ARTICLE

The Substantive Value of Diversity in Investment Treaty Arbitration

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Diversity in investment treaty arbitration (ITA), as in many other areas of law and beyond, presents an ongoing struggle. Commentators generally agree that a lack of diversity in the pool of arbitrators undermines the regime's legitimacy. But views are more tentative or even skeptical about whether increasing diversity would add substantive value in the sense of improving the quality of decision making. This latter possibility runs up against a strong tendency in the literature to see ITA through the lens of formalism. From this vantage point, what matters to decision-making quality is that investment treaty arbitrators have the relevant expertise and apply the rules impartially. Adding diverse voices is of secondary importance because any impact on substance is seen as speculative.

This Article offers a comprehensive examination of the substantive value of diversity in ITA as a rebuttal to that skepticism. It begins by drawing on the extensive interdisciplinary literature studying how diversity in backgrounds and values shapes judicial decision making. Examining the interdisciplinary research and distinctive features of ITA suggests that diversity's substantive value not only applies to this context, but does so with heightened force. The Article also explores how a lack of diversity has affected ITA jurisprudence in concrete ways. In particular, the overrepresentation of arbitrators from developed countries and private practice backgrounds has likely contributed to the imbalance that critics have long identified, but that formalist defenders of the status quo, focused on impartiality, have ignored or minimized. Finally, the Article considers several practical implications that follow from recognizing diversity's substantive value: how states should revise their appointment strategy, when arbitrators should be willing to write separately, and to what extent previously settled jurisprudence should be reexamined.

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I. INTRODUCTION

Around the globe, foreign investors are suing national governments for purported mistreatment ranging from the outright nationalization of their industries to generally applicable regulations that only indirectly diminish the value of their firms.[1] While the former type of investment treaty arbitration (ITA) claim is mostly uncontroversial, the latter raises difficult questions about how best to balance the goals of protecting investors and ensuring adequate policy flexibility for host states.[2] Should, for instance, Philip Morris be entitled to relief because its business suffered when Uruguay enacted plain-packaging regulations aimed at promoting public health?[3] Or, to use the example of a brewing concern, to what extent should governments be liable for measures adopted to address the COVID-19 pandemic when they harm the business of foreign investors?[4]

Setting aside the merits of these claims, a central concern is that they are heard by arbitral tribunals composed of private individuals who lack accountability and tenure, having been selected to resolve only a single dispute.[5] Because the resolution of such claims against a host state will affect its population at large, it is important to understand who is making these decisions.[6] Moreover, the arbitrators do not merely apply established rules to facts in a mechanical fashion. Rather, they exercise substantial discretion in applying open-ended treaty provisions and make policy judgments in shaping the content of the rules themselves.[7]

Examination of the arbitrators' identities reveals a troubling lack of diversity. Scholars have documented the variety of groups that are underrepresented among the ranks of investment treaty arbitrators. For example, women make up only about five percent of arbitrators.[8] About two-thirds come from developed as opposed to developing countries.[9] Arbitrators also disproportionately have backgrounds in commercial law as

1. *See* JONATHAN BONNITCHA, LAUGE N. SKOVGAARD POULSEN & MICHAEL WAIBEL, THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME 105, 108 (2017).

2. *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 141 (2d ed. 2012).

3. *See* Philip Morris Brands Sàrl v. Oriental Republic of Uru., ICSID Case No. ARB/10/7, Award (July 8, 2016). The tribunal rejected Philip Morris's claims, with one arbitrator dissenting in part. *See Recent International Decision*, 130 HARV. L. REV. 1986, 1986-90 (2017) (summarizing the opinions).

4. *See* Julian Arato, Kathleen Claussen & J. Benton Heath, *The Perils of Pandemic Exceptionalism*, 114 AM. J. INT'L L. 627, 627-28 (2020) (discussing potential investment treaty claims challenging COVID-19-related measures).

5. *See* Barnali Choudhury, *Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?*, 41 VAND. J. TRANSNAT'L L. 775, 818-20 (2008).

6. *See infra* Section IV.C.

7. *See infra* Section IV.C.

8. Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387, 404 (2014).

9. BONNITCHA ET AL., *supra* note 1, at 254.

opposed to in specialties such as public international law or public law.[10]

In the context of domestic judiciaries, scholars have noted that a lack of diversity undermines both perceptions of legitimacy and the substantive quality of decisions.[11] In the ITA context, commentators have more uniformly emphasized legitimacy concerns.[12] If arbitrators do not represent a fair cross-section of the population affected by their decisions, then the public will lose trust in the ITA regime.[13] These concerns about the composition of tribunals then feed into broader legitimacy critiques that threaten the long-term viability of the regime.[14]

The commentary is more mixed, however, when it comes to the substantive value of diversity in ITA. To be clear, many scholars acknowledge that diversity could improve the quality of decision making.[15] But a substantial portion of the literature treats that possibility as "speculative"[16] and describes diversity as secondary to considerations like expertise.[17] This perspective reflects a common attitude in the ITA literature that views disputes through the lens of formalism and emphasizes the ideal

10. *See id.*

11. *See* SUSAN B. HAIRE & LAURA P. MOYER, DIVERSITY MATTERS: JUDICIAL POLICY MAKING IN THE U.S. COURTS OF APPEALS 6, 13 (2015); Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MINN. L. REV. 1985, 1997 (2016) (discussing career diversity on the U.S. Supreme Court and distinguishing between "perceptions of legitimacy" and "a concern that goes directly to substance").

12. *See, e.g.*, Susan D. Franck et al., *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*, 53 COLUM. J. TRANSNAT'L L. 429, 496-98 (2015) (discussing and exploring legitimacy over several pages before more briefly acknowledging diversity's potential substantive value); Douglas Pilawa, Note, *Sifting Through the Arbitrators for the Woman, the Minority, and the Newcomer*, 51 CASE W. RES. J. INT'L L. 395, 427 (2019) ("While this Note takes issue with the 'diversity yields better results' conclusion, it does not disagree with [the] assessment that diverse tribunals can help legitimize international arbitration.").

13. *See* Franck et al., *supra* note 12, at 496-98.

14. *See* BONNITCHA ET AL., *supra* note 1, at 233-34 (summarizing concerns about bias, inconsistency, and transparency, among others). The focus here and throughout is on sociological legitimacy, which examines "perceptions of justified authority," as opposed to normative legitimacy, which assesses authority based on substantive criteria. Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMPLE L. REV. 61, 64 (2013). The latter sense of legitimacy would overlap more directly with decision-making quality.

15. For example, the United Nations Commission on International Trade Law Working Group III on Investor-State Dispute Settlement Reform recognizes that a lack of diversity raises both legitimacy and substantive concerns. As to the latter, the Working Group explains that "achieving diversity would enhance the quality of the ISDS process, as different perspectives, especially from different cultures and different levels of economic development could ensure a more balanced decision making." U.N. Comm. on Int'l Trade Law, Working Group III, Possible Reform of Investor-State Dispute Settlement (ISDS): Selection and Appointment of ISDS Tribunal Members, U.N. Doc. A/CN.9/WG.III/WP.203, ¶ 10 (Nov. 16, 2020) [hereinafter UNCITRAL Working Group III, Possible Reform of ISDS].

16. Franck et al., *supra* note 12, at 498.

17. *See* Christophe Seraglini, *Who Are the Arbitrators? Myths, Reality and Challenges*, *in* LEGITIMACY: MYTHS, REALITIES, CHALLENGES 593, 597 (Albert Jan van den Berg ed., 2015).

of neutral decision making.[18] Commentators taking this view highlight studies finding that the development status of respondent states does not affect case outcomes and conclude that charges of bias against the developing world are unfounded.[19] Under this view, diversity would not be expected to add much value to an already well-functioning system.

This Article offers a comprehensive examination of the substantive value of diversity in ITA as a rebuttal to such skepticism. As a starting point, there is an extensive interdisciplinary literature studying how domestic judges' backgrounds and values shape their decision making. Scholars have only recently begun to consider the implications of this literature for the practice and design of international courts and tribunals,[20] and it has been largely missing in discussions about ITA.[21] While caution is necessary in translating this research to the ITA context, it provides a valuable framework for understanding how arbitrators make decisions and the likely impact of increasing diversity.

Drawing on that framework and the limited studies available on ITA specifically, this Article shows how the overrepresentation of arbitrators from developed countries and the private sector has likely distorted the law in favor of investors. To strike a better balance, the pool needs more arbitrators who have experience working in and advocating for the governments of developing countries. Such arbitrators would bring distinctive values and perspectives to the ongoing dialogue and help shape the law in a direction that more effectively balances the competing interests of the various stakeholders.[22]

Contrary to the optimistic assessments praising the system's neutrality, there is reason to think that substantive concerns about diversity are heightened in the ITA context. As alluded to earlier, investment treaty arbitrators are frequently charged with interpreting open-ended provisions

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18. *See, e.g.*, Jan Paulsson, *Third World Participation in International Investment Arbitration*, 2 ICSID REV.: FOREIGN INV. L.J. 19, 20-21 (1987) (suggesting that "the dice are no longer loaded," and that developing countries should see ITA as "a neutral means for the resolution of conflicts . . . to be mastered rather than complained about").

19. *See* Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 473, 477 (2009); *see also* Charles N. Brower & Sadie Blanchard, *What's in a Meme? The Truth About Investor-State Arbitration: Why It Need Not, and Must Not, Be Repossessed by States*, 52 COLUM. J. TRANSNAT'L L. 689, 711-12 (2014) (citing Franck's research and concluding that the results "give the lie to the endlessly repeated bias argument").

20. *See, e.g.*, Tomer Broude, *Behavioral International Law*, 163 U. PA. L. REV. 1099, 1143-49 (2015) (discussing the implications of behavioral research for debates on practices in the World Trade Organization dispute settlement system).

21. The empirical studies summarized in Section IV.B constitute a limited exception, and they only briefly acknowledge the behavioral research that helps explain the patterns. Susan Franck addresses the behavioral research more extensively but applies it to other questions in international investment law, without focusing on ITA decision making. *See* SUSAN D. FRANCK, ARBITRATION COSTS: MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATION 25-66 (2019).

22. *See infra* Part V.

and necessarily exercise policy discretion in doing so. The arbitrators' values and experiences are especially likely to affect such judgments.[23] Moreover, compared to other types of arbitrators, investment treaty arbitrators are deciding issues of broader public importance and, through the precedential dialogue among tribunals, contributing to the development of the law beyond the individual dispute.[24] Thus, improving diversity affects not just who applies the rules to individual cases, but who, in the process of interpretation, ends up crafting those very rules.

This last point suggests a possible way to bridge an apparent impasse in the debate between defenders of the status quo and the regime's harshest critics. The former emphasize evidence that the rules are being impartially applied without addressing the fundamental critique that the rules themselves, as defined by tribunals, are imbalanced.[25] This structural bias critique has been explored extensively elsewhere, but the particular aim here is to examine the issues through the lens of diversity's substantive value to create a path toward common ground. Those who defend the system's formal neutrality need not accept the specific criticisms and reform proposals in all their detail. But if they recognize how a historical lack of diversity has affected the system down to its foundational principles, that should prompt a more serious reckoning with the likely presence of the structural biases that critics are raising.

Once the substantive value of diversity is fully appreciated, several practical implications follow. Developing countries as a group should rethink their strategy for appointments. When they select arbitrators that belong to the club of elites, they miss an opportunity to add new voices that may be better equipped to speak to the particular interests of developing states. Likewise, the arbitrators themselves should more often consider writing separately to articulate a new vision instead of tempering their views to seek a compromise decision. The optimal approach in a particular case will depend on all of the circumstances, but given that conventional wisdom has begun to form without adequate vetting from diverse perspectives, the need for alternative views is especially pressing right now.

This Article proceeds as follows. Part II begins with a brief overview of key features of the ITA regime. It then summarizes empirical studies on the state of diversity in ITA and explains how diversity's substantive value has been underappreciated in the literature, particularly by those who view the regime through a formalist lens.

Part III elaborates on the substantive value of diversity by drawing on the interdisciplinary literature on judicial decision making. This research

23. *See infra* Section IV.C.
24. *See infra* Section IV.C.
25. *See infra* Section IV.D.

shows that judicial decisions can be predicted by policy preferences as well as background characteristics like race, gender, and career experience. Part III also explores the causal mechanisms that have been identified to explain how these characteristics influence decision making. Drawing on the literature on collective decision making, this Part further shows how a judiciary that is diverse on these dimensions makes better decisions by avoiding blind spots and incorporating a broader range of inputs.

Part IV translates the research on domestic judges to the ITA context. It demonstrates the translation's plausibility by drawing on the limited studies available on ITA specifically. It further explains why core features of the ITA regime magnify the importance of diversity's substantive value. This Part concludes by showing what formalist defenders of the status quo have missed in their debates with critics and calling for a broader shift in perspective to properly evaluate diversity's substantive impact.

Part V examines more closely how a lack of diversity has shaped ITA jurisprudence in concrete ways. It shows, in particular, how the overrepresentation of arbitrators from developed countries and the private sector has likely driven the investor-friendly jurisprudence that many commentators have criticized. And it sketches how new arbitrators who have worked for or on behalf of developing countries might contribute to reshaping the law.

Part VI turns to implications for future practice. Two proposals already noted above are that developing states should exercise their appointing authority to select arbitrators likely to offer more novel perspectives and that arbitrators should be more willing to write separate decisions. A third implication is that, because fundamental principles were settled during a period in which an unrepresentative group of arbitrators reigned, those principles should be subjected to reevaluation as new voices are belatedly added to the dialogue.

II. AN OVERVIEW OF INVESTMENT TREATY ARBITRATION (ITA) AND ITS DIVERSITY CHALLENGES

This Part provides an overview of the ITA regime and the diversity challenges it faces. The first Section provides a brief background on ITA, focusing on the features most relevant to diversity concerns. The second Section summarizes key statistics on the state of diversity in ITA and how commentators have explained persisting deficits. The third Section addresses how diversity concerns have been evaluated. While scholars have largely agreed that a lack of diversity poses a threat to ITA's legitimacy, the commentary on diversity's substantive value is more mixed, at least in part because a segment of the literature adopts an overly formalistic perspective.

A. Key Features of the ITA Regime

The ITA regime is a decentralized system built primarily around bilateral investment treaties (BITs), of which there are nearly three thousand.[26] The treaties afford investors of each contracting state certain protections while operating in the counterpart state.[27] Most also include state consent to arbitration, which allows foreign investors to bypass domestic courts and challenge host state conduct before an arbitral tribunal.[28] The most commonly used arbitral forum is the International Centre for Settlement of Investment Disputes (ICSID), which is housed in the World Bank.[29] The ICSID Convention provides a standard procedural framework, and the institution offers administrative support, but it lacks the continuity and hierarchy of a court system.[30] Each tribunal is created anew to resolve a single dispute, and there is no appellate mechanism to review the merits of decisions.[31]

Under the ICSID Convention rules, a panel must include an odd number of arbitrators, as few as one but usually three.[32] For the typical three-person tribunals, each party—investor and state—gets to select one arbitrator.[33] The parties or the two chosen arbitrators then try to agree on a third, or else the Secretary-General of ICSID makes the selection.[34] Either way, the third arbitrator chosen serves as the tribunal's president, also known as the presiding arbitrator.[35] ICSID maintains a database of available arbitrators, but this limits only the selections made by the Secretary-General and not the parties.[36]

As noted above, ICSID provides only the procedural framework, while the substantive principles applied in a given dispute come from the governing investment treaty. BITs follow a typical model that includes both

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26. *See* DOLZER & SCHREUER, *supra* note 2, at 13. There are also investment provisions in regional treaties like the North American Free Trade Agreement, as well as in industry-specific treaties such as the Energy Charter Treaty. *See id.* at 15.

27. *See id.* at 13.

28. *See id.*

29. *See id.* at 238. Other commonly used institutions include the International Chamber of Commerce and London Court of International Arbitration, while the UNCITRAL Rules can be adopted and used by any institution or ad hoc tribunal. *See id.* at 242-43.

30. *See* Puig, *supra* note 8, at 395.

31. *See* DOLZER & SCHREUER, *supra* note 2, at 302. There is a possibility of annulment by an ad hoc committee, but only on a few narrow grounds such as corruption or a failure to state reasons for the award. *See id.* at 303. Domestic courts in states that are parties to the ICSID Convention are supposed to enforce ICSID awards without even this limited review. *See* BONNITCHA ET AL., *supra* note 1, at 77. For non-ICSID awards, there may be narrow grounds available for courts to set aside awards, but the merits are still not up for reconsideration. *See id.* at 78.

32. *See* Puig, *supra* note 8, at 397.

33. *See id.*

34. *See id.* at 398.

35. *See id.*

36. *See id.* at 398-99.

absolute and relative standards of protection.[37] The former category includes guarantees in case of expropriation as well as assurances of fair and equitable treatment (FET), full protection and security, and the free transfer of payments.[38] It also includes so-called umbrella clauses, which bring the host state's contractual commitments under the protection of the BIT.[39] The latter category includes national treatment and most-favored-nation clauses, which promise "treatment at least as favourable as that enjoyed by domestic investors . . . and foreign investors from third countries," respectively.[40]

The FET provision is the most consequential, serving as the most common basis for liability.[41] It is also the most open-ended standard, providing a catchall basis for challenging host state conduct that does not fall within another provision.[42] Typical FET provisions say only that "[e]ach Contracting State shall in its territory in every case accord investments by investors of the other Contracting State fair and equitable treatment."[43] Tribunals have therefore had considerable policy discretion in defining the provision's contours.[44] Although tribunals and commentators continue to debate its precise meaning, the provision is commonly thought to protect values like due process, transparency, and the investor's legitimate expectations.[45]

B. Diversity Statistics and Explanations

This Section first summarizes key statistics that capture ITA's diversity deficits and then turns to commentators' explanations for the problematic trends.

1. Statistics

Numerous studies have examined the state of diversity in ITA. Their precise findings vary because of the different samples used, but the studies are consistent in showing a troubling lack of diversity along several dimensions.

One arresting statistic is that women make up only about five percent of arbitrators. A study by Sergio Puig of all ICSID appointments through

37. BONNITCHA ET AL., *supra* note 1, at 15.

38. *See id.*; DOLZER & SCHREUER, *supra* note 2, at 13.

39. *See* BONNITCHA ET AL., *supra* note 1, at 15.

40. *Id.* at 15-16.

41. DOLZER & SCHREUER, *supra* note 2, at 130.

42. *See id.* at 132 ("Essentially, the purpose of the clause as used in BIT practice is to fill gaps which may be left by the more specific standards, in order to obtain the level of investor protection intended by the treaties.").

43. BONNITCHA ET AL., *supra* note 1, at 108.

44. *See id.*

45. *See id.* at 109; DOLZER & SCHREUER, *supra* note 2, at 145.

February 2014 finds that ninety-three percent of appointments were of male arbitrators, but two prominent female arbitrators made up three-quarters of all female appointments. Thus, the ratio of arbitrators in Puig's sample was ninety-five to five male to female.[46] The gender imbalance raises serious legitimacy concerns, but whether it affects decision making in ITA is less clear, so it is not the focus of this Article's arguments concerning diversity's substantive value.[47] The link between the next two characteristics and the substance of ITA disputes is more immediately obvious.

First, where do arbitrators come from? A study by Michael Waibel and Yanhui Wu finds that, through 2016, only one-quarter of ICSID arbitrators came from developing countries[48] even though a large majority of claims are filed against such countries.[49] The disparity is even more pronounced when it comes to the place of arbitrators' education, as Waibel and Wu find that about ninety percent of arbitrators received their higher education in developed countries.[50] Puig similarly finds that although several arbitrators from Latin American countries had numerous appointments, most of them had law degrees from schools in England, France, or the United States.[51] Another study focusing on the twenty-five most frequently appointed arbitrators finds that all but four were nationals of Western countries.[52]

The second important characteristic is career background. Waibel and

46. *See* Puig, *supra* note 8, at 404-05.

47. *See* Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 CHI. J. INT'L L. 647, 652 (2012) (explaining how gender balance in international adjudication impacts legitimacy regardless of whether men and women decide cases differently); *see also id.* at 654-57 (discussing the limited evidence regarding when gender may affect international tribunal decision making).

48. Waibel and Wu provide percentages broken out by arbitrator type (president, claimant appointed, and respondent appointed). *See* Michael Waibel & Yanhui Wu, Are Arbitrators Political? Evidence from International Investment Arbitration, tbl.2 (Jan. 2017) (unpublished manuscript) (on file with the Virginia Journal of International Law Association). Averaging the percentages for each arbitrator type shows that approximately 24.7% of arbitrators, overall, come from developing countries. *Id.*

49. A 2015 report by the United Nations Conference on Trade and Development (UNCTAD) finds that twenty-eight percent of claims were against developed countries, which means seventy-two percent were against developing countries. U.N. Conference on Trade & Development, *Investment Policy Framework for Sustainable Development*, at 75, U.N. Doc. UNCTAD/DIAE/PCB/2015/5 (2015) [hereinafter UNCTAD, IPFSD] (citing U.N. Conference on Trade & Development, *IIA Issues Note: Recent Trends in IIAs and ISDS*, at 5, U.N. Doc. UNCTAD/WEB/DIAE/PCB/2015/1 (Feb. 2015)). However, the proportion of cases against developed countries appears to be "on the rise." *Id.* at 75.

50. Waibel and Wu's figures are again broken out by arbitrator type, but in this instance the numbers for all three are close to ninety percent. *See* Waibel & Wu, *supra* note 48, at tbl.2.

51. Puig, *supra* note 8, at 405. The seven developed countries representing "almost half of total appointments" were New Zealand, Australia, Canada, Switzerland, France, the United Kingdom, and the United States. *Id.*

52. *See* Malcolm Langford, Daniel Behn & Runar Hilleren Lie, *The Revolving Door in International Investment Arbitration*, 20 J. INT'L ECON. L. 301, 309 (2017). Consistent with Puig's finding, the authors of this study further explain: "The single arbitrator from Eastern Europe . . . has been a resident in the USA for almost three decades. . . . The other three are from high income Latin American states, and either live or have their professional practice based in the US or Western Europe." *Id.* at 310.

Wu find that sixty-nine percent of arbitrators came from private practice, about thirty-four percent were specialists in public international law, and about thirty-seven percent had government executive branch experience.[53] A similar study of ICSID arbitrators through 2009 put the number with government experience at a little over twenty-five percent.[54] That stands in stark contrast to the World Trade Organization (WTO) Dispute Settlement Body, where the number of panelists with "a substantial government background" was eighty-eight percent.[55]

Scholars have also noted the significant presence of international commercial arbitrators in the ITA pool, particularly in the regime's earlier phases.[56] Although the overlap warrants more systematic investigation, it has been observed, for example, that all members of a group of twenty-five elite international commercial arbitrators have also arbitrated investor-state disputes.[57] Moreover, seven arbitrators appeared both on that list and a list of the twenty-five most frequently appointed investment treaty arbitrators.[58]

The implications of these figures will be discussed in more detail in later Parts, but the general disconnect should not be difficult to spot. Developing countries are more directly affected than developed countries by the rules of international investment law, but the arbitrators who determine the content of those rules lack experience working in and advocating for governments in the former category. The arbitrators instead come disproportionately from backgrounds that best equip them to understand the commercial perspective of investors from wealthy countries.

2. Explanations

To explain the lack of diversity in the pool of investment treaty arbitrators, commentators tend to focus on the specialized nature of the work and how it favors elite players receiving repeat business. An investment treaty arbitrator needs to be familiar with "business transactions, commercial agreements, transnational legal frameworks, and investment

53. Here again the overall percentages were calculated by averaging the disaggregated figures in Waibel & Wu, *supra* note 48, at tbl.2.

54. *See* José Augusto Fontoura Costa, *Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields*, 1 OÑATI SOCIO-LEGAL SERIES 1, 17 (2011).

55. Joost Pauwelyn, *The Rule of Law Without the Rule of Lawyers? Why Investment Arbitrators Are from Mars, Trade Adjudicators from Venus*, 109 AM. J. INT'L L. 761, 772 (2015).

56. *See* Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45, 77 (2013); Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law*, 22 EUR. J. INT'L L. 875, 889 (2011) ("[C]ommercial arbitrators dominate the practice in international investment law," though "public international lawyers represent an important group in the community.").

57. *See* ALEC STONE SWEET & FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY 71-72 (2017).

58. *See id.*

decisions."[59] More than just training, arbitrators need to have strong reputations to obtain appointments, but there are insufficient "structured opportunities for sophisticated education and professional development" needed to achieve the necessary status.[60] The premium placed on experience means that newcomers are unlikely to be given a chance to prove themselves.[61]

Instead, the process of appointments across the regime is one in which "the rich get richer."[62] Puig uses the concept of "social capital" to illustrate the connections among the network of arbitrators[63] and show how "arbitrators who have been appointed more frequently are more likely to attract further appointments."[64] This results not from any top-down pressures, but rather from factors like "heuristic biases" and "risk aversion" that affect the appointing parties' choices.[65]

Apart from reputational considerations and the dynamics of the arbitrator network, the approach taken by respondent states may also contribute to the diversity deficits. Commentators have found evidence that developing countries in particular may not have a clear strategy for appointments. For example, Catherine Rogers cites reports suggesting that developing country representatives are "unable to obtain reliable information about arbitrator candidates" and may "resort to relatively random selection criteria, such as nominating an academic they happened to encounter at a conference on investment arbitration."[66]

Moreover, even developing countries employing a more conscious strategy may end up exacerbating the problem. Such countries may feel obligated to appoint arbitrators from the existing club of elites so that they have their own prestigious representative on the panel.[67] Thus, they draw primarily from the pool of arbitrators coming from European or North American countries.[68] And of the few exceptions, many had law degrees from Western countries, as found in the studies summarized above.[69] The

59. Puig, *supra* note 8, at 402.

60. Franck, *supra* note 19, at 480.

61. *See* Andrea K. Bjorklund et al., *The Diversity Deficit in International Investment Arbitration*, 21 J. WORLD INV. & TRADE 410, 430 (2020).

62. Puig, *supra* note 8, at 391.

63. *Id.*

64. *Id.* at 423.

65. *Id.* at 423-24.

66. Catherine A. Rogers, *The Arrival of the "Have-Nots" in International Arbitration*, 8 NEV. L.J. 341, 358 (2007).

67. *See* BONNITCHA ET AL., *supra* note 1, at 64 (describing "the incentive of each party to appoint arbitrators from inside [the elite] community to maximize the ability of 'their' arbitrator to persuade their co-arbitrators, as newcomers may carry less weight in the deliberations of the tribunal"); *see also* WON L. KIDANE, THE CULTURE OF INTERNATIONAL ARBITRATION 163-64 (2017).

68. *See, e.g.*, KIDANE, *supra* note 67, at 155-56 (finding that seventy-three percent of appointed arbitrators in sixty-four ICSID cases involving African countries are from Europe or North America).

69. *See supra* notes 50-52 and accompanying text.

result is to deepen the influence of the same dominant actors and perspectives, with no proactive efforts to broaden the range of participating voices.

Finally, recall that the presiding arbitrator in ICSID disputes will be appointed by the Secretary-General if the parties do not agree among themselves. It should not be surprising that institutional appointments often go to members of the elite group, since they would represent safe choices.[70] There is some evidence to suggest that appointments by the Secretary-General are more inclusive of developing countries than appointments by the co-arbitrators, but there is undoubtedly still room for improvement.[71]

C. Perspectives on Diversity in ITA

This Section explores how commentators have evaluated the current state of diversity in ITA. After describing the consensus view that homogeneity in the pool of arbitrators undermines the regime's legitimacy, the Section discusses how the commentary is more mixed on whether diversity matters to the substance of arbitral decision making. Section II.C further explains how the more skeptical views on diversity's substantive value fit in the larger context of formalistic perspectives that overstate the system's neutrality. Finally, Section II.C summarizes some empirical evidence that supports these perspectives here, while reserving more critical evaluation, as well as the contrary evidence that supports the Article's affirmative arguments, for Part IV.

The uncontested rationale for diversity's importance is its impact on legitimacy. Legitimacy concerns have plagued international investment law and ITA since the number of arbitrations began to take off around the beginning of this century.[72] Any relatively new adjudicative body faces similar challenges, but the lack of more centralized institutional structures in ITA likely exacerbates the difficulties.[73] Particular sources of concern include the authority given to private arbitrators to interfere with democratically enacted legislation,[74] insufficient transparency in the arbitral process,[75] and inconsistency in tribunal decisions.[76] At bottom, these concerns reflect uneasiness with a system that allows privately appointed

70. *See* Bjorklund et al., *supra* note 61, at 427-28.

71. *See* Franck et al., *supra* note 12, at 499.

72. *See* BONNITCHA ET AL., *supra* note 1, at 233-34, 260.

73. *See* Pauwelyn, *supra* note 55, at 801-03 (comparing where the WTO and ICSID derive their legitimacy from respectively).

74. *See* BONNITCHA ET AL., *supra* note 1, at 235-38.

75. *See id.* at 247-49.

76. *See id.* at 249-50.

individuals to decide issues of such public importance.[77]

With respect to diversity, there are legitimacy concerns about who these powerful individuals are. If the pool of arbitrators is geographically skewed, then populations that feel excluded from the process may question the legitimacy of the decisions that affect them.[78] Such concerns may persist even in the absence of evidence of actual bias on the part of the decision makers.[79]

By contrast, views regarding a second concern, namely that a lack of diversity weakens the quality of decision making, are more tentative or even skeptical.[80] Many commentators do recognize the concern, though some note reservations, and none discuss it as thoroughly as this Article does below.[81] But on the other side, some argue that because the most sought-after arbitrators are valued for their expertise, diversity is of secondary importance.[82] To some commentators in this vein, the idea that diversity would improve the quality of decision making is "speculative."[83] While recognizing the value of furthering "symbolic legitimacy," they raise questions about diversity's substantive value as part of defending ITA's essential neutrality.[84]

This depiction of a neutral, well-functioning system finds some support in empirical research. To the extent the claimed bias is that arbitrators unduly favor investors, studies show that states actually win more often than they lose.[85] Likewise, to the extent the claimed bias is that arbitrators are prejudiced against developing countries, studies show that developing

77. *See* Jason Webb Yackee, *Controlling the International Investment Law Agency*, 53 HARV. INT'L L.J. 391, 399 (2012) (describing "the fundamental source of the system's controversy" as "the concern that unaccountable, transnational elites-cum-bureaucrats might impose undesirable policies upon domestic polities").

78. *See* Franck, *supra* note 19, at 479 ("There is value to having a broader cross-section of decision makers and minimizing a perceived democracy deficit between arbitrators and those affected by arbitration.").

79. *See id.* at 449 ("While a substantively correct result is desirable, it is also vital that parties and the public perceive the process to be procedurally fair, in order to maintain a legitimate dispute resolution system. The arbitrators are responsible for dispensing justice, so their backgrounds and methods of exercising authority are fundamental to systemic integrity."); *see also* Seraglini, *supra* note 17, at 605 ("It is important not only that justice is done, but also that justice seems to be done in arbitration. More diversity in the arbitrators' panel could play a role in this regard.").

80. *Cf.* Sherrilyn A. Ifill, *Judicial Diversity*, 13 GREEN BAG 2D 45, 48-49 (2009) (describing the legitimacy rationale for judicial diversity as "widely accepted" and the substantive concern as "a bit more controversial").

81. *See, e.g.*, BONNITCHA ET AL., *supra* note 1, at 255-57; KIDANE, *supra* note 67, at 288-89. The empirical studies addressed in Section IV.B below provide evidence of diversity's impact on decision making, but they only briefly discuss causal mechanisms and implications.

82. *See* Seraglini, *supra* note 17, at 593. Seraglini acknowledges that diversity may add value, but suggests that the impact of existing homogeneity "is probably overestimated." *Id.* at 597.

83. Franck et al., *supra* note 12, at 498.

84. *Id.* at 497-98.

85. *See* Susan D. Franck & Lindsey E. Wylie, *Predicting Outcomes in Investment Treaty Arbitration*, 65 DUKE L.J. 459, 489-90 (2015) (finding that respondent states win about sixty percent of the time).

countries do not fare differently than developed countries,[86] and that presiding arbitrators from developing countries do not vote in predictably different patterns.[87]

To be clear, no one, including the authors themselves, treats these studies as conclusive evidence of ITA's fairness. Win-loss rates alone cannot establish that conclusion given the absence of and difficulty in determining a baseline for how many cases should have been won.[88] Moreover, as this Article will discuss below, other studies reach different conclusions regarding the significance of the development status of respondent states and of the arbitrators' home states. Nonetheless, one author finds at least tentative support for the view "that the system is not unfairly balanced per se" and instead reflects "neutral, merits-based adjudication."[89]

This assessment lines up with a broader perspective common in the ITA literature that is grounded in formalism. A formalist perspective sees adjudication as involving the relatively mechanical application of rules to facts.[90] As a descriptive theory, it is contrasted with legal realism, which emphasizes the indeterminacy of rules and the wide discretion courts have to make law.[91] As a normative theory of what judges ought to do, formalism can be contrasted with pragmatism, which contends that courts should more openly weigh consequences and embrace their policymaking function.[92]

In the ITA context, scholars, as well as arbitrators themselves, often respond to charges of bias by defending the system in formalistic terms. They describe arbitrators as technical experts with strong reputations for impartiality and independence, tasked with seeking objectively right

86. *See* Franck, *supra* note 19, at 464. In a later study using an expanded dataset, Franck found initial evidence of a relationship between respondent states' World Bank classifications and case outcomes, as well as with amounts awarded, but any apparent relationship disappeared once she added controls for democracy levels. *See* Susan D. Franck, *Conflating Politics and Development? Examining Investment Treaty Arbitration and Outcomes*, 55 VA. J. INT'L L. 13, 41-43, 45-46, 56-59 (2014).

87. *See* Franck, *supra* note 19, at 464.

88. *See* JOSÉ E. ALVAREZ, THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT 390-91 (2012). Win-loss rates also do not account for the thirty-five percent of cases that are settled or otherwise discontinued prior to a final award. *See* THE ICSID CASELOAD — STATISTICS (ISSUE 2020-2) 13 (2020), https://tinyurl.com/x9waxp5k. Unfortunately, there is minimal information about why cases were settled or on what terms, though it is worth remembering that investors can only obtain relief and not be held liable under the asymmetrical treaty regime, so presumably they are often getting at least part of what they wanted when they opt to settle. If nothing else, it seems fair to say that the substantial proportion of discontinued cases makes it difficult to infer from the results of decided cases that the system is neutral and balanced. *See* Sergio Puig, *Blinding International Justice*, 56 VA. J. INT'L L. 647, 677-78 (2016) (noting similar concerns about drawing inferences from win/loss ratios).

89. Franck, *supra* note 19, at 477.

90. *See* Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1144-45 (1999) (book review).

91. *See* John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 86-89 (1995).

92. *See* Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 4-8 (1996).

answers.[93] Likewise, they conceptualize ITA as a neutral forum to resolve private disputes, overlooking or downplaying the public policy concerns those disputes may raise.[94] Indeed, these types of formalistic assumptions are evident even in writings that are not responding to criticisms per se but are merely addressing matters of system design. For example, discussions of the practice of precedent or proposals for an appellate mechanism often describe the goal of "accuracy" as if there were objectively right answers to most questions.[95] Finally, it is worth noting the possible link between these formalistic views and the legitimacy issues summarized above: Those who are invested in the regime's success may believe that emphasizing neutrality and expertise is essential to preserving its claim to legitimacy.[96]

For those who view ITA disputes through a formalistic lens, some skepticism about diversity's substantive value is entirely natural. If resolving disputes is primarily about applying rules, then expertise in those rules is of course paramount. Likewise, if the main function of ITA is to offer a neutral forum for resolving private disputes, then arbitrators must be impartial in the sense of not favoring either party. But under those assumptions, there is little further value to be gained from the inclusion of more diverse perspectives. So long as the prerequisites of expertise and impartiality are met, the arbitrators' backgrounds and values would not be expected to make much of a difference.

As summarized above, commentators do not reject diversity's substantive value altogether, and even those who generally defend the status quo are not out to block efforts to improve diversity, given its value to the regime's legitimacy. But understanding how diversity affects substance is essential to appreciating precisely what is at stake. The answer not only

93. *See* Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT'L L. 471, 492 (2009); *see also* Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47, 90 (2010) ("In order to promote their reputation, arbitrators may choose to increase accuracy and to counter any real or perceived biases rather than to cater to any particular interests.").

94. *See* Ibrahim F.I. Shihata, *The Settlement of Disputes Regarding Foreign Investment: The Role of the World Bank, with Particular Reference to ICSID and MIGA*, 1 AM. U. J. INT'L L. & POL'Y 97, 116 (1986) ("The wide membership that ICSID has since attracted reflects its value as an effective and truly neutral forum where disputes are to be settled according to objective non-political criteria."); *see also* Roberts, *supra* note 56, at 77 ("The commercial background of many investment treaty lawyers often manifested itself in investment treaty protections being treated as akin to contractual obligations between equal disputing parties."); Yackee, *supra* note 77, at 395-96 (contrasting the dispute resolution frame with constitutional and administrative law alternatives that would more explicitly acknowledge the public policy concerns at stake).

95. *See* Irene Ten Cate, *The Costs of Consistency: Precedent in Investment Treaty Arbitration*, 51 COLUM. J. TRANSANT'L L. 418, 457-58 (2013); Thomas W. Walsh, *Substantive Review of ICSID Awards: Is the Desire for Accuracy Sufficient to Compromise Finality?*, 24 BERKELEY J. INT'L L. 444, 447 (2006). For a further critique of this conception of accuracy, see Richard C. Chen, *Precedent and Dialogue in Investment Treaty Arbitration*, 60 HARV. INT'L L.J. 47, 63 (2019).

96. *See* Pauwelyn, *supra* note 55, at 803 (describing ICSID's legitimacy as dependent on "the individual neutrality, expertise, and status of adjudicators").

affects the urgency with which reforms are pursued, but also has implications for the debate between defenders of the status quo[97] and the regime's harshest critics. The former have too readily dismissed the structural bias critiques raised by the latter. By fleshing out and drawing attention to diversity's substantive value, this Article aims to build some common ground regarding the likely presence of some degree of bias resulting from the overrepresentation of certain perspectives in the pool of arbitrators.

The following two Parts build the case for diversity's substantive value and respond to the skeptical viewpoints. Part III examines the interdisciplinary literature on judicial decision making, for which the substantive value of diversity is well established. Part IV applies that literature to ITA, discussing the supporting empirical evidence while also directly addressing what the formalistic perspectives miss. In emphasizing the ideal of impartially applied expertise, they overlook or ignore the substantial discretion that tribunals exercise and thus fail to appreciate the value that diverse perspectives would add to the process.

III. JUDICIAL DECISION MAKING AND THE SUBSTANTIVE VALUE OF DIVERSITY

The idea that a diverse decision-making body would perform better than a homogeneous one seems relatively uncontroversial. But the intuition does not immediately carry over to judges or arbitrators because their work is often idealized as neutral and expert driven. This conception is associated with formalists, as discussed above, but also aligns with how much of the broader public might understand the nature of judging.[98] Thus, a fuller assessment of how diversity adds value in the adjudication context is needed.

Under the traditional "legal model" of decision making, judges are expected to decide cases based solely on legal considerations, such as the plain meaning of texts and relevant precedents.[99] This model was first called into question by the legal realists, who showed how legal considerations

97. This shorthand reference to "defenders of the status quo" is not intended to imply that anyone thinks the system is perfect as is. Rather, the point is to distinguish between those who think the system is generally effective and those who think dramatic reforms are needed. Most in the former group are open to targeted reforms and changes on the margin. *See, e.g.*, Franck, *supra* note 19, at 478 ("Despite the cautiously good news about the integrity of the dispute resolution process at the macro level, there are issues concerning the investment treaty arbitration system's operation at the micro level.").

98. *See* Jason Iuliano, *The Supreme Court's Noble Lie*, 51 U.C. DAVIS L. REV. 911, 933 (2018) (describing how the analogy of judges to umpires "has dominated the popular discourse"). *But see id.* at 971-72 (summarizing various surveys finding that a majority of respondents believe judges are influenced by politics).

99. *See* Lawrence Baum, *Motivation and Judicial Behavior: Expanding the Scope of Inquiry*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 3, 4 (David Klein & Gregory Mitchell eds., 2010).

alone often do not provide determinate answers.[100] Interdisciplinary research from political science, economics, and psychology has now supplemented legal theory to develop a more sophisticated account of how judges and other adjudicators make decisions.

Drawing on this interdisciplinary literature, this Part begins with an overview of the studies of judicial behavior showing how values and experience influence decision making.[101] The second Section elaborates on how that influence occurs, including both conscious and unconscious causal mechanisms. The judicial behavior studies, as well as the limited arbitrator studies discussed later in Part IV, often skip this step because they are focused on observable trends. For present purposes, it is useful to drill down into the mechanisms in order to assess whether and how they are likely to affect investment treaty arbitrators. A final Section turns from individual to group dynamics to explain how diverse bodies make better decisions by mitigating individual biases and by drawing on a broader range of inputs.

A. Studies of Judicial Behavior

Building on the insights of the legal realists, political scientists have conducted empirical studies to show that judges' decisions can largely be explained by their policy preferences. A landmark study by Jeffrey Segal and Harold Spaeth applies the so-called "attitudinal model" to examine the Supreme Court's search and seizure cases from 1962 through 1989.[102] Using only "the facts of the case and the ideology of the justices," the authors find that they could correctly predict the justices' votes with seventy-four percent accuracy.[103] Later studies reinforce these findings and further show that the attitudinal model made more accurate predictions than experienced law professors.[104]

The lower courts do not have the same degree of policy discretion,[105]

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100. *Id.*

101. The empirical studies summarized in this Part and elsewhere should be treated with appropriate caution. For a discussion of the limits of empirical legal studies and the difficulty of distinguishing between causation and correlation, see Victoria Nourse & Gregory Shaffer, *Empiricism, Experimentalism, and Conditional Theory*, 67 S.M.U. L. REV. 101, 116-25 (2014).

102. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 229 (1993).

103. *Id.* at xvi, 229.

104. *See* Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1151-52 (2004).

105. Segal and Spaeth explain why the Supreme Court has the most policy discretion: "they lack electoral or political accountability, ambition for higher office, and comprise a court of last resort that controls its own jurisdiction." SEGAL & SPAETH, *supra* note 102, at 69; *see also* Christopher Zorn & Jennifer Barnes Bowie, *Ideological Influences on Decision Making in the Federal Judicial Hierarchy: An Empirical Assessment*, 72 J. POL. 1212, 1218 (2010) (demonstrating that ideology has an influence at all levels of the federal judiciary, but decreases as you move down from the Supreme Court).

but nonetheless have shown similarly predictable patterns in voting behavior. One study led by Cass Sunstein examines 6,408 federal court of appeals cases across a range of controversial issues, such as affirmative action, environmental regulations, and sex discrimination.[106] The authors adopt a rough measure of "stereotypically liberal votes," which would mean, for example, voting to uphold affirmative action programs and environmental regulations, and in favor of plaintiffs in sex discrimination cases.[107] They find that Democratic appointees were twelve percent more likely than Republican appointees to vote for the stereotypically liberal result—a difference they characterized as "not huge, but substantial."[108]

In addition to studies of ideology, scholars have examined how background characteristics predict judicial behavior. Career experience is one commonly studied factor.[109] For example, studies have found that past experience as a prosecutor is correlated with ruling more often against criminal defendants,[110] as well as having a more conservative voting record in general.[111] Another study finds that the variable of past "federal administrative experience" strongly predicts support for the state or federal government in criminal cases.[112]

Approaching the issue from a different angle, a study led by Gregory Sisk takes advantage of a natural experiment in 1988 when almost 300 federal district judges were required to rule on the same question, namely the constitutionality of the Federal Sentencing Guidelines that took effect the prior year.[113] The authors consider the predictive power of a range of variables, including ones based on demographics, politics, and prior employment.[114] In the last category, they include past experiences (a) as a prosecutor; (b) as a criminal defense lawyer; (c) in military service; (d) as a law professor; (e) in elected or appointed political positions; and (f) as a state

106. CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 17 (2006).

107. *Id.* at 19.

108. *Id.* at 22.

109. For a helpful appendix of such studies as of 2003, see Lee Epstein, Jack Knight & Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CALIF. L. REV. 903, 961-65 (2003). The results are sometimes mixed or counterintuitive. For example, one study finds that past experience representing management in labor disputes was correlated with a greater likelihood of supporting union claims as a judge. *See* James J. Brudney, Sara Schiavoni & Deborah J. Merritt, *Judicial Hostility Toward Labor Unions—Applying the Social Background Model to a Celebrated Concern*, 60 OHIO ST. L.J. 1675, 1680-81 (1999).

110. *See* Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. L. & CRIMINOLOGY 333, 336 (1962).

111. *See* C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-88*, 35 AM. J. POL. SCI. 460, 474-76 (1991).

112. S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947-1956 Terms*, 17 AM. J. POL. SCI. 622, 623-26 (1973).

113. *See* Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1381-82 (1998).

114. *See id.* at 1417-21.

or local judge.[115] The authors' most significant finding is that experience as a criminal defense lawyer strongly predicted disapproval of the Sentencing Guidelines.[116] The authors further find that experience as a prosecutor and military service could predict judges' rulings on particular constitutional challenges, but not the final outcome.[117]

Shifting from career backgrounds to demographic considerations, numerous studies have looked at race and gender as possible predictors of judicial behavior. In the race context, one study finds that white judges are more likely than their minority counterparts to dismiss employment discrimination claims at the summary judgment stage, even after controlling for political affiliation.[118] Other studies comparing black and nonblack federal judges have found that race is a better predictor than political affiliation of the judges' likelihood of voting in favor of minority plaintiffs in Voting Rights Act cases,[119] in support of affirmative action programs,[120] and in favor of plaintiffs in racial harassment claims.[121] Apart from "race-related issues, the literature is more scarce and the findings more mixed."[122]

A similar pattern holds in studies of gender. Female judges do not vote differently than their male counterparts as a general matter.[123] The one area in which a consistent difference is found is in sex discrimination cases,[124] where female judges are more likely to rule in favor of plaintiffs, "even after controlling for ideology or partisanship."[125]

In sum, there is compelling evidence that policy preferences drive judicial decision making, while the influence of career experience and demographic characteristics is substantial in the categories of cases for which one would expect them to be relevant. The next Section considers the causal mechanisms that underlie the observed patterns.

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115. *See id.* at 1420-21.

116. *See id.* at 1470-71.

117. *See id.* at 1473-74, 1478-79. The study's remaining results are inconclusive or against the authors' hypothesis. *See id.* at 1474-80. The counterintuitive finding is that judges who had been state or local judges were more likely to approve the Guidelines, contrary to the authors' hypothesis that such judges should have been "more accustomed to the independent judicial role" and thus "more offended by the restraints of the Guidelines." *Id.* at 1477.

118 *See* Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 338-39, 341 (2011).

119. *See* Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 4 (2008).

120. *See* Jonathan P. Kastellec, *Racial Diversity and Judicial Influence on Appellate Courts*, 57 AM. J. POL. SCI. 167, 175 (2013).

121. *See* Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1141, 1149-50 (2008). For additional studies, see Allison P. Harris & Maya Sen, *Bias and Judging*, 22 ANN. REV. POL. SCI. 241, 249-50 (2019).

122. Harris & Sen, *supra* note 121, at 249.

123. *See* HAIRE & MOYER, *supra* note 11, at 44-45.

124. *See id.* at 48.

125. Harris & Sen, *supra* note 121, at 251; *see id.* at 251-52 (summarizing studies).

B. Causal Mechanisms

This Section explores the causal mechanisms by which values and backgrounds influence judicial decision making, leading to the patterns identified in the preceding Section. The mechanisms are not mutually exclusive, and it often will not be possible to determine which is at work in a given case. In any event, it suffices for present purposes to identify the various causal mechanisms without attempting to develop a detailed model of judicial behavior. The discussion in Parts IV and V below will draw on the identified mechanisms to show that they plausibly apply to the decision making of investment treaty arbitrators and to explore how homogeneity in backgrounds and values has affected ITA jurisprudence in concrete ways.

1. Conscious Ideology

The first mechanism applies to the studies of ideology as a predictor. Sometimes judges are simply trying consciously to shape the law according to their policy preferences. Some attitudinal researchers assumed this was driving their results, though as insights from psychology were incorporated, the model left room for the possibility of unconscious mechanisms like the ones discussed below.[126] Absent survey data, which may not be reliable even if available, it is impossible to gauge the extent of this practice, but there are times when judges are open about their ideological influences. For example, some judges and justices pledge fealty to originalism as a method of constitutional reasoning, while others espouse a common law approach.[127] Such interpretive methodologies are a kind of ideology, though they are often espoused in the name of procedural rather than substantive values.[128] In any event, judges are often open about advancing the values embedded in their chosen methodologies, whether in extrajudicial writings or the opinions themselves.[129]

At other times, conscious ideology is less explicit but hardly less visible. For example, when judges embrace different conceptions of government power and individual rights, their disagreement may be on full display in a

126. *See* Baum, *supra* note 99, at 6; *see also* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 433 (2002) (describing the attitudinal model's view on unconscious processes like motivated reasoning as agnostic).

127. *See* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457-58, 1487-88 (2019).

128. *See* Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1837 (2016). Of course, skeptical observers point out that particular methodologies correlate strongly with certain substantive ends. *See, e.g.*, FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 188 (2013) (suggesting "originalist sources are simply used to 'decorate' opinions reached on other grounds").

129. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L REV. 1175, 1184-85 (1989) (suggesting that the constraints of originalism serve rule-of-law values).

given case as they emphasize one or the other value to support their reasoning.[130] In such a case, the judges do not expressly acknowledge comprehensive ideologies, but they also are not hiding the values they privilege in close cases, though they may purport to find those values in the precedents they cite.[131] It would seem fair to say that such judges are consciously moving the law in a pro-government or pro-rights direction.

Ideology is sometimes thought of as an inappropriate, extralegal factor in judicial decision making.[132] When judges engage in results-oriented reasoning and ignore legal considerations like text and precedent, they are properly criticized as partisan.[133] But value judgments can also be *internal* to legal reasoning, when general legal concepts need to be filled in with normative content.[134] Ideological reasoning in this latter sense is inevitable, and there is no point in trying to extricate it.[135] The goal instead should be to include diverse viewpoints so that ideological competition over time can promote better balance in the law.

2. Specialized Knowledge

The second mechanism applies to the studies of background characteristics. Judges of different backgrounds bring different specialized knowledge to the cases they decide.[136] For example, judges who have worked in technical legal fields, such as patent law, may be able to parse issues better than those who lack such experience.[137] Likewise, judges who have worked in certain roles—prosecutors, public defenders, legislators, executive branch lawyers—may draw on knowledge from their prior careers to assess a case before them.[138] And women and minority judges who have firsthand experience with discrimination may be better equipped to

130. *See, e.g.*, Richard H. Fallon, Jr., *The Supreme Court, Habeas Corpus, and the War on Terror: An Essay on Law and Political Science*, 110 COLUM. L. REV. 352, 353-56 (2010) (discussing how the Supreme Court balances executive power and individual liberties in terrorism cases).

131. *See id.* at 387-89 (illustrating how conflicting precedents can be invoked to support competing normative conclusions).

132. *See* Brian Z. Tamanaha, *The Several Meanings of "Politics" in Judicial Politics Studies: Why "Ideological Influence" Is Not "Partisanship,"* 61 EMORY L.J. 759, 762 (2012).

133. *See id.* at 777-78.

134. *See* Dan M. Kahan et al., *"Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment*, 164 U. PA. L. REV. 349, 360 (2016) ("It is a well-known feature of the Anglo-American system of law that it frequently demands that judges resort to normative reasoning.").

135. *See id.* at 361 (noting that "it is perfectly commonplace for judges who have competing 'jurisprudential' orientations to *disagree* on what normative theory should animate a particular legal provision").

136. *See* Harris & Sen, *supra* note 121, at 247.

137. In the United States, specialized expertise is the justification for allocating certain types of appeals, including patent law, to the Federal Circuit. *See* Laura G. Pedraza-Fariña, *Understanding the Federal Circuit: An Expert Community Approach*, 30 BERKELEY TECH. L.J. 89, 93-94 (2015).

138. *See* Ifill, *supra* note 80, at 55.

recognize problematic conduct.[139]

As compared to the other two mechanisms, there are no downsides to at least considering specialized knowledge. It can only help by informing deliberations, even if it does not necessarily dictate a particular result. It is a form of expertise that even a formalist perspective should recognize as valuable.[140] But even specialized knowledge may distort decision making if it comes from only some perspectives and relevant information from other perspectives is not available to be considered.

3. Implicit Cognition

The third mechanism applies to both sets of studies. Whether because of their policy preferences or background characteristics, judges have developed different perspectives that affect their reasoning process on an unconscious level. Unlike specialized knowledge, which always adds value, this sort of implicit cognition can lead decision makers astray. But it is also, at least to some extent, an inevitable part of decision making.

Implicit cognition describes the unconscious influences on a person's processing of information. This type of cognition involves "top-down reasoning," where "the generic predispositions, perceptions, or theories people bring to a judgment context dictate how they process the new information in front of them."[141] That is in contrast to "bottom-up processing," which "involves objective scrutiny of the information, facts, or evidence at hand."[142] The suggestion here is that judges at least sometimes engage in top-down reasoning and thus reach decisions that are shaped by their backgrounds and values.[143]

A variety of psychological mechanisms may be at work in top-down reasoning, but this Section will focus on two to illustrate: heuristics and motivated reasoning. Heuristics are the shortcuts all human beings take to make faster judgments. They are "knowledge structures, presumably learned and stored in memory."[144] Judgments based on heuristics involve quick processing and "minimal cognitive demands."[145] Heuristic processing is distinguished from systematic processing, which "involves a relatively comprehensive and analytic scrutiny of judgment-relevant information."[146]

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139. *See* Christina L. Boyd, *Representation on the Courts? The Effects of Trial Judges' Sex and Race*, 69 POL. RSCH. Q. 788, 789 (2016).

140. *See id.* (describing specialized knowledge as "expertise").

141. Brandon L. Bartels, *Top-Down and Bottom-Up Models of Judicial Reasoning*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 41, 43 (David Klein & Gregory Mitchell eds., 2010).

142. *Id.* at 44.

143. *See id.* at 48.

144. Serena Chen, Kimberly Duckworth & Shelly Chaiken, *Motivated Heuristic and Systematic Processing*, 10 PSYCH. INQUIRY 44, 44 (1999).

145. *Id.*

146. *Id.*

Heuristics are unavoidable because the cognitive effort needed for systematic processing is not always possible, and they are sufficiently reliable to guide behavior and decision making in many situations.[147] But they also lead to predictable errors. For example, one commonly studied shortcut is the availability heuristic, which refers to how people "judge[] the size of categories by the ease with which instances [come] to mind."[148] The heuristic leads people to "overestimate the frequency of high-profile events such as earthquakes or tornadoes while underestimating the frequency of less-publicized and less-dramatic risks such as asthma, emphysema, or diabetes."[149]

Judges must make these types of estimates in a variety of circumstances, and it is easy to see how the availability heuristic could distort them. For example, in deciding whether a complaint should survive a motion to dismiss, a judge may evaluate the claim's plausibility in light of salient past experiences that just happen to come readily to mind.[150] And when judges come to the bench with different past experiences, it should not be surprising that they differ in predictable ways when making these types of assessments.[151]

Similar shortcuts may influence how judges reason about policy concerns in the course of crafting legal doctrine. For example, Nancy Levit links the availability heuristic with the development of sexual harassment law.[152] Citing data showing a "disjunction between public beliefs and empirical realities" about the frequency of false claims, she suggests that "[n]ews reports about anomalous or unusual cases fuel these misconceptions."[153] Judges, whether influenced directly by the heuristic or indirectly through public backlash, tightened restrictions on sexual harassment suits likely as a result.[154] Here, too, it is not difficult to see how judges of different backgrounds and possessing different values would be more or less susceptible to these heuristics or simply susceptible to different

147. *See id.* at 44-45.

148. DANIEL KAHNEMAN, THINKING FAST AND SLOW 7 (2011).

149. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 698 (1999).

150. *See* Alexander A. Reinert, *The Burdens of Pleading*, 162 U. PA. L. REV. 1767, 1786-88 (2014); *see also* Darrell A. H. Miller, Iqbal *and Empathy*, 78 UMKC L. REV. 999, 1008 (2010) ("[W]hether a judge can accurately assess whether an event is plausible may have much to do with whether, and how, the judge has experienced the event alleged.").

151. *See* Miller, *supra* note 150, at 1008 ("[H]euristics and their associated biases are often born of experience, and in the same way they are limited by experience.").

152. *See* Nancy Levit, *Confronting Conventional Thinking: The Heuristics Problem in Feminist Legal Theory*, 28 CARDOZO L. REV. 391, 410-12 (2006).

153. *Id.* at 411.

154. *See id.* at 411-12.

ones.[155] Because overcoming heuristics on an individual level can be difficult, increasing diversity in the judiciary as a whole may be more effective in reducing their potentially distorting influence.[156]

Turning to the second form of implicit cognition, motivated reasoning is "the tendency of people to unconsciously process information—including empirical data, oral and written arguments, and even their own brute sensory perceptions—to promote goals or interests extrinsic to the decisionmaking task at hand."[157] Notably, motivated reasoning affects not only "heuristic-driven" judgments, but "more deliberate and reflective forms of judgment as well."[158]

The goals being unconsciously promoted could come in the form of policy preferences. In the studies cited earlier using ideology as a predictor, the judges may have been unconsciously interpreting ambiguous legal materials to support their previously held positions.[159] This unconscious process provides an alternative or supplemental explanation to the possibility of conscious efforts to shape the law according to policy preferences.

The goals at stake could also be less clearly defined than policy preferences. One species of motivated reasoning is known as identity-protective cognition, which involves processing information in a way that "[a]ffirm[s] one's membership in an important reference group."[160] The idea of identity-protective cognition could help explain studies of demographics and career experience as predictors of judicial behavior. The past and present identities of judges may create interests that are less tangible than policy preferences but nonetheless influence their interpretation of facts and law.

For example, in the Sisk study examining district judge rulings on the Sentencing Guidelines, the authors offer two explanations for why judges with criminal defense backgrounds consistently held them unconstitutional. One possibility is that criminal defense lawyers have distinctive convictions,

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155. *See* Maria Rotundo, Dung-Hanh Nguyen & Paul R. Sackett, *A Meta-Analytic Review of Gender Differences in Perceptions of Sexual Harassment*, 86 J. APPLIED PSYCH. 914, 919 (2001) (finding that "women are more likely than men to define a broader range of behaviors as harassing"). For a similar argument about how the heuristics of the dominant groups from which judges are drawn have shaped the law of employment discrimination, see Elizabeth Thornburg, *(Un)conscious Judging*, 76 WASH. & LEE. L. REV. 1567, 1639 n.419 (2019).

156. *See Why Do We Think that Things that Happened Recently Are More Likely to Happen Again? The Availability Heuristic Explained*, THE DECISION LAB, https://thedecisionlab.com/biases/availability-heuristic/ (last visited Mar. 21, 2021).

157. Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 7 (2011).

158. *Id.* at 21.

159. *See supra* notes 102-108 and accompanying text; *see also* Baum, *supra* note 99, at 16-17 (discussing motivated reasoning and policy preferences).

160. *See* Kahan, *supra* note 157, at 20.

which may have drawn them to their careers initially and were then further "molded by their environment."[161] A second possibility is that the very project of the Sentencing Guidelines "may have been uniquely provocative to those with criminal defense backgrounds."[162] The first explanation appears to involve tangible views, while the second suggests a more intangible ethos reflected in defense lawyers as an identity group.[163] Either or both interests together could have been motivating judges on an unconscious level to be skeptical of the Sentencing Guidelines, on top of any conscious reasoning that took place.

It should be emphasized here that identifying motivated reasoning by one group does not necessarily mean those reaching the opposite conclusion were reasoning more objectively to a better result. As noted at the outset, implicit cognition affects everyone and is to some extent inevitable. There may be ways to counteract its negative effects on the individual level,[164] but, as with the previous two mechanisms, improved diversity also offers a path to more effective decision making at the group or institutional level.

Before turning to explore group dynamics in more detail, the next subsection addresses some caveats about the application of implicit cognition research to judges.

4. Caveats

While the empirical research on judicial behavior demonstrates the predictability of certain voting patterns, more caution regarding the causal mechanisms is warranted. As noted earlier, this Article does not propose a general model to explain the various components of judicial decision making. But one potential gap warrants further discussion. Because studies of how implicit cognition affects judges specifically are limited, some may question how effectively that research translates to judicial decision making.

An initial question is whether the training judges receive enables them to make reasoned decisions without the influence of heuristics.[165] The available evidence suggests that judges are not immune in this regard. One study of federal magistrate judges finds that their decision making was in fact influenced by five common heuristics.[166] In a later article, the authors

161. Sisk et al., *supra* note 113, at 1472.

162. *Id.*

163. Regarding the latter possibility, the authors went on to note that "every judge has some characteristic or personal identity that may at some point be directly implicated by the type of case before the court." *Id.*

164. *See* Dan M. Kahan, *"Ideology in" or "Cultural Cognition" of Judging: What Difference Does It Make?*, 92 MARQ. L. REV. 413, 421 n.43 (2009).

165. *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 782 (2001).

166. *See id.* at 784. The study focuses on the cognitive illusions of anchoring, framing, hindsight bias, representativeness heuristic, and egocentric biases.

of that study summarize their research as showing "that judges tend to make decisions in a largely intuitive way,"[167] though they also acknowledge that judges can, under certain circumstances, be prompted to override intuition with more deliberation.[168] A study of international arbitrators, both commercial and investment, uses similar experiments to those previously conducted on judges and finds that they were likewise influenced by common heuristics.[169]

A further question would be whether judges, in taking the same shortcuts that all of us do, are employing a kind of expert intuition that makes even their nonreasoned decisions relatively reliable.[170] Here, too, there is reason to doubt that judges are different from ordinary human beings. In his research on expert intuition, psychologist Daniel Kahneman finds that two conditions are necessary for the development of skilled intuition: (1) "an environment that is sufficiently regular to be predictable," and (2) "an opportunity to learn these regularities through prolonged practice."[171] For practice to be helpful, prompt feedback is needed.[172]

The feedback judges receive is sparse and slow in coming, as appeals face limitations such as deferential standards of review and take months or years to resolve.[173] For courts of last resort, there is no formal feedback beyond public and scholarly reaction. But the more fundamental point is that many decisions made by judges do not involve the prerequisite regularity in environment. Hard cases require a complex evaluation of text, precedent, and policy, among other considerations, and there often will not be an objective basis to declare a decision right or wrong.[174] In that setting, even judges that received prompt feedback would rarely be learning useful lessons transferable to future cases.

While substantial evidence supports the impact of heuristics on judicial

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167. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 19 (2007).

168. *See id.* at 28-29.

169. *See* Susan D. Franck et al., *Inside the Arbitrator's Mind*, 66 EMORY L.J. 1115, 1135 (2017).

170. *See* Guthrie et al., *supra* note 167, at 29-30. Frederick Schauer has suggested that judges might be uniquely skilled in second-order reasoning, which entails looking beyond the individual case to consider the constraints of precedent and the implications for future disputes. *See* Frederick Schauer, *Is There a Psychology of Judging?*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 103, 107-09 (David Klein & Gregory Mitchell eds., 2010). Even if this supposition were confirmed empirically, it would have no bearing on many other aspects of legal reasoning. For example, after judges successfully move to the level of second-order reasoning, they still need to evaluate competing considerations to decide on an appropriate rule, and that involves tasks like "empirical observation, induction, and moral reasoning" that judges are not uniquely qualified to perform. Emily Sherwin, *Features of Judicial Reasoning*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 121, 128 (David Klein & Gregory Mitchell eds., 2010).

171. KAHNEMAN, *supra* note 148.

172. *Id.* at 241.

173. *See* Guthrie et al., *supra* note 167, at 32.

174. *See* Thornburg, *supra* note 155, at 1621.

decision making, the research on motivated reasoning in judges is more limited and mixed. One study examines how judges evaluated evidence in the form of social science research on the deterrent effect of the death penalty.[175] The study finds that judges' preexisting attitudes toward the death penalty correlated with their assessments of the weight that the evidence should be afforded.[176] Another study compares law students to undergraduates to determine that "legal training did not appear to attenuate motivated perceptions."[177]

A study led by Dan Kahan provides the most direct test to date of whether motivated reasoning affects judicial decision making.[178] The experiment asked participants to answer two statutory interpretation problems, where party identities were manipulated to trigger competing cultural sympathies.[179] The study finds that judges converged on apparently correct (or at least better) answers and avoided the influence of identity-protective cognition.[180] Lawyers showed the same ability, in contrast to members of the general public.[181] These results verified the hypothesis that "professional training and experience . . . [would] instill in lawyers and judges habits of mind resistant to identity-protective cognition when performing the types of reasoning tasks characteristic of their profession."[182]

The Kahan study provides significant evidence that judges are *capable* of resisting motivated reasoning, but the extent of that ability should not be overstated. The authors themselves acknowledge that any special capacity is limited to legal reasoning.[183] Moreover, it is not clear whether their findings would hold when the legal problem was more difficult. As Elizabeth Thornburg has suggested, we might see "judges' cultural identities exert[ing] more influence" if they were tasked with answering a "more indeterminate" problem.[184]

Finally, Kahan's study does not shed light on the role of motivated reasoning when judges make legal judgments based on policy reasoning. The study does separately find that judges are as polarized as the general public

175. *See* Richard E. Redding & N. Dickson Reppucci, *Effects of Lawyers' Socio-Political Attitudes on Their Judgments of Social Science in Legal Decision Making*, 23 LAW & HUM. BEHAV. 31 (1999).

176. *See id.* at 48.

177. Eileen Braman & Thomas E. Nelson, *Mechanism of Motivated Reasoning? Analogical Perception in Discrimination Disputes*, 51 AM. J. POL. SCI. 940, 940 (2007). The study asked participants to read a legal precedent and a newspaper story involving discrimination and decide whether the precedent was analogous. *See id.* at 945. Both undergraduates and law students tended to reach conclusions consistent with their policy preferences. *See id.* at 954.

178. *See* Kahan et al., *supra* note 134. This article also identifies some limitations in the Redding and Reppucci study of the death penalty. *See id.* at 367-68.

179. *See id.* at 380.

180. *See id.* at 410-11.

181. *See id.*

182. *Id.* at 411.

183. *See id.* at 354.

184. Thornburg, *supra* note 155, at 1636.

in their policy views.[185] And this is consistent with past research finding that those with advanced critical reasoning abilities may actually be more susceptible to identity-protective cognition.[186] It is harder to imagine judges putting aside their views when making legal judgments that actually turned on policy concerns.[187]

In that vein, Kahan elsewhere shows how motivated reasoning may have influenced the Seventh Circuit's analysis of *Crawford v. Marion County Election Board*,[188] which decided the constitutionality of a voter ID law. The issue turned on policy consequences concerning whether the law "advance[d] a state interest in avoiding fraud" and whether "requiring identification burdens prospective voters."[189] Describing the split decision, Kahan suggests that while conscious partisan motivation could have been at work, the better explanation seems to be that the judges interpreted "legally consequential facts" in a way that was unconsciously "shaped by their values."[190]

The more recent experimental study does not examine how motivated reasoning affects the interpretation of legally consequential facts. It uses manipulated party identities precisely because they have no legitimate bearing on the statutory analysis.[191] With this design, the authors isolate and help rule out what would be a particularly troubling form of motivated reasoning. But Kahan's own work shows why the results would likely differ for a task that required judges to evaluate policy consequences, such as whether a voter ID law reduces fraud or unfairly burdens voters.

Unlike party identities, there is nothing illegitimate about considering policy consequences, but it is still important to understand whether motivated reasoning affects that process. It matters because, as Kahan himself notes, there may be ways to counteract such influences.[192] More importantly for present purposes, it matters to the diversity discussion

185. *See* Kahan et al., *supra* note 134, at 411.

186. *See id.* at 369-70, 410-11; *see also* James R. Steiner-Dillon, *Epistemic Exceptionalism*, 52 IND. L. REV. 207, 234-35 (2019) ("Intelligence, access to information, and education are not correctives to cognitive tribalism; to the contrary, the polarizing effects of cultural and identity protective cognition tend to be positively associated with access to information and technical proficiency. More intelligent and educated individuals become more adept at reconciling empirical data with their normative priors.").

187. *See* Steiner-Dillon, *supra* note 186, at 235 ("[W]hile judges' situation sense may insulate them from the effects of identity-protective cognition while performing technical legal interpretive tasks involving no intrinsic normative judgments, it may be the case that they are more susceptible, by virtue of their higher general intelligence, to such effects when performing tasks that contain an intrinsic normative component.").

188. 472 F.3d 949 (7th Cir. 2007). The case was affirmed by the Supreme Court in Crawford v. Marion County Election Board, 553 U.S. 181 (2008).

189. Kahan, *supra* note 164, at 416.

190. *Id.* at 416-17.

191. *See* Kahan et al., *supra* note 134, at 380.

192. *See* Kahan, *supra* note 164, at 421.

because judges of different backgrounds who possess different values will have distinct goals. If motivated reasoning is difficult to eliminate in any one individual, its effects can at least be mitigated by diversifying the participants in the decision-making process.

The bottom line is that Kahan's study is reassuring in showing that judges can avoid motivated reasoning when presented with pure legal questions with relatively clear answers. But whether judges can avoid motivated reasoning when making policy-informed legal judgments, or even when deciding purely legal but more open-ended questions, is a very different matter. Given the Kahan study's own findings that judges are polarized in their policy positions, it would be surprising to find that they are able to transcend their worldviews when analyzing policy concerns.

C. Group Dynamics

The preceding sections focused on how individual judges make decisions. Knowing that backgrounds and values shape decision making is reason enough to want a diverse group of individuals participating in the process. But the "effect of diversity is more than just the sum of the individual parts."[193] This Section turns to group dynamics to explore how diversity or a lack thereof affects collective decision making.

A wealth of research finds that diverse groups make better decisions than homogeneous ones. When a group is composed of individuals with different backgrounds and values, it has a broader "range of ideas and information" to work with in the decision-making process.[194] The group must then subject those ideas to "effective experimentation, inquiry, and testing" to reach the best possible decision.[195] Diverse groups are also better equipped to recognize the biases and blind spots of individual members.[196] The inclusion of diverse perspectives helps to mitigate the distorting effect such influences might otherwise have had.[197]

By contrast, homogeneous and insulated groups are vulnerable to groupthink, which interferes with effective decision making by suppressing alternative viewpoints and encouraging conformity.[198] Moreover,

193. HAIRE & MOYER, *supra* note 11, at 95.

194. Epstein et al., *supra* note 109, at 944.

195. *Id.*

196. *See* Jose L. Duarte et al., *Political Diversity Will Improve Social Psychological Science*, 38 BEHAV. & BRAIN SCIENCES 1, 8 (2015).

197. *See* Regina F. Burch, *Worldview Diversity in the Boardroom: A Law and Social Equity Rationale*, 42 LOY. U. CHI. L.J. 585, 594 (2011) (arguing that "greater worldview diversity on corporate boards may lead to better governance and mitigate bias and unfairness in corporate decision making"); *see also* JOHN RAWLS, A THEORY OF JUSTICE 358 (1971) ("In everyday life the exchange of opinion with others checks our partiality and widens our perspective; we are made to see things from their standpoint and the limits of our vision are brought home to us.").

198. *See* IRVING L. JANIS, GROUPTHINK 9 (2d ed. 1982).

deliberation in such groups may actually produce a more extreme position relative to "the original distribution of individual views."[199] One explanation for this phenomenon, known as group polarization, is that "a group whose members are already inclined in a certain direction will have a disproportionate number of arguments going in that same direction," so that "the result of discussion will be to move people further in the direction of their initial inclinations."[200] Thus, groups that lack diversity not only fail to correct for flaws in individual decision making, but may end up doing affirmatively worse.

How do these dynamics play out in the legal context? As an initial matter, it is worth separating out two levels of analysis: diversity in a single panel, and diversity in a larger legal system. Empirical studies confirm that the presence or absence of diversity in a particular panel can affect the outcome of a case. For example, the Sunstein study cited earlier on the ideological tendencies of Democratic and Republican appointees also examines how votes changed depending on the identity of co-panelists. The study finds that panels in which all judges came from one party exhibited more pronounced tendencies than panels in which only a majority came from that party.[201] Similarly, studies have found that the presence of a female judge on a panel makes male judges more likely to vote in favor of sex discrimination plaintiffs,[202] and the presence of a black judge on a panel makes nonblack judges more likely to uphold affirmative action programs.[203]

The existence of such so-called panel effects is significant in showing that the value of diversity goes beyond the individual judge's vote. If judges are actually learning from and being persuaded by each other, then the addition of one judge offering an underrepresented perspective can shape the decision by the panel of three.[204] Moreover, the empirical studies leave out a less measurable but equally important consequence, namely the impact that diversity has on the reasoning of a decision. For example, reasoning can

199. Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 87 (2000).

200. *Id.* at 89.

201. *See* SUNSTEIN ET AL., *supra* note 106, at 12. As the authors explain, a majority of either party "has enough votes to do what it wishes." *Id.* Thus, it is notable that "a large disciplining effect comes from the presence of a single panelist from another party." *Id.*

202. *See* Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406 (2010) ("[T]he likelihood of a male judge ruling in favor of the [sex discrimination] plaintiff increases by 12% to 14% when a female sits on the panel.").

203. *See* Kastellec, *supra* note 120, at 178 ("[A]dding a black counterjudge increases the probability that a nonblack judge will vote in favor of affirmative action by about 25 to 30 percentage points.").

204. *See* Boyd et al., *supra* note 202 , at 406 ("[N]ot only do males and females bring distinct approaches to these cases, but the presence of a female on a panel actually causes male judges to vote in a way they otherwise would not . . . ."); Kastellec, *supra* note 120, at 179 (suggesting it is likely that "black judges are leading their nonblack colleagues to change their votes either by their presence on the panel, or by presenting information or arguments that their nonblack colleagues would not receive otherwise").

be stated "narrowly or broadly," and "it is plausible to speculate that a unified panel is far less likely to be moderate than a divided one is."[205]

At the second level, diversity is valuable in shaping the dialogue in which courts are engaged in the course of developing the law. For example, the U.S. Supreme Court has the final say on the content of federal law, but it generally depends on the lower federal courts to identify and test different ideas before it weighs in.[206] When the federal judiciary as a whole is more diverse, it can identify a broader range of options and vet them more effectively. Thus, even if every individual three-judge panel cannot be optimally diverse, robust diversity in the larger system still contributes to the quality of decision making at that higher level.[207]

Having identified the two levels on which diversity may operate, the next question is what it means to improve the quality of decision making in the legal context. In some contexts, a diverse group of judges may be better able to identify the objectively superior answer. For example, when judges are called on to interpret a text or make a factual determination, diverse perspectives may help by recognizing relevant context that might otherwise have been missed.[208] In other situations, where no objectively right answers exist, better decisions are ones that more effectively promote legal and social values and balance them when they are in competition.[209] Here the value of diversity is even more significant, as judges from underrepresented groups can speak to values and policy consequences that might otherwise have been left out of the equation.[210]

In sum, a judiciary composed of individuals with diverse backgrounds and values makes better decisions because it can check biases and achieve a better balance among the competing considerations that go into shaping the law. Even as individual judges bring distinctive perspectives shaped by their personal and professional experiences, the goal is for the judiciary as a whole

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205. SUNSTEIN ET AL., *supra* note 106, at 72; *see also* Crespo, *supra* note 11, at 1999 (noting that the career backgrounds of U.S. Supreme Court Justices may affect "the ways in which they frame the questions before them and craft legal doctrines in response").

206. *See* Paul J. Watford, Richard C. Chen & Marco Basile, *Crafting Precedent*, 131 HARV. L. REV. 543, 577-78 (2017) (book review).

207. *See* Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 456 (2000) ("The inclusion of alternative or 'non-mainstream approaches' in judicial decision making can invigorate the law with new and challenging approaches to decision making . . . In this sense, diversity benefits not only minority litigants but the entire justice system."). Scholars also suggest that the introduction of diverse participants may gradually affect "organizational culture" and make "deliberate procedures" more inclusive in the longer run. HAIRE & MOYER, *supra* note 11, at 135.

208. *See* Edward M. Chen, *The Judiciary, Diversity, and Justice for All*, 91 CALIF. L. REV. 1109, 1117-19 (2003) (explaining how diversity may help avoid "cross-cultural misunderstanding[s]" in assessing witness credibility).

209. *See* Ifill, *supra* note 207, at 441-42.

210. *See id.* at 472.

to achieve "structural impartiality."[211] And when judges engage in meaningful dialogue and genuinely consider alternative viewpoints, the result is to enhance diversity's substantive value beyond the mere totaling of the individual contributions.

While diversity's substantive value in the context of domestic courts is now more widely recognized, translating that to the ITA context requires further assessment. This Article turns to that translation process in the next Part.

IV. TRANSLATION TO THE ITA CONTEXT

This Part addresses how effectively the literature on diversity in judicial decision making translates to the ITA context. The first Section provides some initial caveats acknowledging how the arbitrator's role differs from that of domestic judges. The second Section discusses the limited empirical studies in ITA specifically, which support applying the general insights about judicial decision making to investment treaty arbitrators. The third Section contends that certain features of the ITA regime magnify the importance of diversity in this context. The fourth and final Section revisits and responds to the formalist skepticism about the substantive value of diversity and argues for a shift in perspective to better assess diversity's impact on ITA decision making.

A. The Arbitrator's Role

Arbitrators differ from judges in two main ways. First, arbitrators have no fixed status and instead rely on individual appointments for their work, while judges do not have any comparable need to generate business. Commentators have suggested a variety of ways in which the incentive to seek future appointments may influence the work of arbitrators. One possibility is that arbitrators will tend to favor the party that appointed them, attracting business by cultivating a reputation as friendly to one side, either investors or states.[212] But others suggest that arbitrators undertake a more nuanced strategy. For example, they may issue lukewarm, "split the baby" decisions and avoid strong positions that would take them out of the

211. *Id.* at 411.

212. *See* Weijia Rao, *Are Arbitrators Biased in ICSID Arbitration? A Dynamic Perspective*, 66 INT'L REV. L. & ECON. (forthcoming 2021) (manuscript at 3-4), https://ssrn.com/abstract=3203019. As discussed in the next Section, there is some evidence to support such strategic voting, though it can be difficult to disentangle which way causality runs. *See* Sergio Puig & Anton Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approach*, 46 J. LEGAL STUD. 371, 393 (2017) (distinguishing between "selection effects (parties appointing friendly arbitrators)" and "affiliation effects (arbitrators changing their behavior in response to their appointment)").

running for future appointments.[213] Perhaps the most positive view is that arbitrators maximize their appeal by cultivating a strong reputation as "credible and independent decision makers."[214]

Second, unlike judges, investment treaty arbitrators may and do continue representing clients as attorneys. The concern this raises is that arbitrators may take the opportunity to audition not just for future arbitration appointments but to be hired as counsel.[215] Moreover, neutrality is difficult to maintain when arbitrators must decide issues that they have recently argued or are currently arguing as advocates.[216]

There is likely some truth to all these accounts. Different arbitrators may act differently, and even individual arbitrators may vary in their approach from case to case. The key point, though, is that the introduction of these distinctive considerations would not negate, and may in fact magnify, the effect that backgrounds and values have on decision making.

Under the positive view that arbitrators simply want to do the best job possible, they would be no different from judges, and the concerns set forth in the prior Part would apply in full. To the extent arbitrators have an eye on future appointments (whether as arbitrators or counsel) from one particular side, such interests would likely magnify the predispositions they already had to analyze issues through a state- or investor-friendly lens.

Only the possibility that arbitrators adopt lukewarm positions to maintain appeal to both sides would potentially lead to some offsetting of existing predispositions. Some empirical work undercuts this theory.[217] But even assuming that dynamic describes a meaningful subset of arbitrations, the very effort to determine what constitutes lukewarm doctrine may be affected by implicit cognition mechanisms. An arbitrator predisposed to sympathize with investors would likely identify a different middle ground than an arbitrator predisposed to sympathize with host states. Thus, diversity in the arbitrator pool would matter even under the assumption that arbitrators often try to satisfy both parties.

Finally, there is one aspect unique to ITA that suggests arbitrators have a structural incentive to favor investors. Gus Van Harten contends that, because only investors can bring claims, arbitrators who want to increase use of the ITA system and thereby open up more opportunities for

213. Seraglini, *supra* note 17, at 599.

214. Kapeliuk, *supra* note 93, at 66.

215. *See id.* at 59-60.

216. *See* Seraglini, *supra* note 17, at 604.

217. *See* Kapeliuk, *supra* note 93, at 81 (finding that "arbitration tribunals involving elite arbitrators do not have a tendency to render compromise awards"). Franck's experimental study finds that arbitrators did not consistently "split the baby" when they were asked to assess damages and provided with two competing expert valuations in a hypothetical case. *See* Franck et al., *supra* note 169, at 1142-46. Some arbitrators did render compromise awards, but substantial numbers also leaned toward one or the other side's expert report. *See id.* at 1145-46.

appointments will be inclined on the whole to favor investors.[218] Van Harten supports his hypothesis with empirical evidence that tribunals have taken an "expansive approach" to questions of "jurisdiction and admissibility of claims."[219] This last point rounds out the picture of arbitrator incentives, but it differs from the previous points in suggesting a skew in one direction. In that regard, it also relates to and reinforces the concerns about structural bias discussed in Part V below.

B. Studies of ITA Decision Making

This Section turns to consider what we can learn from the limited studies available of arbitral decision making. Recall first that studies have found that the development status of respondent states did not affect outcomes.[220] These findings were used to bolster the argument that investment treaty arbitrators are not biased against developing countries. It should be noted here that a more recent study using an expanded dataset finds that developing countries are in fact more likely to lose.[221] But the more immediately relevant finding summarized earlier is the lack of any statistically significant relationship between the development status of presiding arbitrators and case outcomes.[222] This result provides some evidence against the idea that arbitrator backgrounds influence their decision making.

But other studies paint a different picture. One piece of evidence that ideological predispositions matter is that arbitrators have reputations as being friendly to states or investors, and parties make appointments accordingly. Examining the list of the twenty-five most frequently appointed arbitrators, only five could be said to have roughly equal numbers of appointments by either party type.[223] The most lopsided included Brigitte Stern with eighty-two appointments by respondents and one by claimants, and Charles Brower, with fifty appointments by claimants and zero by

218. *See* Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L.J. 211, 219, 238 (2012).

219. *Id.* at 238. The study examined tribunal determinations on these questions where the treaty language was ambiguous and thus required arbitrator discretion to resolve. *See id.* at 226-27. It found a significant tendency toward expansive rather than restrictive interpretations that could not be explained by chance. *See id.* at 237.

220. *See supra* note 86 and accompanying text.

221. *See* Weijia Rao, *Development Status and Decision-Making in Investment Treaty Arbitration*, 59 INT'L REV. L. & ECON. 1, 2 (2019) (identifying "consistent negative correlations between respondent states' development status and their likelihood of losing, indicating potential biases against developing respondent states in investment treaty arbitration").

222. *See supra* note 87 and accompanying text.

223. *See* Langford et al., *supra* note 52, at 310. The arbitrators with roughly equal numbers of appointments were Albert Jan van den Berg (16 appointments by claimants and 12 by respondents), V.V. Veeder (6 and 6), Bernardo Cremades (10 and 10), Juan Fernández-Armesto (1 and 3), and Franklin Berman (5 and 4). *See id.*

respondents.[224] A recent study by Weijia Rao confirms that "investors or states are more likely to appoint arbitrators with stronger reputations for being pro-investor or pro-state, respectively."[225] And empirical work by Sergio Puig finds that strategic appointments pay off for parties. Looking at claimant success rates and the proportion of compensation awarded to compensation sought, he concludes that "ICSID arbitrators repeatedly appointed by investors or States are more likely to make decisions that support the interest of investors or States respectively."[226]

The extent to which arbitrators tend to favor one or the other side raises the additional question of whether the patterns are simply a function of the arbitrators voting for the parties that appointed them.[227] A study led by Julian Donaubauer suggests that such an explanation is at best incomplete, and that the arbitrators' own policy predispositions play at least a contributing role.[228] This study finds a significant correlation between how the presiding arbitrator votes and whether that arbitrator had previously been appointed more often by one or the other side ("appointment bias").[229] The model controls for variables such as the GDP of the respondent state and investor's home state as well as the quality of governance in the respondent state.[230] As explained earlier, presiding arbitrators are appointed by the agreement of the other two arbitrators or by the arbitral institution. Given that presiding arbitrators do not owe their appointments to either party, the best explanation for the observed patterns is that arbitrators have views that predispose them toward one or the other side.

As with policy predispositions, there is also evidence that background characteristics influence arbitral decision making. Waibel and Wu, whose study this Article cited earlier for its diversity statistics, also examine whether variables relating to background characteristics correlated with voting tendencies.[231] One of their central findings is key to the present analysis: "being an arbitrator from a developing country is in general negatively correlated with affirming jurisdiction and holding the host states liable."[232]

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224. *See id.*

225. Rao, *supra* note 212, at 4. Rao goes on to show that over time arbitrators may vote strategically *against* their reputed tendencies to cultivate a reputation for neutrality. *See id.* at 4-5.

226. Puig, *supra* note 88, at 685.

227. Puig & Strezhnev, *supra* note 212.

228. *See* Julian Donaubauer, Eric Neumayer & Peter Nunnenkamp, *Winning or Losing in Investor-to-State Dispute Resolution: The Role of Arbitrator Bias and Experience*, 26 REV. INT'L ECON. 892 (2018).

229. *Id.* at 901.

230. *See id.* at 898-99. Their findings remain robust even after using alternative measures for the governance control variable and alternative definitions for appointment bias. *See id.* at 905.

231. The authors treat the variables of home country development status and career experience as proxies for "[p]olicy preferences" as a way to distinguish those from other possible explanatory variables. Waibel & Wu, *supra* note 48, at 14-15. But, of course, background characteristics and policy preferences do not actually align perfectly, and this Section discusses them as separate though related ways in which diversity can be improved.

232. *Id.* at 19.

This result contradicts previously cited findings by Susan Franck on the question of whether the development status of an arbitrator's home state influences decision making. It is worth noting that Waibel and Wu's study covers a significantly larger number of arbitrations than Franck's, 231 to 47, and that unlike Franck's it is not limited to the decisions of presiding arbitrators.[233]

As for career experience, Waibel and Wu find some correlation between a background in private practice and pro-investor votes, but only for party-appointed and not for presiding arbitrators.[234] They do not find significant relationships between voting patterns and whether the arbitrators had government experience or specialized in public international law.[235] The latter result raises the question of whether the perspective more likely to make a difference is one informed by experience working for developing countries in particular, as the next Part addresses further.

Further empirical investigation would be undoubtedly valuable both in confirming tendencies that have already been identified and in searching for other interesting patterns. The evidence is clearer with respect to values and policy preferences than background characteristics. But at a minimum the research generally supports a high-level translation of the literature on judicial decision making to the ITA context. In ITA, as in domestic judiciaries, it matters who the decision makers are and what perspectives they bring to the process.

That conclusion also serves as an initial rebuttal to the formalist view of ITA as a neutral, merits-driven process. On that matter, Donaubauer and his co-authors summarize their study's takeaway as follows:

> If whether investors win or lose in investor-state dispute settlement were dependent merely on the merit of the investor's claim against the respondent state, the composition of the arbitration tribunal would not matter. The prior experience of arbitrators as well as whether they have represented in previous cases relatively more the side of the respondent state or the side of the investor would be of no significance. Alas, our analysis demonstrates that this is not the case.[236]

Section IV.D will raise more fundamental concerns about the way formalists have framed the issues. But the key point for now is that, even approaching

233. *See id.* at 12, 17-18; Franck, *supra* note 19, at 455-56. Franck's 2015 co-authored study also considers the predictive value of the development status of arbitrator home states, with mixed findings. *See* Franck & Wylie, *supra* note 85, at 506-07, 515-16. Moreover, that study does not examine individual arbitrator votes, instead considering only the final decisions of tribunals featuring different compositions. *See id.*

234. *See* Waibel & Wu, *supra* note 48, at 17-18.

235. *See id.* at 19.

236. Donaubauer et al., *supra* note 228, at 910.

the debate on their terms, substantial evidence now undermines their depiction of a system that needs only arbitrator expertise and impartiality to functioning effectively.

C. Diversity's Heightened Importance

The preceding Section provided support for the argument that the research on judicial decision making translates at least generally to the ITA context. This Section explores how three core features of the ITA regime underscore the particular importance of promoting diversity in this setting. The features discussed here are familiar to anyone working in or writing about ITA, but they are important to highlight as part of the diversity discussion.

First, investment treaty arbitrators are frequently charged with interpreting open-ended treaty provisions with minimal guidance, beyond nonbinding precedent. Thus, the policy discretion they must exercise is broad. That is particularly true with respect to the substantive rights included in typical BITs, such as the requirements of fair and equitable treatment and full protection and security, which are typically defined with minimal guidance.[237] For other important issues, such as the meaning of the most favored nation clause, there is more detailed language, but key ambiguities remain.[238] As the next Part discusses further, foundational aspects of the international investment law regime are built on arbitral interpretations that were far from inevitable as a matter of treaty text.

Accordingly, there is ample opportunity for investment treaty arbitrators to import their own policy preferences consciously, if they so choose. And to the extent they aim for a neutral perspective, the influence of implicit cognition mechanisms will be difficult to avoid. With respect to heuristics, despite sometimes being described as experts, investment treaty arbitrators do not have expert intuition. Like domestic courts and especially courts of last resort, ITA tribunals do not receive the prompt feedback necessary to hone their judgment, and any feedback they do receive is likely to be based on policy disagreement. Further, investment treaty arbitrators are likely susceptible to motivated reasoning. Research suggesting that judges can sometimes resist this influence does not extend to the task of deciding difficult legal questions informed by policy consequences. In short, adjudicators are most susceptible to the influence of implicit cognition when exercising policy discretion, and investment treaty arbitrators likely operate in that mode more often than others.

Second, relative to other types of arbitrators, investment treaty

237. *See* DOLZER & SCHREUER, *supra* note 2, at 132-33, 160-61.
238. *See id.* at 206-12.

arbitrators more regularly decide issues that affect nonparties and the public interest. By way of comparison, international commercial arbitration typically concerns "private law claims between private parties in a system that is divorced from any single national political context."[239] Although occasional and limited effects on the larger public are possible, the primary purpose of such arbitrations is still to resolve a private dispute.[240] By contrast, the very structure of ITA involves claims against a host state, the resolution of which necessarily affects its ability to regulate for the public benefit. As the nature of claims has evolved beyond direct expropriations to include challenges to good-faith regulations in the public interest, the potential impact of arbitral decisions on the larger public has likewise expanded.[241]

Third, again as compared to other types of arbitrators, investment treaty arbitrators have a larger impact on the development of the law. As in other types of arbitrations, ITA decisions do not formally bind anyone other than the parties to the dispute.[242] But unlike in international commercial arbitration,[243] ITA tribunals frequently cite past decisions at least as persuasive authority and sometimes more.[244] Over time, certain approaches and principles become effectively settled law.[245] This may be entirely appropriate so long as convergence follows a robust debate.[246] But regardless of one's normative views on the use of precedent in ITA, the prevalence of the practice cannot be denied.[247]

For present purposes, the concern raised by the practice is that each tribunal's decision has the potential to influence the direction of the law beyond the individual case. The question of who participates in the decision-making process, in turn, takes on greater significance. When a single tribunal speaks without input from diverse perspectives, its reasoning may persuade a later tribunal to follow suit. And when the larger pool of arbitrators is similarly homogeneous, groups of tribunals may settle on solutions without adequately considering alternative possibilities or properly balancing

239. Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 KANS. L. REV. 1301, 1308 (2006).

240. *See id.* at 1308-09; *see also id.* at 1331-34 (describing regulatory interests that could be at stake in international commercial arbitration).

241. *See* Antonius R. Hippolyte, *Aspiring for a Constructive TWAIL Approach Towards the International Investment Regime*, *in* INTERNATIONAL INVESTMENT LAW AND DEVELOPMENT: BRIDGING THE GAP 180, 182 (Stephan W. Schill, Christian J. Tams & Rainer Hoffman eds., 2016).

242. *See* STONE SWEET & GRISEL, *supra* note 57, at 119.

243. *See* W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1909 (2010). The difference is likely due to the relatively lower rates of publication and difficulty of accessing awards in international commercial arbitration. *See id.* at 1922-23.

244. *See* STONE SWEET & GRISEL, *supra* note 57, at 152-55.

245. *See id.* at 154-55.

246. *See* Chen, *supra* note 95, at 72-73.

247. *See id.* at 48.

competing interests.

The three concerns discussed in this Section should be considered in combination and not just in isolation. It is not just that tribunals exercise wide policy discretion in interpreting treaty provisions but that they do so on matters of public importance. And it is not just that they address matters of public importance but that their decisions influence the reasoning of future tribunals. The scope of the de facto lawmaking authority of ITA tribunals is immense, and the need to ensure the participation of diverse voices is correspondingly urgent.

D. Responding to the Formalist Defense and Calling for a Shift in Perspective

As summarized earlier, while commentators uniformly identify the legitimacy benefits of increasing diversity, their assessment of its substantive value is more mixed. Those who take a formalist perspective prioritize arbitrator expertise while treating diversity as secondary or describing its substantive value as speculative. This Article argued above that such formalist defenses of the status quo failed on their own terms, given mounting evidence that decision making in ITA is not purely merits based but is influenced by the distinctive perspectives that arbitrators bring to the process. This Section elaborate on two further responses.

First, formalist defenses and the empirical studies they rely on misconstrue the nature of the bias that critics are alleging. The cited studies show that investors do not win more often than states and that developing countries fare about as well as developed countries. As to the former studies, they provide information about whether investors are bringing winnable cases and perhaps suggest that the rules are not being unevenly applied. But they tell us nothing about the fairness of the rules as they have been interpreted, and that has been the main target of the imbalance critique.[248] As to the latter studies, they help rule out any intentional discrimination against developing countries. But even if they are not losing more often, the mere fact that they are more frequently sued means the rules burden them disproportionately.

Moreover, the formalist defenses overlook how decisions granting expansive investor protections create costs for states that are not reflected in win-loss rates, and how those again disproportionately harm developing countries. In particular, the governments of developing countries need more regulatory flexibility because they are more limited in resources and capacity, are more likely to face various crises, and have less developed policy in areas

248. *See* Kidane, *supra* note 67, at 144. Section V.B below elaborates on these issues.

like labor and environment law.[249] Compliance with rules granting strong investor protections is thus more burdensome for such countries. At the same time, developing countries are the least equipped to pay the costs of defending against arbitration claims (particularly when facing well-funded investors) and any damages for which they are found liable.[250] Whether they proceed with regulatory changes or are chilled from doing so, the harm is substantial even if they ultimately prevail or would have done so.[251]

Because the consequences of ITA rules affect developing countries more often and more deeply, the rules can be described as structurally biased even if they appear facially neutral and are being evenly applied.[252] This structural bias critique is mostly sidestepped by the regime's defenders, who fall back on the argument that such constraints are simply part of the deal that the states themselves have struck.[253] But that argument overlooks the core ITA features discussed in the previous Section, namely the significant discretion arbitrators exercise in interpreting treaty provisions and the de facto authority they possess to develop the law. Any imbalance in ITA jurisprudence is directly traceable to the exclusion of diverse perspectives in the pool of arbitrators. In short, when the structural bias and lawmaking authority concerns are examined together, the response to the formalist skepticism about diversity's substantive value becomes clear. Because arbitrators are not merely applying established law but are actually crafting the rules as they go, it matters who the arbitrators are and what perspectives they are bringing.

Identifying this concern about who makes the rules points to a second response to the formalist defenses. Existing studies, whether they find that backgrounds and values matter or not, are singularly focused on votes. Votes are the most measurable expression of a diverse point of view, but

249. *See* RUMANA ISLAM, THE FAIR AND EQUITABLE TREATMENT (FET) STANDARD IN INTERNATIONAL INVESTMENT LAW: DEVELOPING COUNTRIES IN CONTEXT 172-73, 182 (2018).

250. *See* BONNITCHA ET AL., *supra* note 1, at 243; Sonia E. Rolland & David M. Trubek, *Legal Innovation in Investment Law: Rhetoric and Practice in Emerging Countries*, 39 U. PA. J. INT'L L. 356, 362-63 (2017).

251. The extent of this regulatory chill is sometimes disputed, and the existing evidence is mostly anecdotal. *See* BONNITCHA ET AL., *supra* note 1, at 241-42. But it seems fair to say that, to the extent such chill is occurring, it affects lower-income countries more than higher-income countries. *See* Rolland & Trubek, *supra* note 250, at 362-63.

252. *See* Hippolyte, *supra* note 241, at 196 (describing this as a "regime bias" critique).

253. For example, when Judge Brower and Sadie Blanchard dismiss charges of bias, they address only the more overt version and rely on the studies of win-loss rates to refute it. *See* Brower & Blanchard, *supra* note 19, at 709-11. When they do turn to the structural critique, they describe the issue as an interference-with-sovereignty claim and refute it by saying that is what the states signed up for. *See id.* at 720-22. They do not acknowledge that the rules are effectively created by the arbitrators, nor do they directly engage with the critique that the bias comes not from the application but the creation of the rules. The closest they come is arguing that arbitral jurisprudence leaves ample room for regulatory flexibility and thus should not deter sound policymaking. *See id.* at 736-38. Section V.B addresses this point.

they cannot tell the whole story of diversity's substantive impact. To see why, consider first that, when settled law dictates a particular outcome, identical votes may mask underlying disagreement. The absence of more pronounced differences in voting patterns should not be relied on to predict that diversity will have a minimal impact on substance going forward. Arbitrators bringing underrepresented perspectives may have more to contribute in novel areas or if they are given (as this Article argues for below) a mandate to revisit conventional wisdom formed during a period when their input was excluded.

Even more fundamentally, one cannot discern the entirety of an arbitrator's influence by her vote.[254] Two decisions reaching the same outcome by different paths could have dramatically different implications for future disputes. The presence of an arbitrator bringing a novel perspective could mean the difference between one path and another. But if that arbitrator joins a final, unanimous award, that influence would be undetectable in a study of voting patterns.[255]

In short, a shift in perspective is needed because diversity's impact is likely to be missed if we do not broaden our understanding of what that looks like.[256] It is about not just how arbitrators vote, but also what they contribute to the reasoning of a decision and to the larger dialogue about the law beyond the individual case. Part V attempts to demonstrate this less measurable impact by exploring how a lack of diversity has shaped the direction of international investment law in concrete ways. Part VI then proposes practical steps that would both maximize diversity's substantive value and better promote understanding of its importance.

V. ASSESSING THE IMPACT OF DIVERSITY ON ITA JURISPRUDENCE

This Part explores how a lack of diversity has affected ITA jurisprudence in concrete ways. In particular, Part V explains why the overrepresentation of arbitrators from developed countries and backgrounds in private practice has likely contributed to structural biases in the law. And this Part argues that the inclusion of more arbitrators with experience working in and advocating for developing countries may contribute toward producing a more balanced body of principles.

The first Section addresses an initial concern already recognized in the literature about how arbitrators coming from the international commercial

254. *See* Ifill, *supra* note 80, at 52 ("[J]udicial decisionmaking is not just about outcomes; it is also about the *process* of decisionmaking.").

255. *See* Puig, *supra* note 88, at 676 (noting that voting studies would not capture behind-the-scenes compromises).

256. *See* Ifill, *supra* note 80, at 56 (suggesting that "case outcomes are not . . . the appropriate measure of how diversity affects judicial decisionmaking").

arbitration field have imported certain notions over to the ITA context. The second Section turns to the Article's main argument connecting the overrepresentation of arbitrators from developed countries and private practice backgrounds to the imbalanced jurisprudence critics have identified. The third Section sketches some ideas about the different directions the law might take if the pool of arbitrators included more diverse perspectives.

A. The Influence of International Commercial Arbitration

Before turning to the main argument, it is worth noting a related concern that the literature has already recognized about the influence of international commercial arbitration on ITA. Anthea Roberts suggests that the "backgrounds, training, and interests" of arbitrators are likely to affect the paradigms they use to conceptualize the relatively new field of ITA.[257] That conceptual framework, in turn, shapes the analogies they draw on and their unconscious reasoning as they confront new or unresolved issues in ITA.[258] As noted earlier, many investment treaty arbitrators also have experience with international commercial arbitration, while there are comparatively fewer specialists in public international law.[259] That is significant because, in contrast to public law or public international law paradigms, "[t]he commercial arbitration paradigm . . . emphasizes that the investor and host state are disputants subject to 'equality of arms,' which tends to downgrade the relative significance of states and elevate that of investors."[260]

Stephan Schill makes a similar argument, suggesting that "professional background[] and experience will often facilitate a certain mindset or style that is in line with either the public international law or the commercial arbitration archetype."[261] Depending on their backgrounds, arbitrators may rely on different sources or methods of reasoning and interpretation.[262] One current controversy in ITA concerns the extent to which other treaties and regimes are relevant to ITA disputes.[263] Although it is not a clear division, arbitrators who are more open to public international law sources are likely to be more sympathetic to host states, while those who are not will tend to be less so. That is because public international law issues tend to arise when states cite other legal obligations—in human rights or environmental

257. Roberts, *supra* note 56, at 54.
258. *See id.* at 56.
259. *See supra* notes 56-58 and accompanying text.
260. Roberts, *supra* note 56, at 54.
261. Schill, *supra* note 56, at 889.
262. *See id.*
263. *See* BONNITCHA ET AL., *supra* note 1, at 251-53.

treaties, for example—as a defense or explanation for their actions.[264]

In short, the influence of international commercial arbitration has likely contributed to some part of the perceived skew in ITA jurisprudence in favor of investors. To be clear, that influence has not gone unchecked, as commentators and participants in the regime have looked to other paradigms to shape the direction of ITA's evolution.[265] But the fact that the commercial paradigm was influential early on means that its proponents were able to set the terms of the debate and establish a point of departure.[266] Moreover, it is worth pointing out that the new paradigms being proposed as alternatives are grounded in Western concepts.[267] Thus, they may have a moderating influence, but they still reflect the regime's fundamental insularity.

B. The Scope of Investor Protections

Picking up where the previous Section left off, Section V.B turns now to the concerns raised by the overrepresentation of arbitrators from developed countries and private practice backgrounds. As acknowledged earlier, others have developed the critique of structural bias at length. This Article's particular aim is to examine the issues through the lens of diversity to shed new light on the debate and perhaps provoke some reexamination by those who resist the critique. As a caveat, the goal is not to establish causation or even correlation with respect to any specific decisions noted below. Instead, this Article contends only that we can connect at a high level the general diversity patterns summarized earlier with the shape the law has taken.

Investment treaties have been described as a "grand bargain," in which host states promise to protect foreign investors in exchange for increased capital flows.[268] The major ongoing controversy in the field is whether protections have gone too far. In particular, investment treaty claims today are not limited to abusive or bad-faith host state conduct, but instead involve challenges to regulations in the public interest that may only incidentally affect the value of foreign investment.[269] Thus, protecting investors in this

264. *See* Roberts, *supra* note 56, at 74 ("The public international law paradigm tends to privilege the role of states because it focuses on the system's treaty basis and locates the field within a broader corpus of international rules, paving the way for principles from trade, human rights, and environmental law.").

265. *See id.* at 63-74.

266. *See id.* at 75-77.

267. *See id.* at 68 (noting that commentators developing the public law alternative draw primarily on ideas from Western legal systems).

268. Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 77 (2005).

269. *See* Richard C. Chen, *A Contractual Approach to Investor-State Regulatory Disputes*, 40 YALE J. INT'L L. 295, 296 (2015).

manner necessarily comes at the expense of host state regulatory flexibility. And although the trends are evolving, most foreign investors are from developed countries, while most respondents are developing countries.[270] That means any pro-investor bent in the law works to the advantage of the former and the disadvantage of the latter.

If the treaties themselves clearly provided for such expansive liability, states would have no basis to complain. But it was actually investment treaty arbitrators who interpreted open-ended treaty language to develop the law in this direction.[271] Thus, the question that warrants closer scrutiny is how a lack of diversity in the ITA regime may have shaped the law in this manner. In particular, given that defining the scope of investor protections requires balancing investor and host state concerns, it is important to consider how a homogeneous pool of arbitrators may have underappreciated the latter.

That arbitrators bring certain conceptions of investor rights and regulatory power is plainly visible in their decisions. Consider, for example, how the tribunals that developed the broad understanding of the FET provision justified their interpretation. The tribunal in *Azurix v. Argentine Republic* explained:

> The standards of conduct agreed by the parties to a BIT presuppose a favorable disposition towards foreign investment, in fact, a pro-active behavior of the State to encourage and protect it. To encourage and protect investment is the purpose of the BIT. It would be incoherent with such purpose and the expectations created by such a document to consider that a party to the BIT has breached the obligation of fair and equitable treatment only when it has acted in bad faith or its conduct can be qualified as outrageous or egregious.[272]

Defining the purpose of investment treaties in this way is not inevitable, but rather reflects a policy view that increasing investment is inherently valuable and will, on its own, produce benefits for the host state.[273] It is true that tribunals were able to point to language in treaty preambles to support their reasoning.[274] But it is nonetheless telling that they focused so heavily on investor concerns in conceptualizing the treaty's purpose, which would lead naturally to an expansive definition of investor protections at the expense

270. *See* UNCTAD, IPFSD, *supra* note 49, at 75.

271. *See* BONNITCHA ET AL., *supra* note 1, at 108-09.

272. Azurix Corp. v. Arg. Republic, ICSID Case No. ARB/01/12, Award, ¶ 372 (July 14, 2006).

273. *See* Nicolás M. Perrone, *The Emerging Global Right to Investment: Understanding the Reasoning Behind Foreign Investor Rights*, 8 J. INT'L DISP. SETTLEMENT 673 (2017) ("[T]he premise is that maximizing wealth through foreign investment benefits everybody: host states, local actors, and foreign investors.").

274. *See* Chen, *supra* note 269, at 305-06.

of host state regulatory needs.[275]

Such policy views not only influence the conscious reasoning of arbitrators, but they, along with background characteristics, also serve to shape their implicit cognition. For the large majority of investment treaty arbitrators that come disproportionately from developed countries, and the even larger majority who were educated in such countries,[276] their understandings of how regulation interacts with investment have been shaped by the larger environment in which they worked. Likewise, many arbitrators have professional experience representing the interests of business clients, while relatively few have worked for governments, and, by extrapolation, undoubtedly fewer still have worked specifically for the governments of developing countries.[277]

For arbitrators with the prototypical background, it would be naturally easier to understand the perspective of an investor operating in an uncertain environment than that of a host state responding to complex policy challenges. In trying to balance competing interests and craft socially optimal legal principles, such arbitrators may tend to overvalue the investors' need for stability, having experienced it firsthand, and undervalue the host states' need for flexibility, having no similarly direct insight into that perspective.

With respect to particular mechanisms, the availability heuristic may cause such arbitrators, relying on past experiences, to overestimate the frequency of unfair treatment of investors and thus to conclude that a broad, inclusive test is needed.[278] Similarly, such arbitrators may be unconsciously motivated by a pro-business ideology, or a more intangible self-identification with business clients, to interpret ambiguous legal materials as favoring expansive investor protections. Further, Puig's network analysis summarized earlier suggests that elite arbitrators as a group may be even more closed off to outside influence than other collective bodies.[279] Thus, their insulated environment makes them vulnerable to groupthink and group polarization.

The result of these influences is a jurisprudence that many have criticized as skewed in favor of investors. For example, the most cited definition of FET comes from the tribunal in *Tecmed v. Mexico*:

> The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations

275. *See id.*

276. *See supra* notes 48-52 and accompanying text.

277. *See supra* notes 53-54 and accompanying text.

278. *See supra* notes 148-155 and accompanying text.

279. *See* Puig, *supra* note 8, at 418 (describing elite arbitrators as "a small, dense and interconnected group, where members at the core are unlikely to escape the observation of other members of the core, but may remain insulated from outside influence").

> with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations.[280]

Subsequent tribunals relied on *Tecmed* to find liability based on the host states' inconsistent actions, emphasizing the investors' need for stability.[281] One even went so far as to impose a duty on the host state's part to act proactively to promote investment, finding that "a passive behavior of the State or avoidance of prejudicial conduct to the investors" was insufficient to constitute fair and equitable treatment.[282]

Just as commentators pushed back on the international commercial arbitration paradigm, tribunals moderated their approach to FET.[283] In particular, some noted that "the requirement of stability is not absolute and does not affect the state's right to exercise its sovereign power to legislate and to adapt its legal system to changing circumstances."[284] The tribunals often tied their reasoning to a revised and more nuanced understanding of treaty purpose. For example, in *Lemire v. Ukraine*, the tribunal reasoned that "the object and purpose of the Treaty is not to protect foreign investments *per se*, but as an aid to the development of the domestic economy."[285] Recognizing that aspect of the treaty's purpose meant taking proper account of the host state's right to "adopt measures for the protection of what as a sovereign it perceives to be its public interest."[286]

Defenders of the status quo point to such examples as evidence that tribunals have developed a balanced perspective that affords appropriate deference to host states' regulatory decisions.[287] They likewise cite statistics suggesting that investors do not win more often than states.[288] However, these efforts to moderate ITA jurisprudence do not negate the structural bias critique. For one thing, in a system that lacks binding precedent, states cannot assume that any particular tribunal will be deferential and instead

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280. Tecnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶ 154 (May 29, 2003).

281. *See* DOLZER & SCHREUER, *supra* note 2, at 146-47 (summarizing CMS Gas Transmission Co. v. Republic of Arg., ICSID Case No. ARB/01/8, Award (May 12, 2005), and Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Award (July 1, 2004)).

282. MTD Equity Sdn. Bhd v. Republic of Chile, ICSID Case No. ARB/01/7, Award, ¶ 113 (May 25, 2004).

283. One possible explanation for both moves is that developed countries began finding themselves on the receiving end of arbitration claims. *See* Chen, *supra* note 269, at 319.

284. *See* DOLZER & SCHREUER, *supra* note 2, at 148 (citing examples of this view).

285. Lemire v. Ukr., ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 273 (Jan. 14, 2010).

286. *Id.*

287. *See* Brower & Blanchard, *supra* note 19, at 737-48.

288. *See id.* at 710.

must take seriously the possibility that a stricter definition, like *Tecmed*'s, will be applied. Moreover, even more moderate approaches, including those that have gained a consensus, remain problematic. For example, tribunals coalesced around a view that the FET provision protects investors' "legitimate expectations."[289] Under such a doctrine, even regulations enacted in good faith can trigger host state liability, which means that concerns about regulatory chill persist.[290]

Finally, another way in which tribunals moderated their approach to investor protection was to draw on European doctrines like proportionality and the margin of appreciation.[291] Here, as with the reliance on Western concepts to develop alternatives to the international commercial arbitration paradigm, the lack of diverse perspectives has limited the ideas available for resolving dilemmas in ITA.[292] This compromise may have struck an appropriate balance of concerns from the standpoint of developed countries, whose regulatory needs are more predictable and which can afford to defend against claims in any event. But for developing countries, such moderating doctrines do not meaningfully change the calculus, given the uncertainty and subjectivity involved in their application.

In sum, international investment law involves a fundamental tradeoff between the investors' need for stability to plan effectively and the host states' need for flexibility to regulate effectively. When most arbitrators bring perspectives that better understand one side of that balance, it should not be surprising that the jurisprudence they produce is skewed in that direction. The hope here is that connecting the dots in this way strengthens the plausibility of the structural bias critique and, by extension, the argument for diversity's substantive value.

C. What Would Diversity Add?

This Section shifts from identifying the problems created by the existing homogeneous pool of arbitrators to exploring the potential benefits of diversifying that pool. There are many dimensions of diversity that would add value to the regime.[293] The Section focuses on the importance of including more voices from developing countries, and in particular individuals who have worked in or advocated for the governments of developing countries. Such individuals would have the values and

289. *See* Chen, *supra* note 95, at 86-87.

290. *See id.* at 87.

291. *See id.* at 90.

292. *See* Perrone, *supra* note 273 ("[T]he use of proportionality in investment awards does not amount to a paradigmatic shift in the purpose of foreign investor rights. Proportionality operates within the dominant interpretative framework.").

293. *See* Bjorklund et al., *supra* note 61, at 432 (noting other characteristics, such as "sector-based expertise," that might be beneficial).

experiences to provide the most direct counterbalance to the perspectives that have dominated the arbitral dialogue to date. Below, the Section draws on commentary from scholars from and advocates for developing countries to sketch some ideas about how these potential new voices might rethink aspects of international investment law.

Before turning to the substantive contributions that diverse arbitrators could make, two more process-oriented points should be noted. First, it is worth emphasizing that the causal mechanisms discussed in Section III.B may shape even ordinary tasks of adjudication. Setting aside how investment treaty arbitrators make policy and contribute to a wider dialogue, the basic job of deciding cases requires applying law to facts as well as determining the facts themselves. The application of a standard like FET, no matter how it is defined, will always require some judgment calls, which are likely to be influenced by arbitrator backgrounds and values.[294] And that influence will only grow as the standards call for normative reasoning about whether regulations are proportionate and expectations are legitimate.[295] Thus, adding diverse perspectives would make a difference in specific disputes even if the legal principles remained relatively unchanged.

Second, a question may be raised as to how much difference new voices can make if they are only one person on a panel of three. As discussed above in Section III.C, one voice can in fact change the character of a deliberation and thereby influence the outcome or reasoning of a decision. Moreover, even if the two fellow tribunal members are not persuaded, the arbitrator can write a separate opinion in the hopes of influencing future tribunals. Of course, it is true that influence is, in part, a numbers game, but each new voice at least helps to enrich the dialogue. The next Part discusses these issues further, exploring how practices might be revised to take fuller advantage of diversity's substantive value.

Turning to potential substantive contributions, consider first how developing country scholars and advocates approach the problem of imbalance. As noted earlier, ITA tribunals have already begun moderating their analysis, but their efforts reveal a limited perspective influenced by developed countries concerned about their own liability. For developing countries, scaling back the doctrine of legitimate expectations or adding a layer of review for proportionality does not fully resolve concerns about regulatory chill. Examining the issue from their perspective reveals that the chilling effect arises from the uncertainty that persists even with a more moderate approach.

A team of authors organized by the Columbia Center on Sustainable

294. *See* BONNITCHA ET AL., *supra* note 1, at 256. Moreover, as Won Kidane has shown, the cross-cultural aspect of international disputes makes it that much more likely that those with varied perspectives will assess the facts differently. *See* KIDANE, *supra* note 67, at 286.

295. *See supra* notes 289-291 and accompanying text.

Investment (CCSI) summarizes the fundamental problem in this way:

> Given the vague nature of the words "fair" and "equitable," and the varying interpretations given to the FET concept by tribunals, it is exceedingly difficult for governments and others to know what the standard requires or when it has been breached. This uncertainty, in turn, can have negative impacts including over-deterring legitimate regulatory conduct, and generating unnecessary and undesirable litigation.[296]

A variety of proposals to address this uncertainty have been made. The CCSI team suggests removing the FET provision entirely,[297] and some states, including Brazil and South Africa, have in fact excluded FET from their recent BIT's.[298] Citing similar concerns, Nicolás Perrone proposes eliminating the doctrine of legitimate expectations, which could be accomplished through tribunal interpretation.[299] Such a revision, if endorsed broadly enough, would meaningfully reduce regulatory chill by removing (and not merely scaling back) the most open-ended basis for liability.[300]

Perrone also suggests broadening the FET analysis to consider "local expectations" within the host state, instead of exclusively weighing the economic reliance interests of investors.[301] Similarly, Rumana Islam argues for a "need to reconceptualize the FET standard" so that the specific, common challenges that developing countries face become standard considerations.[302] That includes "factors such as limited resources and lack of infrastructure, technological support and administrative capabilities, as well as the struggles related to extreme circumstances such as political instability, conflict and its aftermath, social unrest, social and political transitions and economic crises."[303] For both Perrone and Islam, the key is that developing country concerns must be expressly incorporated as part of the analysis. Compared to the recalibration that some tribunals have announced in more abstract terms, such an express recognition of concrete factors may send a clearer signal that regulatory space will be respected.

Apart from distinctive takes on the frequently debated imbalance

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296. EMMA AISBETT ET AL., RETHINKING INTERNATIONAL INVESTMENT GOVERNANCE: PRINCIPLES FOR THE 21ST CENTURY 29 (2018).

297. *See id.*

298. *See* Fabio Morosini & Michelle Ratton Sanchez Badin, *Reconceptualizing International Investment Law from the Global South: An Introduction*, *in* RECONCEPTUALIZING INTERNATIONAL INVESTMENT LAW FROM THE GLOBAL SOUTH 1, 29 (Fabio Morosini & Michelle Ratton Sanchez Badin eds., 2018). Brazil only recently began signing investment treaties and excluded FET from the outset. *See id.* at 18-19.

299. *See* Perrone, *supra* note 273.

300. UNCTAD, IPFSD, *supra* note 49, at 97.

301. *See* Perrone, *supra* note 273.

302. *See* ISLAM, *supra* note 249, at 205.

303. *Id.*

concern, developing country scholars and advocates are also currently engaged in a more fundamental reimagining of the international investment law regime. In particular, several commentators argue for realigning international investment law with sustainable development priorities—at a minimum, ensuring that international investment law does not pose an obstacle, and ideally calibrating it to promote synergies.[304] Many of these ideas would have to be negotiated as part of new or amended treaties, such as the possibility of imposing obligations on investors.[305] But at least some proposals contain insights that could be incorporated into the analysis of existing treaty provisions. For example, even if investor responsibilities are not included in most existing treaties, arbitrators could decide to consider an investor's wrongdoing as part of a more holistic analysis of an FET claim.[306]

Similarly, developing country advocates have proposed limiting protections to investments that contribute to the host state's economic development and excluding categories of assets that are unlikely to do so.[307] Under the ICSID Convention, there is a live controversy about what counts as an "investment" to support jurisdiction.[308] Given that the ICSID Convention does not define the term and tribunals already employ tests that are not grounded in the treaty text,[309] they could revise their approach to address the policy concerns raised by developing countries. Tribunals have in fact experimented with making "contribution to the development of the host state" a factor in defining covered investments.[310] But this factor is considered controversial because it introduces uncertainty and subjectivity into the analysis.[311] While such concerns are fair to raise, states object to a similar uncertainty and subjectivity about the scope of investor protections. To the extent tribunals afford less weight to the latter, it is a notable illustration of how a lack of diversity has skewed their vision.

The preceding discussion about reform proposals raises the question of whether more state involvement is the better answer to the concerns identified. Indeed, increased diversity should be only one part of a larger strategy, but it will be a necessary component at least so long as ITA itself has not been discarded. First, any treaty redesign requires two or more

304. *See, e.g.*, AISBETT ET AL., *supra* note 296, at 87-88; UNCTAD, IPFSD, *supra* note 49, at 6.

305. *See* AISBETT ET AL., *supra* note 296, at 107; UNCTAD, IPFSD, *supra* note 49, at 77.

306. *See* AISBETT ET AL., *supra* note 296, at 109; UNCTAD, IPFSD, *supra* note 49, at 109-10.

307. *See* AISBETT ET AL., *supra* note 296, at 93-94; UNCTAD, IPFSD, *supra* note 49, at 93. Some states, such as India, have already moved in this direction. *See* AISBETT ET AL., *supra* note 296, at 94.

308. *See* Stratos Pahis, *Investment Misconceived: The Investment-Commerce Distinction in International Investment Law*, 45 YALE J. INT'L L. 69, 72 (2019).

309. *See id.* at 72-73. The applicable BIT may contain further limitations, but under the approach most tribunals employ, ICSID's definition provides the outer limit of jurisdiction. *See id.* at 81.

310. DOLZER & SCHREUER, *supra* note 2, at 75.

311. *See id.*

willing partners, and change has been slow at least in part because developing countries negotiating with developed countries lack the bargaining power to obtain more favorable treaty terms.[312] Second, existing treaties built on earlier templates will remain in effect for the foreseeable future. Third, even as redesigned treaties take effect, there will inevitably still be discretion involved in interpreting them. Fourth, and finally, arbitral practice could potentially inform treaty negotiations, whether by proposing new approaches or underscoring the deficiencies of existing ones.[313] For all these reasons, promoting diversity should remain a priority in any reform efforts.

The ideas discussed in this Section are meant only to be a sketch of possible paths that international investment law could take with the contribution of more diverse perspectives. The literature exploring potential such contributions is growing as scholars begin to document the innovative ideas emerging from the Global South.[314] To be clear, the intention here is not to endorse any particular proposal discussed or suggest that arbitrators from developed countries hold the key to the right answers. Acting alone, such arbitrators influenced by their own backgrounds and values might swing the law too far in the other direction. The Article's claim throughout has simply been that adding their voices to the current mix, dominated as it is by investor-friendly perspectives, has the potential to produce solutions that more effectively balance the fundamental values at stake.

VI. IMPLICATIONS FOR FUTURE PRACTICE

This Part offers three proposals for how participants in the ITA regime can take better advantage of diversity's substantive value. Others have suggested reforms to promote diversity more generally, and many of those are worth pursuing as well.[315] Part VI's focus is on ensuring that the expanded pool includes people with new and valuable ideas and that their contributions are given maximum consideration.

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312. *See* Wolfgang Alschner, *The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality*, 42 YALE J. INT'L L. 1, 40 (2017).

313. *See* Chen, *supra* note 95, at 52 (noting that tribunal decisions may contribute to a larger public dialogue about the content of investment treaties). Meredith Kolsky Lewis notes a similar potential link between WTO opinions (specifically dissents) and reform efforts. *See* Meredith Kolsky Lewis, *The Lack of Dissent in WTO Dispute Settlement*, 9 J. INT'L ECON. L. 895, 927-28 (2006). Section VI.B below addresses the role of dissents and concurrences.

314. *See, e.g.*, Morosini & Sanchez Badin, *supra* note 298, at 1 (introducing an edited volume on reconceptualizing international investment law from Global South perspectives). *See generally* Olabisi D. Akinkugbe, *Africanization and the Reform of International Investment Law*, 53 CASE W. RES. J. INT'L L. (forthcoming 2021), https://ssrn.com/abstract=3766357 (describing reform efforts by African states and their implications for the global agenda).

315. *See, e.g.*, Bjorklund et al., *supra* note 61, at 430-34 (proposing reforms to the appointment process as well as initiatives to train diverse individuals in arbitration).

A. Appointment Strategy

As described earlier, there is anecdotal evidence suggesting that developing countries do not have a clear strategy underlying their appointments, and to the extent they tend to draw from the existing club of elite arbitrators, that strategy is flawed.[316] Even when countries are savvy enough to appoint arbitrators who tend to be friendly to respondent state interests, their perspectives are necessarily limited by their experiences. Developing countries should look beyond the traditional pool to appoint arbitrators that can bring genuinely fresh perspectives and, over time, help restore balance and set international investment law on a more sustainable course.

Where should they look for such prospects? Although the previously discussed empirical studies measured the numbers of arbitrators who are from developing countries, a focus on diversity's substantive value points to a more targeted approach. The goal should be to appoint individuals who have worked in or advocated on behalf of developing countries. Many such people will be from developing countries, but the more important qualifications include a track record of engaging with state concerns on a deep level and a demonstrated ability to generate or give voice to new ideas about international investment law. Notably, Brigitte Stern, the most well-known state-friendly arbitrator, has herself asked the question, "why should arbitrators not come from the ranks of NGOs?"[317]

Sherrilyn Ifill makes a similar argument with respect to racial diversity in the American judiciary. While recognizing the symbolic value of having more African Americans on the bench, she argues that maximizing diversity's substantive value requires finding "candidates who are both capable of and willing to include outsider narratives to judicial decision-making."[318] She suggests that not every minority candidate is willing and able to perform the latter function, and conversely, at least some white candidates might be.[319] Likewise, Jason Iuliano and Avery Stewart distinguish between "surface-level diversity," which is focused on demographic differences, and "deep-level diversity," which considers characteristics such as "values, life experiences, and education backgrounds."[320] While both types of diversity have benefits and they sometimes overlap, it is deep-level diversity that actually "enhances the

316. *See supra* notes 66-69 and accompanying text.

317. Brigitte Stern, *The Future of International Investment Law: A Balance Between the Protection of Investors and the States' Capacity to Regulate*, *in* THE EVOLVING INTERNATIONAL INVESTMENT REGIME 174, 186 (José E. Alvarez et al. eds., 2011).

318. Ifill, *supra* note 207, at 488.

319. *See id.*

320. Jason Iuliano & Avery Stewart, *The New Diversity Crisis in the Federal Judiciary*, 84 TENN. L. REV. 248, 249 (2016).

decision-making process."[321] More attention to promoting deep-level diversity specifically is therefore warranted.[322]

Applying these insights to the ITA context, the concern would be that looking solely at the nationality of arbitrators would mistake surface-level for deep-level diversity. That is particularly true when most arbitrators from developing countries are educated in developed countries and are incentivized to adopt the ideologies of elite arbitrators to gain acceptance to the selective club.[323] The process should focus more on the values that prospective arbitrators have espoused, the environments in which they have trained, and the roles they have performed. Arbitrators who bring these more deeply informed perspectives will be both better poised to understand the distinctive challenges that developing countries face and better equipped to assist in crafting principles that take those concerns into account.

The merits of this proposed strategy are clearest from a long-term viewpoint. The full benefits will take time as new arbitrators in this mold gain stature and their ideas gradually influence the dialogue. But one might object that individual states cannot be expected to sacrifice their short-term interests in winning the immediate case at hand to pursue this collective, long-term goal.[324] In that case, it may be that the only viable path to reform will involve broader changes to the method of appointing arbitrators, such as those currently being discussed by the UNCITRAL Working Group III.[325]

But assuming such changes are not on the immediate horizon, a further response to the concern about short-term incentives is that a new arbitrator with the suggested characteristics could potentially represent a developing country's interests in deliberations more effectively. Among the more experienced alternatives, the choice is between (a) an arbitrator who consistently votes for respondents and whose views may therefore be discounted and (b) an arbitrator with a balanced track record whose vote is therefore unpredictable. Compared to these alternatives, the advantage of new arbitrators with firsthand experience working for or on behalf of developing countries is that they can provide genuinely new information and insights. Their contributions to the deliberations may therefore be more

321. *Id.* at 249.

322. *See id.* at 268.

323. *See* Franck, *supra* note 19, at 479 ("It may be that arbitrators from the developing world (particularly those seeking repeat appointments) believe that rulings in favor of the developed world are the price of admission to the 'club.'"); *cf.* Sylvia R. Lazos Vargas, *Only Skin Deep?: The Cost of Partisan Politics on Minority Diversity of the Federal Bench*, 83 IND. L.J. 1423, 1474 (2008) (suggesting that for judicial appointments in the United States, "[t]he safe nominee is a minority who shares views with his or her white counterparts").

324. *See* Pilawa, *supra* note 12, at 417-18 (describing the trade-off between pursuing diversity goals and maximizing chances for success in the individual case).

325. *See* UNCITRAL Working Group III, Possible Reform of ISDS, *supra* note 15, ¶¶ 17-40.

persuasive than those that merely rehash old arguments.[326]

Finally, for this revised appointment strategy to have its maximum impact, there are complementary steps that other actors would ideally take. In particular, as other commentators have suggested, deliberations would be more meaningful if presiding arbitrators had records indicating open-mindedness, and ICSID can do its part by limiting its appointments to those that have not previously been appointed by parties, or at least not overwhelmingly by one side.[327] Likewise, given Puig's findings about how the existing club of elite arbitrators tends to be closed off to outside influence, a cultural shift may be needed.[328] Members of that group should look for ways to engage more with the critics of ITA in, for example, academic writings and professional conferences. These steps to promote open-mindedness and balance should be uncontroversial because they would simultaneously address *perceptions* of bias, which even the regime's defenders acknowledge as a concern. In any case, these changes are not prerequisites to this Section's main proposal directed to the developing countries themselves, but they would help ensure that the contributions of new voices are fully considered.

B. Separate Opinions

A focus on diversity's substantive value also has implications for how arbitrators should conduct themselves once they have been appointed. There is an active debate about whether investment treaty arbitrators are dissenting too often or too infrequently. Those who favor increasing the practice argue that it may enhance the regime's legitimacy "because transparency provides greater assurances of a fair and equitable process," while critics contend that "separate writings undermine the authority of investment arbitration awards."[329] Without attempting to resolve those or other competing considerations, this Section suggests that a focus on maximizing the substantive impact of diversity provides one reason to favor more liberal use of dissents as well as concurrences.

This argument is tailored to the particular context of a system that lacks

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326. *See* Albert Jan van den Berg, *Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 821, 829-30 (Mahnoush H. Arsanjani et al. eds., 2010) (noting that the "deliberative process breaks down" when arbitrators begin acting like advocates, but that genuine exchange can be productive).

327. *See* Donaubauer et al., *supra* note 228, at 911 (proposing "the creation of a pool of potential candidates who can function as presidents drawn from those and only those who have not systematically over-represented investors or respondent states in previous cases").

328. *See supra* note 279 and accompanying text.

329. Pedro J. Martinez-Fraga & Harout Jack Samra, *A Defense of Dissents in Investment Arbitration*, 43 U. MIAMI INTER-AM. L. REV. 445, 463-64 (2012).

binding precedent but in which tribunals routinely cite past decisions. Consider first the role of separate opinions in such a system. A well-reasoned concurrence or dissent could well be more persuasive than a majority decision that happened to command one additional vote.[330] An arbitrator with new ideas and solutions can therefore contribute meaningfully to the dialogue even if she is writing only for herself.[331] That mindset is particularly appropriate given the current state of the dialogue, in which dominant views have gone relatively unchecked for a long period in shaping conventional wisdom.[332]

On the flipside, the main alternative of seeking concessions before joining a compromise decision produces minimal benefits. In a system with a doctrine of stare decisis, a judge may want to obtain such concessions to preserve flexibility or reduce problematic consequences for future cases. But in the ITA context, where there is no hierarchy or stare decisis, any prospective harm to future cases is attenuated and speculative. Likewise, even concessions that are affirmatively valuable and not just aimed at preventing harm are unlikely to move the needle so long as the compromise reasoning remains with the bounds of mainstream jurisprudence. In such circumstances, the arbitrator may still contribute more by writing separately to lay out her distinctive vision in full.[333]

Of course, none of this is to suggest that compromise is never appropriate. The earlier discussion emphasized the goal of restoring balance, which implies that some effort to compromise may be necessary. And the ultimate goal is to actually implement ideas in final awards and not merely to develop them in separate opinions as some kind of shadow jurisprudence. The key point for now is just to underscore that as the tradeoffs of separate opinions are assessed, the role that they play in maximizing the impact of diverse perspectives should not be overlooked.

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330. For a description of how one influential dissent persuaded a later tribunal majority, see Lucas Bastin & Aimee-Jane Lee, *Venoklim Holding B.V. v. Bolivarian Republic of Venezuela*, 109 AM. J. INT'L L. 858, 861, 864 (2015). The majority in *Venoklim* held that it lacked jurisdiction under the ICSID Convention because the claimant, though incorporated in another country, was effectively controlled by Venezuelans. *See id.* at 861. In emphasizing ICSID's purpose of encouraging *international* investment and declining to "privilege form over reality," *id.* at 864, the decision drew on the reasoning of Prosper Weil's dissent in Tokios Tokelés v. Ukr., ICSID Case No. ARB/02/18, Decision on Jurisdiction (Apr. 29, 2004).

331. *See* Martinez-Fraga & Samra, *supra* note 329, at 474-75. It has further been suggested that future tribunals can more readily invoke the majority position as persuasive authority when they can see and consider the opposing view expressed in a well-reasoned dissent. *See id.* For similar arguments made regarding separate opinions in the WTO, see Lewis, *supra* note 313, at 917-19.

332. In the WTO context, Lewis notes that developing countries pushed proposals to encourage more dissents, arguing that "development-oriented positions are not adequately expressed in monolithic decisions and that an increase in dissents would bring their issues more to the forefront and public eye." Lewis, *supra* note 313, at 925.

333. *Cf. id.* at 922-23 (noting the benefits of writing separately instead of seeking concessions from the majority in the WTO context).

C. Reexamining Settled Law

There are good reasons for tribunals to defer to consensus views established in past decisions, so long as a robust dialogue preceded any convergence.[334] But viewing the practice of ITA precedent through the lens of diversity suggests an important caveat. To the extent that jurisprudence seems settled on various issues, it should be remembered that settlement took place without adequate input from diverse perspectives. Thus, as new voices join the dialogue, they should not hesitate to rethink conventional wisdom, and others should give their ideas due consideration.

Similar arguments have been made in the context of customary international law. As B. S. Chimni explains, the basic methods and assumptions of customary international law were established "in a particular cultural and political milieu that excluded reference to the practice of non-European states which were classified as 'uncivilized.'"[335] The currently prevailing norms, built on such problematic foundations, continue to reflect the interests of powerful states, and the existing formation process leaves little room for developing countries to play a role in reshaping them.[336] Chimni calls for reexamination under a more deliberative, inclusive approach that is skeptical of purported customary norms not supported by "a predominant majority of weak states" and that ratifies those that reflect a reasoned analysis of "common interests."[337]

By the same token, arbitrators bringing new perspectives into the ITA process should not feel burdened by the weight of existing precedent. Recognizing the lack of diversity in the voices that shaped existing jurisprudence, such arbitrators should feel empowered to reexamine even the most fundamental principles and make their best arguments for new pathways. While the injection of novel ideas may exacerbate existing concerns about inconsistency, the goal is to achieve consensus around revised principles that will better support the ITA regime's long-term viability.

VII. CONCLUSION

This Article has argued that a more diverse pool of investment treaty arbitrators will make better decisions that more effectively balance the competing interests and values at stake. Extensive interdisciplinary research finds that backgrounds and values influence how adjudicators make

334. *See* Chen, *supra* note 95, at 72-73.

335. B. S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM. J. INT'L L. 1, 17 (2018).

336. *See id.* at 27.

337. *Id.* at 38.

decisions, and that diverse groups make better decisions than homogeneous ones. Examining the available studies on ITA and the regime's distinctive features suggests that diversity's substantive value not only applies to this context, but does so with heightened force.

Even those who defend the existing system's neutrality acknowledge that increased diversity would be beneficial from a legitimacy standpoint. But by emphasizing the substantive component that is sometimes downplayed or overlooked, this Article helps to clarify precisely what is at stake. Promoting diversity is not just about shoring up the system against those who might perceive it as unfair. It is about welcoming underrepresented perspectives that may contribute to reshaping international investment law in fundamental ways. Likewise, this Article shows that if substantive contributions are the goal, then the system needs to bring in arbitrators who are willing and able to offer new ideas and to promote a robust dialogue among open minds.

This Article has also tried to use the question of diversity's substantive value as a way to bridge an impasse in the debate between defenders of the status quo and the regime's harshest critics. The former tend to misconstrue the bias critique and declare the system to be neutral based on even win-loss rates. But once the lopsided pool of arbitrators and the substantial policy discretion they exercise are recognized, the likelihood of at least some substantive imbalance is difficult to deny.

With those concerns in mind, the path forward seems clear. Those who defend the status quo are not wrong to care about the regime's legitimacy, but if they are committed to its long-term viability, they should look beyond more superficial concerns and reforms. When efforts to improve diversity emphasize its substantive component, legitimacy is not just simultaneously enhanced, but might be exponentially so. That is because the pool of arbitrators would then reflect not just demographic diversity, but the full range of perspectives of those affected by international investment law. Capitalizing on diversity's substantive value gives the ITA regime its best chance of moving forward with wider and deeper levels of support.