

## DIVERSITY IN THE INVESTOR–STATE ARBITRATION: INTERSECTIONALITY MUST BE A PART OF THE CONVERSATION

KSENIA POLONSKAYA \*

*This article examines the contemporary discourse on diversity in the field of investment arbitration, and finds that conceptually the aspect of ‘intersectionality’ is overlooked. The parties, arbitration institutions, law firms and arbitrators themselves pledge to increase diversity in the field by appointing more female arbitrators without asking which women to appoint. Female lawyers come from various backgrounds, for example, there are female lawyers from developing countries, black female lawyers, indigenous female lawyers, Asian female lawyers, etc. Their backgrounds do not constitute a single dimensional characteristic, instead, they can overlap, creating unique obstacles for ‘entry’ into the field as an arbitrator, a position of legal authority and prestige. The article seeks to contribute to the discourse on diversity by examining the concept of intersectionality, and its relevance to the ongoing attempts of the participants of the investment regime to diversify the pool of candidates for the arbitral bench. The article examines the list of ICSID cases, and the list of the investment cases in which Canada was a respondent to conclude that the vast majority of female candidates that are appointed to the investment panels continue to be Caucasian women from developed states. The article provides an overview of options for diversifying the pool of arbitrators, and points the direction forward for the diversity discourse.*

### CONTENTS

I	Introduction.....	260
II	Diversity in the Investment Regime: Current State of Affairs.....	266
	A Current State of Affairs: The ICSID List and the Canada List.....	266
	B Examining Possible Reasons Why Candidates with Overlapping Identities Are Excluded .....	273
III	Intersectionality Must Be a Part of the Conversation on Diversity in Investment Arbitration.....	278
	A Explaining the Concept of ‘Intersectionality’ .....	279
	B Why Intersectionality Matters in Investment Arbitration.....	281
IV	Examining Existing Options and Mapping Future Options: What Can Be Done?.....	285
	A Current State of Affairs: Existing Options .....	285
	1 Arbitral Institutions .....	285
	2 States: Canada in Focus.....	286
	3 Foreign Investors.....	287
	4 Academic Proposals .....	289
	B Areas of Future Focus.....	290
	1 Pool of Candidates and Appointment Process .....	291
	2 The Educational Development Opportunities: Changing Culture.....	295
V	Concluding Remarks.....	296

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\* Phd Candidate, Queen’s University, Faculty of Law (Canada). LLM, University of Toronto, Faculty of Law (Canada), LLB Kuban State University, Faculty of Law (Russia). I am very grateful to my supervisor Joshua Karton (Queen’s Law) for his comments and feedback for the earlier draft of this paper. I also thank Gillian McNeil (Queen’s/Dalhousie) for her suggestions and comments as well as two anonymous peer reviewers for their feedback.

## I INTRODUCTION

Investor–state arbitration (‘ISA’) is a mechanism for the resolution of disputes between foreign investors and sovereign states.<sup>1</sup> The disputes are usually resolved by a panel of three arbitrators. The parties to the dispute appoint the arbitrators. The ‘wing’ arbitrators select the president of the tribunal. In case they are unwilling or are unable to do so, the Arbitration Institutions (‘AIs’) have residual power to appoint the president of the tribunal.<sup>2</sup>

In recent years, the problem of lack of diversity on investment arbitration panels has come into the spotlight. For example, the International Centre for the Settlement of Investment Disputes (‘ICSID’) reports that in 2017 ‘14% of the new appointees were women’ in the investment disputes administered by the centre.<sup>3</sup> The lack of diversity problem persists in the field of international arbitration more generally but this paper focuses on the problem specifically in relation to investment arbitration panels. For instance, a report by Berwin Leighton Paisner (‘BLP’) shows that ‘[o]ut of the 222 arbitrators from which presidential appointments are made, only 16 (7%) are women’.<sup>4</sup> According to BLP, a lack of gender diversity is not the only problem, ‘[o]nly 11 cases (4%) were arbitrated by entirely non Anglo-European tribunals’ under the auspices of the ICSID.<sup>5</sup> The majority of arbitrators are thus ‘pale, male and stale’ and are from developed states.<sup>6</sup>

A review of the literature reinforces the conclusion reached in this article that, based on statistical data, there is a lack of diversity. An overwhelming majority of commentators in the field of investment arbitration acknowledge that lack of diversity in the composition of investment arbitration panels constitutes a problem. For example, Malcolm Langford, Daniel Behn and Runar Hilleran Lie

<sup>1</sup> See generally Caroline Henckels, *Proportionality and Deference in Investor–State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge University Press, 2015); Rémy Gerbay, *The Functions of Arbitral Institutions* (Wolters Kluwer, 2016).

<sup>2</sup> Cédric Dupont and Thomas Schultz, ‘Towards a New Heuristic Model: Investment Arbitration as a Political System’ (2016) 7 *Journal of International Dispute Settlement* 3, 7.

<sup>3</sup> International Centre for Settlement of Investment Disputes, ‘Annual Report 2017’ (Report, October 2017) 35 <<https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20AR%20EN.pdf>> archived at <<https://perma.cc/T9QU-XCHG>> (‘ICSID Annual Report 2017’); *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) arts 12–14 (‘Convention on the Settlement of Investment Disputes’); *Arbitration Rules of the United Nations Commission on International Trade Law*, GA Res 31/98, UN GAOR, 31<sup>st</sup> sess, 99<sup>th</sup> plen mtg, Supp No 39, UN Doc A/RES/31/98 (15 December 1976).

<sup>4</sup> Berwin Leighton Paisner, ‘Are We Getting There? International Arbitration Survey: Diversity on Arbitral Tribunals’ (Survey Report, 10 January 2017) 3 <[http://www.blplaw.com/media/download/BLP-Diversity\\_on\\_Arbitral\\_Tribunals\\_-\\_Survey\\_Report.pdf](http://www.blplaw.com/media/download/BLP-Diversity_on_Arbitral_Tribunals_-_Survey_Report.pdf)> archived at <<https://perma.cc/EGX8-JZPQ>>.

<sup>5</sup> *Ibid.*

<sup>6</sup> Chiara Giorgetti, ‘Is the Truth in the Eyes of the Beholder? The Perils and Benefits of Empirical Research in International Investment Arbitration’ (2013) 12 *Santa Clara Journal of International Law* 263, 269–70 (citations omitted). This problem of course is not only present in the field of arbitration. Lack of diversity persists in the domestic judiciary and in other legal fields more broadly: see Noel Semple, ‘Male, Pale, and Stale? Diversity in Lawyers’ Leadership’ (2016) 31 *Canadian Journal of Law and Society* 405.

note that the majority of arbitrators have ‘elite educational backgrounds’ and are ‘male and [have] Western identities’.<sup>7</sup>

Perhaps the most comprehensive recent empirical study on diversity in the arbitration context is that by Susan D Franck et al which maps the contours of diversity according to six factors: ‘(1) gender; (2) nationality; (3) age; (4) linguistic capacity; (5) legal training; and (6) professional experiences related to arbitration’.<sup>8</sup> In their analysis, Franck et al arrive at the conclusion that ‘[t]he “median international arbitrator” was a fifty-three year-old man who was a national of a developed state and had served as arbitrator in ten arbitration cases’.<sup>9</sup>

There is a well-established notion amongst commentators, of which Leigh Swigart and Daniel Terris are proponents, that international adjudicators represent an ‘invisible college’,<sup>10</sup> which is ‘a professional community bound together’.<sup>11</sup> They remark that ‘[t]his informal but nevertheless influential network consisted largely of men who circulated among elite academic and professional institutions’.<sup>12</sup> Sergio Puig observes that arbitral appointments reflect gender imbalance.<sup>13</sup> Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel submit that ‘[a]rbitrators of Asian or African nationality are under-represented, despite significant inward and investment flows to and from Asia in particular, and associated investment treaty disputes’.<sup>14</sup> The commentators thus call for an enhancement of diversity within arbitral panels.<sup>15</sup>

This paper argues that the current discourse on diversity in investment arbitration is incomplete. The existing discourse is driven by some aspects of diversity such as, for example, gender or nationality, but seems not to examine the way these categories overlap. Accordingly, the existing studies can be considered a starting point to further our understanding and appreciation of diversity in the context of international investment arbitration. In particular, the current discourse on diversity does not take into consideration intersectionality in

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<sup>7</sup> Malcolm Langford, Daniel Behn and Runar Hilleren Lie, ‘The Revolving Door in International Investment Arbitration’ (2017) 20 *Journal of International Economic Law* 301, 302.

<sup>8</sup> Susan D Franck et al, ‘The Diversity Challenge: Exploring the “Invisible College” of International Arbitration’ (2015) 53 *Columbia Journal of Transnational Law* 429, 440.

<sup>9</sup> *Ibid* 466.

<sup>10</sup> Leigh Swigart and Daniel Terris, ‘Who are International Judges?’ in Cesare P R Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014) 619, 620, citing Oscar Schachter, ‘The Invisible College of International Lawyers’ (1977) 72 *Northwestern University Law Review* 217, 217.

<sup>11</sup> Swigart and Terris, above n 10, 620.

<sup>12</sup> *Ibid*.

<sup>13</sup> Sergio Puig, ‘Social Capital in the Arbitration Market’ (2014) 25 *European Journal of International Law* 387, 404–5.

<sup>14</sup> Jonathan Bonnitcha, Lauge N Skovgaard Poulsen and Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford University Press, 2017) 255.

<sup>15</sup> The arbitration community has even adopted a volunteer commitment known as ‘the Pledge’ that encourages states, investors and Arbitration Institutions (‘AIs’) to appoint more female arbitrators. In the past year, AIs have celebrated an increasing number of female arbitrators on investment arbitration panels. Given its non-binding nature, the Pledge may be more useful in helping its participants gain ‘political’ capital rather than to advance the cause of diversity: see Equal Representation in Arbitration, *Take the Pledge* <<http://www.arbitrationpledge.com/take-the-pledge>> archived at <<https://perma.cc/8VJY-LZHQ>>.

evaluating diversity in investment arbitration panels.<sup>16</sup> The term ‘intersectionality’ has no universally accepted doctrinal definition and is still at the stage of crystallisation. Kimberlé Crenshaw explains the term by providing the following example:

Intersectionality is what occurs when a woman from a minority group ... tries to navigate the main crossing in the city ... The main highway is ‘racism road’. One cross street can be Colonialism, then Patriarchy Street. ... She has to deal not only with one form of oppression but with all forms, those named as road signs, which link together to make a double, a triple, multiple, a many layered blanket of oppression.<sup>17</sup>

For greater clarity and at the risk of oversimplifying, this paper adopts an ‘analytical approach’<sup>18</sup> to the understanding of intersectionality to ensure the visibility of candidates with overlapping identities and to examine the structural barriers that hinder the progress of those candidates. ‘Identities’ here are construed as ‘individual and collective narratives that answer the question “who am/are I/we?”’.<sup>19</sup> The application of intersectionality has a purely practical objective which is to raise the following two questions. First, *which* women do obtain arbitral appointments? Second, what procedural tools in principle can be used to ensure the accessibility of the arbitral seats for the candidates with overlapping identities?

To respond to the first question, this paper examines the list of disputes administered by the ICSID to identify the background of female arbitrators and determine in how many cases women were appointed as arbitrators. The paper will also examine the list of cases in which Canada was a respondent in the investment disputes to identify how many women Canada appointed as arbitrators and identify the background of these women.

Female lawyers come from diverse backgrounds. There are indigenous female lawyers, black female lawyers, Asian female lawyers, female lawyers from developing states, female lawyers whose legal expertise is primarily in public

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<sup>16</sup> Other international courts and tribunals also lack ‘regional diversity in the gendered composition of benches’ or candidates with intersection of gender, race and regional representation: Josephine Jarpa Dawuni, ‘Introduction: Challenging Gender Universalism and Unveiling the Silenced Narratives of the African Woman Judge’ in Josephine Jarpa Dawuni and Akua Kuenyehia (eds), *International Courts and the African Woman Judge: Unveiled Narratives* (Routledge, 2018) 1, 4.

<sup>17</sup> Nira Yuval-Davis, ‘Intersectionality and Feminist Politics’ (2006) 13 *European Journal of Women’s Studies* 193, 196, quoting Kimberlé Crenshaw. See also Kimberlé Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1991) 43 *Stanford Law Review* 1241.

<sup>18</sup> Birte Siim, ‘Intersections of Gender and Diversity — A European Perspective’ in Birte Siim and Monika Mokre (eds), *Negotiating Gender and Diversity in an Emergent European Public Sphere* (Palgrave Macmillan, 2013) 3, 13.

<sup>19</sup> Yuval-Davis, above n 17, 197. Most often ‘gender, race and class’ informed the intersectionality analysis: at 193. Yuval-Davis explains that without appreciation of intersectionality, there was a perception that ‘all women are White and all Blacks are men’: at 193, citing bell hooks, *Ain’t I a Woman: Black Women and Feminism* (Routledge, 2015) 23. Similarly, in arbitration, if there is a perception that there are more women arbitrators, it does not mean that all women-lawyers with equal merit effectively get access to the arbitral appointments.

interest litigation, etc.<sup>20</sup> The consideration of candidates whose identities represent an overlap of three categories such as gender/race/country of origin is essential because ‘an intersectional reading of their performativity discloses that they also operate simultaneously together’.<sup>21</sup> Without an explicit appreciation of this overlap in the arbitration rules, reports of arbitration institutions and treaty language, there is systemic devaluation of identity and experience of female arbitrators who come from backgrounds other than Caucasian.<sup>22</sup> In particular, this approach contributes to the furthering of the ‘invisibility’ of such candidates in international law that reflects methodological problems in how we approach empirical inquiry on diversity in investment arbitration generally. Chandra Mohanty explains that ‘[w]omen are constituted as women through the complex interaction between ... ideological institutions and frameworks. They are not “women” — a coherent group’.<sup>23</sup>

Admittedly, this situation is not unique to the field of investment arbitration but applies to international law more generally. Hilary Charlesworth and Christine Chinkin observe that women in international law ‘are viewed in a very limited way’ as law-takers rather than law-makers, ‘chiefly as victims, particularly as mothers, ... and accordingly in need of protection’.<sup>24</sup> Such perception may be in itself problematic for advancing in the profession. For example, Navanethem Pillay, one of the former International Criminal Court judges, has observed, ‘I started off as a lawyer, and I always say I was trebly disadvantaged. I was black, I was a woman, and I was of a poor class’.<sup>25</sup>

To answer the second question, this paper surveys existing proposals and projects on how to enhance diversity on investment arbitration panels. The paper also examines some proposals that have been developed in other fields, for example to enhance diversity on corporate boards. The response to the second question is necessary to ensure that the problem is not simply identified but a clear procedural path exists to resolve it. Canada has a role to play in developing a solution to the problem. In particular, Canada can lead the way in promoting diversity of investment arbitration panels, which is in line with its current foreign policy profile on gender and also reflects its international legal commitments.

Canada is a party to the *Convention on the Elimination of All Forms of Discrimination against Women* (‘CEDAW’) that requires all states party to ‘take all appropriate measures to ensure to women, on equal terms with men and

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<sup>20</sup> Discussing racial perspective, Sherrilyn A Ifill states: ‘the creation of a racially diverse bench can introduce traditionally excluded perspectives and values into judicial decision-making. The interplay of diverse views and perspectives can enrich judicial decision-making’: Sherrilyn A Ifill, ‘Racial Diversity on the Bench: Beyond Role Models and Public Confidence’ (2000) 57 *Washington and Lee Law Review* 405, 410. The study of the role of gender or race in the outcome of arbitral decision-making is absent in the context of investment arbitration.

<sup>21</sup> Ido Katri, ‘The Banishment of Isaac: Racial Signifiers of Gender Performance’ (2018) 68 *University of Toronto Law Journal* 118, 121.

<sup>22</sup> See *ibid* 121–2.

<sup>23</sup> Chandra Mohanty, ‘Under Western Eyes: Feminist Scholarship and Colonial Discourses’ (1988) 30 *Feminist Review* 61, 72.

<sup>24</sup> Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000) 48.

<sup>25</sup> Daniel Terris, Cesare P R Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World’s Cases* (Oxford University Press, 2007) 40.

without any discrimination, the opportunity to represent their Governments at the international level'.<sup>26</sup> Canada is also a party to the *International Convention on the Elimination of All Forms of Racial Discrimination* ('ICERD') and has endorsed the *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, which encourage all governments to undertake measures to eliminate all forms of discrimination and promote equality.<sup>27</sup>

In 2015, Canada endorsed the *United Nations Development Agenda* that resulted in the adoption of the *UN Sustainable Development Goals* ('UN SDGs').<sup>28</sup> The *UN SDGs* recognise gender equality and female empowerment as a means to achieve sustainable development.<sup>29</sup> In 2017, Canada amended its *Free Trade Agreement with Chile* ('Canada–Chile FTA') by incorporating a trade and gender chapter.<sup>30</sup> In the text of this chapter, Canada and Chile linked their trade commitments with the *UN SDGs*, including sustainable development goal 5, which contains a commitment to enhance gender equality and female empowerment.<sup>31</sup> In 2017, the Federal Government of Canada launched

<sup>26</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 8 ('CEDAW'); See also *Declaration on the Elimination of Discrimination against Women*, GA Res 22/2263, UN GAOR, 22<sup>nd</sup> sess, 1597<sup>th</sup> plen mtg, Agenda Item 53, UN Doc A/RES/22/2263 (7 November 1967).

<sup>27</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 1 (entered into force 4 January 1969) ('ICERD') arts 1(1), (4). See also *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, GA Res 1904, UN GAOR, 18<sup>th</sup> sess, 1261<sup>st</sup> plen mtg, Agenda Item 43, Supp No 15, UN Doc A/Res/18/1904 (20 November 1963) art 2.1: 'No State, institution, group or individual shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons or institutions on the ground of race, colour or ethnic origin'.

<sup>28</sup> Government of Canada, 'Canada's Statement to the 2017 UN High Level Political Forum on Sustainable Development' (Plenary Statement delivered at the 2017 UN High Level Political Forum on Sustainable Development, New York, 19 July 2017) <<http://www.international.gc.ca/prmny-mponu/statements-declarations/2017/07/19b.aspx?lang=eng>> archived at <<https://perma.cc/QK45-N72Q>>; *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, UN GAOR, 70<sup>th</sup> sess, 4<sup>th</sup> plen mtg, Agenda Items 15 and 116, UN Doc A/Res/70/1 (21 October 2015) ('UN SDGs').

<sup>29</sup> *UN SDGs*, UN Doc A/Res/70/1, para 3. See generally Felix Dodds, David Donoghue and Jimena Leiva Roesch, *Negotiating the Sustainable Development Goals: A Transformational Agenda for an Insecure World* (Routledge, 2017).

<sup>30</sup> *Canada–Chile Free Trade Agreement*, signed 5 December 1996, [1997] CTS 50 (entered into force 5 July 1997) ch N, as amended by *Agreement to Amend, in Respect of Investment and Trade and Gender, the Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, signed 5 June 2017 (not yet in force) app II art 3 ('Canada–Chile Amending Agreement') <[http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/2017\\_Amend\\_Modif-App2-Chap-N.aspx?lang=eng](http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/chile-chili/fta-ale/2017_Amend_Modif-App2-Chap-N.aspx?lang=eng)> archived at <<https://perma.cc/8LA7-KUH9>>.

<sup>31</sup> *Canada–Chile Amending Agreement* app II art N bis-01(2). The Canadian Government also endorsed a gender and trade declaration under the World Trade Organization in December 2017: see *Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017* (12 December 2017) <[https://www.wto.org/english/thewto\\_e/minist\\_e/mc11\\_e/genderdeclarationmc11\\_e.pdf](https://www.wto.org/english/thewto_e/minist_e/mc11_e/genderdeclarationmc11_e.pdf)> archived at <<https://perma.cc/7HV7-DRBY>> ('Buenos Aires Joint Declaration'). In particular, the declaration acknowledges that 'international trade and investment are engines of economic growth for both developing and developed countries, and that improving women's access to opportunities and removing barriers to their participation in national and international economies contributes to sustainable economic development'.

‘Canada’s Feminist International Assistance Policy’ to advance the cause of female empowerment and equality.<sup>32</sup> These efforts combined elucidate the overarching theme of Canada’s current foreign policy, which is to contribute to gender diversity and the empowerment of women. Canada’s position is particularly timely given that the renegotiations of the *North American Free Trade Agreement* (‘NAFTA’) are ongoing.<sup>33</sup>

The overarching goal of this paper is to show once more that ‘distinctive women’s experiences’ are ‘factored out of the international legal process’, which impairs investment arbitration ‘from having universal validity’.<sup>34</sup> Such validity for investment arbitration is particularly important given that the arbitrators render authoritative decisions that ‘stabiliz[e] and generat[e] normative expectations in transborder social relations and therefore exercis[e] transnational authority that demands justification in order to be considered as legitimate’.<sup>35</sup> ‘Legitimacy’ here is discussed in Max Weber’s sense — the participants in a system should accept the authority of the system because they *believe* that the exercise of such authority is just.<sup>36</sup>

This paper accordingly proceeds in the following steps. Part I maps the current state of affairs with regards to diversity in investment arbitration. This Part will review the reports of AIs that establish how many female arbitrators were appointed and provide methodological criticisms of these reports. This Part will complement these observations by identifying how many arbitrators in the ICSID and Canada lists meet the three identified criteria ie female arbitrators from developing states who are a visible racial minority. The literature overview will discuss possible reasons why female candidates, and particularly the candidates with overlapping identities, are largely excluded from the investment arbitration panels. In Part II this paper will examine the concept of intersectionality in greater detail and rationalise why the link between intersectionality and diversity matters in the context of investment arbitration. In Part III, this paper will examine Canada’s role in championing the linking of intersectionality and diversity where appointments to arbitral panels are concerned.

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<sup>32</sup> Government of Canada, ‘Canada’s Feminist International Assistance Policy’ (Policy Statement, Global Affairs Canada, 2017) <<http://international.gc.ca/world-monde/assets/pdfs/iap2-eng.pdf>> archived at <<https://perma.cc/SY79-Y24T>> (‘Canada FIA Policy’).

<sup>33</sup> *North American Free Trade Agreement*, Canada–Mexico–US, signed 17 December 1992, [1994] CTS 2 (entered into force 1 January 1994); Risa Schwartz, ‘The Case for Adding an Indigenous Chapter to NAFTA’ on Centre for International Governance Innovation, *Trade and Finance* (17 August 2017) <<https://www.cigionline.org/articles/case-adding-indigenous-chapter-nafta>> archived at <<https://perma.cc/XZL4-2YAC>>.

<sup>34</sup> Hilary Charlesworth, Christine Chinkin and Shelley Wright, ‘Feminist Approaches to International Law’ (1991) 85 *American Journal of International Law* 613, 616.

<sup>35</sup> Stephan W Schill, ‘Conceptions of Legitimacy of International Arbitration’ in David D Caron et al (eds), *Practising Virtue: Inside International Arbitration* (Oxford University Press, 2015) 106, 110.

<sup>36</sup> See, eg, Susan D Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions’ (2005) 73 *Fordham Law Review* 1521; Daniel Behn, ‘Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art’ (2015) 46 *Georgetown Journal of International Law* 363. For more on Max Weber’s sociological account of legitimacy see Wolfgang J Mommsen, *The Political and Social Theory of Max Weber: Collected Essays* (Polity Press, 1989) 21.

## II DIVERSITY IN THE INVESTMENT REGIME: CURRENT STATE OF AFFAIRS

This Part maps the current state of affairs in investment arbitration panels with regards to candidates with overlapping identities. First, this Part examines the ICSID and Canada lists of cases and concludes that female arbitrators from developing states who are visible racial minorities are rarely appointed to investment arbitration panels. To complement the quantitative data, this paper discusses statistics provided by AIs with regards to the appointments of female arbitrators in the field of arbitration more generally. Secondly, it examines possible reasons why the candidates with overlapping identities are heavily underrepresented on the ISA panels.

### A *Current State of Affairs: The ICSID List and the Canada List*

This Part will examine the current state of affairs with regards to the appointment of candidates with overlapping backgrounds. For the purposes of this article, and to ensure the feasibility of this project, this Part will take into consideration three overlapping factors: the nationality of the arbitrator (particularly, candidates from developing states), the gender of the arbitrator and, finally, whether the arbitrator belongs to a visible racial minority.<sup>37</sup> Accordingly, this paper focuses on the candidates who are (1) female arbitrators (2) from developing states and (3) may be identified as visible racial minorities in the context of the investment regime where the majority of arbitrators are Caucasian.

This paper proposes to examine the lists of cases of the ICSID and the list of cases in which Canada was a respondent to identify how many women with overlapping identities obtained arbitral appointments. This paper thus examines the list of cases from 2012–17 administered by the ICSID and focuses on the cases for which tribunals were constituted. The disputes in which Canada was a respondent will also be examined. The list by ICSID is not a random choice; the centre is the most popular venue for resolving investment disputes.<sup>38</sup> Canada is one of the few developed states that is sued most frequently that has also explicitly stated its commitment to gender equality and female empowerment. This exercise will help to identify how many candidates with overlapping identities (ie a female arbitrator from a developing state who is also a visible racial minority) obtain appointments. The goal of this paper is to make such candidates visible in the field of investment arbitration by linking the discourse on intersectionality with the diversity debate in investment arbitration.

The ICSID list is comprised of 345 cases from 2011–17.<sup>39</sup> This means that of a total of 951 appointments made, only 106 arbitral seats were occupied by women. These numbers do not take into account repeated appointments, ie when the arbitrator obtains appointment more than once. The list also excludes cases where only one arbitrator was appointed. Among these 106 arbitral seats, 53 are accounted for by Brigitte Stern, 15 for Gabrielle Kaufmann-Kohler and 38 include other female arbitrators. These findings seem to be largely consistent

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<sup>37</sup> Of course, other factors such as age, legal training and professional experience are also relevant.

<sup>38</sup> *ICSID Annual Report 2017*, above n 3, 3.

<sup>39</sup> International Centre for Settlement of Investment Disputes, *Recently Constituted* (2018) <<https://icsid.worldbank.org/en/Pages/cases/ViewRecentUpdates.aspx?view=RECCONSITUTED>> archived at <<https://perma.cc/6GZF-MQRR>>.



with Puig's findings on gender diversity in investment arbitration. Puig also observed that 'only two women, Professors Stern and Kaufmann-Kohler combined, held three-quarters of all female appointments'.<sup>40</sup> Out of all 951 appointments, it appears that not a single female arbitrator meets all three identified factors together.<sup>41</sup> It is worth noting that there were three female arbitrators who served on annulment committees for several cases out of the present ICSID list who meet *all* three factors. These arbitrators are: Bertha Cooper-Rousseau (Bahamian),<sup>42</sup> Tinuade Oyekunle (Nigerian)<sup>43</sup> and Dorothy Udeme Ufot (Nigerian).<sup>44</sup>

Some female arbitrators meet two factors out of three. For example, Teresa Cheng is a female arbitrator from Hong Kong and can be identified as a visible minority.<sup>45</sup> Notably, Ms Cheng was appointed by the ICSID as part of its residual power to appoint the president of a tribunal. Some arbitrators self-identify as female and could be identified as visible racial minorities. For example, Marie-Andrée Ngwe is a black female arbitrator (French).<sup>46</sup> Some arbitrators self-identify as female and are from a developing state but cannot be identified (at least from the outset) as a visible racial minority. For example,

<sup>40</sup> Puig, above n 13, 405.

<sup>41</sup> Dr Mónica Pinto is a female arbitrator from Argentina and she was appointed by the respondent. Dr Pinto appears to meet two criteria out of three (a female arbitrator from a developing state). The author was able to independently verify that Dr Pinto is of mixed ethnic heritage (Argentine/Moroccan). Investment Centre for Settlement of Investment Disputes, *Case Details: JGC Corporation v Kingdom of Spain (ICSID Case No ARB/15/27)* (2018) <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/15/27>>.

<sup>42</sup> International Centre for Settlement of Investment Disputes, *ICSID Arbitrator/Conciliator: Ms Bertha Cooper-Rousseau* (19 December 2017) <<https://icsid.worldbank.org/en/Pages/arbitrators/ViewProfile.aspx?cvid=84>>; International Centre for Settlement of Investment Disputes, *Case Details: Standard Chartered Bank (Hong Kong) Limited v Tanzania Electric Supply Company Limited (ICSID Case No ARB/10/20)* (2018) <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/10/20>>.

<sup>43</sup> International Centre for Settlement of Investment Disputes, *ICSID Arbitrator/Conciliator: Ms Tinuade Oyekunle* (8 January 2014) <<https://icsid.worldbank.org/en/Pages/arbitrators/ViewProfile.aspx?cvid=614>>; Investment Centre for Settlement of Investment Disputes, *Case Details: TECO Guatemala Holdings LLC v Republic of Guatemala (ICSID Case No ARB/10/23)* (2018) <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/10/23>>.

<sup>44</sup> International Centre for Settlement of Investment Disputes, *ICSID Arbitrator/Conciliator: Mrs Dorothy Udeme Ufot* (11 December 2017) <<https://icsid.worldbank.org/en/Pages/arbitrators/ViewProfile.aspx?cvid=2077>>; International Centre for Settlement of Investment Disputes, *Case Details: Karkey Karadeniz Elektrik Uretim A S v Islamic Republic of Pakistan (ICSID Case No ARB/13/1)* (2018) <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/13/1>>.

<sup>45</sup> International Centre for Settlement of Investment Disputes, *ICSID Arbitrator/Conciliator: Ms Teresa Cheng* (13 April 2018) <<https://icsid.worldbank.org/en/Pages/arbitrators/ViewProfile.aspx?cvid=602>>; International Centre for Settlement of Investment Disputes, *Case Details: ENERGO-PRO a s v Republic of Bulgaria (ICSID Case No ARB/15/19)* (2018) <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/15/19>>.

<sup>46</sup> International Centre for Settlement of Investment Disputes, *ICSID Arbitrator/Conciliator: Ms Marie-Andrée Ngwe* (2 May 2018) <<https://icsid.worldbank.org/en/Pages/arbitrators/ViewProfile.aspx?cvid=419>>; International Centre for Settlement of Investment Disputes, *Case Details: Antoine Abou Lahoud and Leila Bounaféh-Abou Lahoud v Democratic Republic of the Congo (ICSID Case No ARB/10/4)* (2018) <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/10/4>>.

Maja Stanivuković is an arbitrator from Serbia who was appointed by the respondent.<sup>47</sup> A majority of female arbitrators are from developed states and cannot be identified as belonging to a visible racial minority.<sup>48</sup> Two arbitrators who served on ICSID annulment committees also met the overlap of two factors, they are Shoschana Zusman Tinman (Peruvian)<sup>49</sup> and Dyalá Jiménez Figueres (Costa Rican).<sup>50</sup>

The Canada list includes a total of 21 cases for which tribunals were constituted.<sup>51</sup> The total number of arbitral seats is 63 (not taking into consideration repeated appointments). The total number of seats occupied by male arbitrators is 56 (the number of individual male arbitrators is 48). The total number of seats occupied by female arbitrators is 7 (the number of individual female arbitrators is 5). Out of 63 arbitral seats, Canada was solely responsible for 21 appointments and appointed female arbitrators only three times.<sup>52</sup> The arbitrator Brigitte Stern was appointed by Canada twice meaning that the number of unique appointments by Canada is 2 (Brigitte Stern and Céline Lévesque).<sup>53</sup>

<sup>47</sup> International Centre for Settlement of Investment Disputes, *ICSID Arbitrator/Conciliator: Professor Maja Stanivuković* (8 February 2016) <<https://icsid.worldbank.org/en/Pages/arbitrators/ViewProfile.aspx?cvid=408>>;

International Central for Settlement of Investment Disputes, *Case Details: Elektrogospodarstvo Slovenije — razvoj in inženiring d.o.o. v Bosnia and Herzegovina (ICSID Case No ARB/14/13)* (2018) <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/14/13>>.

<sup>48</sup> The list of female arbitrators from developed states includes Jean Engelmayr Kalicki (American), Gabrielle Kaufmann-Kohler (Swiss), Brigitte Stern (French), Claudia Annacker (Austrian), Lucinda A Low (American) and Laurence Boisson de Chazournes (French), Ms Deva Villanua Gomez (Spanish), Juliet Blanche (British), Vera Van Houtte (Belgian), Lucy Reed (American), Anna Joublin-Bret (French), Loretta Malintoppi (Italian), Laurence Boisson de Chazournes (French/Swiss) and Yas Banifatemi (French/Iranian).

<sup>49</sup> Shoschana Zusman Tinman, *Experiencia*, Estudio Zusman <[http://estudiozusman.com/?page\\_id=26](http://estudiozusman.com/?page_id=26)> archived at <<https://perma.cc/LB89-ZUM2>>; International Centre for Settlement of Investment Disputes, *Case Details: Flughafen Zürich A G and Gestión e Ingeniería IDC S A v Bolivarian Republic of Venezuela (ICSID Case No ARB/10/19)* (2018) <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/10/19>>.

<sup>50</sup> International Centre for Settlement of Investment Disputes, *ICSID Arbitrator/Conciliator: Ms Dyalá Jiménez Figueres* (7 December 2017) <<https://icsid.worldbank.org/en/Pages/arbitrators/ViewProfile.aspx?cvid=856>>; International Centre for Settlement of Investment Disputes, *Case Details: Valores Mundiales, S L v Bolivarian Republic of Venezuela (ICSID Case No ARB/13/11)* (2018) <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/13/11>>.

<sup>51</sup> Government of Canada, *NAFTA Chapter 11 Investment: Cases Filed against the Government of Canada* (2 February 2018) Global Affairs Canada <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng>> archived at <<https://perma.cc/E8Z4-WPTM>>.

<sup>52</sup> Canada appointed female arbitrators in three cases: United Nation Conference on Trade and Development, *Investment Dispute Settlement: St Marys VCNA, LLC v The Government of Canada* (2013) Investment Policy Hub <<http://investmentpolicyhub.unctad.org/ISDS/Details/442>> archived at <<https://perma.cc/9XK6-HVYP>>; United Nation Conference on Trade and Development, *Investment Dispute Settlement: Lone Pine Resources Inc v Canada (ICSID Case No UNCT/15/2)* (2013) <<http://investmentpolicyhub.unctad.org/ISDS/Details/547>> archived at <<https://perma.cc/HUT6-PKU3>>; United Nation Conference on Trade and Development, *Investment Dispute Settlement: Resolute Forest Products Inc v Canada (PCA Case No 2016-13)* (2013) <<http://investmentpolicyhub.unctad.org/ISDS/Details/681>> archived at <<https://perma.cc/W3YF-TENM>>.

<sup>53</sup> United Nation Conference on Trade and Development, *IDS: St Marys*, above n 52; United Nation Conference on Trade and Development, *IDS: Lone Pine*, above n 52.

Female arbitrators appointed by Canada are from France and Canada respectively and cannot be identified as belonging to a visible racial minority.<sup>54</sup>

The Canada list and ICSID list show that the number of female arbitrators with overlapping identities (gender, race and nationality) is almost non-existent. It appears that the corps of ‘grand white old men’ from developed states has become incrementally diluted by the participation of ‘grand white women’ from developed states. It is worth noting, however, that in further studies it is important to identify the proportion of lawyers that meet the identified criteria specifically in the field of investment arbitration, and in legal practice more broadly. Such study (if conducted) will help identify whether such low numbers reflect a problem of appointment procedures, or entry into the legal investment practice. It may be that the low numbers reflect the barriers that emerge at both ends of the spectrum.

To complement this data, it may be useful to examine statistics provided by AIs. AIs report that the number of candidates from developing and least developed states and women appointed as arbitrators has increased.<sup>55</sup> Most notably, the AIs’ reports provide no information on the backgrounds of the arbitrators making it impossible to assess whether any possess the intersecting grounds. This is because when AIs compose their reports, they largely ignore the overlap of identities that make such candidates largely invisible in the arbitral college. The applicable international treaties and the arbitration rules are mostly silent on the criteria for the selection of arbitrators; the treaties and rules at best contain the note that candidates must be appointed on the basis of merit and expertise without clearly stating what these categories entail.

The ICSID provides a country-by-country breakdown of newly appointed arbitrators; methodologically the report lacks the rubric that would identify how many newly appointed arbitrators were female candidates from low or middle-income economies. Accordingly, it is not clear how many female arbitrators from low-income or middle-income states obtained appointments in 2017 in the disputes administered by the ICSID.

According to the International Chamber of Commerce (‘ICC’), ‘women arbitrators represented 14.8% of all arbitrators appointed by ICC arbitration parties, co-arbitrators or directly by the Court in 2016’.<sup>56</sup> The London Court of International Arbitration (‘LCIA’) reports that ‘[i]n 2016, of 496 individual

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<sup>54</sup> It is worth noting that in 2014 across most provinces in Canada, women were ‘close to the majority’ of lawyers entering the legal profession (practicing for 0–5 years); however only 9.7% of women reach the level of partner in the law firm. Reportedly, in Ontario, ‘racialised’ lawyers only accounted for 17.6% of lawyers in the profession (this includes both women and men): Catalyst Inc, *Women in Law in Canada and the US* (19 April 2017) <<http://www.catalyst.org/knowledge/women-law-canada-and-us>> archived at <<https://perma.cc/8UP5-QFUK>>.

<sup>55</sup> *ICSID Annual Report 2017*, above n 3, 35: ‘Twenty-three percent of the first-time appointees were nationals of low or middle income economies, and 14% of the new appointees were women’.

<sup>56</sup> International Chamber of Commerce, *ICC Court Sees Marked Progress on Gender Diversity* on *International Chamber of Commerce Media Wall* (31 May 2017) <<https://iccwbo.org/media-wall/news-speeches/icc-court-sees-marked-progress-gender-diversity/>> archived at <<https://perma.cc/DU3B-24CT>>.

appointments, 102 or 20.6% were of female arbitrators'.<sup>57</sup> The LCIA appointed 40.6% of female arbitrators; the nominees and the parties appointed 16.3% and 4.1% respectively. The pool of arbitrators in the LCIA is dominated by American, Australian, Canadian, British, Irish and French arbitrators.<sup>58</sup> The Stockholm Chamber of Commerce ('SCC') reports that '[o]f the total appointments of arbitrators in 2016, 16% was women arbitrator [sic]. Meanwhile, when the SCC made the appointment, women made up more than 20% of the appointment'.<sup>59</sup> The SCC appointed 22.5% of the female arbitrators, the parties made 11% of the appointments and the co-arbitrators appointed 20% of the women.<sup>60</sup>

Four preliminary conclusions can be drawn on the basis of this data. First, the AIs' reports do not provide any detailed information on the overlapping identities of the female arbitrators who were appointed. Secondly, gender and nationality disparities are prominent in the field of arbitration (although, admittedly, the numbers of female arbitrators have increased). Thirdly, the parties appoint female arbitrators less frequently than AIs. Finally, the majority of the arbitrators come predominantly from Europe and the US.

Commentators in the field of arbitration seem to unanimously recognise that the lack of gender diversity constitutes a problem<sup>61</sup> and call for the appointment of more female arbitrators to 'broaden the pool'.<sup>62</sup> While the commentators recognise the lack of diversity as a persisting problem in the field of arbitration, the literature on diversity in the context of investment arbitration is limited. Three major trends can be identified.

First, the lack of diversity on arbitration panels is viewed as creating a legitimacy deficit and is briefly mentioned within the broader context of criticisms of the ISAs.<sup>63</sup> For example, the report 'Profiting from Injustice' critically views investment arbitrators as '[p]ro-business, males and from the rich

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<sup>57</sup> London Court of International Arbitration, 'LCIA Facts and Figures — 2016: A Robust Caseload' (Report, London Court of International Arbitration, 3 April 2017) 13 <<http://www.lcia.org/News/lcia-facts-and-figures-2016-a-robust-caseload.aspx>> archived at <<https://perma.cc/HPN5-B3WV>> ('*LCIA Facts and Figures Report*').

<sup>58</sup> *Ibid* 12–13.

<sup>59</sup> Arbitration Institute of the Stockholm Chamber of Commerce, 'Statistics 2016' (Report, Stockholm Chamber of Commerce, 2016) 15 <<http://www.sccinstitute.com/media/246918/statistics-2016.pdf>> archived at <<https://perma.cc/KZ7K-QUHM>> ('*SCC Statistics Report*').

<sup>60</sup> *Ibid*.

<sup>61</sup> Gus Van Harten, 'The (Lack of) Women Arbitrators in Investment Treaty Arbitration' (Working Paper, Osgoode Hall Law School of York University, 2011) <[http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1033&context=all\\_papers](http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1033&context=all_papers)>. See also Moshe Hirsch, *Invitation to the Sociology of International Law* (Oxford University Press, 2015) 142–4; Antonio R Parra, *The History of ICSID* (Oxford University Press, 2012) 212.

<sup>62</sup> Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 3<sup>rd</sup> ed, 2017) 6; School of International Arbitration at Queen Mary University of London and White & Case, '2015 Arbitration Survey: Improvements and Innovations in International Arbitration' (Survey Report, 2015) 10 <[http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015\\_International\\_Arbitration\\_Survey.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf)> archived at <<https://perma.cc/9Z7E-VYHE>>.

<sup>63</sup> See, eg, Lucas Bento, 'From Anarchy to Rational Design: Direction and Perception in International Investment Law' in Andrea K Bjorklund (ed), *Yearbook on International Investment Law & Policy 2014–2015* (Oxford University Press, 2016) 233, 247; Won L Kidane, *The Culture of International Arbitration* (Oxford University Press, 2017) 111–13.

North' who 'have a tight grip on the investment arbitration system and can exert immense influence over it'.<sup>64</sup> Such close relationships within the community are professed to delegitimise the authoritative decisions of the arbitral panels as politically charged.<sup>65</sup>

Secondly, the coverage is geared towards the issues of lack of 'gender' or 'geographical' diversity without adequate appreciation of overlapping identities.<sup>66</sup> These backgrounds inform the experiences of lawyers and influence how female lawyers approach the decision-making process.<sup>67</sup>

The composition of investment arbitration panels does not seem to reflect those diverse backgrounds.<sup>68</sup> Carly Coleman examines why the ICSID investment panels lack geographical and gender diversity.<sup>69</sup> According to Coleman, the structural features of investment arbitration reinforce the lack of gender and geographic diversity.<sup>70</sup> In particular, arbitrators have market incentives to maintain a relatively 'closed' system.<sup>71</sup> Wol L Kidane explains that the practice of 'repeat appointments' can also hinder the possibility for 'outsiders' to become arbitrators.<sup>72</sup> Thomas Ginsburg makes an ideologically similar point: '[t]hose inside the relatively closed world of international

<sup>64</sup> Pia Eberhardt and Cecilia Olivet, 'Profiting from Injustice: How Law Firms, Arbitrators and Financiers Are Fuelling an Investment Arbitration Boom' (Report, Corporate Europe Observatory and Transnational Institute, November 2012) 36 <<https://www.tni.org/files/download/profitfrominjustice.pdf>> archived at <<https://perma.cc/H93T-XEEH>>.

<sup>65</sup> Ibid 7.

<sup>66</sup> Ibrahim F I Shihata, *The World Bank in a Changing World: Selected Essays and Lectures* (Martinus Nijhoff, 1995) vol 2, 443:

In all, over sixty individuals from some thirty countries have served on the thirty ICSID arbitral tribunals constituted to date. It has so happened that the largest national groups have been Swiss and British, followed closely by Dutch, French, and US nationals. On the other hand, only about a dozen of the arbitrators have been nationals of developing countries.

On the meaning of the term 'culture' in the legal context, see Lawrence M Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation, 1975) 15: 'those parts of general culture — customs, opinions, ways of doing and thinking — that bend social forces toward or away from the law'. On the importance of legal cultures in the context of arbitration, particularly for procedural matters, see Jan Paulsson, 'Cultural Differences in Advocacy in International Arbitration' in R Doak Bishop and Edward G Kehoe (eds), *The Art of Advocacy in International Arbitration* (Juris, 2<sup>nd</sup> ed, 2010) 15. See also Kidane, above n 63, 177–8. Carol Boyce-Davies argues that institutions 'tended not to account for Black women either as participants or as leaders': Carol Boyce-Davies, 'Writing Black Women into Political Leadership: Reflections, Trends, and Contradictions' in Jeremy I Levitt (ed), *Black Women and International Law: Deliberate Interactions, Movements and Actions* (Cambridge University Press, 2015) 23, 24.

<sup>67</sup> Josephine Jarpa Dawuni and Akua Kuenyehia (eds), *International Courts and the African Woman Judge: Unveiled Narratives* (Routledge, 2017).

<sup>68</sup> Admittedly, it is not a concern within the investment arbitration field but more broadly in international law. The seminal work of Hilary Charlesworth, Christine Chinkin and Shelley Wright shows the dominance of 'the male organizational and normative structure of the international legal system': Charlesworth, Chinkin and Wright, above n 34, 614, 624–34.

<sup>69</sup> Carly Coleman, 'How International Is International Investment Dispute Resolution? Exploring Party Incentives to Expand ICSID Arbitrator Demographics' (2016) 26 *Transnational Law and Contemporary Problems* 121.

<sup>70</sup> Ibid 129–36.

<sup>71</sup> Ibid 129, 131–2.

<sup>72</sup> Kidane, above n 63, 113; Kidane discusses the idea of 'cultural "outsiders"', appointments only for people you know and bias against outsiders: at 113, 254.

arbitration can use claims of an “arbitration culture” to highlight their own expertise. Those who are “outside the culture” are less desirable participants’.<sup>73</sup>

Thirdly, the lack of diversity is sometimes perceived as only a temporary stage in the development of the investment arbitration field.<sup>74</sup> With time, as the proponents of this approach argue, female lawyers and other diversity candidates will enter the arbitration practice in greater numbers, will ‘grow into the profession’ and will be able to establish themselves in the field, resulting in more appointments of such candidates as arbitrators.<sup>75</sup> This approach essentially echoes the ‘trickle up’ argument popular in domestic debates on the diversity of the judiciary.<sup>76</sup> Erika Rackley explains that the ‘trickle up’ argument is built on an assumption that women and men progress in the profession on equal terms and there will be more women in the judiciary with time. This argument manifestly ‘fails to take into account complex structural and cultural factors within both the appointments process and legal profession which prevent women, and other non-traditional candidates from joining the Bench’.<sup>77</sup> Sally Jane Kenney explains that ‘[c]ontrary to popular belief, women’s progress is not natural, inevitable’ and most importantly ‘may be easily reversed’.<sup>78</sup>

Such cultural and structural barriers are acute in investment arbitration as well.<sup>79</sup> Deborah Rothman argues that culture can inform ‘implicit bias’ that may

<sup>73</sup> Tom Ginsburg, ‘The Culture of Arbitration’ (2003) 36 *Vanderbilt Journal of Transnational Law* 1335, 1344.

<sup>74</sup> Chiara Giorgetti, ‘Why Are There So Few Women Arbitrators?’ on *IntLawGrrls* (9 April 2013) <<https://ilg2.org/2013/04/09/why-are-there-so-few-women-arbitrators/>> archived at <<https://perma.cc/234G-UJ2S>>.

<sup>75</sup> See, eg, Anthea Roberts, ‘A Possible Approach to Transitional Double Hatting in Investor–State Arbitration’ on *EJIL: Talk!* (31 July 2017) <<https://www.ejiltalk.org/a-possible-approach-to-transitional-double-hatting-in-investor-state-arbitration/>> archived at <<https://perma.cc/X5MU-USRA>>.

<sup>76</sup> Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013) 32–5.

<sup>77</sup> *Ibid* 35.

<sup>78</sup> Sally Jane Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (Routledge, 2012), cited in Françoise Tulkens, ‘More Women — But Which Women? A Reply to Stéphanie Hennette Vauchez’ (2015) 26 *European Journal of International Law* 223, 225.

<sup>79</sup> Annalise Nelson demonstrates a woman’s point of view by asking the following questions:

Will I be able to get a job in international arbitration? Will I at least be able to land a job in a firm that has an arbitration practice, even if they’re not currently hiring? When will I be ‘established’ enough and experienced enough that it’s ‘okay’ for me to go on maternity leave? What am I going to do with my toddler when I have that hearing scheduled in London or Singapore? Can I carve out a career for myself that balances arbitration practice with academia?

Annalise Nelson, ‘The Representation of Women in Arbitration — One Problem, Two Issues’ on *Kluwer Arbitration Blog* (2 November 2012) <<http://arbitrationblog.kluwerarbitration.com/2012/11/02/the-representation-of-women-in-arbitration-one-problem-two-issues/>> archived at <<https://perma.cc/CS59-MPUR>>. See also Mirèze Philippe, ‘Redressing the Balance: The Path Ahead for Gender and Generational Diversity on Arbitral Tribunals’ on *Kluwer Arbitration Blog* (31 October 2016) <<http://arbitrationblog.kluwerarbitration.com/2016/10/31/redressing-the-balance-the-path-ahead-for-gender-and-generational-diversity-on-arbitral-tribunals/>> archived at <<https://perma.cc/Z5A9-YA28>>. Mirèze Philippe emphasises that in the field of arbitration ‘[t]he barriers to gender diversity are numerous; some are subtle others clearly visible. Stereotypes are probably the worst enemy’.

hinder the advancement of female candidates in the field of arbitration.<sup>80</sup> Rothman provides an example of William Tetley who in turn ‘illustrates how the combined power of the old boy network and supreme self-confidence enabled him to get his start in international arbitration’.<sup>81</sup> In 1982, two prominent international arbitrators phoned and asked him to chair a major arbitration, stating as an afterthought, ‘Of course, you know the ICC Rules’.<sup>82</sup> Most notably, ‘he had never participated in arbitration as either an attorney or an arbitrator, had no idea what the ICC was, and had virtually no experience with construction law. His co-arbitrators later praised his fine work on the matter’.<sup>83</sup>

Three approaches clearly identify the lack of diversity as a problem but conceptually ignore the question *which* women obtain arbitral appointments. As a result, the conversation on diversity revolves around formally showing that a number of female arbitrators’ appointments grows without a full appreciation of the factor that these female arbitrators come from similar backgrounds, ie Caucasian female lawyers from developed states. This vision is methodologically problematic, not only because it excludes candidates with diverse experiences from the fabric of social capital in the investment regime, but also because it radically misrepresents the picture that the situation on diversity at the investment arbitration panels is improving.

#### B *Examining Possible Reasons Why Candidates with Overlapping Identities Are Excluded*

The influential study of the arbitration field by Yves Dezalay and Bryant Garth provides useful insight into the past situation of diversity in the field of arbitration. This in turn helps to understand the possible reasons why changes in the field of arbitration have been incremental where diversity is concerned.<sup>84</sup> In particular, the study shows that historically the ‘pioneers of arbitration’ were ‘grand “notable arbitrators”’.<sup>85</sup> These ‘grand old men’ reportedly treated arbitration as ‘a duty’ rather than a professional occupation.<sup>86</sup> Notably, there were no ‘grand old women’ within the arbitrators’ circles.<sup>87</sup> The market for arbitration services expanded and resulted in an influx of ‘technocrats’ into the field of arbitration. The ‘technocrats’ represented a ‘new generation’ of ‘international arbitration professionals’.<sup>88</sup> In 1985, Jan Paulsson noted in his introduction to the *Journal of International Arbitration* that the newcomers in the field of arbitrators ‘labor, but not for love’.<sup>89</sup> Paulsson, of course, argued that the

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<sup>80</sup> Deborah Rothman, ‘Gender Diversity in Arbitrator Selection’ (2012) 18(3) *Dispute Resolution Magazine* 22, 25.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996).

<sup>85</sup> *Ibid.* 34–5.

<sup>86</sup> *Ibid.* 20.

<sup>87</sup> *Ibid.* 35: ‘These relatively few grand old men, as they are often referred to (there were no women)’.

<sup>88</sup> *Ibid.* 36.

<sup>89</sup> See, eg, Jan Paulsson, ‘Introduction’ (1985) 1 *Arbitration International* 2, 2, quoted in Dezalay and Garth, above n 84, 37

'technocrats' began approaching arbitration services as a professional occupation rather than a 'duty' additional to their primary employment in universities, courts or law firms.

The influx of 'newcomers' and greater professionalisation of arbitration services did not, however, result in greater diversity of arbitral panels. The arbitrator Brigitte Stern offers the following explanation for this phenomenon:

I agree we need more diversity ... But the fault is not in the family. The fault is in the parties. I've been trying very hard to propose women, public international lawyers ... from outside Europe and the US. The parties say, 'Ah, we don't trust these people because we don't know how they think'. It's the parties that close the circle.<sup>90</sup>

Of course, the parties hold the 'keys' to arbitral appointments; they appoint the candidates. An opportunity to select the adjudicator is a key advantage of arbitration in comparison to litigation. Thus, logically if the parties choose to appoint more candidates with non-conventional 'profiles', they are free to do so. There is no doubt that strictly from a procedural standpoint, the parties make appointments. For example, the ICSID Arbitration Rules stipulate that the parties can appoint the arbitrators.<sup>91</sup> Nonetheless, to say that the present lack of diversity is due to the fact that the parties refuse to appoint more arbitrators with 'non-conventional' profiles is to neglect the reality that the parties make their decisions on the basis of perceptions about adjudicators, can be subject to implicit biases and can irrationally follow such perceptions and biases when they decide on appointments.

A female candidate from a Third World country can be irrationally perceived on the basis of 'her feminine gender (read: sexually constrained) and being "third world" (read: ignorant, poor, uneducated, tradition-bound, religious, domestic, family-oriented, victimized, etc)'.<sup>92</sup> Such a perception may be contrasted with 'the (implicit) self-representation of western women as educated, modern, as having control over their own bodies and sexualities, and the "freedom" to make their own decisions'.<sup>93</sup> Admittedly, some states may be rational in denying a qualified female candidate a position for political reasons. For example, the Government of Belgium submitted an 'all-male list' of candidates for the position of judge at the European Court of Human Rights ('ECHR'). Judge Françoise Tulkens observes,

the Belgian authorities argued that the only woman who had applied in response to the national call for applications was 'underqualified' — an untenable statement, as Professor Brems' curriculum vitae clearly demonstrates. In reality, the Government was perhaps concerned about her overly high-calibre skills and probably no longer wanted to have a full-time professor as a judge.<sup>94</sup>

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<sup>90</sup> Kidane, above n 63, 114.

<sup>91</sup> International Centre for Settlement of Investment Disputes, *Arbitration Rules* (adopted 14 October 1966) r 3 <<http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partf-chap01.htm>> archived at <<https://perma.cc/98ZD-R78F>>.

<sup>92</sup> Mohanty, above n 23, 65. See also Gloria I Joseph and Jill Lewis, *Common Differences: Conflicts in Black and White Feminist Perspectives* (South End Press, 1981).

<sup>93</sup> Mohanty, above n 23, 65.

<sup>94</sup> Tulkens, above n 78, 226.



Dezalay and Garth propose a different explanation. The lack of diversity may be in part attributable to the fact that the ‘outsiders’ often face difficulties entering, and becoming recognised within, the field of arbitration. The access to the ‘gate’ of arbitration requires that a candidate be recognised and acknowledged by her or his peers; without such an acknowledgement and recognition, the candidate will never be appointed because ‘[y]ou always appoint your friends — people you know’.<sup>95</sup>

The tight connections between the members of the arbitration community produce a perception in the scholarship and in NGOs’ circles that arbitrators are members of an elite club or mafia.<sup>96</sup> Thomas Ginsburg described the tight relationships within the arbitration community as a ‘network’.<sup>97</sup> In particular, Ginsburg rationalises the tight connections within arbitral community from an economic perspective. According to Ginsburg, ‘networking’ produces ‘common practices’ that result in ‘greater efficiency’ and helps to surpass competition in the field of arbitration services.<sup>98</sup> Accordingly, the tightly networked arbitration community can be explained from the perspective of economic efficiency. Such networking, however, (whether it is economically efficient or not) can produce a situation in which ‘outsiders’ do not belong to this well ‘networked’ elite and thus cannot find the point of entry to access the arbitral seat.

Paulsson does not find the lack of ‘outsiders’ problematic and makes the case to support the ‘elite corps of arbitrators’.<sup>99</sup> Paulsson submits that ‘[g]iven the large stakes and great sensitivities involved in many arbitrations, there seems to be a good case for supporting the emergence and recognition of an elite corps of arbitrators’.<sup>100</sup> To justify his position, Paulsson rhetorically inquires ‘why should arbitration, which routinely involves high stakes and complex issues of both substance and procedure, be a suitable playing field for amateurs?’<sup>101</sup> Paulsson continues ‘an elite recruits by definition on the basis of demonstrated merit. This is as it should be’<sup>102</sup> and ‘it would be intolerable if it were a closed shop by any standard (culture, gender, nationality)’.<sup>103</sup> Paulsson notes that ‘individual reputations in this field’ develop

only by the slow accretion of evidence of independence and fairmindedness ... Elitism is no sin ... To acquire a good name, whether personal or institutional, is a lengthy process, and necessary in order to attain the requisite degree of confidence.<sup>104</sup>

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<sup>95</sup> Dezalay and Garth, above n 84, 50, quoting an anonymous interview with ‘a leading arbitrator of the new generation’.

<sup>96</sup> Eberhardt and Olivet, above n 64, 36. Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, 2013) 342: ‘the inner circle has been described as the “mafia” or the “club”, a community into which it is difficult to gain entrance’.

<sup>97</sup> Ginsburg, above n 73, 1342.

<sup>98</sup> *Ibid* 1344.

<sup>99</sup> Jan Paulsson, *The Idea of Arbitration* (Oxford University Press, 2013) 171–3.

<sup>100</sup> *Ibid* 171.

<sup>101</sup> *Ibid*.

<sup>102</sup> *Ibid* 173.

<sup>103</sup> *Ibid* 171.

<sup>104</sup> *Ibid* 173.

Paulsson builds his thesis on two assumptions. The first assumption is that only candidates with a certain degree of merit can be appointed as arbitrators. His second assumption is that all candidates must attest to their merit ‘through a lengthy process’ of acquiring ‘a good name’.<sup>105</sup> Both points are in principle flawed. First, what is merit? This is not a question about what the concept of merit means in the abstract but an issue of what the meaning of merit is in a particular field of legal practice such as arbitration. Baroness Julia Neuberger reinforces this point by suggesting that ‘[w]hat needs discussing is definitions of merit, and whose definition of merit holds sway’.<sup>106</sup>

Merit is understood differently depending on the field of legal practice and is most certainly relative to values supported by the legal practitioners within a particular field.<sup>107</sup> Paulsson fails to establish any objective criteria that newcomers must satisfy to be accepted to the ‘elite corps’ except ‘merit’ and ‘good name’ as subjectively understood by the arbitrators, AIs or other users. According to the Queen Mary Survey 2010, parties report that five factors drive their choices in the selection of arbitrators, in particular fairness, prior experience of arbitration and quality of award, availability and reputation.<sup>108</sup> Impartiality, independence and knowledge of the field are understood to be reflective of merit in the arbitration field. Knowledge of the field means not only an understanding of the governing law but also an ‘ability to influence others’.<sup>109</sup>

Second, Paulsson assumes that *all* legal practitioners have a level playing field when accessing the field of arbitration and only their willingness to commit to ‘the lengthy process’ is required ‘to attain the requisite degree of confidence’.<sup>110</sup> This is not the case in part due to a number of systemic factors that characterise the investment regime such as the party driven appointment system that will be discussed further in this Part.

Kidane’s elaborative critique of Paulsson’s justification of ‘elite arbitration corps’ reaffirms the two points above. Kidane situates Paulsson’s proposition within the broader context of opposition between Global North and Global South.<sup>111</sup> For Kidane, the current arbitration community has ‘the privileged position obtained merely because of membership in a particular society that has

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<sup>105</sup> Ibid.

<sup>106</sup> Gillian Carmichael Lemaire, ‘Achieving Gender Diversity for Future Generations in Appointments to International Commercial Arbitration Tribunals: A Focus on Scotland’ (2015) 12(4) *Transnational Dispute Management* 16, quoting Baroness Julia Neuberger, ‘Merit Diversity — Compatible Aspirations in Judicial Appointments?’ (Speech delivered at the Diversity Conference, Edinburgh, Scotland, 11 March 2014).

<sup>107</sup> Note the word ‘field’ is used in Pierre Bourdieu’s sense: Pierre Bourdieu, *Outline of a Theory of Practice* (Richard Nice trans, Cambridge University Press, 1977) 39 [trans of: *Esquisse d’une théorie de la pratique, précédé de trois études d’ethnologie kabyle* (first published 1972)].

<sup>108</sup> School of International Arbitration at Queen Mary University of London and White & Case, ‘2010 International Arbitration Survey: Choices in International Arbitration’ (Survey Report, 2010) 25–6 <[http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010\\_InternationalArbitrationSurveyReport.pdf](http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2010_InternationalArbitrationSurveyReport.pdf)> archived at <<https://perma.cc/2778-TT8E>> (‘*Choices in International Arbitration*’).

<sup>109</sup> Kidane above n 63, 254.

<sup>110</sup> Paulsson, *The Idea of Arbitration*, above n 99, 173.

<sup>111</sup> Kidane, above n 63, 244.

historically enjoyed positions of influence'.<sup>112</sup> Kidane suggests that Paulsson largely ignores that

the privileges of the elite class are structurally perpetuated. The elite class already exists, and it owes its existence to some very pragmatic considerations necessitated by historical realities. The West's advantaged position, and its creation of institutions and articulation of doctrine before anyone else could, in turn created opportunities for those proximate to it. By the time the rest of the world adopted, just like a business venture or a piece of technology, the advantage was essentially lost, but the dependency lingers partly because of the mystification of the process by the privileged class, and not so subtle claim of superiority, which could be convincing to those who view the arbitral process as a scientific process that requires a particular kind of scientific knowledge that exclusively resides in the West.<sup>113</sup>

Accordingly, while Paulsson is correct in summarising what the users of the system perceive as virtues in an arbitrator, he ignores the reality that those 'virtues' were essentially shaped in Geneva or London; places historically privileged in shaping the values of the arbitration field.<sup>114</sup> The content of the virtues is not objective but rather is interpreted by members of the 'elite corps' themselves who decide eventually whether 'outsiders' can gain access to the field. The objection can be made again that the parties ultimately decide whom they appoint as arbitrators. Accordingly, if parties prefer to make the system more democratic ('access for all') than elitist ('elite corps') they are free to do so. But parties do not make their choices in a vacuum; quite the opposite. Parties make informed (and often pragmatic) choices on the basis of recommendations and references from their legal counsel who often themselves can serve as arbitrators.<sup>115</sup> These choices are skewed by information asymmetry; information about the qualifications, skills and even the previous track record of candidates is not often available particularly for first time litigants, a problem well-recognised by the users of investment arbitration.<sup>116</sup>

Michael Waibel shows that systemic features of investment arbitration such as the party driven appointment system and particularly the possibility of repeated appointments constitute 'a barrier to entry' for many candidates.<sup>117</sup> There are two explanations for this phenomenon. First, parties favour arbitrators with a track record of previous appointments to 'avert' the risks of potentially unpredictable outcomes.<sup>118</sup> Understandably so, the stakes in investment arbitration are high; a potential award of damages can reach up to US\$50

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<sup>112</sup> Ibid.

<sup>113</sup> Ibid 245.

<sup>114</sup> Ibid 244.

<sup>115</sup> Langford, Behn and Lie, above n 7.

<sup>116</sup> Michael Waibel, 'ICSID Arbitrators: The Ultimate Social Network?' on *EJIL: Talk!* (25 September 2014) <<https://www.ejiltalk.org/icsid-arbitrators-the-ultimate-social-network/>> archived at <<https://perma.cc/X9ZJ-PL76>>.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

billion.<sup>119</sup> Secondly, parties try to ensure that the arbitrator has a reputation in the field and can ‘sway’ the opinions of his or her colleagues by exercising this influence while on the panel.<sup>120</sup>

Another reason why ‘outsiders’ have difficulties in finding the point of entry to the field as arbitrators can be that the career development of women lawyers requires, in particular, mentorship to achieve progress in male-dominated professions.<sup>121</sup> ‘Outsiders’ can experience difficulties in obtaining such mentorship. While there is no data specific to the investment arbitration context that reaffirms that women and minority first time candidates face additional difficulties in acquiring mentors, the literature on diversity on corporate boards offers insight. For example, Michael L McDonald and James D Westphal show that women and racial minority first-time directors face additional difficulties in acquiring mentorship and overall are ‘less likely to meet incumbent directors’ expectations regarding proper ways of participating in board meetings’ and are ‘less likely to receive incumbents’ recommendations for board seats at other firms’.<sup>122</sup>

### III INTERSECTIONALITY MUST BE A PART OF THE CONVERSATION ON DIVERSITY IN INVESTMENT ARBITRATION

This Part examines the concept of intersectionality and explains why intersectionality must be a part of diversity discourse in the context of investment arbitration. Before explaining the significance of intersectionality in the investment arbitration discourse, it is worth considering the relationship between the concepts of intersectionality and diversity. Diversity and intersectionality are two related but conceptually distinctive approaches. Birte Siim explains that

diversity has a double meaning and can refer to either ethno-cultural, religious or sexual differences that should be preserved, for example language differences, or to inequalities, such as gender, class, ethnicity/race, which should be abolished. Intersectionality is also different from the diversity approach, in that it does not address only one single dimension of diversity but examines multiple and intersecting categories of differences ... The aim of the intersectionality approach is to conceptualise differences and to address multiple inequalities, intersecting categories of difference and overlapping identities.<sup>123</sup>

In the context of an investment regime, the intersectionality approach is particularly valuable methodologically because it makes us stop asking whether

<sup>119</sup> Irmgard Marboe, ‘*Yukos Universal Limited (Isle of Man) v The Russian Federation: Calculation of Damages in the Yukos Award — Highlighting the Valuation Date, Contributory Fault and Interest*’ (2015) 30 *ICSID Review* 326, 326. The *Yukos* award against Russia was over US\$50 billion: Alec Stone Sweet and Florian Grisel, *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (Oxford University Press, 2017) 4.

<sup>120</sup> Todd Tucker, ‘Inside the Black Box: Collegial Patterns on Investment Tribunals’ (2016) 7 *Journal of International Dispute Settlement* 183, 189–90.

<sup>121</sup> Aarti Ramaswami et al, ‘The Interactive Effects of Gender and Mentoring on Career Attainment: Making the Case for Female Lawyers’ (2010) 37 *Journal of Career Development* 692, 694.

<sup>122</sup> Michael L McDonald and James D Westphal, ‘Access Denied: Low Mentoring of Women and Minority First-Time Directors and Its Negative Effects on Appointments to Additional Boards’ (2013) 56 *Academy of Management Journal* 1169, 1197.

<sup>123</sup> Siim, above n 18, 13.

we get women at the composition of the investment arbitration panels and begin asking which women obtain appointments, what obstacles female candidates from developing states encounter and what hinders access to the arbitration field for female candidates who can be identified as visible racial minorities. Such questions can shape a better understanding of why certain female lawyers are excluded and underrepresented as arbitrators in investment disputes.

#### A *Explaining the Concept of 'Intersectionality'*

The term 'intersectionality' has no universally accepted doctrinal definition and is still at the stage of crystallisation.<sup>124</sup> For greater clarity and at the risk of oversimplifying, intersectionality in this paper is adopted as an 'analytical approach ... to studying multiple and intersecting differences and inequalities'.<sup>125</sup> The gist of intersectionality as an analytical approach is in its commitment to ensure the 'visibility' of candidates with overlapping identities and examining the structural barriers that hinder the progress of such candidates.

The words of Judge Gabrielle Kirk McDonald, the first female African-American judge on the International Criminal Tribunal for the Former Yugoslavia ('ICTY'), who also served as an arbitrator at the Iran-United States Claims Tribunal, illustrate that background and experiences can inform a judge's approach to decision-making:

To me, given my background as a civil rights lawyer, I was struck by what was happening in the former Yugoslavia and how it related to what was going on in the United States, primarily with respect to African Americans. That's what drew me there, and I often said, as you've probably seen, that it was a 'visceral' almost — I don't want to say 'mission,' but maybe so — that took me there.<sup>126</sup>

Josephine Jarpa Duwani explains that

Judge McDonald embodies different identities. At one end of the spectrum is the identity of power, represented by the nation-state from which she derives her citizenship (the US); then there is her class identity, due to her educational and professional background ... also her gender, as she is a woman; and a racial identity, given that she is a Black woman.<sup>127</sup>

In the field of investment arbitration, candidates with overlapping identities are largely overlooked and excluded from the ongoing conversation on diversity. Diversity criteria are at best considered individually and in a strict isolation from one another. When the parties and AIs commit to 'broaden the pool' by, in particular, appointing and nominating more women as arbitrators, they are not making a precise enough commitment to diversity. Their narrow focus excludes

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<sup>124</sup> Lorena Sosa has explained different theoretical approaches in intersectionality research: Lorena Sosa, *Intersectionality in the Human Rights Legal Framework on Violence against Women: At the Centre or the Margins?* (Cambridge University Press, 2017) 19–27.

<sup>125</sup> Siim, above n 18, 13.

<sup>126</sup> David P Briand and Leigh Swigart, Interview with Gabrielle Kirk McDonald (East Hampton, 15 July 2016).

<sup>127</sup> Josephine Jarpa Duwani, 'Introduction: Challenging Gender Universalism and Unveiling the Silenced Narratives of the African Woman Judge' in Josephine Jarpa Duwani and Akua Kuenyehia (eds), *International Courts and the African Woman Judge: Unveiled Narratives* (Routledge, 2017) 8.

conversations about race, class or legal background. In other words, *which* women are precisely appointed and nominated?

The lack of clarity and application of a generic term ‘women’ in the discourse on arbitral diversity results in a perception that women have ‘identical interests and desires, regardless of class, ethnic or racial location or contradiction’.<sup>128</sup> The problem of such a ‘monolithic’ approach is that it ignores conceptually the difficulties and barriers some female candidates may face by virtue of particular overlapping characteristics generally in the legal profession and particularly in accessing arbitral seats.<sup>129</sup> The monolithic approach falls into both a methodological and analytical trap when *all* women are treated the same, as if their experiences form a single unique voice not affected by the country of origin, race or class.<sup>130</sup>

The concept of intersectionality permits the greater conceptual mainstreaming of the idea that candidates with overlapping backgrounds can face systemic obstacles of a different nature than their counterparts. This conversation is essential from both symbolic and pragmatic standpoints. From a symbolic perspective, the concept of intersectionality can help to establish the ‘visibility’<sup>131</sup> of women who are underrepresented in the field. This symbolic perspective translates into the practical value of ‘increasing the visibility of women’ arbitrators.<sup>132</sup> This can help to ‘counter attitudinal biases and patronage practices and encourage women’s appointments’.<sup>133</sup> In particular, it can impact the way in which the selection procedure is set up for arbitrators and the factors taken into consideration in the appointment process. From a pragmatic perspective, more diverse arbitral panels will contribute to the sociological legitimacy of investment arbitration.

For greater clarity, intersectionality is not an instrument that will help to give everyone access to the field of international investment arbitration, but rather one that ensures candidates with overlapping identities are ‘visible’ in the field. To the author’s knowledge, the field of investment arbitration lacks an empirical study on the barriers that candidates with overlapping backgrounds may face. AIs are not even collecting information to render such candidates visible or to make an empirical study possible. To identify the nature of such obstacles, it may be useful to conduct interviews with female lawyers in the field to learn from their experiences. Some preliminary lessons, for example, can be drawn from the field of alternative dispute resolution (‘ADR’).

In ADR, the empirical study of Maria Volpe et al shows that the participation of candidates with overlapping backgrounds is hindered by a number of

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<sup>128</sup> Mohanty, above n 23, 64. Mohanty warns against the danger of a monolithic approach in international law generally and observes the following trend in Western feminist thought generally — the ‘appropriation’ of the experiences and ‘struggles’ of women of colour in an attempt to situate the law within the broader context of economic and political struggles of the Third World: at 61.

<sup>129</sup> Ibid 61.

<sup>130</sup> Ibid 64–5.

<sup>131</sup> Anna Carastathis, *Intersectionality: Origins, Contestations, Horizons* (University of Nebraska Press, 2016) ix–xvi.

<sup>132</sup> Organisation for Economic Co-operation and Development, *Women, Government and Policy Making in OECD Countries: Fostering Diversity for Inclusive Growth* (OECD Publishing, revised ed, 2014) 64.

<sup>133</sup> Ibid.

obstacles such as ‘no clear entry point’, ‘limited access and penetration of established networks’, ‘limited access to compensated rosters’, ‘limited opportunity for repeat selection’ and a ‘lack of mentors’.<sup>134</sup> While there are differences between ADR and investment arbitration (in ADR, both parties can be private; in ISA only foreign investors can sue states), some features are strikingly similar. For instance, existing networks are well established and thus are difficult for outsiders to penetrate, both employ a party-driven appointment process and, in both, the possibility of repeated appointments reinforces the inaccessibility of entry into the ‘elite corps’.

Research on ADR shows that candidates with overlapping backgrounds identify that they have limited opportunities to penetrate ‘established networks’.<sup>135</sup> In the context of investment arbitration, the arbitrators represent a very well-networked community; the parties particularly value ‘the likelihood the arbitrator will be able to influence the Chair of the tribunal (which scored 47%)’.<sup>136</sup> An outsider without previous networking in the arbitration community has little influence in the arbitration circles and thus less chance to get appointed in the first place.<sup>137</sup> Finally, the cognitive bias of the ‘inner circle’ against the ‘outsiders’ can result in missed opportunities for candidates.<sup>138</sup> The attitudes in professional communities shape and foster cognitive biases that are difficult to combat through legal means.<sup>139</sup>

#### B *Why Intersectionality Matters in Investment Arbitration*

Greater diversity on investment arbitration panels is important for at least three reasons — ‘legitimacy, equity and difference’.<sup>140</sup> Legitimacy in the context of investment arbitration means, as Gus Van Harten puts it, that ‘arbitrators who make decisions of public importance should reflect the make-up of those affected by their decisions’.<sup>141</sup> The lack of diversity thus results in a homogenous group of decision-makers, which is radically different from those affected by their

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<sup>134</sup> Maria R Volpe et al, ‘Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field’ (2008) 35 *Fordham Urban Law Journal* 119, 136–8. ADR for the purposes of this study does not include international commercial arbitration. The study focuses on the US context.

<sup>135</sup> *Ibid* 137.

<sup>136</sup> *Choices in International Arbitration*, above n 108, 26.

<sup>137</sup> Tucker, above n 120, 189–90; Puig, above n 13, 423.

<sup>138</sup> Tucker, above n 120, 189–90; Puig, above n 13, 423.

<sup>139</sup> Tucker, above n 120, 189–90; Puig, above n 13, 423. See also Melissa Finucane et al, ‘Gender, Race, and Perceived Risk: The “White Male” Effect’ (2000) 2 *Health, Risk and Society* 159.

<sup>140</sup> Rackley, above n 76, xiii.

<sup>141</sup> Van Harten, above n 61, 1. Nienke Grossman argues that underrepresentation of women at international courts undermines their institutional legitimacy. See Nienke Grossman, ‘Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts’ (2012) 12 *Chicago Journal of International Law* 647.

decisions.<sup>142</sup> Judge of the ECHR, Françoise Tulkens explains the relevance of the legitimacy argument as follows:

The presence of women on the bench cannot be considered in itself a condition for the legitimacy of international courts. Women are not on the bench to ‘legitimate’ or ‘justify’ anything. Women are present at the European Court of Human Rights simply because there is no reason for them not to be there. Conversely, I believe that it is the lack of women at the Court that poses a problem in terms of legitimacy.<sup>143</sup>

Equity stands for the recognition of each and every meritorious candidate who is interested in an appointment but has no chance to gain it due to structural barriers in the arbitration field.<sup>144</sup> Equity thus ensures that such candidates are not excluded from the mantle of the privileged arbitral profession.<sup>145</sup> Stephan Wilske and Martin Raible explain that ‘[t]raditionally, the profession of “international arbitrator” seems to be associated with prestige, exclusivity, and autonomy’.<sup>146</sup>

At the core of the ‘difference’ argument is that ‘who judges’ matters insofar adjudicators can arrive at different conclusions depending on their background.<sup>147</sup> Admittedly, there is a serious disaccord in the legal scholarship as to whether gender constitutes a factor that influences the outcome of cases. While a few experts point out that female adjudicators have their unique ‘women’s voices’,<sup>148</sup> others argue that ‘a wise old man and a wise old woman

<sup>142</sup> The legitimacy debate is mirrored in the debate regarding diversity on corporate boards. Karen Curtin explains ‘[t]here is real debate between those who think we should be more diverse because it is the right thing to do and those who think we should be more diverse because it actually enhances shareholder value. Unless we get the second point across, and people believe it, we’re only going to have tokenism’: quoted in Alice H Eagly and Linda L Carli, *Through the Labyrinth: The Truth About How Women Become Leaders* (Harvard Business School Press, 2007) 192.

<sup>143</sup> Tulkens, above n 94, 224.

<sup>144</sup> Rackley, above n 76, xiii–xiv.

<sup>145</sup> Sandra Day O’Connor, first female Justice of the US Supreme Court, states that female lawyers still face the glass-ceiling. ‘[W]omen still may face ... a “glass ceiling” in the legal profession — a delayed or blocked ascent to partnership or management status’: Sandra Day O’Connor, ‘Madison Lecture: Portia’s Progress’ (1991) 66 *New York University Law Review* 1546, 1554.

<sup>146</sup> Stephan Wilske and Martin Raible, ‘The Arbitrator as Guardian of International Public Policy? Should Arbitrators Go beyond Solving Legal Issues?’ in Catherine A Rogers and Roger P Alford (eds), *The Future of Investment Arbitration* (Oxford University Press, 2009) 249, 257.

<sup>147</sup> Rackley, above n 76, 28. Bertha Wilson, the first female Justice at the Supreme Court of Canada, noted that the judicial office itself could impose constraints on whether she as a female judge can make a difference at the bench: Bertha Wilson, ‘Will Women Judges Really Make a Difference?’ (1990) 28 *Osgoode Hall Law Journal* 507, 507.

<sup>148</sup> See, eg, Jennifer L Peresie, ‘Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts’ (2005) 114 *Yale Law Journal* 1761, 1761:

An empirical analysis of 556 federal appellate cases decided in 1999, 2000, and 2001 reveals that judges’ gender mattered to case outcomes. Though plaintiffs lost in the vast majority of cases, they were twice as likely to prevail when a female judge was on the bench.

See also Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press, 1993). Gilligan’s work is influential as it highlights a difference between male and female ways of thinking. The study focused on girls and boys that expressed distinctive approaches to handling the problem, girls expressed ‘care’ whereas boys did not.



reach the same conclusion. In the vast majority of cases, [gender] will have no impact whatever'.<sup>149</sup> Others, such as Christina Boyd, Lee Epstein and Andrew Martin, show that gender in judging can matter in discrimination cases: female judges showed that 'when a woman serves on a panel with men, men are significantly more likely to rule in favour of the rights litigant'.<sup>150</sup> Judge Cecilia Medina Quiroga of the Inter-American Court of Human Rights emphasises that women judges bring a unique perspective to the bench.<sup>151</sup> Judge Quiroga recalls that she posed the following question to the witness: 'Could you please explain to me what is the additional suffering of a woman who has been raped in a case such as this?'<sup>152</sup> The judge observes that she wanted to have the answer on record because it was 'important for reparations'.<sup>153</sup>

The overview of scholarship in economics, in particular on the role of gender and other diversity characteristics on corporate boards reveals that such characteristics make a difference in decision-making processes and outcomes. After conducting quantitative research of female and male CEOs at Fortune 500 companies, Mara Faccio, Maria-Teresa Marchica and Roberto Mura conclude that

firms run by female CEOs tend to make financing and investment choices that are less risky than those of otherwise similar firms run by male CEOs ... it appears that women who climbed the corporate ladder are different from their male peers.<sup>154</sup>

Faccio, Marchica and Mura observe that female appointees within corporate boards can influence these boards to allocate risk and make choices on acquisitions differently.<sup>155</sup> Accordingly, gender-diverse boards enhance the quality of decision-making because they can introduce different perspectives for firms' governance.<sup>156</sup>

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<sup>149</sup> Angela Nicole Johnson, 'Intersectionality, Life Experience & Judicial Decision-Making: A New View of Gender at the Supreme Court' (2014) 28 *Notre Dame Journal of Law, Ethics and Public Policy* 353, 353 n 4, quoting Justice Jeanne Coyne. See also Darrell Steffensmeier and Chris Hebert, 'Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?' (1998) 77 *Social Forces* 1163. A similar point is raised by John Aneurin Grey Griffith, who states '[t]hese judges have by their education and training and the pursuit of their profession as barristers, acquired a strikingly homogeneous collection of attitudes, beliefs and principles, which to them represents the public interest': J A G Griffith, *The Politics of the Judiciary* (Manchester University Press, 1977) 193.

<sup>150</sup> Christina L Boyd, Lee Epstein and Andrew D Martin, 'Untangling the Causal Effects of Sex on Judging' (2010) 54 *American Journal of Political Science* 389, 390.

<sup>151</sup> Daniel Terris, Cesare P R Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Oxford University Press, 2007) 180.

<sup>152</sup> *Ibid* 186.

<sup>153</sup> *Ibid* 187.

<sup>154</sup> Mara Faccio, Maria-Teresa Marchica and Roberto Mura, 'CEO Gender, Corporate Risk-Taking, and the Efficiency of Capital Allocation' (2016) 39 *Journal of Corporate Finance* 193, 207.

<sup>155</sup> *Ibid* 194.

<sup>156</sup> Daehyun Kim and Laura T Starks, 'Gender Diversity on Corporate Boards: Do Women Contribute Unique Skills' (2016) 106 *American Economic Review* 267, 270.

In the context of arbitration, Michael Waibel and Yanhui Wu conclude that the background of arbitrators matters at least in the perception of the parties.<sup>157</sup> Otherwise, why would experienced litigants carefully pick candidates for the arbitral appointments? Waibel and Wu explain that

the views of arbitrators may diverge, depending on their background, life experience, and ideology. We would expect ‘conservative’ arbitrators to tend to favor the protection of property rights without much reservation, whereas ‘progressive’ arbitrators would tend to give greater weight to other societal values such as protection of the environment or public service delivery. The balancing may differ depending on the arbitrator’s view of the world.<sup>158</sup>

This paper does not seek to empirically reaffirm previous studies. Even if we assume that ‘diverse religions, cultures, nationalities, classes, and sexualities’ do not make any difference in judging, the diverse representation of adjudicators is significant in any case given that stakeholders who are affected by arbitral decisions believe that the makeup of the arbitral panel matters ‘to perceptions of impartiality and fairness, and thereby, sociological legitimacy’.<sup>159</sup> It is worth noting that justice does not only need to be done but also ‘should manifestly and undoubtedly be seen to be done’.<sup>160</sup> The environment of exclusion in the investment arbitration profession has already contributed to the perception that investment arbitrators form a ‘mafia’.<sup>161</sup> Such a perception induces mistrust against arbitral authority that can result in the scenario that the governed eventually may refuse to comply with the authoritative orders of the arbitrators.

Before examining future options of what can be done to improve diversity on the bench, it is important to acknowledge two possibilities. First, the actors that exercise appointing authority (ie investors, states and AIs) may think that an appointment of candidates with overlapping characteristics will result in the situation that will unduly limit the possibility of having multiple arbitrators with single diversity characteristics on the single panel. Secondly, the appointing authorities may also assume that having multiple candidates with single diversity characteristic can achieve intersectionality of perspective.

While both possibilities are entirely plausible, they do not diminish the importance of intersectionality at the arbitral bench because candidates with overlapping characteristics (1) may bring a unique perspective to the bench distinctive from candidates with a singular diversity characteristic and (2) may experience different obstacles to entering the arbitration field than candidates with singular diversity characteristics. In other words, what characterises ‘intersectionality’ is that ‘multiple categories of distinction do not simply “add”

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<sup>157</sup> Michael Waibel and Yanhui Wu, *Are Arbitrators Political? Evidence from International Investment Arbitration* (January 2017) University of Southern California: Yanhui Wu <<http://www-bcf.usc.edu/~yanhuiwu/arbitrator.pdf>> archived at <<https://perma.cc/69WS-FE3C>>.

<sup>158</sup> *Ibid* 8.

<sup>159</sup> Grossman, above n 141, 660–1.

<sup>160</sup> Mark Hoskins and William Robinson, *A True European: Essays for Judge David Edward* (Hart Publishing, 2003) 21, quoting *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259 (Hewart CJ).

<sup>161</sup> While Paulsson acknowledges this perception exists, he believes it to be unwarranted: see Jan Paulsson, ‘Ethics, Elitism, Eligibility’ (1997) 14 *Journal of International Arbitration* 13, 19.

to each other to create multiplied effect, rather a new and different form of subordination or discrimination is created'.<sup>162</sup> Lorena Sosa explains that

women of colour are not 'doubly oppressed' based on a race-gender addition; they experience a new and different form of discrimination and are often not covered by the combination of policies and laws addressing single categories of subordination.<sup>163</sup>

#### IV EXAMINING EXISTING OPTIONS AND MAPPING FUTURE OPTIONS: WHAT CAN BE DONE?

Before proposing how candidates with overlapping identities can gain greater visibility in investment panels, it is worth examining existing options: what states, arbitral institutions, foreign investors and academics already do to address the problem of a lack of diversity generally. These efforts can, of course, be expanded further by taking into consideration candidates with overlapping identities. After examining the existing options, this Part will map potential areas of future focus.

##### A *Current State of Affairs: Existing Options*

The problem of diversity has gained political momentum in the field of arbitration and beyond. AIs, states, foreign investors and academics have undertaken steps and made proposals as to how the diversity of investment arbitration panels can be increased. The following Parts briefly examine existing options to address the problem of lack of diversity. It is worth noting that these propositions do not currently take into account intersectionality.

##### 1 *Arbitral Institutions*

AIs make a number of statements about their commitment to enhance diversity on investment arbitration panels. Besides public statements, AIs have undertaken particular steps to achieve the goal of diversity. First, AIs exercise a residual power to appoint arbitrators to investment panels.<sup>164</sup> In exercising their powers, AIs appoint more female arbitrators than investors or states.<sup>165</sup> The problem is that 'institutions account for only a fraction of all arbitrator appointments'.<sup>166</sup>

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<sup>162</sup> Sosa, above n 124, 17–18.

<sup>163</sup> Ibid.

<sup>164</sup> Dupont and Schultz, above n 2, 7; *Convention on the Settlement of Investment Disputes* art 38.

<sup>165</sup> See *ICSID Annual Report 2017*, above n 3, 35: 'ICSID and the Respondent/State each appointed 43.5% of these female appointees ... No female appointments were made by the Claimant/investor individually or by the co-arbitrators ... and 21% of ICSID appointees were women'.

<sup>166</sup> Catherine A Rogers, 'The Key to Unlocking the Arbitrator Diversity Paradox? Arbitrator Intelligence' on *Kluwer Arbitration Blog* (27 December 2017) <<http://arbitrationblog.kluwerarbitration.com/2017/12/27/on-arbitrators/>> archived at <<https://perma.cc/2375-RQD5>>.

Secondly, AIs publish reports with publicly available data on arbitral appointments that permit monitoring of the current diversity of arbitral panels.<sup>167</sup> Thirdly, AIs keep publicly available records on the identities of arbitrators that permit first time users to access information about candidates, their experiences, legal background and state of origin.<sup>168</sup> Finally, AIs conduct professional development sessions and host events for practitioners in the field that can potentially change attitudes from within the field.<sup>169</sup> Accordingly, such initiatives cannot be underestimated.

## 2 States: Canada in Focus

States have numerous powerful options to tackle the problem of lack of diversity in investment arbitration. The reason is that states draft international treaties that determine the rules for the appointment of arbitrators and the prerequisites of becoming an arbitrator. States also exercise the right to appoint arbitrators for arbitral panels. States make commitments to gender diversity and female empowerment more broadly but not in the context of investment arbitration specifically. In 2015, a majority of states expressed a political commitment to diversity and inclusion when the UN unanimously adopted the *UN Development Agenda* in 2015.<sup>170</sup> Sustainable development goal 5 on gender diversity and female empowerment was recognised as a crosscutting goal to achieving sustainable development for all and one of the international community objectives for 2030. One of sustainable development goal 5's objectives is to ensure that women play greater roles in decision-making capacities.<sup>171</sup> Canada confirmed its commitment to the *UN SDGs*.<sup>172</sup> In 2017, in the context of the World Trade Organization ('WTO'), states unanimously agreed to the *Joint Declaration* on 'Gender and Diversity' that acknowledges 'the importance of incorporating a gender perspective into the promotion of inclusive economic growth' and the necessity to improve 'women's access to opportunities and removing barriers to their participation in national and international economies contributes to sustainable economic development'.<sup>173</sup>

<sup>167</sup> See, eg, *ICSID Annual Report*, above n 3; *LCIA Facts and Figures Report*, above n 57; *SCC Statistics Report*, above n 59.

<sup>168</sup> See International Centre for Settlement of Investment Disputes, *Arbitrators, Conciliators and Ad Hoc Committee Members* (2018) <<https://icsid.worldbank.org/en/Pages/arbitrators/CVSearch.aspx>>; Singapore International Arbitration Centre, *Our Arbitrators: SIAC Panel* (2017) <<http://siac.org.sg/our-arbitrators/siac-panel>> archived at <<https://perma.cc/YK6F-QNNA>>.

<sup>169</sup> International Centre for Settlement of Investment Disputes, *Upcoming Events and Training* (2018) <<https://icsid.worldbank.org/en/Pages/about/Upcoming-Events-and-Training.aspx>> archived <<https://perma.cc/659Z-6PR2>>. The International Chamber of Commerce offers similar services: see International Chamber of Commerce, *Events and Online Learning* (2018) <<https://iccwbo.org/trainings-events/>> archived at <<https://perma.cc/Q9KS-C8C7>>.

<sup>170</sup> *UN SDGs*, UN Doc A/Res/70/1; *Beijing Declaration and Platform for Action 1995 as contained in Report of the Fourth World conference on Women*, UN Doc A/CONF.177/20/Rev.1 (17 October 1995) annex I paras 3, 24; Janice Auth (ed), *To Beijing and Beyond: Pittsburgh and the United Nations Fourth World Conference on Women* (University of Pittsburgh Press, 1994).

<sup>171</sup> *UN SDGs*, UN Doc A/Res/70/1, para 18.

<sup>172</sup> *Canada FIA Policy*, above n 32, 7.

<sup>173</sup> *Buenos Aires Joint Declaration*, above n 31, Preamble.

States reinforce their political declarations by adopting binding commitments in international treaties. For example, in 2017 Canada and Chile amended the *Canada–Chile FTA* by introducing a gender and trade chapter. In this chapter, the parties reaffirm ‘their commitment to adopt, maintain and implement effectively their gender equality laws, regulations, policies and best practices ... promote public knowledge of its gender equality laws, regulations, policies and practices’.<sup>174</sup> Canada also adopted the Canada Feminist International Assistance Policy to ensure that women all over the world are supported. In particular, the policy calls for the provision of support ‘so that they can more effectively challenge harmful and discriminatory social beliefs and practices’.<sup>175</sup>

Evidently gender and diversity constitute a popular political message in the UN, WTO and individual governments. ISA panels are however largely overlooked. The *Comprehensive Economic and Trade Agreement* (‘CETA’) between Canada and the EU, for example, does not have any language that states the importance of gender diversity (not to say intersectionality) in the appointment process for arbitral panels.<sup>176</sup> To the author’s knowledge, there are no international investment agreements (‘IIAs’) that expressly link diversity to the appointments process or addresses diversity in the context of the qualifications of the arbitrators. There are however precedents of linking IIAs to *UN SDGs* including to sustainable development goal 5 on gender diversity and female empowerment. For example, art 24 of the *Nigeria–Morocco Bilateral Investment Treaty* requires foreign investors to

comply with all applicable laws and regulations of the Host State and the obligations in this Agreement, and in accordance with the size, capacities and nature of an investments, and taking into account the development plans and priorities of the Host State and the *Sustainable Development Goals* of the United Nations.<sup>177</sup>

### 3 Foreign Investors

The ICSID reports that in 2017 foreign investors did not appoint a single female arbitrator in the investment disputes administered by the centre.<sup>178</sup> The surveys by White & Case and the Queen Mary University of London shed some light on the preferences of foreign investors when making appointments. Foreign investors list the ability to influence others, previous experience as an arbitrator and expertise as among their top preferences in candidates for the arbitral

<sup>174</sup> *Canada–Chile Amending Agreement*, app II art N bis-01.

<sup>175</sup> *Canada FIA Policy*, above n 32, 19.

<sup>176</sup> CETA only sets the geographic distribution requirements for the arbitral seats: *Comprehensive Economic and Trade Agreement*, Canada–European Union, signed 30 October 2016, 60 *Official Journal of the European Union* 1080 (provisionally entered into force 21 September 2017) art 8.27 para 2 (‘CETA’).

<sup>177</sup> *Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria*, signed 3 December 2016 (not yet in force) art 24 <<http://investmentpolicyhub.unctad.org/Download/TreatyFile/5409>> archived at <<https://perma.cc/Q7LL-NQXG>>.

<sup>178</sup> ‘No female appointments were made by the Claimant/investor individually or by the co-arbitrators’: *ICSID Annual Report 2017*, above n 3, 35.

appointments.<sup>179</sup> Notably, foreign investors file claims and thus generate demand for appointments at the first place. Accordingly, it is difficult to imagine how the situation on diversity can be improved without bringing foreign investors on board to make appointments of more diverse candidates.

As has been mentioned, the ‘Diversity Pledge in Arbitration’ aims to encourage foreign investors and other users of the regime to make more diverse appointments.<sup>180</sup> The pledge is however silent on candidates with overlapping identities and generally constitutes a voluntary initiative. Although there are more than 2905 signatories to date, foreign investors (as appears apparent from the ICSID statistics) have not rushed to fulfil the pledge.<sup>181</sup>

For example, major law firm Allen & Overy is one of the signatories of the pledge.<sup>182</sup> On its website, Allen & Overy presents a selection of eight cases in which the firm represented either the claimant or respondent to an investment dispute.<sup>183</sup> After examining the arbitral awards in all eight cases, it appears that all the arbitrators on the panels were men. Of course, the party to the dispute makes the final decision on arbitral appointments. But the law firms play a major role in consulting the parties on appointments. Presumably, given the expertise of legal counsel and the often tight connections between AIs, law firms and the arbitral community, the parties will largely follow the advice of legal counsel on arbitral appointments.<sup>184</sup> The example of Allen & Overy is remarkable because it shows that signatories of the pledge do not necessarily advance the cause of diversity in the context of particular disputes. The reason may be that the law

<sup>179</sup> *Choices in International Arbitration*, above n 108, 26.

<sup>180</sup> Equal Representation in Arbitration, *Take the Pledge*, above n 15.

<sup>181</sup> *Ibid.*

<sup>182</sup> Equal Representation in Arbitration, *Take the Pledge: Organisations* (2018) <<http://www.arbitrationpledge.com/organisations>> archived at <<https://perma.cc/3SY7-72C7>>.

<sup>183</sup> Allen & Overy, *Investment Treaty Arbitration* (2018) <<http://www.allenoverly.com/expertise/practices/litigation/Pages/investment-treaty.aspx>>. The cases and arbitrators are: *Deutsche Bank AG v Sri Lanka* (ICSID Arbitral Tribunal, Case No ARB/09/02, 31 October 2012) (Makhdoom Ali Khan, David A R Williams and Bernard Hanotiau); *Progas Energy Ltd v Pakistan* (UNCITRAL Permanent Court of Arbitration, August 2016) (L Y Fortier, C N Brower and J C Thomas); *Karkey Karadeniz Elektrik Uretim A S v Pakistan* (ICSID Arbitral Tribunal, Case No ARB/13/1, 22 August 2017) (Yves Derains, Horacio A Grigera Naón and D A O Edward); *Tethyan Copper Company Pty Ltd v Pakistan* (ICSID Arbitral Tribunal, Case No ARB/12/1, 13 December 2012) (Klaus Sachs, Stanimir A Alexandrov and Lord Hoffmann); *Les Laboratoires Servier v Poland* (Permanent Court of Arbitration, 3 December 2010) (W W Park, Bernard Hanotiau and Marc Lalonde); *Millicom International Operations BV v Senegal* (ICSID Arbitral Tribunal, Case No ARB/08/20, 16 July 2010) (Pierre Tercier, Ronny Abraham and Kaj Hobér); *Dunkeld International Investment Ltd v Belize* (Permanent Court of Arbitration, Case No 2010–13/DUN-BZ, 28 June 2016) (Albert Jan van den Berg, John Beechey and Rodrigo Oreamuno).

<sup>184</sup> Alec Stone Sweet and Florian Grisel explain that

[a] relatively small number of individuals, each of whom occupies multiple positions of importance in the field, dominate arbitration. Consider the common attributes of a ‘who’s who’ list of the twenty-five most highly regarded arbitrators ... Every individual is a lawyer, and all have been partners in important law firms ... This group has also dominated top management positions in the major IACs [international arbitration courts], including the ICC [International Chamber of Commerce], LCIA [London court of International Arbitration] ... SCC [Stockholm Chamber of Commerce] [and] SIAC [Singapore International Arbitration Centre].

Stone Sweet and Grisel, above n 119, 52.

firms must fulfil their obligation before their clients by proposing the ‘best’ possible candidate for the arbitral seat.<sup>185</sup> Accordingly, the law firms may prefer the candidates who are well-known and well-regarded in the field, an important factor that helps to influence intra-panel dynamics and deliberations in a particular case.<sup>186</sup> This factor may contribute to the persisting trend why the previously appointed arbitrators attract repeated appointments.<sup>187</sup>

#### 4 Academic Proposals

Some of the most recent academic proposals on how to resolve the lack of diversity on investment arbitration panels deserve critical scrutiny. Catherine Rogers’ initiative known as Arbitrator Intelligence and Gary Benton’s radical proposition to label the arbitral panels without a diversity candidate ‘defective panels’ will be considered. This Part reviews them in order.

Arbitrator Intelligence has a mandate ‘to promote transparency, accountability, and diversity in arbitrator appointments’.<sup>188</sup> In short, the project helps to disseminate information about arbitrators and their history of decision making. In particular, Arbitration Intelligence collects feedback from the participants of the disputes by allowing them to submit a questionnaire. Arbitration Intelligence extracts information from the questionnaires and publishes at the platform of *Investment Arbitration Reporter*. The goal is to provide all users of international arbitration with verified information about the arbitrators that is usually available only through personal inquiries. Rogers believes that

Arbitrator Intelligence can promote diversity and expand the pool of arbitrators. It will help newer arbitrators establish positive reputations. Today, to come to the attention of parties, in addition to a track record, a new arbitrator needs someone who is well-connected and ‘on the inside’ to vouch for her. It is especially difficult to get this ‘vouching’ from insiders ... Arbitrator Intelligence has the potential to reduce the importance of ‘insider vouching’ by facilitating direct access to information about the performance of newer arbitrators even in smaller cases.<sup>189</sup>

In Rogers’ view, it is necessary to ‘close the gap between the altruism that animates abstract concerns about diversity, and the strategic pragmatism that dominates arbitrator selection in individual cases’ by ‘appeal[ing] ... to the more

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<sup>185</sup> Sergio Puig, above n 13, 400 (citations omitted):

In arbitration, especially in a self-contained and delocalized arbitration setting like the *ICSID Convention* cases (insulated from scrutiny by domestic courts), litigants spend a great deal of time and effort scrutinizing the backgrounds of arbitrators. The assessment may include the analysis of their ethical behaviour, prior appointments, ‘judicial’ or decision-making philosophy, and potential scheduling conflicts, as well as the managerial style of the president of the tribunal. The role of an arbitrator can be fundamental in the outcome of proceedings, and of course arbitrators’ views vary.

<sup>186</sup> Tucker, above n 120, 192–4.

<sup>187</sup> Stone Sweet and Grisel, above n 119, 71–2.

<sup>188</sup> Arbitrator Intelligence, *Home Page* (12 June 2018) <<http://www.arbitratorintelligence.org/>> archived at <<https://perma.cc/XTR2-G6AP>>, citing Rogers, above n 166.

<sup>189</sup> Patricia Shaughnessy, ‘Arbitrator Intelligence — An Interview with Its Founder and Director, Professor Catherine Rogers’ (2015) 1 *Journal of Technology in International Arbitration* 87, 95 (emphasis altered).

Machiavellian instincts'.<sup>190</sup> Rogers is certain that Arbitrator Intelligence can unlock diversity potential by making information about 'outsiders' available to users of the investment arbitration system.<sup>191</sup>

Arbitrator Intelligence is a voluntary initiative that has the potential to alter *status quo ante* where diversity is concerned. Due to its voluntary nature, the platform has obvious limitations such as, for example, the lack of possibility of ensuring that its participants fully commit to the diversity cause in arbitral appointments. Additionally, Arbitrator Intelligence requires its participants to make submissions and respond to questions about a case after its completion. Without diligent responses of the participants Arbitrator Intelligence is impossible to operate. Most notably, despite its commitment to diversity, Arbitrator Intelligence has a board of directors that includes only one woman (Catherine Rogers), the other five directors are men.<sup>192</sup>

The other proposal is more radical. Gary Benton calls for the labelling of arbitral panels which lack diversity 'defective'. Benton submits that the following standard should be adopted: 'All panels should include at least one woman or other diverse practitioner and panels that do not are "Defective Panels"'.<sup>193</sup> The objective of this proposal is clear: it aims to encourage the parties to make appointments of the diversity candidates to avoid risk of such labelling.

This proposal does not appear to take into account overlapping identities and seems rather radical. It is not clear how such labelling will co-exist with the parties' right to appoint any candidate they consider fit for the role of arbitrator. The will of the parties is a crucial feature of arbitration that distinguishes it from litigation. It is also not clear whether such labelling will apply *ex post facto*; ie to all previous arbitral panels that lacked a female arbitrator or any other diversity candidate. It is also not clear how this labelling would play out in the long-term to actually resolve systemic issues within the field of investment arbitration and to help to attract more candidates with diverse (and even overlapping) identities to serve as arbitrators. Benton himself admits that such labelling will not resolve the problem, but rather, will raise awareness that the problem exists.<sup>194</sup>

## B Areas of Future Focus

This Part will map potential future opportunities to ensure that more candidates with overlapping identities participate in arbitral panels. The paper focuses on two main areas: (1) the appointment process itself and the pool of candidates and, (2) development of opportunities for candidates. Of course, the cooperation of all users of investment arbitration is essential. States, in particular, have a major role to play.

<sup>190</sup> Rogers, above n 166.

<sup>191</sup> *Ibid.*

<sup>192</sup> Arbitrator Intelligence, *Board of Directors* (2018) <<http://www.arbitratorintelligence.org/board-of-directors/>> archived at <<https://perma.cc/A6QE-YL7K>>.

<sup>193</sup> Gary L Benton, 'Let's Stop Talking about the Arbitrator Diversity Problem' on *Kluwer Arbitration Blog* (14 January 2018) <<http://arbitrationblog.kluwerarbitration.com/2018/01/14/post/>> archived at <<https://perma.cc/U7X8-Y87X>>.

<sup>194</sup> *Ibid.*



### 1 *Pool of Candidates and Appointment Process*

Investment arbitration functions on the basis of a party-driven appointment system. In other words, parties to the arbitration, an investor and a state, appoint the adjudicators. The will of the parties is paramount in the arbitration process. The rules governing the nomination and election process for candidates are virtually non-existent. It is difficult to envisage how mandatory appointments of diversity candidates can be introduced without trumping the freedom of the parties to select arbitrators. Greater procedural clarity on the appointment process and an expansion of the pool of candidates are necessary to increase diversity. Such changes become particularly important in light of future potential developments such as the establishment of a multilateral investment court or the creation of investment courts on a bilateral level similar to the one established in *CETA*.<sup>195</sup>

Admittedly, the appointments of adjudicators to international courts and tribunals are conducted under a politicised process and are a subject of vaguely formulated criteria.<sup>196</sup> Some constitutive instruments of the international courts and tribunals, however, (at least to some extent) permit greater procedural clarity than arbitration panels as concerns the nomination of candidates. For example, ‘in the case of the International Court of Justice, candidates are nominated by national groups in the Permanent Court of Arbitration, or national groups appointed specifically for the purpose of making nominations’.<sup>197</sup> The General Assembly of the Council of Europe requires states to include at least one female candidate to the list of nominations for the ECHR.<sup>198</sup>

Yet even in international courts, ‘states retain almost unfettered discretion’ regarding the nomination of candidates to courts.<sup>199</sup> This of course ‘leaves open the possibility that informal networks, or other non-transparent mechanisms, will be utilized to identify suitable candidates’.<sup>200</sup> Of course, the appointment process for international courts and tribunals is often political; states prefer to appoint candidates without publicly declaring why they prefer one. It is often argued that states, investors and AIs do not appoint more ‘diversity’ candidates simply because there are no meritorious ‘diversity’ candidates in the pool. The key is accordingly to understand how the ‘point of entry’ can be developed for candidates with diverse backgrounds who are heavily underrepresented where arbitral appointments are concerned. There are at least two ways non-conventional candidates can gain access to arbitral appointments. Both require changes in the applicable treaties and arbitration rules. First, it is possible to

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<sup>195</sup> *CETA* art 8.27(2); Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Bloomsbury Publishing, 2018) 181.

<sup>196</sup> Erik Voeten, ‘The Politics of International Appointments’ (2009) 9 *Chicago Journal of International Law* 387, 387. See also Joost Pauwelyn, ‘Who Decides Matters: The Legitimacy Capital of WTO Adjudicators versus ICSID Arbitrators’ in Nienke Grossman et al (eds), *Legitimacy and International Courts* (Cambridge University Press, 2018) 216.

<sup>197</sup> Ruth Mackenzie and Phillipe Sands, ‘Judicial Selection for International Courts: Towards Common Principles and Practices’ in Kate Malleson and Peter H Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (University of Toronto Press, 2006) 213, 220.

<sup>198</sup> Tulkens, above n 94, 225.

<sup>199</sup> Mackenzie and Sands, above n 197, 221.

<sup>200</sup> *Ibid.*

introduce quotas for arbitrators. Second, it is possible to require the parties to submit to a diversity matrix as a part of the selection process.

Before examining these two options, it is worth noting that a few international courts have already established criteria for judicial appointments. For example, arts 36(8)(a)(i)–(iii) of the *Rome Statute of the International Criminal Court* ('*Rome Statute*'), that established the International Criminal Court, requires parties 'to take into account the need, within the membership of the Court for the representation of the principal legal systems of the world; equitable geographical representation; and a fair representation of female and male judges'.<sup>201</sup> The *Rome Statute*, at art 36(8)(b), envisioned the possibility of appointing judges with specialised expertise to meet the needs of the Court.<sup>202</sup> Article 55(2) of the *United Nations Convention on the Law of the Sea* requires 'representation of the principal legal systems of the world' on the panels under International Tribunal on the Law of the Sea.<sup>203</sup> In some instances, the treaty establishing a court may be silent on gender diversity however secondary instruments complement the treaty and may contain such requirements. For example, the *European Convention on Human Rights* does not establish diversity requirements for judges at the ECHR.<sup>204</sup> Article 21 of the *Convention* only requires judges to be 'of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence'.<sup>205</sup> The Council of Europe has adopted a number of instruments such as Resolutions of the Parliamentary Assembly that address gender diversity issues.<sup>206</sup> For example, *Resolution 1366* on candidates for the ECHR stipulates that 'the Assembly decides not to consider lists of candidates where ... the list does not include at least one candidate of each sex'.<sup>207</sup> *Recommendation 1649* on candidates for the ECHR at para 18 states that

<sup>201</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 36(8)(a) ('*Rome Statute*').

<sup>202</sup> *Ibid* art 36(8)(b).

<sup>203</sup> *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 396 (entered into force 16 November 1994) art 55(2). Some judges critically point out that this category is rather abstract. According to Alexander Yankov:

The concept of 'principal legal systems of the world' has not been sufficiently elucidated ... There is no such generally accepted definition, since it is a complex notion encompassing many elements ... Nevertheless, the existing composition of the Tribunal corresponds broadly to the notion of the 'principal legal systems of the world', whatever that notion would carry within its scope and content.

Alexander Yankov, 'The International Tribunal for the Law of the Sea and the Comprehensive Dispute Settlement System of the Law of the Sea' in P Chandrasekhara Rao and Rahmatullah Khan (eds), *The International Tribunal for the Law of the Sea: Law and Practice* (Kluwer Law International, 2001) 42.

<sup>204</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention on Human Rights*'), as amended by *Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 27 May 2009, CETS No 204 (entered into force 1 September 2009).

<sup>205</sup> *Ibid* art 21.

<sup>206</sup> Parliamentary Assembly of the Council of Europe, *Candidates for the European Court of Human Rights*, Resolution 1366, 8<sup>th</sup> sitting (30 January 2004) Preamble paras 2(2), 4; Parliamentary Assembly of the Council of Europe, *Candidates for the European Court of Human Rights*, Recommendation 1649, 8<sup>th</sup> sitting (30 January 2004) paras 18, 19(2), 21.

<sup>207</sup> Parliamentary Assembly of the Council of Europe, *Candidates for the European Court of Human Rights*, Resolution 1366, 8<sup>th</sup> sitting (30 January 2004) Preamble paras 2(2), 4.

the Assembly believes that it is not satisfactory merely to assert that the gender balance of the Court reflects the under-representation of women in the judiciary of the member states ... It is in the interest of ... the Assembly, and the high contracting parties to address the issue of the gender imbalance of the Court by considering — and where necessary, improving — the procedures for the appointment of judges.<sup>208</sup>

Provisions on geographical diversity can be found in the founding treaties of international courts and tribunals. For example, the *Protocol* that establishes the African Court on Human and Peoples' Rights, in art 11(1), states that '[t]he Court shall consist of eleven judges, nationals of Member States of the OAU, elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights'.<sup>209</sup> The WTO permits states to include an arbitrator from a developing country 'when a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panellist from a developing country Member'.<sup>210</sup> The WTO has no specific provisions on gender diversity.<sup>211</sup>

In domestic legal systems, for example in Canada, the selection and nomination of candidates for the judiciary is based on constitutional norms and long standing practices that require diverse regional (inter-provincial) representation.<sup>212</sup> For example, the *Supreme Court Act* stipulates that three Supreme Court of Canada justices must be appointed from Quebec.<sup>213</sup> The long standing convention for the Supreme Court of Canada has been that three seats are held by judges from Ontario, three from Quebec, one judge from the Maritime Provinces and two from the Western provinces.<sup>214</sup>

<sup>208</sup> Parliamentary Assembly Council of Europe, *Candidates for the European Court of Human Rights* Recommendation 1649, 8<sup>th</sup> sitting (30 January 2004) para 18.

<sup>209</sup> Organisation of African Unity, *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, opened for signature 9 June 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT(III) (entered into force 25 January 2004) art 11(1).

<sup>210</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('*Understanding on Rules and Procedures Governing the Settlement of Disputes*') art 8(10).

<sup>211</sup> World Trade Organization, 'Celebrating Women in WTO Dispute Settlement', *WTO News* (online), 21 June 2016 <[https://www.wto.org/english/news\\_e/news16\\_e/disp\\_21jun16\\_e.pdf](https://www.wto.org/english/news_e/news16_e/disp_21jun16_e.pdf)> archived at <<https://perma.cc/3S3N-P8N9>> (citations omitted):

only five per cent of the 168 ad hoc panelists who served during the *GATT* period were women. The eight pioneers were from Chile; Hong Kong, China; Japan; New Zealand; Singapore; Sri Lanka; and Switzerland. They served in 11 disputes out of a total of 132 reports issued under the *GATT*, which is approximately eight per cent. The WTO dispute settlement system has fared somewhat better. Of the 209 WTO panels composed since 1995, 90 have included women panelists, representing approximately 43 per cent of the total number of panels composed.

<sup>212</sup> Nelson Wiseman, *In Search of Canadian Political Culture* (UBC Press, 2007) 115.

<sup>213</sup> *Supreme Court Act*, RSC 1985, c S-26, s 6.

<sup>214</sup> 'It is otherwise unspecific about the Court's composition, but in practice an operative convention arose: an equivalent three judges from Ontario, two from the West, and one from the Atlantic region': Wiseman, above n 212, 115.

The treaty provisions have proven effective in enhancing diversity. Nienke Grossman shows that

[o]f the eight international courts surveyed with no representativeness requirements built into their selection procedures, only 15% of judges were women in mid-2015. On courts with either aspirational representativeness language or mandatory targets, however, 33% were women.<sup>215</sup>

The following two Parts examine the possibility of introducing (a) quotas or adopting a so-called (b) mandatory diversity matrix (similar to the ones used for tracking diversity on corporate boards in the US context).

(a) *Quotas*

Some international courts establish so-called ‘minimum voting requirements’ that require equal gender representation on a judicial bench.<sup>216</sup> For example, states party to the *Rome Statute* established ‘minimum voting requirements so that the bench [has] at least six judges of each gender’ on the International Criminal Court.<sup>217</sup> Kaufmann-Kohler and Michele Potestà have suggested that states should ‘consider inserting aspirational language or quantitative targets ... at least for a transitional period until such time when gender balance is achieved naturally’ if a multilateral investment tribunal is put in place.<sup>218</sup> Kaufmann-Kohler and Potestà’s proposal may be applicable to *CETA* and treaties similar to *CETA* that establish a quasi-investment court. This is the case because of two reasons, discussed in detail below. First, *CETA* sets the requirements on geographical diversity of the candidates. Secondly, *CETA* amends the party-driven appointment system by authorising states party to appoint arbitrators within a limited period of time.

The quasi-investment court under *CETA* sets requirements of geographical diversity for arbitral appointments. Pursuant to art 8.27 of *CETA*, the *CETA* Joint Committee will ‘appoint fifteen Members of the Tribunal. Five of the Members of the Tribunal shall be nationals of a Member State of the European Union, five shall be nationals of Canada and five shall be nationals of third countries’.<sup>219</sup> *CETA* also sets minimum qualifications for arbitrators to be appointed. Under

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<sup>215</sup> Nienke Grossman, ‘Shattering the Glass Ceiling in International Adjudication’ (2016) 56 *Virginia Journal of International Law* 339, 342 (citations omitted); Grossman, above n 141, 654.

<sup>216</sup> Quotas for domestic courts in the UK were not recommended. See Lori Hausegger and Troy Riddell, ‘Unpacking the Debate on Judicial Appointments Outside the United States: What Research Might Contribute to the Normative Conversation’ in Brandon L Bartels and Chris W Bonneau (eds), *Making Law and Courts Research Relevant: The Normative Implications of Empirical Research* (Routledge, 2014) 142, 147. France and Norway introduced mandatory quotas for corporate boards: see Julie C Suk, ‘Gender Parity and State Legitimacy: From Public Office to Corporate Boards’ (2012) 10 *International Journal of Constitutional Law* 449, 449–50.

<sup>217</sup> Gabrielle Kaufmann-Kohler and Michele Potestà, ‘The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards’ (Report, Geneva Center for International Dispute Settlement, 15 November 2017) 41 [66] <[http://www.uncitral.org/pdf/english/workinggroups/wg\\_3/CIDS\\_Supplemental\\_Report.pdf](http://www.uncitral.org/pdf/english/workinggroups/wg_3/CIDS_Supplemental_Report.pdf)> archived at <<https://perma.cc/R7YS-CSAM>>. See also *Rome Statute* art 36(8)(a)(iii): ‘The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: ... A fair representation of female and male judges’.

<sup>218</sup> Kaufmann-Kohler and Potestà, above n 217, 42.

<sup>219</sup> *CETA* art 8.27(2).

art 8.27 para 4, arbitrators must ‘possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognised competence. They shall have demonstrated expertise in public international law’.<sup>220</sup> *CETA* also emphasises that it is desirable for candidates to possess knowledge of public international law, international investment law or international trade law. The arbitrators will be appointed for a period of 5 years, ‘renewable once’.<sup>221</sup> The language of the treaty does not indicate that the diversity of candidates (and/or intersectionality) will be taken into consideration by the *CETA* Joint Committee in the appointment process. In theory, *CETA*’s quasi-investment court model permits the incorporation of minimum voting requirements similar to the ones found in the *Rome Statute*. Of course, the language of diversity must be introduced in conjunction with intersectionality to ensure balanced representation on the panels.

(b) *Diversity Matrix*

The so-called ‘diversity matrix’ is an initiative undertaken by US investors to enhance diversity on corporate boards. The petition made by the Public Fund Fiduciaries to the US Securities and Exchange Commission proposes the introduction of the so-called ‘matrix’ approach to disclosure. The proposal requests the Commission to introduce a provision that will require ‘registrants to indicate, in a chart or matrix, each nominee’s gender, race, and ethnicity, in addition to the skills, experiences, and attributes described above’.<sup>222</sup> Cross-fertilisation of experiences may be useful in the context of investment arbitration. Of course, in investment arbitration, claimants are often one-time litigants.

Accordingly, such a requirement imposed on parties is unlikely to induce systemic benefits for diversity candidates. Instead of imposing a ‘diversity matrix’ on the parties, it may be more appropriate to require a legal counsel to fill in the diversity matrix. Of course, such a requirement will have to be implemented by ICSID or United Nations Commission on International Trade Law (‘UNCITRAL’). In particular, it may be required that law firms or individual practitioners disclose information about candidates as per a ‘diversity matrix’ framework that they recommend to their clients for each case. Such disclosure can be made to AIs and published after the completion of the dispute. If law firms do not recommend diversity candidates to the parties, they must explain why.<sup>223</sup>

## 2 *The Educational Development Opportunities: Changing Culture*

As has been discussed, the arbitration community constitutes a tight network that may be unwelcoming to outsiders. Lack of procedures for the appointment

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<sup>220</sup> Ibid art 8.27(4).

<sup>221</sup> Ibid art 8.27(5).

<sup>222</sup> Petition for Amendment of Proxy Rule Regarding Board Nominee Disclosure — Chart/Matrix Approach from Anne Simpson et al to Elizabeth M Murphy, 31 March 2015, 1 <<https://www.sec.gov/rules/petitions/2015/petn4-682.pdf>> archived at <<https://perma.cc/N39X-HS9T>>.

<sup>223</sup> Brianna Castro, ‘Raising the Stakes on Board Gender Diversity’ on *Harvard Law School Forum on Corporate Governance and Financial Regulation* (8 January 2018) <<https://corpgov.law.harvard.edu/2018/01/08/raising-the-stakes-on-board-gender-diversity/>> archived at <<https://perma.cc/6XJS-5W5J>>.

of diversity candidates and difficulties in entering the field as arbitrators reinforce the inaccessibility of investment arbitration panels for candidates with overlapping identities. One possible solution is a funded training program.

Funded training programs may be provided to practicing lawyers and academics to equip them with knowledge of investment arbitration law and procedures, similar to courses that judges can take to improve their qualifications in their chosen field. Such training programs may be arranged in Canada, for example, as a commitment under Canada's International Feminist Program.<sup>224</sup> Such a training program (if organised) can introduce candidates from developing states to practicing professionals and those who have already performed as investment arbitrators. Such networking can help to build bridges and can potentially create a point of entry. For this purpose, it may be useful to consider, as an example, the most recent United Nations Conference on Trade and Development ('UNCTAD') initiative on a specialised course on the nexus of trade and gender.<sup>225</sup> The UNCTAD course provides an opportunity for its participants to gain substantial knowledge of gender aspects of trade, and the most successful participants will be added to 'the UNCTAD trade and gender consultancy roster, and may be considered for future assignments in this area'.<sup>226</sup>

The educational development opportunities can help the candidates generally under-represented in the field of investment arbitration to gain greater access to networking opportunities. The 2018 report of UNCITRAL somewhat echoes this proposal when it mentions that 'training should be provided to expand the pool of potential international arbitrators'.<sup>227</sup>

## V CONCLUDING REMARKS

This paper has shown that the discourse on diversity in investment arbitration is misconstrued. The discourse often converges around some single diversity characteristics such as race or gender in isolation. There is no appreciation of their overlap. As a result, candidates with overlapping identities are 'invisible' on investment arbitration panels, in statistical reports and in academic discourse. Such an approach is methodologically and analytically problematic because it reveals the trap of conventional thinking about 'gender' as a unifying characteristic that has a potential to trump other characteristics and promotes a vision that *all* women face equal obstacles in accessing arbitral seats.

The overview of the ICSID list and Canada list of cases shows that women from developing states who can be identified as visible racial minorities rarely (almost never) obtain arbitral appointments. While it is true that women are now appointed to investment arbitral panels with greater frequency, the majority of these women are Caucasian and are from developed states. Female lawyers who are visible minorities from developing states are largely excluded from

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<sup>224</sup> See *Canada FIA Policy*, above n 32.

<sup>225</sup> UNCTAD, *Online Course* (2018) UNCTAD Virtual Institute on Trade and Development <<https://vi.unctad.org/services/online-courses>> archived at <<https://perma.cc/Q28Y-3CRT>>.

<sup>226</sup> *Ibid.*

<sup>227</sup> United Nations Commission on International Trade Law, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-Fifth Session (New York, 23–27 April 2018)*, UN GAOR, 51<sup>st</sup> sess, UN Doc A/CN.9/935 (14 May 2018) 11 [74].

harvesting the benefits associated with arbitral appointments such as prestige and remuneration.

This study explores current proposals and options to resolve the problem of lack of diversity at arbitration panels. The main goal of it is however to show the exclusion and invisibility of certain identities, groups and experiences. Accordingly, whatever procedural steps are taken to change the existing rules, it is crucial to keep in mind the urgency to qualitatively change the nature of conversation. It is time to ask not only whether we appoint enough women to arbitral panels but also *which* women we appoint. This conversation is essential not only in the field of investment arbitration but broadly in the context of international law.

From a sociological perspective, the legitimacy of international law rests on its claim of universality; universal institutions, legal norms and universal values.<sup>228</sup> International lawyers, judges and arbitrators are supposed (at least in theory) to reflect such universality.<sup>229</sup> In the current circumstances, where there are only certain individuals (men or women) who can aspire to undertake the role of decision-makers (such as adjudicators), and the others are de facto excluded from performing such roles, the legitimacy of international law itself is in question.

Of course, it is also legitimate to ask a thought-provoking question such as ‘must all panels include a queer disabled Marxist woman of colour from a developing country?’<sup>230</sup> In other words, how much of such ‘intersectionality’ is sufficient to conclude that we have achieved equal and diverse representation on international arbitration panels? This question is worth asking only if one envisages the issue of diversity on arbitral panels as a *destination* not the *process*. When diversity is understood as a final destination, the response to this question requires us to give a rigid figure and precise characteristics for each candidate. In contrast, when diversity is understood as the process, it requires flexibility in adjustment of the panels’ compositions in such a way that reflects changes in community of international lawyers. Thus, diversity, when it is linked with intersectionality, is not a final destination but the *process* that requires the international community to put mechanisms and structures in place to ensure accessibility of arbitral seats for not just women, but for female lawyers of diverse backgrounds. The starting point for this change is to ask not simply whether we appoint enough women to arbitration panels but *which* women do we appoint — what are the barriers that women of various backgrounds face in accessing the arbitral seat.

Accordingly, further research is necessary to identify the precise nature of barriers to access and to explore the options for eliminating those barriers; more qualitative and quantitative studies are required to understand the experiences of diverse candidates in the course of their professional development in the field of

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<sup>228</sup> ‘But present day international law at least constitutes a successful attempt at a common law of mankind, of relatively intensive and pervading universality and uniformity, in the limited field of relations between sovereign states’: H Lauterpacht, ‘The So-Called Anglo-American and Continental Schools of Thought in International Law’ (1931) 12 *British Yearbook of International Law* 31, 62.

<sup>229</sup> Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017) 43–5.

<sup>230</sup> This thought provoking question emerged in discussions with Joshua Karton.

arbitration. This study is only the beginning of a conversation that links investment arbitration to the broader field of intersectionality studies.