of such a large number of decision-makers within the system. The evidence, as discussed above, simply suggests that, other things being equal, diversity has certain benefits. Part 3 will examine to what extent ISDS arbitrators possess this diversity. But first, we need to understand how to empirically assess diversity.

2. Methodology

2.1 Existing research

The study of diversity in adjudicatory bodies has its origins in the legal realism movement in the US. This is, in short, a theory of adjudication which holds that judges make decisions not only through the strict application of legal rules (as asserted by legal formalism), but are also influenced by their social and political context. It suggests that judges' backgrounds and policy preferences play a role in their decision-making, which makes such matters a legitimate topic of research for scholars in law and political science. This led to a flurry of empirical work in "judicial studies", seeking to identify those backgrounds and preferences and establish their effect on outcomes in particular cases, such as those cited in the section above.[24] For some time, these studies were limited to the judiciaries of the US.

In the mid-1990s, Yves Dezalay and Bryant Garth sparked enormous interest in the kind of people appointed to international commercial arbitration tribunals through their ground-breaking study *Dealing in Virtue*.[25] Drawing on Pierre Bourdieu's work on symbolic capital, they conducted interviews focusing on the attributes which gave successful arbitrators such credibility. They identified a generation of "Grand Old Men" who first rose to the top of their national legal professions (typically senior judges and litigators) and made a late transition to arbitration. They explained that this generation, while dominant in the 1970s and 1980s, had since been eclipsed by "Technocrats": usually lawyers at commercial law firms who had spent almost their entire careers specialising in arbitration.

Unsurprisingly, it was natural for interest to grow in the identities of ISDS arbitrators. This began as grumblings from political commentators and NGOs that they tended to be "pale, male and stale". In the mid-2000s, Susan D. Franck began publishing on the applications of empirical research in ISDS and in 2008 compiled data on the nationality and gender of all ICSID arbitrators, concluding that male arbitrators from the OECD dominated the

[23] There is some debate as to whether consistent decisions are a valuable aim of ISDS in any case. See Thomas Schultz, "Against Consistency in Investment Arbitration" in Douglas, Pauwelyn and Viñuaels (eds) *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press, 2014), 297-316.

[24] For a useful summary of legal realism and its relationship with studies of diversity, see Thomas, above n 21, 20-21.

[25] Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (The University of Chicago Press, 1996).

pool.[26] In the context of international commercial arbitration, Lucy Greenwood and C. Mark Baker's 2012 article explores in some depth the extent and causes of the under-representation of women on tribunals.[27] More recently, there have been two large-scale projects to examine certain features of the most appointed ISDS arbitrators. José Augusto Fontoura Costa analysed the professional profiles of all ICSID arbitrators, as well as WTO panellists, although this did not include precise figures or extensive qualitative analysis.[28] Sergio Puig's use of networking analytics to examine the most frequently appointed arbitrators was based on an original (unpublished) database of all ICSID appointed arbitrators up until February 2014.[29] While his article notes similar trends to Professor Franck's, its focus is on social capital rather than background. David Schneiderman's gives an excellent account of "judicial studies" and social background analysis in the context of ISDS, and seeks to use it to explain differing outcomes in some of the major cases against Argentina, but his work only looked at six arbitrators.[30]

2.2. Our methodology

Our approach differs from the above in both depth (i.e. number of arbitrators) and scope (i.e. diversity factors considered). Though we use a relatively large dataset, our method can be easily stated.

We created a database of the vast majority of the publicly-available investment treaty cases as of December 2014. These were obtained from three sources: ICSID,[31] ITA Law[32] and the Permanent Court of Arbitration.[33] This totalled 667 cases, with 499 different arbitrators and 1,969 individual appointments.[34] We included only ISDS cases in the dataset. Disputes pursuant to private investment agreements between an investor and a state were not included, nor were inter-state arbitrations.

We then listed all of the arbitrators appointed in these cases and the number of times that each had been appointed. We found 52 individuals with ten or more appointments, with a total of 1,072 appointments between them. They represent 54% of appointments in the

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[26] Susan D. Franck, "Empirically Evaluating Claims about Investment Treaty Arbitration" (2007) 86 *North Carolina Law Review*, 77-79. See also Susan D. Franck, "Empiricism and International Law: Insights for Investment Treaty Dispute Resolution" (2008) 48(4) *Virginia Journal of International Law* 767.

[27] Lucy Greenwood and C. Mark Baker, "Getting a Better Balance on International Arbitration Tribunals" (2012) 28(4) *Arbitration International* 653.

[28] José Augusto Fontoura Costa, "Comparign WTO Panelists and ICSID Arbitrators: the Creation of International Legal Fields" (2011) 1(4) *Oñati Socio-Legal Series* 1.

[29] Sergio Puig, "Social Capital in the Arbitration Market" (2014) 25(2) *European Journal of International Law* 387.

[30] David Schneiderman, "Judicial Politics and International Investment Arbitration: Seeking and Explanation for Conflicting Outcomes" (2010) 30(2)

[31] See https://icsid.worldbank.org/apps/icsidweb/cases/Pages/AdvancedSearch.aspx

[32] See http://www.italaw.com/

[33] See http://www.pcacases.com/web/

[34] Note that, in some cases, more than three arbitrators were appointed (as when the composition of an annulment committee changed to that in the original proceedings), while others were heard by sole arbitrators.

dataset. For these 52 arbitrators, we sought to identify seven characteristics of their personal qualities and background. These characteristics are: (i) gender; (ii) nationality (including dual or triple nationality); (iii) the legal tradition of their training (i.e. civil or common law); (iv) the universities they attended; (v) their professional experience; (vi) language skills; and (vii) expertise in public international law other than investment law. This was done through public searches, typically through a combination of researching the arbitrator's own website and the International Arbitration Institute directory.[35] We then compiled this data to gain a picture of how each characteristic fared in terms of diversity.

Some of these characteristics are easily discerned, but others required an original definition. These are as follows:

- *Legal tradition of training*: licence to practice in a given common law, civil law or hybrid system. Merely holding a degree from a common or civil law country is insufficient.
- *University attended*: award of an undergraduate degree or higher by the institution.
- *Experience in government / regulation*: appointment to a position with a state, state agency or regulator. This includes both political and apolitical roles. Advisory services to a government are insufficient.
- *Experience in academia*: appointment as a researcher, lecturer or senior administrative position. Service as a guest lecturer is insufficient.
- *Judicial experience*: appointment as a judge in a national court, or an international judicial organ (such as the International Court of Justice or WTO Appellate Body).
- *Experience in commercial law*: employment in private legal practice or as in-house counsel in the private sector, regardless of the size of the firm. This is the term used to assess the allegation that ISDS arbitrators are "corporate lawyers".
- *Language skills*: a claim to be "native" or "fluent" in a language. Claims to have "working knowledge" of or to be "familiar" with a language are insufficient. Naturally, this relies on the arbitrator's self-assessment.
- *Expertise in public international law other than investment law*: service as a judge or counsel at a court which deals primarily in public international law other than investment law (e.g. the ICJ, WTO Appellate Body or Inter-American Court of Human Rights); significant publications (i.e. multiple refereed journal articles or books) in public international law fields other than investment law; or appointment to a government position requiring knowledge of public international law other than investment law (e.g. treaty negotiator; UN ambassador; legal advisor in a government department of foreign affairs/external relations).

Before moving on to discuss the results, we must note the limitations of our methodology. As with any empirical analysis in arbitration, it is confined to those cases which are

[35] See http://www.iaiparis.com/index.asp

publicly available. The number of unpublished cases, which our dataset does not include, is obviously unknown.

Moreover, the characteristics examined do not capture all the elements of diversity discussed above. There is, for example, no ready mechanism for determining the ideological bent of an arbitrator (as Professor Sunstein was able to do in his research by looking at the appointing president). It is sometimes said that certain arbitrators are "pro-investor" or "pro-state", based on which party tends to appoint them.[36] But using the appointing party as a proxy for a particular predisposition of an arbitrator is not very helpful for (i) arbitrators who are most often appointed as chair (either by an institution, the co-arbitrators or jointly by the parties) or (ii) arbitrators whose appointments have come from investors and states in roughly equal proportions. Further, as with "judicial studies," it is not obvious how socioeconomic background can be measured. As discussed in Part 3, nationality and university education may give some indications of a person's life experience and, perhaps, worldview, but these are far from perfect.

Further, it is worth noting that the cases in our sample go back many years, with a handful of cases from the 1970s. The vast majority of cases are from the early 2000s onwards. So while the picture is a recent one, it should not be thought that the dataset is a snapshot of merely current ISDS cases. With these limitations in mind, let us turn to the results.

3. The results and discussion

3.1. Gender

Historically, a lack of gender diversity was most objectionable from the perspective of equity and fairness. Adjudicatory bodies fifty years ago lacked female participation because of significant formal and informal barriers to women's entrance into the legal profession. Today, many states have laws that outlaw discrimination based on gender and some states and corporations have adopted policies to positively encourage gender diversity. But gender diversity is important for reasons in addition to equity and fairness. As noted in Part 1, there is empirical evidence to suggest that panels with at least one female judge tend to have a higher quality of reasoning, in some respects, than an all-male panel. Likewise, the absence of women in a regime like ISDS makes it more easily subject to a charge that it lacks legitimacy.

This is one of the more frequently discussed diversity topics in arbitration, so the statistics will come as little surprise.[37] They can be presented in one of two ways. On the one hand, 21% of the tribunals in our total dataset included at least one female arbitrator. On the other, this figure hides the fact that the female tribunal member in the majority of cases tends to be one of two people: Brigitte Stern or Gabrielle Kaufmann-Kohler. Professor

[36] Charles N. Brower is supposedly the favourite of investors, while Brigitte Stern is said to be host states' preferred choice.

[37] See, e.g., Greenwood and Baker, above n 27 and Franck, "Empirically Evaluating Claims about Investment Treaty Arbitration", above n 26.

Stern is (by some distance) the most frequently appointed ISDS arbitrator. Professor Kaufmann-Kohler is the sixth most appointed. No other women appear in our sample of 52, and only two more (Teresa Cheng and Yas Banifatemi) appear in the top 100. Out of the entire dataset of 499 arbitrators, only 25 are women. In other words, 95% of participants in ISDS tribunals are men – not far off the rate at the Bullingdon Club. This figure has changed little since research carried out by professors almost a decade ago,[38] and is comparable to the figures established, in the context of international commercial arbitration generally, by Greenwood and Baker.[39] Quite rightly, members of the arbitration community tend to be embarrassed by this, and few try to defend it. Is there anything that can be said in mitigation?

One might suspect that the numbers are dragged down by the participation in ISDS of many countries which offer few prospects for women in the legal profession. Perhaps ISDS, because of its global nature, is simply a more accurate reflection of global discrimination than, say, the superior courts of England and Wales. This may play some role. We cannot be surprised that a country like Saudi Arabia produces no female arbitrators: its first four female lawyers were licensed in 2013. But the vast majority of ISDS arbitrators come from countries with no formal barrier to female participation in the legal profession (see the nationality section below). This leads to a second possible explanation.

The problem may be the legal profession in general. The available data suggest that women are under-represented in senior legal positions around the world, so ISDS may simply be one example of this broader trend. This is undoubtedly part of the explanation. In most jurisdictions, senior lawyers and judges are overwhelmingly male. But again, this is unlikely to be the whole picture: the under-representation seems more acute in ISDS than elsewhere. Take the example of law firms in the UK, where reliable data is available. Though unimpressive, the figures are nowhere near 5%. Around a quarter of partners in UK firms are women.[40] Even in the five so-called “Magic Circle” firms, which tend to perform poorly on a range of diversity measures, the figure is around 18%.[41] And yet, while well-represented among the arbitrators in our list of 52, none of the Britons are women.

So other factors must be at play, and we can do little more than speculate as to why this is so. One possibility is age. The number of women in senior legal positions has been gradually increasing for the past two decades, but there may be an additional lag in ISDS because most arbitrators tend to be much older than a typical law firm partner, or even senior judge. Indeed, many ISDS arbitrators are ex-judges from senior courts that included

[38] See Franck, “Empirically Evaluating Claims about Investment Treaty Arbitration”, above n 26.

[39] Greenwood and Baker, above n 27, 655-656.

[40] Chambers Student, 2014 Gender in the Law Survey, available at http://www.chambersstudent.co.uk/where-to-start/newsletter/2014-gender-in-the-law-survey

[41] Ibid.

no women at the time of their service. Another factor may be the lack of a centralised institutional actor able to push for greater female participation. A progressive government or appointing body can do this in judiciaries, just as a progressive managing partner may do so in law firms. In ISDS, the role of ICSID notwithstanding, appointing power is spread across hundreds of parties. But whatever the causes, the inescapable conclusion is that ISDS suffers from a serious lack of gender diversity, which is substantially worse than that faced by the legal profession as a whole in many countries.

3.2. Nationality

Though perhaps less important than ever, nationality may inform many elements of a person's worldview and his or her intuitive response to a dispute. A particular practice or set of facts may strike one practitioner as dubious, while appearing perfectly normal to a practitioner from another country. It may therefore be undesirable, from a decision making perspective, to have tribunals dominated by one particular nationality. This seems to be supported by the behavioural studies research outlined above. And even if nationality plays only a small role in arbitrators' conduct and deliberations, as some have suggested,[42] it is unquestionably important to reassure the parties of the neutrality of the tribunal and reinforce the legitimacy of the system. This legitimacy rationale is reflected in the importance that is placed on nationality in many arbitral institutional rules.[43]

The distribution of nationalities among the top 52 arbitrators is as follows.

Figure 1: most frequently appointed arbitrators by nationality

French	8
British	7
Canadian	6
US	4
Australian	3
Spanish	3
Swiss	3
Argentine	2
German	2
New Zealand	2

[42] See Andreas F Lowenfeld, "The Party-Appointed Arbitrator: Further Reflections" in Newman and Hill (eds) *The Leading Arbitrators' Guide to International Arbitration* (Juris Publishing, 2008), 46.

[43] See, e.g., ICC Rules (2012), Art 9(5); UNCITRAL Rules (2010), Art 6(7); ICSID Convention, Art 39; ICSID Arbitration Rules, Art 1(3).

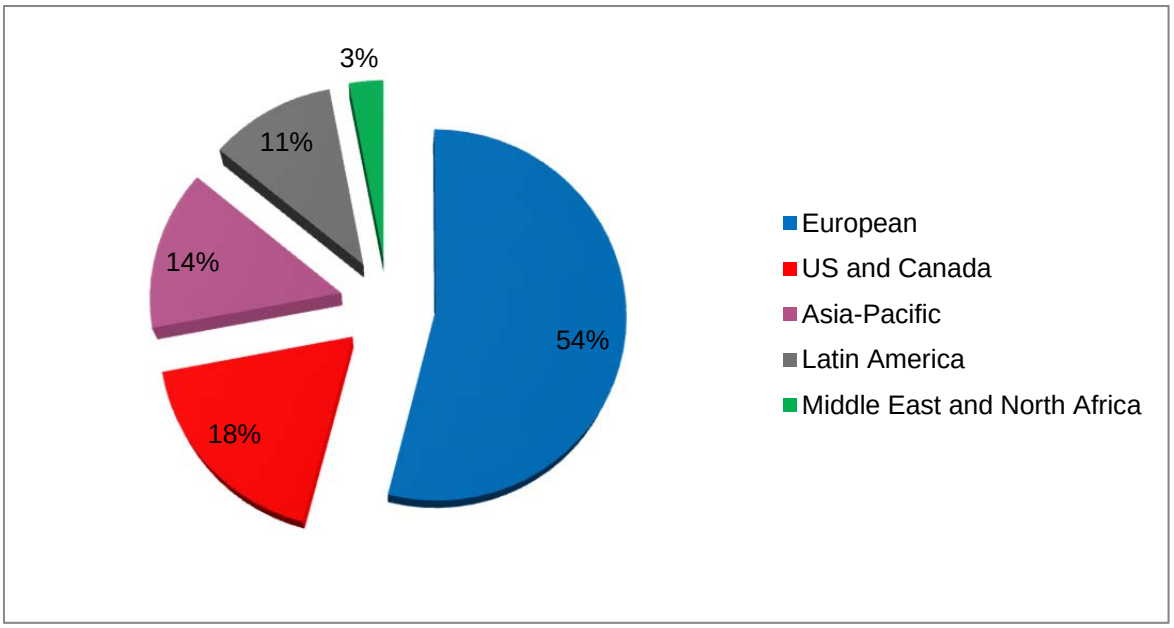
Swedish	2
Bangladeshi	1
Belgian	1
Bulgarian	1
Chilean	1
Colombian	1
Costa Rican	1
Dutch	1
Egyptian	1
Filipino	1
Italian	1
Lebanese	1
Mexican	1
Singaporean	1
Slovakian	1

This is probably a greater range of nationalities than many of ISDS' detractors would expect. The 52 arbitrators hold 25 different nationalities.[44] Few industries or institutions could claim this level of national diversity at the highest level. In fact, the cultural diversity of the field of international arbitration is frequently cited by practitioners as one of the main reasons they enjoy working in it. So it is difficult to sustain the accusation that ISDS is dominated by a particular national group. That said, the criticism is sometimes phrased not as a homogeneity of nationalities, but rather, it is said that the figures are skewed in favour of developed countries or, as one NGO phrases it, the "rich North."[45] Broken down by region, then, the picture is as follows.

[44] Note that four hold dual nationality: Jan Paulsson (French and Swedish), Philippe Sands (British and French), J. William Rowley (British and Canadian) and Ibrahim Fadlallah (French and Lebanese).

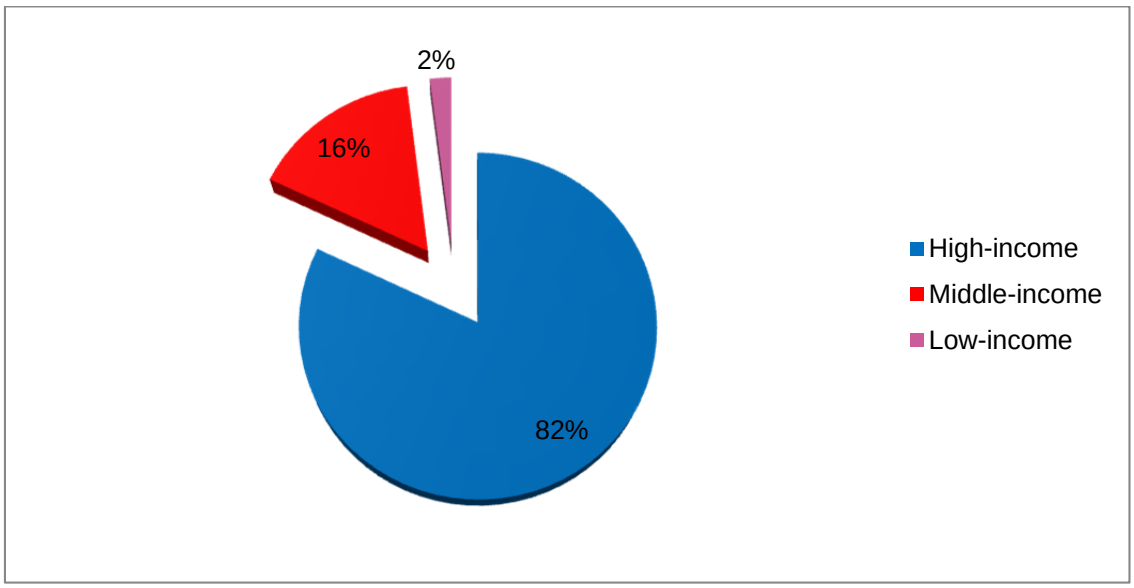
[45] A term which has always baffled the authors of this article, whose home country forms part of the "North" despite its proximity to the South Pole.

Figure 2: most frequently appointed arbitrators by region



The chart below presents the figures by reference to level of economic development, reflecting the classifications used by the International Monetary Fund. A country is "high-income" (or what many people call "developed") when its gross national income (GNI) per capita is US$12,746 or more. A "middle-income" country has GNI per capita of between US$1,045 and US$12,746, while "low-income" countries are those with GNI per capita below US$1,045.

Figure 3: most frequently appointed arbitrators by level of economic development



Clearly, these numbers are skewed in favour of certain regions and developed countries. There are also some glaring absences. It is remarkable that none of the so-called BRICS (Brazil, Russia, India, China and South Africa) are represented. None are from Sub-Saharan Africa, and five of the eight Asian arbitrators are from Australia and New Zealand, which some may consider to be in some respects "European".[46] Other countries may be said to be "over-represented" given their size and role in global investment. Canada, France, New Zealand and the UK are the most obvious of these.

However, the figures show that this is hardly the exclusive European club which some allege it to be. Notwithstanding the conspicuous absence of Brazilians, Latin America's contribution is roughly equivalent to its share of global population, and probably exceeds its place in global investment. Criticisms that ISDS arbitrators are disproportionately "North American" mask the fact that this largely means "disproportionately Québécois": two of the top ten, L. Yves Fortier and Marc Lalonde, spent their undergraduate years at L'Université de Montréal. Only one US citizen, Charles Brower, appears in the top 20. The US is in fact under-represented given its size and place in international commerce.[47] It is also overly simplistic to pretend that "Europe" is a monolithic entity. The Europeans in the list come from a diverse range of countries, and ISDS tribunals benefit from this. The Bulgarian, Slovakian and Spanish arbitrators in the list were raised and educated in countries that seemed a long way from Brussels and Strasbourg at the time.

Furthermore, the numbers are probably driven in part by innocuous factors. France's significance reflects Paris's place as the global centre of arbitration, home to many of the most notable (French and non-French) practitioners, and its universities have strong traditions in comparative and international law. Similarly, London is an arbitration hub, and the popularity of English law across the world means that its lawyers are disproportionately represented. New Zealand, Canada and Switzerland have the advantage of perceived neutrality, and the latter two boast high numbers of multi-lingual lawyers. Language is no doubt an important factor in international dispute settlement. Most investment arbitration awards are rendered in English, Spanish or French, so it is unsurprising to see so many native speakers of these languages. Conversely, parties simply do not choose Mandarin, Portuguese or Russian as the language of their arbitration, so demand for arbitrators who speak only these languages is non-existent.

One factor related to nationality is less obvious in the data, but should be mentioned nonetheless. While we can argue about the national diversity of this group, what really stands out is that they are not that *national* at all. They tend to be very international people who have strong connections to several places. All regularly work abroad; almost a third

[46] It is reasonable enough for there to be debate about where to place Australia and New Zealand. Polling by the Lowy Institute for International Policy, an Australian think tank, indicates that Australians themselves are fairly evenly divided between calling their country part of Asia, Oceania or no region at all, with about 5% claiming it to be part of Europe.

[47] This is consistent with the findings of Susan D. Franck in 2007. See Franck, "Empirically Evaluating Claims about Investment Treaty Arbitration", above n 26, 79.

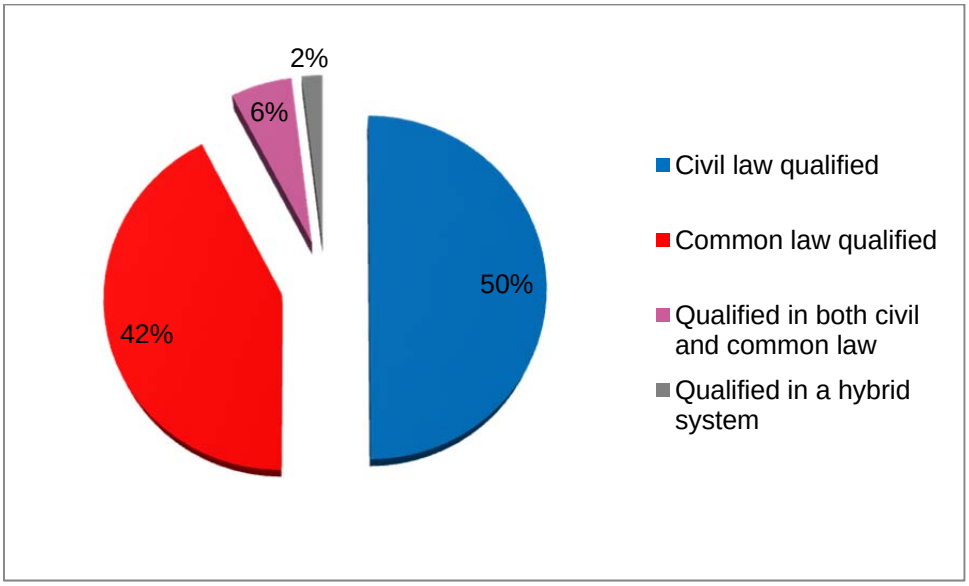
hold a degree from a foreign country; and, as noted below, they are remarkably polyglot. This nuance should inform any assertion that ISDS is dominated by particular nationalities.

3.3. Legal tradition

A diversity of legal training is important for similar reasons to national diversity. Despite the convergence encouraged by international arbitration, important substantive and procedural differences exist between the main legal traditions. Examples of these clashes are well known. US lawyers stun Europeans with their expectations in document discovery, and English barristers are baffled by suggestions that they may have a conflict of interest with counsel with whom they share chambers. So long as a divergence in legal cultures persists, it is important to have a tribunal composed of arbitrators sensitive to the differences, and parties' confidence in the system will be limited without such an outlook.

The spread of legal traditions among the arbitrators in our sample is as follows.

Figure 4: legal training and qualification



As can be seen, this is a fairly balanced distribution. It also probably understates the extent of familiarity which ISDS arbitrators tend to have with other legal families. In addition to the three arbitrators qualified in both systems, 16 of the sample hold a degree from a country in whose system they are not admitted. More importantly, practising international arbitration probably gives these arbitrators greater exposure to different legal families than is typical of most practitioners.

The slight civil law bias reflects the fact that, on sheer numbers, most countries have a civil law system. It is also due to certain civil jurisdictions having strong traditions of arbitration and comparative law (such as France, Switzerland, Lebanon and Egypt) and because some of the major common law countries, notably the US and the UK, may suffer

from a perception of a lack of neutrality in certain cases. One absence worth noting is that this group seems to have little experience in the *Shari'a*. With the notable exception of Egypt,[48] few states in the Muslim world have much experience of ISDS and, in any case, it is rare to find a published award in which the *Shari'a* plays a significant role. To the extent that investment treaty disputes are said to be on the rise in states where the *Shari'a* is important to the legal system, it would be important for the legitimacy of the system that suitable arbitrators emerge. On the whole, however, it can be said that ISDS's diversity issues do not lie in a bias towards a particular legal system; the diversity of experience is in fact quite impressive.

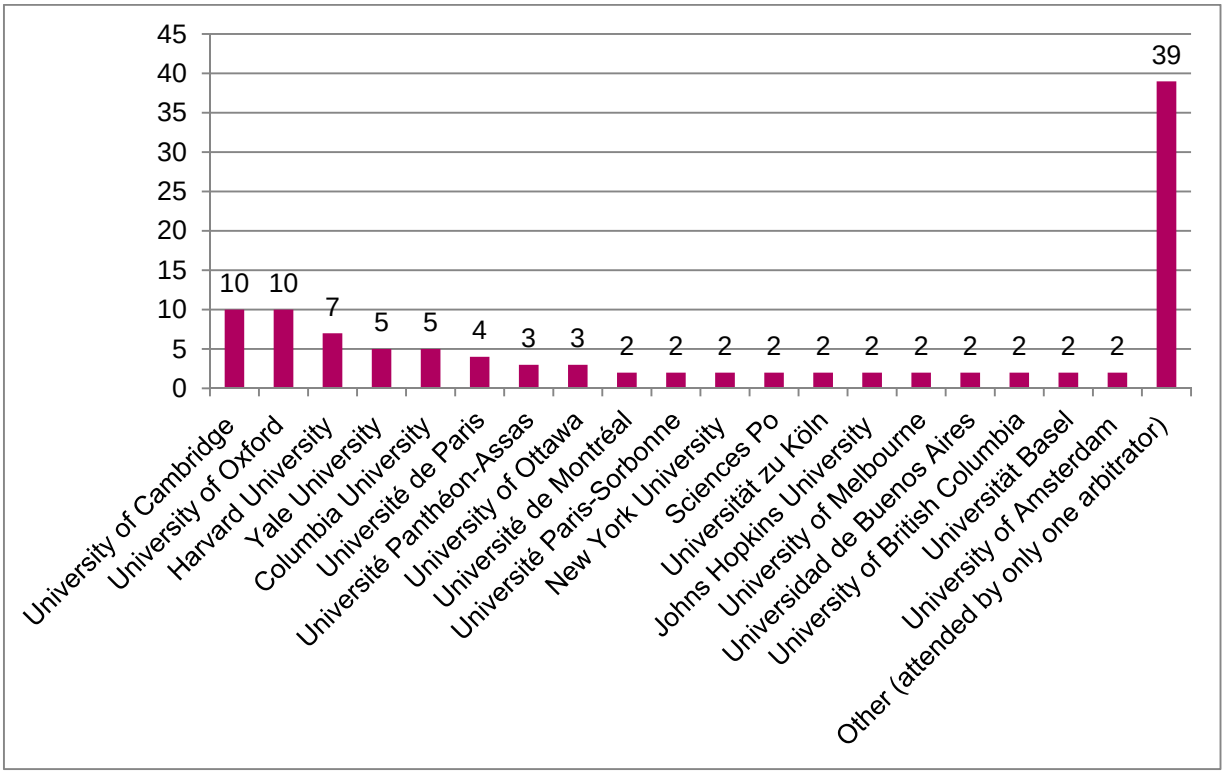
3.4. University

University education, particularly the undergraduate years, may have a formative influence on one's intellectual views and personal biases. Even the most senior lawyers sometimes cite a university lecturer as having left a lasting impression and directed their career in a particular way. For this reason, it seems undesirable to have a tribunal composed of arbitrators who all had the same university experience. Moreover, university education may be an (admittedly crude) proxy to assess the socioeconomic diversity of ISDS arbitrators. If all arbitrators are Oxbridge or Ivy League educated, it may reflect a bias towards wealth and privilege, as well as a barrier to entry for those without such backgrounds.

The distribution of universities attended by the arbitrators is displayed below. It can be seen that most of the universities were attended by only one arbitrator in the sample, with only a handful of institutions claiming two arbitrators or more. It should be noted that this includes degrees from undergraduate to PhD, and most ISDS arbitrators have attended more than one institution.

[48] Egypt is now the fourth most frequent respondent in ISDS, with 23 known claims against it. See UNCTAD, *Recent Developments in Investor-State Dispute Settlement*, April 2014.

Figure 5: universities attended



Notes

[1] In 1970 L'Université de Paris was split into 13 separate universities, including Panthéon-Assas and the Sorbonne. The Université de Paris column includes only those arbitrators who attended it prior to its dissolution.

[2] The 39 other universities, each attended by only one arbitrator in our sample, are: Carleton University, Université catholique de Louvain, Charles University, Escuela Libre de Derecho (Mexico), Rheinische Friedrich-Wilhelms-Universität-Bonn, Hochschule für Politik (Berlin), ICADE Madrid, Universidad Autónoma de Madrid, Hebrew University, Moscow Institute of International Relations, George Washington University, Southern Methodist University (Texas), Bond University, Stockholm University, Universidad Compultense de Madrid, Università di Bologna, Universidad del Rosario (Bogotá), Queen Mary University, University of Adelaide, L'Université de Provence Aix-Marseille I, Erasmus University, University of Auckland, University of Sussex, Graduate Institute of International Studies (Geneva), Tufts University, University of Cape Town, Universidad de Chile, London School of Economics, Universidad de Costa Rica, Universität Frankfurt am Main, Université de Fribourg, Max Planck Gesellschaft (Hamburg), Université de Genève, McGill University, University of Notre Dame, University of Otago, Institut d'Etudes Politiques (Strasbourg), Université de Paris X (Nanterre), L'Ecole Nationale d'Administration (France).

The first few universities may arouse some suspicion, and feed into the view that ISDS arbitrators are a wealthy Anglophone elite. It means that almost half of the most appointed ISDS arbitrators hold either Oxbridge, Harvard or Yale degrees.

A couple of points may be raised in mitigation. First, these are by many measures the "best" and most prestigious universities in the world. Certainly, their law faculties are home to many of the world's most highly regarded legal scholars. As most ISDS arbitrators are English speakers and high-achievers academically, it is not all that surprising that so many of them should end up in these universities. Second, it is worth taking a closer look at when the arbitrators studied at these institutions. It is not, or at least not always, the stereotypical story of a privately educated student being admitted to

Harvard or Oxbridge, just like his father and grandfather did. The more typical pattern is a high-achieving student obtaining an undergraduate degree in their home country, and then winning a scholarship for postgraduate study at an elite university abroad. Most of the Cambridge alumni, for example, are non-British citizens who enrolled at Cambridge for their second or third degree. The Harvard alumni include two Argentines and a New Zealander, all of whom already had degrees in their home country.

Moreover, the sheer length of the list gives it a fairly impressive level of diversity. The top 52 arbitrators hold degrees from 58 different universities. It is in fact remarkable that only a few universities count more than three of these arbitrators among their alumni. This is far greater educational diversity than what exists in many national judiciaries and international law firms. In the UK, for example, 81% of senior judges have Oxbridge degrees.[49] Over half of the current US Supreme Court holds a degree from Harvard. Remarkably, even on the High Court of Australia the majority of justices have an Oxbridge degree, and in the Philippines Ateneo and the University of the Philippines dominate the Supreme Court. Moreover, the geographical spread, while having a clear North American and European bias, is reasonably broad, covering 22 different countries. On any given tribunal, then, it is common to have arbitrators educated in three different countries. No doubt, this is partly explained by the international mobility and outlook of ISDS arbitrators. But it is a diversity advantage nonetheless. Thus, to the extent that alma mater are a proxy for social background and play a significant role in the development of one's worldview, ISDS boasts a relatively high level of diversity.

3.5. Professional experience

There are typically no strict requirements as to qualifications or professional background to be appointed as an ISDS arbitrator. Legislation and institutional rules give little guidance, although the ICSID Convention states that arbitrators should be "persons of high moral character and recognized competence in the fields of law, commerce, industry or finance."[50]

As noted above, one of the regular criticisms of ISDS is that its arbitrators are "moonlighting corporate lawyers". The accusation is essentially that they lack the breadth and diversity of experience to render awards of such significance. If it can be substantiated, it is a serious flaw for three reasons. First, ISDS awards may have major political and economic implications. Investment arbitration awards may place significant limits on government policy, or may require states to pay huge sums in damages which can have a substantial economic impact on public finances. One oft-repeated example is the Czech Republic being ordered to pay an investor an amount roughly equivalent to its annual budget for public health.[51] Second, ISDS does not tend to involve the simple

[49] Thomas, above n 21, 8.

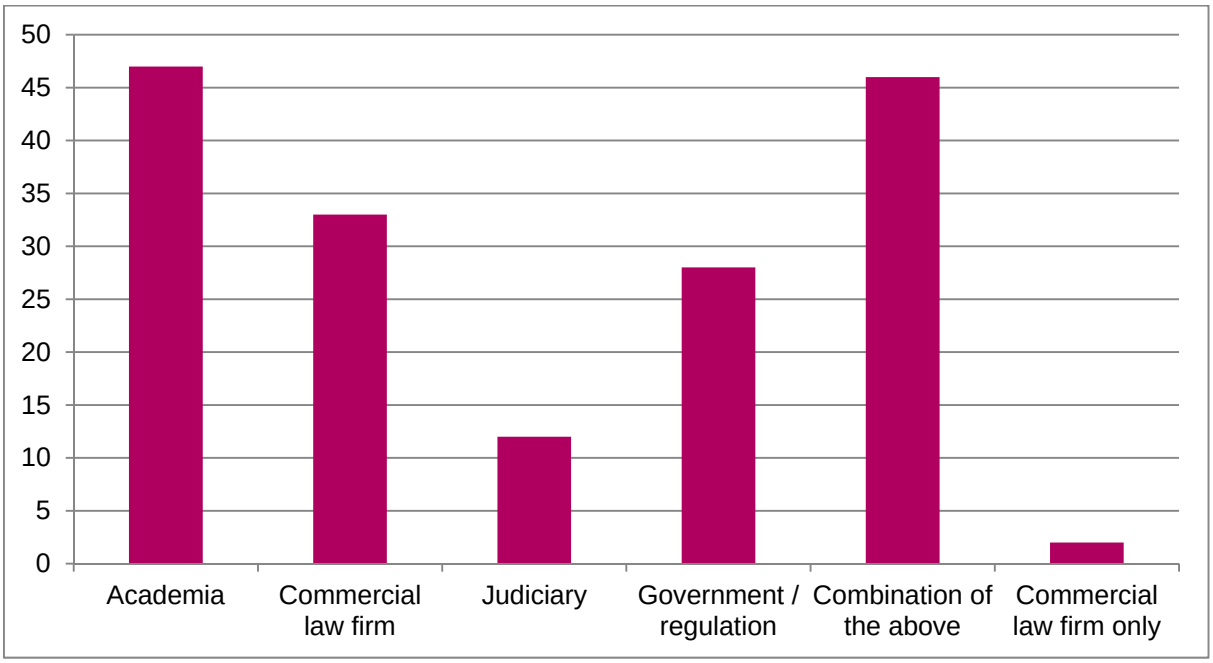
[50] ICSID Convention, Art 14.

[51] *CME Czech Republic B.V. v The Czech Republic*, Final Award, 14 March 2003. See also Peter S. Green, "Czech Republic Pays $355 Million to Media Concern" *New York Times*, 16 May 2003.

application of unambiguous rules. As Catherine Rogers has pointed out, the treaties agreed to by states provide only a broad framework. The "meat on the bones" comes from the decisions of arbitrators.[52] Third, there is the implication that corporate lawyers will naturally be more sympathetic to investors than States, as their firms derive their income from precisely the kind of parties who tend to be claimants in ISDS cases. These arguments seem to compel the conclusion that a tribunal with experience in only corporate law may be ill-equipped to grapple complex questions of treaty interpretation, government regulation, social policy and response to crises.

The professional experience of the 52 arbitrators in our sample is outlined below. Note that most have experience in more than one field.

Figure 6: professional experience



The analysis reveals that the majority of ISDS arbitrators do have experience in commercial law firms. But this is by no means the whole picture. The vast majority (88%) have had careers which span some combination of commercial law firms, academia, government and the judiciary. More have experience working in universities than law firms, and those with government or regulatory experience are only slightly less numerous than those with commercial law experience. Only one has spent his entire career in a corporate law firm.

Those arbitrators that have spent time in commercial law firms have often had significant experience elsewhere. Marc Lalonde, for example, worked for many years at a large Canadian law firm, but before this was an academic, an advisor to Canadian Prime

[52] Catherine A. Rogers, "The Politics of International Investment Arbitrators" (2013) 12 *Santa Clara Journal of International Law* 223, 262.

Ministers, and eventually a Cabinet Minister under Prime Minister Trudeau. Rodrigo Oreamuno is the senior partner at one of Costa Rica's largest commercial firms, but Costa Ricans tend to remember him better as a former Vice-President and Central Bank board member. Charles Brower, the supposedly favourite appointee of investors, has a long association with a major international commercial law firm, but has also served as the chief lawyer for the US State Department, special advisor to a US President and an ad hoc judge of the Inter-American Court of Human Rights. Stanimir Alexandrov is a partner at a large US firm, but he is the former Vice Minister of Foreign Affairs of Bulgaria. Similarly, Ahmed Sadek El-Kosheri is a partner at a commercial law firm, having previously served as a judge on administrative tribunals, an ad hoc judge of the International Court of Justice, and Secretary-General of the Islamic Development Bank. Juan Fernandéz Armesto is a commercial lawyer, but has also served as Chairman of the Spanish Securities and Exchange Commission. L. Yves Fortier has been both a commercial lawyer and President of the UN Security Council. Campbell Mclachlan is a former partner at a large UK firm, but also a Professor at the Victoria University of Wellington, and author of numerous publications on public international law. These examples are not exceptions, but typical of the multi-dimensional careers which the most appointed ISDS arbitrators have followed.

Few of the most appointed ISDS arbitrators currently work at major international commercial firms, which should come as no surprise. If a firm has a large number of clients across the world, its partners are likely be conflicted out of many arbitral appointments. Acting as an ISDS arbitrator is also considerably less lucrative than acting as counsel in international arbitration cases.

The results therefore do not support the charge that ISDS arbitrators moonlighting corporate lawyers. Far more often, their careers have the combination of private, public and academic experience which is arguably the type of experience that is appropriate to adjudicate foreign investment disputes. On this measure, the diversity concern appears to be exaggerated.

3.6. Languages

In the same way that an argument or set of facts may be received differently between legal families, certain positions may be best understood by those familiar with a certain language. In some instances, the meaning of a particular word in the local language of the state can be crucial to determining a case, and expert evidence may be adduced where a tribunal lacks the linguistic competence. In a recent case against Indonesia, for example, the question of Indonesia's consent under the relevant treaty hinged largely on whether the word "bersedia" is more akin to "is prepared/ready" or "is willing".[53] In other situations it may be more a matter of perception that a party is receiving a fair hearing and its position

[53] *Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Decision on Jurisdiction, 24 February 2014. The tribunal, comprising Gabrielle Kaufmann-Kohler, Michael Hwang and Albert Jan van den Berg, are all in our sample.

is being properly understood by the adjudicator. Language abilities may also be relevant to promote efficiency and to avoid the use of translators and interpreters.

The figures below present the linguistic diversity of the arbitrators in our sample.

Figure 7: number of languages spoken

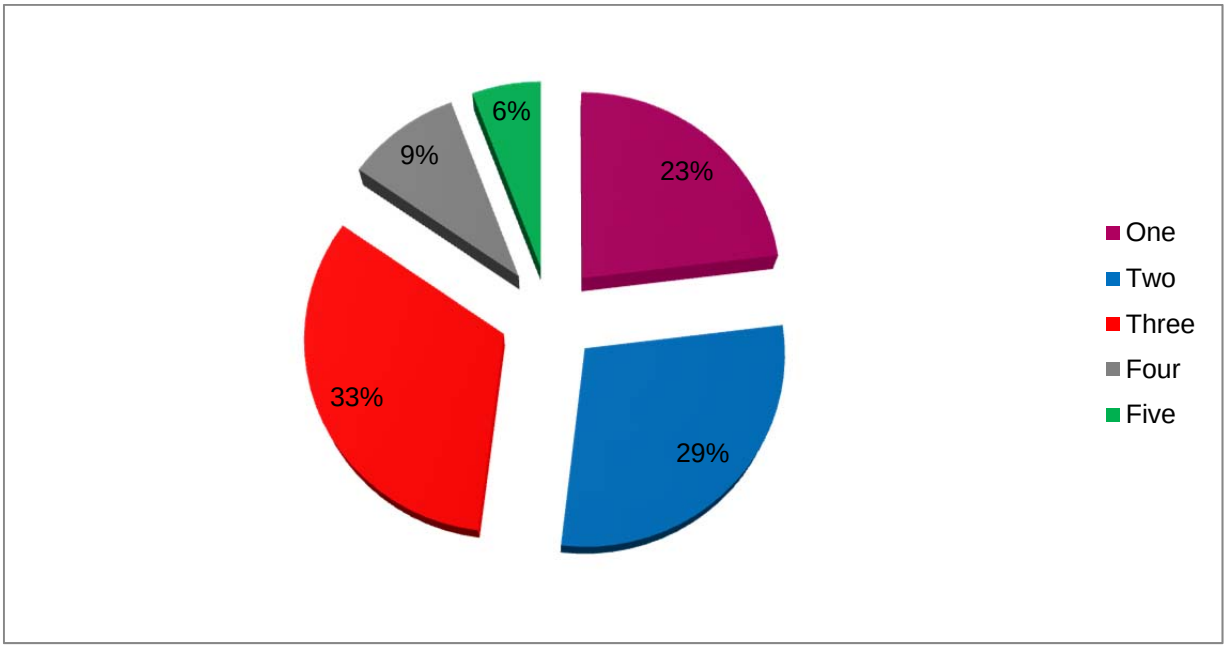
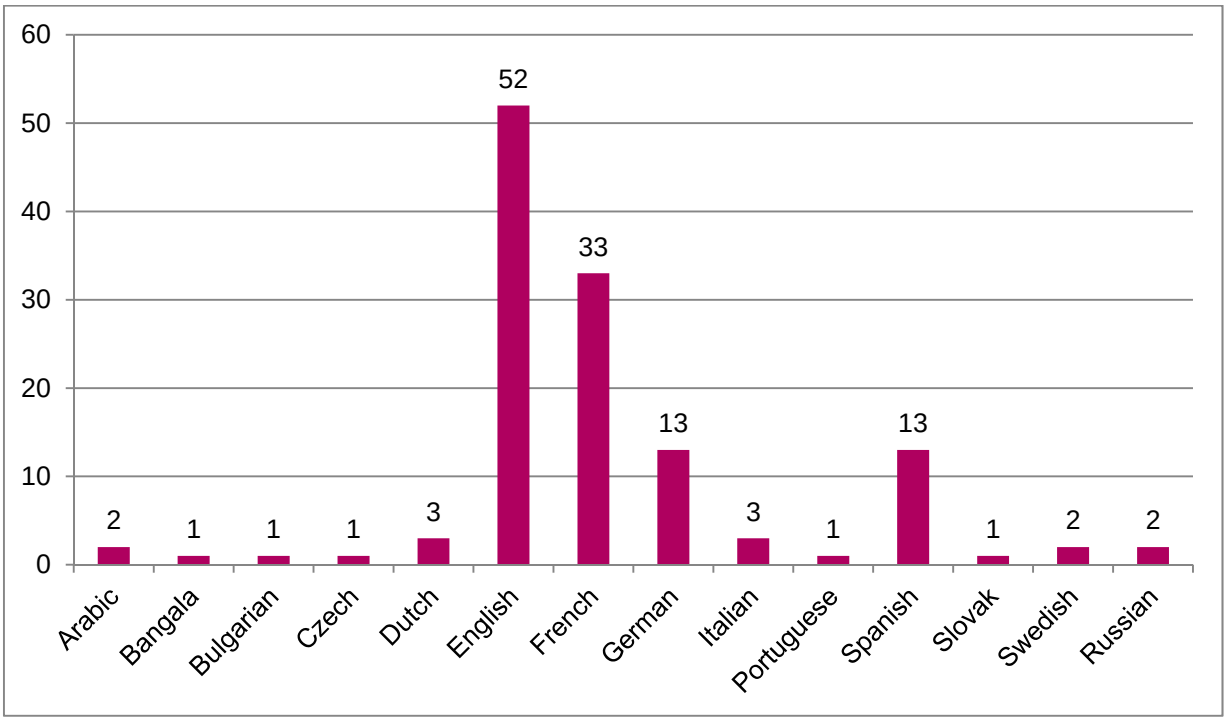


Figure 8: Languages spoken



Here, the numbers speak for themselves. They are clearly an impressively polyglot group, with almost half speaking three languages or more, covering the most frequently used languages in international arbitration and foreign investment. To the extent that parties and institutions value multilingualism, arbitrators seem to be responding.

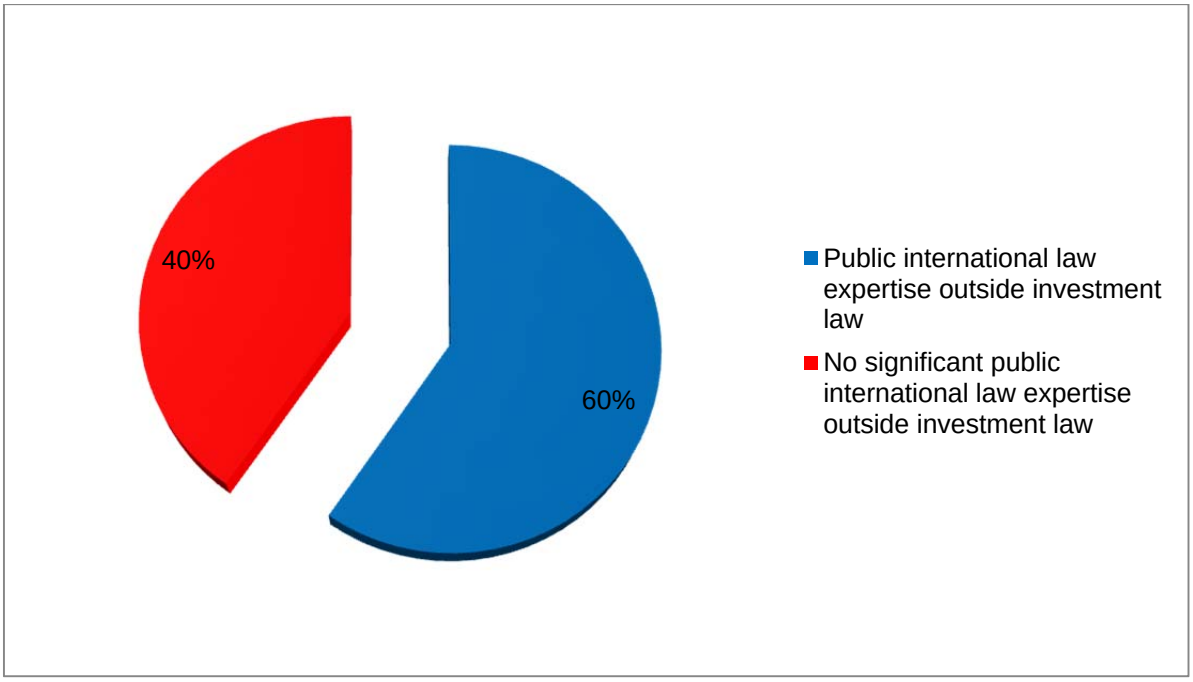
That being said, there is a narrowness in the breadth of languages spoken. It is notable that none are fluent in Mandarin, the world's most spoken language, and surprising to find only one Portuguese speaker. It also appears that there is a dearth of arbitration practitioners who speak both Arabic and English, or Arabic and French, limiting the choice of some parties in the Middle East and Africa. Speaking broadly, however, ISDS compares well to most fields and industries in terms of linguistic diversity.

3.7. Public international law expertise

Some critics of ISDS point to the private sector background of certain arbitrators and assert investor bias. Others have a more measured claim: ISDS arbitrators are essentially lawyers trained in international commercial arbitration and litigation, who tend to lack the public international law expertise which the field demands. While they may have taught themselves investment law, they do not have the lifetime of experience and breadth of exposure required for high quality treaty interpretation.[54] If borne out by the results, the criticism may be perfectly appropriate.

The figure below shows the proportion of ISDS arbitrators who have significant expertise in public international law outside investment law.

Figure 9: public international law expertise



[54] See Roberts, above n 12, 207n134.

At the very least, the results indicate that the problem is not as bad as sometimes alleged. A clear majority in our sample can claim expertise in a field of public international law beyond investment law. Most frequently, this means experience at the International Court of Justice (many have served as counsel or judges), as WTO panellists or senior diplomatic positions entailing treaty negotiations. And the remaining 40% should not be criticised too quickly. These arbitrators have public international law expertise in precisely the field in which they work: investment treaties. While it is plausible that they may be less concerned about the views of treaty parties or public international law interpretive approaches,[55] that view is yet to be confirmed by any thorough analysis.

4. Possible reforms

From the above, it is clear that ISDS suffers a lack of diversity in certain characteristics. It is beyond the scope of this article to extensively explore the potential solutions, but it is hoped that this study – by presenting the nature and extent of some of the diversity problems – will be a sound starting point and catalyst for the debate in order to address the problems. With that in mind, three basic points can be made.

First, substantial improvements cannot be driven by any single actor alone. The selection of ISDS arbitrators may be influenced by a range of factors over a long period of time: economic development of a country; government policy on girls' education; university scholarships; the culture of the legal profession, government, judiciaries and academia in promoting diversity; and the attitudes of parties and institutions in assessing potential arbitrators. So let us not be tricked into thinking that there are quick and easy solutions.

Second, there is a vast range of approaches which can be adopted to address diversity problems, which can usefully be put on a spectrum from "light touch" to the more direct and, potentially controversial. These are already well known in diversity discussions within businesses, universities and judiciaries. On one end of the spectrum, we have measures such as sponsoring scholarships or training for under-represented groups, or establishing minority networks. Further along the spectrum, organisations such as appointing authorities may expressly acknowledge the advantages of diversity and, in assessing two identical candidates, recognise that a group will benefit from greater diversity and take action accordingly. This can be supported by aspirational targets, such as those of commercial law firms aiming to have women represent 30% of the partnership. At the other end of the spectrum lie compulsory quotas, which are obviously more controversial, but are already a de facto part of many international adjudicatory bodies, where the representation of certain regions and countries is assured.

Third, there is already anecdotal evidence of change. Counsel teams, who tend to be younger than arbitrators, are typically more diverse than the tribunals to which they make

[55] Ibid.

submissions. A generation of law students has been introduced to ISDS through law schools and international moots in far larger numbers and in many more countries than their predecessors. And almost a quarter of the *Global Arbitration Review's* "45 under 45" (a 2011 guide to the top 45 commercial arbitrators under 45 years old) are women.[56] Moreover, as noted above, the majority of cases in our dataset are from 2000 onwards, but the data go back to the 1970s. There is no doubt that our study picks up a slight historical bias; the percentage of female arbitrators and arbitrators from outside Europe are probably dragged down by the older cases. When we look only at pending cases, the picture appears more promising from a diversity perspective. As of December 2014, Hong Kong arbitrator Teresa Cheng has five known pending investment cases and Yas Banifatemi, who is Franco-Iranian, has four. This is not to say that dramatic improvement in gender and national diversity is simply a matter of time – that seems unlikely – but merely to suggest that there are signs of gradual improvement.

Conclusion

The rise of ISDS has been met with criticism from many fronts. There is no doubt a legitimate debate to be had as to the scope and practice of ISDS. But this debate must be an informed one. This article has sought to address one of the often made criticisms of ISDS: that the arbitrators are drawn from a narrow pool of essentially male, elite, Western corporate lawyers. Or put another way, the pool of ISDS arbitrators lack diversity.

To this end, we have conducted an empirical study of the most appointed ISDS arbitrators, examining the diversity of 52 individuals who have been appointed to investment tribunals on 10 or more occasions. The diversity characteristics examined in this study are: (i) gender; (ii) nationality; (iii) the legal tradition in which they are trained (i.e. civil or common law); (iv) the universities they attended; (v) their professional experience; (vi) language skills; and (vii) expertise in public international law other than investment law.

On the basis of our findings, it must be concluded that the diversity picture of ISDS arbitrators is mixed. In some areas, particularly professional experience, legal tradition, languages and public international law expertise, ISDS boasts impressive diversity. In others, most strikingly gender and the participation of low-income countries, the situation appears grave.

Unqualified criticisms that ISDS arbitrators "lack diversity" are not supported by the evidence and fail to recognise the more nuanced picture of the diversity characteristics of ISDS arbitrators. In some respects there is cause for optimism from a diversity perspective, as the most appointed ISDS arbitrators come from a diverse range of backgrounds and professional experience. However, if other measures are examined, such

[56] Global Arbitration Review, "GAR 45 under 45 2011", August 2011, < http://globalarbitrationreview.com/surveys/article/29699/gar-45-under-45-2011-introduction/>

as gender diversity and the representation of low income countries, the situation is alarming.

As noted above, diversity is an important issue, both in terms of the quality of decision-making and the legitimacy of ISDS as a dispute resolution system. The lack of diversity in some key measures that have been revealed by our results raise serious concerns and contribute to attacks on the legitimacy of ISDS. History tells us that institutions which do not reflect those over whom they exercise authority tumble sooner or later. The ability of the players in ISDS to address its diversity problems will, in no small part, affect whether it continues to be a feature of transnational dispute resolution or a curious historical anomaly.