True Diversity is Intersectional: Escaping the One-Dimensional Discourse on Arbitrator Diversity

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ISDS tribunals have an unfortunately accurate reputation for being "male, pale, and stale". A welcome backlash to this state of affairs has arisen, but the discourse has focused almost entirely on one aspect of diversity: gender. For example, the Equal Representation in Arbitration Pledge has garnered over 2900 signatories, who have committed to appointing more female arbitrators to arbitral panels (commercial and investor-state). Reportedly, many arbitral institutions have increased the number of female candidates they appoint to panels. These developments are all to the good, although progress has by no means been steady. When investors and co-arbitrators made appointments to ICSID tribunals, they did not appoint a single woman in 2017. International Investment Agreements (IIAs), even those negotiated recently by relatively progressive countries, such as the Canada-European Union Comprehensive Economic and Trade Agreement (CETA), contain no provisions—not even preambulatory ones—relating to arbitrator diversity.

Still, progress is progress. The problem is that while achieving gender parity (or more!) is a laudable goal, there is much more to diversity than gender. Unfortunately, the diversity discourse in ISDS has thus far been almost totally restricted to the issue of gender, and has avoided intersections between different aspects of diversity. (The recent ITA-ASIL Annual Conference, held in Washington in April 2018, was a rare but welcome exception.) After all, female lawyers come from various backgrounds. There are Asian female lawyers, Indigenous female lawyers, black female lawyers, female lawyers from developing states, Muslim female lawyers, and so on. These overlapping characteristics generate different experiences and different struggles to find "points of entry" into the field of investment arbitration. Being an arbitrator is a position of prestige and importance; it is also well remunerated. If we as a community are to take diversity seriously, we must move beyond the kind of token diversity that sees only white women from developed Western countries added to the pool of arbitrators.

At the risk of oversimplifying, "intersectionality" refers to the overlapping effect of different aspects of diversity in a single individual. The term was coined by Kimberlé Crenshaw, an American law professor, in a 1989 paper. Crenshaw was particularly concerned about the experiences of black women in the United States, who suffer from racism and sexism and the intersection between the two, but the concept has broad relevance. Underlying it is the idea that people who belong to more than one group that suffers discrimination experience discrimination differently from those who are

discriminated against only on one axis. Thus, the struggles of black women are shaped by different social dynamics than those affecting white women and those affecting black men. Accordingly, potential arbitrators with intersectional backgrounds—for instance, Asian female lawyers from developing states—can experience a distinctive mix of obstacles in seeking arbitral appointments. Intersectionality more generally refers to this way of thinking about inequality, a perspective that acknowledges and recognizes the range of experiences of those who face intersecting axes of discrimination.

A brief look at the ICSID panels formed in 2012-2017 shows very few female arbitrators with intersecting backgrounds. (Note that the prominent arbitration institutions that administer investment disputes, such as ICSID, ICC, and SCC, do not report statistics on the appointments of female arbitrators with overlapping characteristics, and do not account for double appointments; our statistics were generated by checking the biographies of appointed arbitrators one-by-one.) Over that time period, a total of 951 appointments were made in ICSID arbitrations. Only three appointed arbitrators were female, non-white, and from a developing state: Bertha Cooper-Rousseau (Bahamian), Tinuade Oyekunle (Nigerian), and Dorothy Udeme Ufot (Nigerian). Interestingly, all three were members of annulment committees and all three were appointed by ICSID. We found zero arbitrators appointed to ordinary ICSID panels, and zero arbitrators appointed by parties or by other arbitrators, who meet the gender/race/nationality overlap. There are some arbitrators who meet two of these characteristics; for example, Teresa Cheng is a female arbitrator from Hong Hong and can be identified as non-white; Marie-Andrée Ngwe is a black female arbitrator from France; Maria Stanivukovic is a female arbitrator from Serbia.

Yet, in our sample, most of the few women who are appointed to the panels are Caucasians from developed states. Indeed, the majority of all appointments of women to ICSID panels are of either Brigitte Stern or Gabrielle Kaufman-Kohler. Out of 951 appointments in our data set, only 106 (11%) were of female arbitrators, and of these Stern obtained 53 appointments and Kaufman-Kohler 15. Only 38 appointments (4% of the total) went to all other female arbitrators. (ISDS tribunals are hardly unique in suffering from a lack of diversity; non-Western female judges and arbitrators continue to be rare across all international courts and tribunals with only a few notable exceptions, such as Judge Gabrielle Kirk McDonald of the International Criminal Tribunal for the Former Yugoslavia and the Iran-US Claims Tribunal, Judges Joyce Aluoch and Olga Venecia Herrera Carbuccia of the International Criminal Court, and Judges Julia Sebutinde and Xue Hanqin of the International Court of Justice.)

The current gender-focused discourse is partly to blame for the disappointing outcomes of recent efforts to increase arbitrator diversity because it engenders complacency without tackling the most important problems. The key issue that the lens of intersectionality helps us to identify—the issue that is largely absent from recent discussions—is not whether we appoint enough women arbitrators (we don't) but which women we appoint? In short, the concept of intersectionality gives meaning to the banal observation that diversity is not one-dimensional. People with overlapping backgrounds may experience unique obstacles that prevent them from entering the field as arbitrators, and they would also bring with them unique perspectives should they be appointed. Without representation of intersectional communities on ISDS tribunals, we cannot say that the arbitration community has made progress even on gender diversity.

Why does intersectionality matter? There are at least three reasons why improving diversity by focusing on intersectionality helps everyone, even white males. First, diverse arbitral panels are likely to produce higher quality decisions because diversity disrupts groupthink and short-circuits cognitive biases. For example, in international criminal law, two female judges, Gabrielle Kirk McDonald and Elizabeth Odio-Benito, played an instrumental role in the recognition of sexual assault as a war crime. Second, diversity is a matter of fairness, in any workplace, but especially in one as consequential as that of investor-state arbitrator. As Francoise Tulkens argues, women's presence need not "justify" or

"legitimize" anything; they must be represented on ISDS tribunals simply because there is no good reason for them not to be active decision-makers in the field. Third, diverse representation would improve legitimacy. ISDS depends on widespread political acceptance for its legitimacy, an acceptance that cannot be taken for granted in these days of resurgent populism on the left and right. ISDS can never enjoy global legitimacy unless people from around the globe can see themselves represented in the process.

Just bringing intersectionality into the discourse on arbitrator diversity would be a step forward. But we can do even more to reform the arbitrator appointment process. First, any reforms must be empirically based. Addressing both the obstacles that intersectional candidates experience in seeking arbitral appointments and the perspectives that intersectional arbitrators bring to the deliberations requires more data than we currently have. It may be useful to conduct interviews with arbitration lawyers of diverse backgrounds to identify the key obstacles they encounter in traversing the international arbitration *cursus honorum*. Second, on the basis of these findings, it may be valuable to consult with arbitral institutions, who will necessarily play an important role in shifting the dynamics of arbitral appointments, as they have already been a driving force in increasing appointments of women. Third, if empirical studies can identify the "points of entry" at which candidates with overlapping backgrounds face the most serious obstacles, tailored programs can be established to help intersectional candidates overcome those obstacles. Not only they, but the whole ISDS community, will benefit.

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