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Beyond the Pale: A Proposal to Promote Ethnic Diversity Among International Arbitrators

by C. Dolinar-Hikawa

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Beyond the Pale: A Proposal to Promote Ethnic Diversity Among International Arbitrators

by Courtney Dolinar-Hikawa¹

Abstract

The practice of international arbitration continues to grow, and the parties involved have become increasingly diverse. The arbitrators, however, still look the same: they are almost uniformly older, white males. This article focuses on the lack of ethnic diversity among international arbitrators, as represented by the lack of diversity of nationality. The author uses a regional framework to analyze International Centre for Settlement of Investment Disputes (“ICSID”) arbitrator and party nationality data, dividing the globe into four regions: Anglo-Europe, Africa, Asia, and Latin America. The ICSID data show that arbitrators are overwhelmingly Anglo-European, despite the diverse nationalities of the parties involved in arbitrations. The author suggests that the consistent lack of ethnic diversity among arbitrators is rooted both in Anglo-Europeans’ historical influence in arbitration, and in the arbitrator appointment procedures, which make it difficult for newcomers to establish themselves in the field. As a solution, the author proposes a regional diversity requirement for the sole arbitrator or the presiding arbitrator of a tribunal: the decision-maker and the parties cannot be nationals of the same region. This requirement would increase demand for non-Anglo-European arbitrators. Further, it would make the composition of arbitral tribunals better reflect the diverse nationalities that use arbitral institutions and it would reduce perceptions of arbitrator bias.

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I. International Arbitrators Are Predominantly Anglo-European

The parties involved in international arbitration² are a diverse³ and increasingly large group.⁴ However, the arbitrators themselves look very much the same. Sarah Francois-Poncet's 2003 epithet: "pale, male, and stale,"⁵ continues to describe most international arbitrators. This article focuses on the lack of ethnic diversity⁶ on international arbitral tribunals, as exemplified by the lack of regional nationality diversity among arbitrators. In Part I, I discuss how ICSID data on arbitrators' and parties' nationalities confirm that the arbitrators selected to serve on tribunals are—overwhelmingly—"pale."⁷ Reasons for the lack of diversity, explored in Part II, include Anglo-Europeans' instrumental role in establishing international arbitration as a dispute resolution mechanism and the arbitrator selection procedures that encourage parties to select the same cadre of elites for new arbitrations. In Part III, I propose a solution: an arbitrator regional diversity requirement. Specifically, I propose a requirement that the deciding arbitrator must be from a different region than either of the two parties. Part IV concludes by suggesting that a regional diversity requirement would increase demand for ethnically diverse arbitrators in a way that would better reflect arbitration's internationalism, respect the parties' autonomy, and would also rebut criticism of systemic bias.

In the United States, lack of diversity is often measured by race or ethnicity, but it may also take into account a lack of differences in religion, socio-economic status, and sexual orientation. My analysis employs nationality, rather than ethnicity, as a proxy for paleness,

² The author uses investor-State arbitration as an example of trends in international arbitration generally.

³ According to ICSID's 2014 Annual Report, Eastern Europe and Central Asia had the greatest number of newly registered ICSID cases (25%), followed by cases naming State parties in Western Europe and Sub-Saharan Africa (20% respectively). Latin American State parties were involved in 26% of new cases in FY2013, but only 7% of new cases in FY2014. WORLD BANK, REP. NO. 93612, INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID) 2014 ANNUAL REPORT, at 23 (2014), <http://documents.worldbank.org/curated/en/2014/01/23198664/international-centre-settlement-investment-disputes-icsid-2014-annual-report>.

⁴ The number of investor-State arbitrations has increased significantly over the past two decades, from fewer than 20 new cases per year before 2002 to an average of approximately 40 cases per year in the early 2000s to 57 new cases in 2013. U.N. CONFERENCE ON TRADE & DEVELOPMENT [UNCTAD], IIA ISSUE NOTE NO. 1, RECENT DEVELOPMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT (ISDS), at 2 fig.1 (2014).

⁵ Michael D. Goldhaber, *Madame La Présidente: A Woman Who Sits As President of a Major Arbitral Tribunal Is a Rare Creature. Why?*, 1 TRANSNAT'L DISP. MGMT. 1, 1–2 (2004) ("Arbitration is dominated by a few aging men, many of whom pioneered the field. In the words of Sarah François-Poncet of Salans, the usual suspects are 'pale, male, and stale.'").

⁶ This article will use the term "ethnicity" and its derivations to refer to a socially defined category of people who identify with each other based on common ancestral, cultural, and/or national experience. While the term "race" (a social concept usually used to refer to a group of people who share similar and distinct physical characteristics) is commonly associated with diversity in the United States, I use ethnicity here to represent a broader population.

⁷ It is difficult both to discuss and compare ethnicities without encountering loaded language. I have attempted to avoid such tropes where possible, and invoke the term "pale" because of its use in Francois-Poncet's oft-repeated phrase. As stated above, I use ICSID arbitrations as representative of international arbitrations generally. Other arbitral institution cases could have served as the basis of the research in this article, but ICSID arbitrations, because they are predominantly investor-State disputes, served as an illustrative example where nationality of the parties is easily determined.

because ethnicity is not easily determined without self-declaration. Using nationality simplifies data-gathering and avoids sensitive self-declaration issues.

I divide the globe into four regions: Anglo-Europe, Africa, Asia, and Latin America. In order to analyze the ethnic composition of international arbitral tribunals, I define Anglo-Europe as a region that extends from southern continental Europe to Scandinavia to the Caucasus (including Russia, but excluding Turkey). It also includes the historically Anglo-Saxon countries: Australia, Canada, New Zealand, the United Kingdom, and the United States.⁸ Here, the Anglo-European region corresponds approximately to a predominantly “white” ethnic group, despite significant religious, cultural, and socio-economic differences.⁹ The other regions are also divided based on rough ethnic similarities.¹⁰ From this perspective, nationality serves as a guide for paleness on arbitral tribunals.

The data show that arbitral tribunals are indeed predominantly Anglo-European. I examined the 289 closed ICSID cases from January 1972 to May 2015 for which both the parties’ and the arbitrators’ nationalities are available.¹¹ In nearly half of the cases (45%), the tribunals were composed of all Anglo-European arbitrators. In 84% of the cases, two or more of the tribunal members were Anglo-European, or the sole arbitrator was Anglo-European. By contrast, only 11 cases (4%) were arbitrated by entirely non-Anglo-Europeans.¹²

The results did not vary significantly based on the parties’ nationalities. In the 193 cases where *one party* was Anglo-European (or partially Anglo-European¹³), 40% were decided by

⁸ In analyzing data on ICSID arbitration panels, the following countries were categorized as Anglo-European: Albania, Australia, Austria, Belgium, Bosnia & Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Lithuania, Luxembourg, Macedonia, Moldova, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Ukraine, United Kingdom, and United States.

⁹ For example, my definition does not account for economic disparities between Eastern and Western Europe since the end of World War II.

¹⁰ The division of the regions other than Anglo-Europe into Africa, Asia, and Latin America is based roughly on ethnic similarities and conventional continental divides. This division is not relevant for the initial analysis of ICSID data because that analysis compares only Anglo-European arbitrators with non-Anglo-European arbitrators. It is important, however, for the discussion of the arbitrator regional diversity requirement in Parts III and IV.

¹¹ Information both arbitrators’ and the parties’ nationalities is available for 289 out of 324 closed ICSID cases (representing all cases from January 1972 through May 2015). These cases, found in ICSID’s searchable database (<http://icsid.worldbank.org>), include cases brought under BITs, under the BIT-like Energy Charter Treaty, and under contracts.

¹² The author acknowledges the inherent bias and cultural insensitivity in referring to all regions other than that defined as Anglo-Europe as singularly “Non-Anglo-European.” Nevertheless, this linguistic shortcut is the most efficient way to describe the ethnic distinction that is the focus of this article.

¹³ Under my definition, parties with multiple nationalities (either litigants of different nationalities within the party, or a dual-nationality litigant), including both an Anglo-European and non-Anglo-European country are considered partially Anglo-European. In a handful of cases, arbitrators were dual nationals of an Anglo-European and non-Anglo-European country. My analysis classifies these individuals as partially Anglo-European, and counts them in circumstances where there were a certain number “or more” of Anglo-Europeans. For example, I count an arbitrator who is a dual citizen of Switzerland and Brazil and who served on a tribunal with an American and a Canadian as part of a tribunal with “two or more” Anglo-Europeans, but not a tribunal with three Anglo-Europeans. Under my analysis, the same Swiss-Brazilian arbitrator serving on a tribunal with an Argentinean and a Costa Rican is not counted as part of an entirely non-Anglo-European panel.

entirely Anglo-European arbitrators, and 81% were decided by two or more Anglo-European tribunal members.¹⁴ Again, only 3% of cases were arbitrated by exclusively non-Anglo-Europeans.

The data is very similar in the 47 cases where *neither party* was Anglo-European: 38% were decided by entirely Anglo-European arbitrators, and 83% were decided by two or more Anglo-Europeans. It is notable that the percentage of cases decided by exclusively non-Anglo-European arbitrators is roughly three times higher in cases where both parties were non-Anglo-European (11%). Still, this group of five cases is small relative to the overall number of cases.

Even if the tribunal included non-Anglo-European arbitrators, in the vast majority of cases, the presiding arbitrator was Anglo-European.¹⁵ For the 289 total cases considered—without taking into account the nationalities of the parties—an Anglo-European presided or served as the sole arbitrator 76% of the time. Where the tribunal consisted of two or more Anglo-European arbitrators (or a sole Anglo-European arbitrator), the numbers are even more striking: the presiding or sole arbitrator was Anglo-European in 214 out of 244 cases, or 87%. The numbers are not much different when the nationalities of the parties are taken into consideration; an Anglo-European served as the presiding arbitrator in the majority of cases.¹⁶

	All Anglo-European Arbitrators	Two or More Anglo-European Arbitrators	All Non-Anglo-European Arbitrators	Presiding Arbitrator is Anglo-European
All Data—Without Considering Party Nationality	45%	84%	4%	76%
One Anglo-European or Partially Anglo-European Party	40%	81%	3%	72%
Neither Party Anglo-European	38%	83%	11%	81%

¹⁴ This figure includes cases decided by tribunals of two or more Anglo-European arbitrators and cases decided by a single Anglo-European arbitrator.

¹⁵ Presiding arbitrators with dual nationality including an Anglo-European country and a non-Anglo-European country were not included as Anglo-European arbitrators for the purpose of these percentages. For the entire data set of 289 cases, there were four cases where the presiding arbitrator fit this description: one Brazil-Switzerland, one Argentina-Spain, and two France-Lebanon.

¹⁶ In cases where one party was Anglo-European or partially Anglo-European, the presiding arbitrator was Anglo-European 72% of the time (139 out of 193 cases). And even when neither party was Anglo-European, the presiding or sole arbitrator was Anglo-European in 81% of cases (38 out of 47 cases).

II. Reasons for the Status Quo

There are several explanations for why so many appointed arbitrators are Anglo-European: institutional history, party appointment dynamics, and institutional appointment dynamics.

First and most fundamentally, international arbitration is an Anglo-European institution, concept, and legal practice.¹⁷ In the late-17th century, the Jay Treaty between the United States and Great Britain created a process for resolving property disputes that arose during the Revolutionary War.¹⁸ Contemporary international arbitration developed in the wake of World War II, when International Chamber of Commerce (“ICC”) leaders encouraged nations to draft and accept the New York Convention, which was opened for signature in 1958. The French government ratified the Convention within months and was an active proponent of international arbitration from the beginning, elaborating a judicial policy that encouraged international arbitration through its own legal system.¹⁹ Today, the ICC Court’s leadership continues to be dominated by Anglo-Europeans.²⁰

The predominance of Anglo-Europeans on investor-State arbitration tribunals in particular is perhaps unsurprising because of the mechanism’s roots in the economic and legal imbalances between Anglo-European and non-Anglo-European countries. Investment-related arbitration has grown since it was first included in a bilateral agreement between Germany and Pakistan in 1959.²¹ However, some have argued that investment arbitration’s expansion is not the result of a global consensus on substantive law and business policy, but rather, the widespread imposition of Anglo-European expectations of international business.²² Non-Anglo-European countries tend to be less developed, and therefore have an incentive to enter into bilateral investment treaties with Anglo-European countries and accept institutional arbitration in order to receive the benefit of Anglo-European investment.²³ There is nothing inherently insidious about the system, but the power imbalances that created the system in the first place help to explain why arbitrators have historically been Anglo-European and why Anglo-Europeans continue to make up the majority of investor-State arbitrators today.

¹⁷ Thomas E. Carbonneau, *Judicial Approbation in Building the Civilization of Arbitration*, 113 PENN ST. L. REV. 1343, 1343 n.1 (2009) (“The contemporary law of arbitration originated in North America and Europe.”); Catherine A. Rogers, *The Vocation of the International Arbitrator*, AM. U. INT’L L. REV. 957, 965 (2005).

¹⁸ INVESTOR-STATE DISPUTE SETTLEMENT, OFFICE OF THE U.S. TRADE REPRESENTATIVE (2015), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>.

¹⁹ Thomas E. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 781 (2002).

²⁰ The current president of the ICC Court is John Beechey from the United Kingdom, and 20 out of 26 ICC Court Vice-Presidents are from Anglo-European countries. However, the Court’s membership is comprised of more non-Anglo-European countries (50 non-Anglo-European versus 38 Anglo-European). *List of Current Court Members*, INT’L CHAMBER OF COMMERCE, <http://www.iccwbo.org/About-ICC/Organization/Dispute-Resolution-Services/ICC-International-Court-of-Arbitration/List-of-Current-Court-Members/>.

²¹ *The Arbitration Game*, THE ECONOMIST, Oct. 11, 2014.

²² James E. Meason & Alison G. Smith, *Non-Lawyers in International Commercial Arbitration: Gathering Splinters on the Bench*, 12 NW. J. INT’L L. & BUS. 24, 29 (1991).

²³ *See id.*

Other reasons for the lack of diversity among selected arbitrators are the limitations on the arbitrator appointment process, both in the party appointment process and in the process of appointment by institutions. In the case of party-appointed arbitrators, language barriers and former litigants' hesitation to share anecdotal information about the selection process make it difficult for current litigants to acquire information about arbitrators' conduct and decisional track record.²⁴ Most international commercial arbitration is confidential, and, depending on the institution, both awards and challenges to arbitrators' decisions are often unpublished.²⁵ New arbitrators struggle to establish themselves in the system and gain the kind of recognition that would lead parties to appoint them in the future.²⁶

Because of these information deficiencies, parties are more likely to select prominent arbitrators rather than take a risk on an unknown. Arbitrators often serve as part of a second career, after reaching high into the ranks in another area of the legal profession, such as in the judiciary, academia, or as a litigator.²⁷ For non-Anglo-Europeans, reaching prominence may not only require excelling within their own country's legal system, but on the international arbitration stage as well.²⁸ According to Yves Dezalay and Bryant G. Garth, there is a feedback loop within the central arbitration institutions: the lawyers, co-arbitrators, and chairs of the arbitral tribunals are all part of the same group. The respected primary players become familiar and inevitably nominate each other.²⁹ To the extent that arbitrators have been historically Anglo-European, this feedback loop perpetuates their near-monopoly on the positions.

Listings through organizations, such as the International Arbitration Institute or Arbitrator Intelligence, reduce some of these information deficits. However, Catherine Rogers has suggested that these listings would be even more effective if they included information about

²⁴ Rogers, *supra* note 17, at 969.

²⁵ *Id.* at 969. It is worth noting that ICSID and the Society of Maritime Arbitrators publish both awards and challenges. On the other end of the spectrum, the Hong Kong International Arbitration Centre and the Swiss Chambers International Arbitration Institution do not publish anything. The other major arbitration institutions fall somewhere in between. COMM. ON INT'L COMMERCIAL DISPUTES, N.Y.C. BAR, PUBLICATION OF INTERNATIONAL ARBITRATION AWARDS 4–7 (2014).

²⁶ YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 37 (1996).

²⁷ Schultz and Kovacs suggest that today arbitrators are selected for their prowess as managers, rather than for their general fame (identified by Dezalay and Garth as the “Grand Old Men,” who characterized the first generation of arbitrators, from the 1970s through the 1990s), or for their technical ability (the second, “technocrat” generation in the late 1990s). Their analysis comes from 58 survey responses from lawyers and arbitrators engaged in the practice of arbitration regarding which criteria they use to select or recommend an arbitrator. Thomas Schultz & Robert Kovacs, *The Rise of a Third Generation of Arbitrators? Fifteen Years After Dezalay & Garth*, 28 *ARB. INT'L* 161, 162 (2012).

²⁸ This selection bias also affects women, who may have taken longer than men to reach the same point in their first career. See Lucy Greenwood & C. Mark Baker, *Getting a Better Balance on International Arbitration Tribunals*, 28 *J. LONDON CT. INT'L ARB.* 653, 655 (2012). at 659.

²⁹ DEZALAY & GARTH, *supra* note 26, at 49. Rogers cites instances of the field's clique being referred to as “a ‘cartel,’ a ‘club,’ or a ‘mafia.’” Rogers, *supra* note 17, at 968. Jan Paulsson, the noted arbitration scholar and practitioner, has argued against the mafia analogy because it implies that well-known arbitrators are selected irrespective of their merits. Paulsson suggests that the appointing authority puts at risk its reputation when it selects an arbitrator, which makes the “image of a cabal working to protect mediocre cronies” unrealistic. JAN PAULSSON, *THE IDEA OF ARBITRATION* (2013).

arbitrators' previous challenges for bias and anecdotal feedback from former parties or colleagues, rather than solely information provided by the arbitrators themselves.³⁰

There are also limitations on institutions' capacity to improve arbitrator diversity. One method for improving diversity is for institutions and states to nominate more diverse candidates to the pool of eligible appointees. For example, both ICSID Contracting States and the Chairman of the ICSID Administrative Council nominate potential arbitrators to a list that is consulted if 1) the parties request that ICSID appoint one or more arbitrators, or 2) the parties' nominated arbitrators cannot agree upon a third presiding arbitrator. The list includes 600 individuals, 98% of whom are nominated by the Contracting States.³¹ Because nearly all of the nominees are nationals of the country that nominated them, the list roughly reflects the one-third Anglo-European and two-thirds (combined) African, Asian, and Latin American division of ICSID's Contracting State members.³² The Chairman could theoretically encourage further diversity by nominating entirely non-Anglo-European arbitrators, but since they only account for 10 out of 600 nominees, their impact is limited.³³

Beyond the Chairman's miniscule proportion of nominees to the list, ICSID also has a limited ability to affect whether diverse candidates are actually selected. In fiscal year 2014, 76% of appointments in ICSID cases were made by the parties or party-appointed arbitrators. Only 24% were made by ICSID.³⁴ For the 37 appointments it made in fiscal year 2014, ICSID appointed 27 individuals from 23 different countries, about one-third of which were developing countries.³⁵ At least in the ICSID context, because the arbitrator selection process gives preference to party-selected arbitrators, institutions have a limited ability to encourage diversity.

III. A Proposed Solution: An Arbitrator Regional Diversity Requirement

The ideal solution to the overwhelming homogeneity of arbitral tribunals is to implement an arbitrator regional diversity requirement in arbitration rules. In the case of multiple arbitrator tribunals, the party appointment process would proceed as usual: the parties would appoint arbitrators of their choice. When the process advances to the appointment of the presiding arbitrator (or when a sole arbitrator is appointed), there would be a restriction on who could be appointed to that role. The presiding arbitrator (or the sole arbitrator) would have to be a national of a country from a different region than either of the parties.

³⁰ Rogers, *supra* note 17, at 1009.

³¹ WORLD BANK, INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, MEMBERS OF THE PANELS OF CONCILIATORS AND OF ARBITRATORS (2015), *available at* <https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Pages/Panels-of-Arbitrators-and-Conciliators.aspx>.

³² *Id.* In the rare cases where a country nominated an arbitrator of a different nationality, 65% of the nominees were Anglo-European (the other 35% includes both non-Anglo-European and dual-nationality Anglo-European and non-Anglo-European). Eliminating dual-citizenship nominations, non-Anglo-Europeans were nominated by other countries only 4 out of 48 times (9%, and in the context of a total of 590 member country nominees).

³³ According to the May 2015 list, the Chairman's current nominees include six non-Anglo-Europeans (including two women) and four Anglo-Europeans. *Id.* at 7–8.

³⁴ ICSID Annual Report 2014, *supra* note 4, at 27.

³⁵ *Id.*

This requirement would be a procedural rule. Institutions could include it in their arbitration rules and conventions, much like Article 39 of the ICSID Convention, which requires that a majority of the arbitrators be nationals of States other than either the investor or State involved in the dispute unless the parties agree otherwise.³⁶ In this case, the presiding or sole arbitrator could not be from a region that is the same as either party.³⁷

The global regions could be defined based on the type and degree of diversity desired. One possible geographic regional division would be roughly by ethnicity, like the division into Anglo-Europe, Africa, Asia, and Latin America used to examine the composition of arbitral tribunals in Part I. This would ensure that in all cases, nationals of at least two of the regions would be involved, as represented by the parties and the arbitrator, which would likely lead to a more diverse tribunal. Such a methodology would not eliminate cases in which disputes between non-Anglo-European parties are decided by exclusively Anglo-European tribunals, but that would only occur in a relatively small number of cases (16% of the ICSID cases studied in Part I).³⁸ Unless there is a substantial increase in disputes arising between non-Anglo-European parties, a regional diversity requirement model would not contribute to the predominance of Anglo-European presiding or sole arbitrators.

A regional diversity requirement is an attractive policy, because it would eliminate the possibility that disputes involving at least one Anglo-European party could be decided by exclusively Anglo-European tribunals. These disputes account for a much larger percentage of the ICSID cases studied (67%). Under a regional diversity requirement, non-Anglo-European arbitrators would preside over or individually decide such disputes. Therefore, if the number of ICSID disputes involving at least one Anglo-European party increases or stays the same, nearly two-thirds of all cases would be presided over or decided by an African, Asian, or Latin American arbitrator.

This would create a new demand for arbitrators of non-Anglo-European nationality. In essence, parties and institutions would be forced to look outside of the “pale, male, and stale” box for eligible arbitrators. Once more diverse arbitrators are appointed, younger practitioners of similar nationalities would be more likely to aspire to and work towards becoming arbitrators. Likewise, the requirement would stimulate the international arbitration communities in currently

³⁶ ICSID, 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Art. 39, Mar. 18, 1965, 575 U.N.T.S. 159.

³⁷ An extreme version of this requirement could require that the presiding arbitrator not only be a national of a region other than the regions of either of the disputing parties, but also that he or she not be a national of the same region as either of the other members of the tribunal. Essentially, the parties, the party-appointed arbitrator, and the presiding arbitrator would all have to be from distinct regions. Such a scenario would ensure diversity on arbitral tribunals. It would also impact parties' decisions of which arbitrators to appoint because that, in turn, would restrict the nationality of any potential presiding arbitrator to a region other than the previously appointed arbitrators. A measure this extreme would be difficult to implement, however, because it would require multiple regions (five at a minimum) and could result in all arbitrators being ineligible for appointment. Further, it would considerably restrict party autonomy and involvement in the selection process. Therefore, the author suggests a more moderate approach where only the nationality of the presiding or sole arbitrator is required to be regionally diverse.

³⁸ For example, in a dispute between Japan and South Africa, the sole or presiding arbitrator could not be from Asia or Africa. The sole or presiding arbitrator could only be from Anglo-Europe or Latin America. Thus, if two Anglo-European arbitrators were appointed by the parties as arbitrators, the requirement would not prohibit the selection of an Anglo-European presiding arbitrator, resulting in an entirely pale tribunal. In the ICSID cases studied, however, only a small percentage (16%) were disputes that did not involve at least one Anglo-European party.

under-represented nations by, for example, encouraging the development of international arbitration education in those countries. This would encourage more diverse people to study and pursue careers in international arbitration.

However, a regional diversity requirement based on a division between Anglo-European and non-Anglo-European arbitrators is not without flaws. Criticisms often levied against affirmative action initiatives and ethnicity quotas are relevant here. Because this requirement is designed specifically to address the lack of diversity on arbitral tribunals, it may overlook arbitrators' other qualities that are relevant to obtain the "best" decision-makers. Moreover, diversity is not necessarily the most important factor in composing a fair arbitral tribunal. Indeed, national diversity may not even be the most important form of diversity in the composition of a fair tribunal. Cultural, socio-economic, and religious differences as well as differences in legal backgrounds all may influence an arbitrator's practice in other ways than his or her nationality. Therefore, the delineation of the "regions" for the purpose of the diversity requirement should view diversity broadly and consider the benefits to decision-making from increased diversity of all types.

An alternative delineation for the purposes of a regional diversity requirement could define the regions by conventional continental divides (e.g. Africa, Asia, Australia, Europe, North America, and South America³⁹). Under this alternative geographic division, the presiding or sole arbitrator in a hypothetical dispute between Peru and France could not be a national of a country in South America or Europe. This continental delineation could be further adjusted—as could a regional division based on ethnicity—to account for socio-economic diversity by subdividing the continents according to level of development, as measured by annual gross domestic product, for example. Europe and South America could be further divided into smaller sub-regions, such that in the Peru-France example, only arbitrators from the developed South American and European nations would be excluded. Dividing regions in this way would solve the problem of bias in parties' appointees based on geographic proximity and possible economic ties.

One serious concern with dividing arbitrator regions solely by continent or sub-continent to promote diversity is that such a system would not limit American and European nationals, the core "Anglo-European" countries, from dominating arbitral tribunals. In 2013, nearly half of the ICC arbitral appointments came from the United States, the United Kingdom, Switzerland, France, and Germany alone.⁴⁰ A system that considers the United States and European countries to be members of separate regions would enable nationals of those countries to preside over tribunals between nationals of the opposite continent, thus failing to address the "paleness" of those tribunals.

³⁹ Although seven States have made eight territorial claims to parts of Antarctica (which are neither suspended nor explicitly endorsed by the Antarctica Treaty), I chose not include Antarctica in this analysis because of the dearth of international arbitrations in which Antarctica is involved.

⁴⁰ INT'L CHAMBER OF COMMERCE, PUB. NO. @BUL25-1A, BULLETIN E-CHAPTER 2013 STATISTICAL REPORT 12 (2014), <http://store.iccwbo.org/2013-statistical-report>. The United Kingdom had the highest percentage of nationals appointed as arbitrators (13%) followed by Switzerland (11%), France (10%), the United States (7%), and Germany (6%). Only three of the top 14 countries with the most nationals appointed were non-Anglo-European (Brazil, Singapore, and Mexico). *Id.*

A complete overhaul of the international arbitration system to eliminate Anglo-European arbitrators is not the goal, however. The goal is to create a system where ethnic diversity is better represented, so that the composition of tribunals better reflects the parties who engage in international arbitration. A diversity requirement that considers the arbitrator's regional affiliation and ethnicity is the best way to achieve that goal.⁴¹ Even if such a requirement would not eliminate the possibility of all-Anglo-European tribunals, it would substantially increase the number of diverse tribunals.

IV. The Benefits of an Arbitrator Regional Diversity Requirement

A regional diversity requirement for arbitrators would result in more heterogeneous arbitral tribunals and might also improve age and gender diversity by generating demand for new arbitrators. Furthermore, an arbitrator diversity requirement is in line with the foundations of international arbitration: internationalism and party autonomy. It could also improve arbitration's legitimacy on the international stage.

Stipanowich and Ulrich suggest that the younger generation of arbitrators includes significantly more women and that the (slowly) increasing percentage of female participants will continue to grow as more female arbitrators enter the profession.⁴² An arbitrator regional diversity requirement would not directly address other issues women face, such as gender bias or career timing issues, but it could mitigate them by encouraging parties to look beyond the usual suspects. Nevertheless, the proposed diversity requirement is just a first step. Additional work will be required to break the "pale, male, and stale" formula.

Regardless of the manner in which arbitrator diversity regions are defined, a diversity requirement is consistent with the integral concept of a truly "international" dispute resolution mechanism.⁴³ International arbitration rules require that the disputing parties come from diverse States,⁴⁴ presumably to ensure that foreign nationals and host States are afforded due process by a legal system that is unaffiliated with either party. The same vision of a neutral international legal system does not currently extend to the makeup of the tribunals that ultimately resolve international disputes. At a minimum, there should be a regional diversity requirement for presiding or sole arbitrators in international arbitration to promote greater neutrality.

Such an arbitrator regional diversity requirement also respects the fundamental tenet of international arbitration—the parties' autonomy. Unlike a quota requirement or affirmative action program, an arbitrator regional diversity requirement does not mandate who must be appointed as an arbitrator. Rather it restricts who may not be appointed as arbitrator. Further, because only the presiding arbitrator (in the case of multiple tribunal members) would be

⁴¹ See ICSID Annual Report 2014, *supra* note 4, at 8–13.

⁴² See Thomas Stipanowich & Zachary P. Ulrich, *Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators* 25 AM. REV. INT'L ARB. 401–02 (forthcoming 2014), available at <http://ssrn.com/abstract=2519196> (referring to birth date survey data collected from 109 of 134 total responses).

⁴³ ICSID Annual Report 2014, *supra* note 4, at 5 ("ICSID benefits from a broad and diverse membership, representing States from all legal traditions.").

⁴⁴ See, e.g., ICSID, 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25, Mar. 18, 1965, 575 U.N.T.S. 159; UNCITRAL Model Law on International Commercial Arbitration, Art. 1, 21 U.S.T. 2517 (1985).

required to be regionally diverse from the parties; the parties could still appoint non-presiding tribunal members from their own regions.

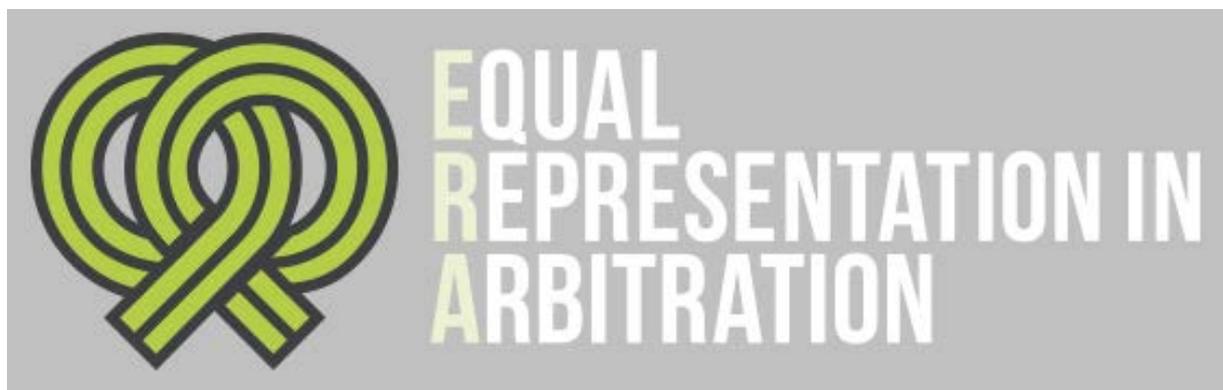
In fact, a presiding arbitrator diversity requirement may improve the overall process of appointing presiding arbitrators. The current process suffers from potential bias.⁴⁵ For example, in some cases, the parties agree that the party-appointed arbitrators will agree on and appoint the presiding arbitrator. In other cases, if the party-appointed arbitrators are unable to agree on a presiding arbitrator, the administering institution appoints a presiding arbitrator from a roster. A diversity requirement for the presiding arbitrator would eliminate the possibility that either the parties or the administering institution could appoint a presiding arbitrator from a common background who is more likely to share the party-appointed arbitrators' national biases than an arbitrator from a different region.

This, in turn, would add legitimacy to international arbitration as a fair and unbiased dispute resolution mechanism. Critics of international arbitration could no longer point to tribunals' composition as evidence of inherent bias against non-Anglo-European countries. The addition of an arbitrator diversity requirement would increase transparency and dispel suspicions of nepotism, favoritism, and bias in arbitrator appointment.

Without a formal mechanism to ensure or encourage arbitrator diversity, arbitral tribunals have been and will continue to be homogenous: pale, male, and stale.⁴⁶ The beauty—and also, possibly, the challenge—of the international arbitration system is that it is shaped entirely by the parties who use it and the individual practitioners. With each appointment, parties (and institutions) have the opportunity to increase arbitrator diversity. But, for the reasons described above, parties are not compelled to challenge the status quo. It will take a communal effort to make arbitral tribunals reflect the diversity of the international arbitration community. A requirement for regionally diverse sole or presiding arbitrators is both achievable and, importantly, consistent with the underlying principles of international arbitration.

⁴⁵ Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration?*, 35 U. PENN. J. INT'L L. 431, 436–37 n.17 (citing criticism for and defenses of the party-selected arbitrator model), 474–85 (proposing modifications to arbitrator selection mechanisms and rules for challenging arbitrator appointments to promote more diverse tribunals without eliminating the party-appointment system).

⁴⁶ Susan D. Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 75 (2008) (internal citations omitted).



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