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Lehmann; Anne Van Aaken, *The Diversity Challenge:  
Exploring the Invisible College of International  
Arbitration*, 53 Colum. J. Transnat'l L. 429 (2015)

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## Articles

# The Diversity Challenge: Exploring the “Invisible College” of International Arbitration

SUSAN D. FRANCK, JAMES FRED A, KELLEN LAVIN, TOBIAS LEHMANN  
& ANNE VAN AAKEN\*

*As diversity can affect the perceived legitimacy of a  
state’s dispute resolution system and the quality of*

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*judicial decisions, diversity levels in the national bench and bar have been an area of transnational concern. By contrast, little is known about diversity of adjudicators and counsel in international arbitration. With a lack of accurate, complete, and publicly available data about international arbitrators and practitioners, speculation about membership in the "invisible college" of international arbitration abounds. Using data from a survey of attendees at the prestigious and elite biennial Congress of the International Council for Commercial Arbitration permitted one glimpse into the membership of the international arbitration community. Although defining the international arbitration community is challenging, rather than leave the "invisible college" unexamined, this Article offers one systematic glimpse into the global elites of international arbitration using data from 413 subjects who served as counsel and 262 who acted as arbitrators (including 67 investment treaty arbitrators). The median international arbitrator was a fifty-three year old man who was a national of a developed state reporting ten arbitral appointments; and the median counsel was a forty-six year old man who was a national of a developed state and had served as counsel in fifteen arbitrations. In addition: (1) 17.6% of the arbitrators were women, and there was a significant age difference such that male arbitrators were approximately ten years older than women; (2) for those acting as international arbitrators, we could not identify a significant difference in the number of appointments women and men obtained; (3) depending upon how development status was defined, developing world arbitrators accounted for fifteen to twenty percent of arbitrators; and (4) for all measures used to analyze development status, arbitrators from the developing world received a statistically lower number of appointments than their developed world counterparts. Recognizing the data revealed diversity in international arbitration is a complex phenomenon, the data nevertheless supported, rather than disproved, claims that international arbitration is a relatively homogenous group. Acknowledging that international arbitration may improve over time and diversity issues challenge other forms of dispute resolution, diversity levels in*

*international arbitration were somewhat lower than in several national court systems but were generally reflective of diversity levels in other international courts and tribunals. The international arbitration community seems aware of the distortions. For all subjects, 57.5% either somewhat or strongly agreed that international arbitration experiences challenges related to gender, nationality, or age. Younger subjects and women were statistically more likely to identify such challenges as compared to older or male subjects; but subjects from states outside the Organisation for Economic Co-operation and Development (OECD) were less likely to identify challenges when compared to their OECD counterparts. Replication is necessary as the results may reflect a limited historical baseline of international arbitration global elites. Given the self-identified concerns and the symbolic legitimacy of broader representation, the international arbitration community may wish to explore factors inhibiting full utilization of untapped talent and facilitate aims of procedural, and potentially distributive, justice. Structural and incremental strategies could then promote a sustainable international arbitration system for the future.*

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## INTRODUCTION

In 1977, Oscar Schachter referred to “The Invisible College of International Lawyers” to describe the elite professional community of professors, students, government officials, civil servants, and practitioners silently influencing international law.<sup>1</sup> At that moment in history, little was known about those involved in the “Invisible College” of the global international arbitration community. Since then, with the classic socio-legal study by Yves Dezalay and Bryant Garth,<sup>2</sup> tranches of discrete information published by arbitral institutions and the recent work of some empirical scholars, we have begun to uncover a degree of information about key actors in international arbitration. José Alvarez has described the “democratization of the invisible college.”<sup>3</sup> There is, however, still a

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1. Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217, 217 (1977); see also DIANA CRANE, *INVISIBLE COLLEGES: DIFFUSION OF KNOWLEDGE IN SCIENTIFIC COMMUNITIES* (1972).

2. YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996); see also DANIEL TERRIS ET AL., *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES* (2007) (conducting a similar process to interview thirty international judges to offer a portrait of the public international law judiciary); Thomas Schultz & Robert Kovacs, *The Rise of a Third Generation of Arbitrators? Fifteen Years After Dezalay and Garth*, 28 ARB. INT'L 161 (2012) (updating the scholarship of Dezalay & Garth); Maya Steinitz, *Transnational Legal Process Theories*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 339, 350–52 (Cesare P.R. Romano et al. eds., 2013) (discussing the “invisible college” of international arbitration). *But see* Catherine A. Rogers, *Gulliver's Troubled Travels, or the Conundrum of Comparative Law*, 67 GEO. WASH. L. REV. 149, 153, 166–68 (1997) (identifying concerns related to the methodology of Dezalay and Garth).

3. Jose E. Alvarez, *The Democratization of the Invisible College*, AM. SOC'Y INT'L L.

dearth of empirical data that cuts across arbitration institutions and subject matter to explore the identities of those involved in the “invisible college” of international arbitration. To bring further transparency to the “invisible college,” this Article addresses the gap within the literature to offer demographic data about members of the global community of international arbitration lawyers.<sup>4</sup>

The International Council for Commercial Arbitration (ICCA) provided us with unprecedented access to their biennial Congress in 2014 to assess the international arbitration community empirically. Our objective was to generate data using verifiable social science methods to test others’ theories and our own assumptions with the hope of improving international dispute settlement.

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I.L. POST: PRESIDENT’S COLUMN (Nov. 8, 2007), *available at* [http://www.law.nyu.edu/sites/default/files/ECM\\_PRO\\_065334.pdf](http://www.law.nyu.edu/sites/default/files/ECM_PRO_065334.pdf); *see also* CATHERINE ROGERS, ETHICS IN INTERNATIONAL ARBITRATION (2014) (discussing the “invisible college” of international arbitration); David Kennedy, *The Politics of the Invisible College: International Governance and the Politics of Expertise*, 5 EUR. HUM. RTS. L. REV. 463 (2001); Sergio Puig, *Social Capital in the Arbitration Marketplace*, 25 EUR. J. INT’L L. 387 (2014) (identifying a network effect among ICSID arbitrators).

4. Queen Mary University has worked with several partners, including White & Case and PriceWaterhouseCoopers, to elucidate international arbitration through surveys and interviews. *See, e.g.*, PAUL FRIEDLAND & STAVROS BREKOULAKIS, WHITE & CASE AND QUEEN MARY, UNIV. OF LONDON, 2012 INTERNATIONAL ARBITRATION SURVEY: CURRENT AND PREFERRED PRACTICES IN THE ARBITRAL PROCESS (2012), [http://annualreview2012.whitecase.com/International\\_Arbitration\\_Survey\\_2012.pdf](http://annualreview2012.whitecase.com/International_Arbitration_Survey_2012.pdf) [hereinafter *White & Case/Queen Mary University of London Survey*]; PAUL FRIEDLAND & LOUKAS MISTELIS, WHITE & CASE AND QUEEN MARY, UNIV. OF LONDON, 2010 INTERNATIONAL ARBITRATION SURVEY: CHOICES IN INTERNATIONAL ARBITRATION (2010), <http://www.whitecase.com/files/upload/fileRepository/2010-International-Arbitration-Survey-Choices-International-Arbitration.pdf>; GERRY LAGERBERG & LOUKAS MISTELIS, PRICEWATERHOUSECOOPERS & QUEEN MARY, UNIV. OF LONDON, CORPORATE CHOICES IN INTERNATIONAL ARBITRATION: INDUSTRY PERSPECTIVES (2013), <https://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>. Benjamin Davis has conducted preliminary research related to diversity of international arbitrators within the United States. *See* Benjamin G. Davis, *American Diversity in International Arbitration 2003–2013 (Pre-Publication Draft)* (Univ. of Toledo Research Studies, Paper No. 2014-03, 2013), *available at* <http://ssrn.com/abstract=2364967>. Recent research by Tom Stipanowich also provides empirical perspectives on international arbitration, including aspects related to diversity. *See* Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 AM. REV. INT’L ARB. (forthcoming 2015), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2519084](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2519084) (identifying roughly fifteen percent of a sample of international arbitrators as women and exploring the literature related to gender diversity in international arbitration); Thomas Stipanowich & J. Ryan Lamare, *Living with “ADR”: Evolving Perceptions and Use of Mediation, Arbitration and Conflict Management in Fortune 1,000 Corporations*, 19 HARV. NEGOT. L. REV. 1 (2013) (conducting empirical research on international commercial arbitration).

At the start of the 2014 ICCA Congress, Jan Paulsson argued that internal reflection and debate should encourage the improvement of international arbitration. Within two weeks of the Congress and our experiment, V.V. Veeder asked the international arbitration community “to act now to regulate itself or risk ‘reputational disaster’”<sup>5</sup> and encouraged the use of data to begin that process.<sup>6</sup> The twin observations from Veeder and Paulsson underscore the importance of the research and the initial findings offered in this Article.

Whereas historic divides in international arbitration mirrored Cold War rifts between east and west,<sup>7</sup> our data demonstrated that two gaps within international arbitration involve development status and gender. Recognizing that there are diversity challenges in dispute resolution generally<sup>8</sup> and that there have been arguable shifts since Dezalay and Garth’s original scholarship,<sup>9</sup> international arbitration stands poised to engage in self-reflection and develop strategies for the future.

This Article first examines the existing literature to identify what was historically known about the “invisible college” of international arbitration. Part II then provides the methodology and explains the data collection procedures. Part III identifies core subject demographics with a focus on the identity of arbitrators and counsel. Parts IV and V then explore how subjects perceived their own experiences with diversity and then contrast those assessments against subjects’ actual experience. Part VI then considers the normative implications for legitimacy. Part VII acknowledges the limitations of the analyses. The Article concludes the data raise two important questions, namely: what the appropriate baseline is for examining the experiences of international arbitration and how the arbitration community wishes to respond. Given the international arbitration community’s acknowledgement of diversity concerns, it would be constructive to identify factors impeding or preventing the maximization of untapped arbitration talent. Recognizing the need to

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5. Leo Szolnoki, *London: Veeder Backs Paulsson's Call to Self-Regulate*, 9 GLOBAL ARB. REV. (Mar. 27, 2014), available at <http://globalarbitrationreview.com/journal/article/32528/london-veeder-backs-paulssons-call-self-regulate>.

6. *Id.*

7. V.V. Veeder, Remarks at the ICCA 50th Anniversary Banquet, 3 (May 19, 2011), available at [http://www.arbitration-icca.org/media/0/13087101785130/v.v.\\_veeder\\_speech.pdf](http://www.arbitration-icca.org/media/0/13087101785130/v.v._veeder_speech.pdf).

8. See *infra* Part IV (exploring diversity challenges in national courts and international tribunals).

9. DEZALAY & GARTH, *supra* note 2.

retain quality without unduly burdening party autonomy, there is value in identifying diversity opportunities and capacity building to promote justice-facilitating objectives and build a sustainable international arbitration system for the future.

## I. THE “INVISIBLE COLLEGE” OF INTERNATIONAL ARBITRATION

There is a lack of empirical evidence about the identity of actors in international arbitration, particularly those who actually serve or might serve as arbitrators.

Some websites and arbitration organizations offer a degree of information about potential arbitrators. For example, the International Arbitration Institute<sup>10</sup> and Arbitral Women<sup>11</sup> have websites where one can search through biographies of registered arbitrators. Institutions like the American Arbitration Association’s International Centre for Dispute Resolution (ICDR), the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the International Centre for the Settlement of Investment Disputes (ICSID) also maintain a general roster or database of people willing to serve as international arbitrators.<sup>12</sup> Other commercial services distribute lists of arbitration experts.<sup>13</sup> Despite this general information on those who could theoretically serve as arbitrators, there is no centralized public repository providing information about individuals who have actually served as

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10. See *Search the IAI Directory*, INT’L ARB. INST. PARIS, [http://www.iaiparis.com/drm\\_search.asp](http://www.iaiparis.com/drm_search.asp) (last visited May 16, 2015).

11. See *Find a Practitioner*, ARBITRAL WOMEN, [http://www.arbitralwomen.com/index.aspx?sectionlinks\\_id=7&language=0&pageName=MemberSearch](http://www.arbitralwomen.com/index.aspx?sectionlinks_id=7&language=0&pageName=MemberSearch) (last visited May 16, 2015).

12. Raymond G. Bender, Jr., *Three Practical Steps to Avoid an Erroneous Arbitration*, 30 ALTERNATIVES TO HIGH COST LITIGATION 155 (Int’l Inst. for Conflict Prevention & Resolution, 2012).

13. For example, *Who’s Who Legal* has a yearly compendium of Commercial Arbitration identifying the most highly regarded firms and individuals that requires participants to be nominated by peers. *Most Highly Regarded Firms: Commercial Arbitration 2013*, WHO’S WHO LEGAL (Nov. 2012), available at <http://whoswholegal.com/news/analysis/article/30104/most-highly-regarded-firms-commercial-arbitration-2013/>. Chambers & Partners identifies firms—and individuals within those firms—as having elite arbitration expertise and the *Global Arbitration Review* generates an index identifying top entities. *Nationwide: International Arbitration*, CHAMBERS & PARTNERS, available at <http://www.chambersandpartners.com/12788/738/editorial/5/1> (last visited May 16, 2015); *GAR 100—7th Edition*, GLOBAL ARB. R. (Jan. 1, 2014), available at <http://globalarbitrationreview.com/surveys/survey/948/gar-100-7th-edition>.



arbitrators that would permit one to identify and analyze core demographic information about international arbitrators.<sup>14</sup> Where institutions have the internal capacity to gather and analyze the data on their own arbitrators, their publicized data focus on basic information about arbitrator nationality. Beyond information published in *Chambers and Partners*, *Global Arbitration Review*, or the International Bar Association's *Who's Who of Commercial Arbitration*,<sup>15</sup> there is little information available on the background, experience, and identities of the international arbitration bar. As such, it is perhaps unsurprising that international arbitration functions as a classic "invisible college."

Given the lack of holistic information,<sup>16</sup> identifying who acts as counsel or arbitrator can only be assessed by considering major international institutions on a case-by-case basis. This section therefore reviews information about arbitrators from institutions including the ICC,<sup>17</sup> LCIA, Singapore International Arbitration

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14. Catherine Rogers recommends providing publicly available information about arbitrators, or what she refers to as "Arbitrator Intelligence." Catherine A. Rogers & Alex Wiker, *Piloting Arbitrator Intelligence*, KLUWER ARB. BLOG (Apr. 10, 2014), <http://kluwarbitrationblog.com/blog/author/catherinerogers>; see also Catherine A. Rogers, *Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration*, 23 MICH. J. INT'L L. 341 (2002); Catherine A. Rogers, *Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct*, 41 STAN. J. INT'L L. 53 (2005); Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 9, 30–32 (1986). Professor Rogers launched and, in January 2015, completed a pilot program to gather arbitrator information. See ARBITRATOR INTELLIGENCE, <http://www.arbitratorintelligence.org> (last visited May 16, 2015).

15. See, e.g., *Arbitrator Profiles*, INVESTMENT ARB. REP., <http://www.iareporter.com/categories/profiles> (last visited May 16, 2015); *GAR 45 Under 45 2011-Introduction*, 6 GLOBAL ARB. REV. (Aug. 11, 2011), available at <http://globalarbitrationreview.com/surveys/article/29699/%20gar45452011introduction>; Michael Goldhaber, *Arbitration Scorecard 2013*, AM. LAW. (June 24, 2013), <http://www.americanlawyer.com/id=1202608198051/ArbitrationScorecard2013?slreturn=20150225152802>; see also Sebastian Perry, *Portrait of the Arbitrator*, 9 GLOBAL ARB. REV. (May 6, 2014), <http://globalarbitrationreview.com/news/article/32586/portraitarbitrator>; Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT'L L. REV. 957 (2005).

16. Arbitral institutions may wish to collaborate in creating this type of information and making it freely available to the public. See *infra* note 86 and accompanying text.

17. For another ICCA Congress session, the ICC reported that "[i]n 2002, there were 660 individuals from 62 countries fulfilling arbitral appointments in ICC arbitration, whereas in 2012 the numbers increased to 847 individuals from 72 countries." Draft Responses of John Beechey, 2014 ICCA Congress Panel B-2 Questionnaire, Response to Question 2 (on file with ICCA), available at <http://www.arbitration-icca.org/conferences-and-congresses/miamiprogramme.html>. The ICC also noted some demographic shifts in party location and places of arbitration over the past decade, stating that "whereas the percentage of parties

Centre (SIAC), and ICSID and focuses on the nationality information they have made available to the public.<sup>18</sup> We are unaware of any demographic information on counsel, whether based upon nationality or otherwise, provided by arbitration institutions.

The LCIA reported that, in 2012, it had 265 new arbitrations. Of those cases, 52.6% of arbitrators were purely nationals from the United Kingdom.<sup>19</sup> As the rate of U.K. arbitrators at the LCIA was roughly sixty-one percent in 2005,<sup>20</sup> descriptively, this decrease in

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from Africa, Latin America, Central and Eastern Europe, and South East Asia increased from 38.3% to 46.9% between 2003 and 2012 (i.e., a 22% increase), the percentage of places of arbitration located in those regions within the same period increased from 15.6% to 25.3% (i.e., a 62% increase).” *Id.* at Response to Question 1.

18. We were unable to locate demographic data on the websites or elsewhere for the ICDR, but parties can pay US\$750 for a list of five potential arbitrators. *Arbitrator and Mediator Selection*, AM. ARB. ASS’N, [https://www.adr.org/aaa/faces/arbitratorsmediators/arbitratormediatorselection?\\_afLoop=1497714073611632&\\_afWindowMode=0&\\_afWindowId=12kiedkwei\\_1#%40%3F\\_afWindowId%3D12kiedkwei\\_1%26\\_afLoop%3D1497714073611632%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3D12kiedkwei\\_55](https://www.adr.org/aaa/faces/arbitratorsmediators/arbitratormediatorselection?_afLoop=1497714073611632&_afWindowMode=0&_afWindowId=12kiedkwei_1#%40%3F_afWindowId%3D12kiedkwei_1%26_afLoop%3D1497714073611632%26_afWindowMode%3D0%26_adf.ctrl-state%3D12kiedkwei_55) (last visited May 16, 2015). We were unable to locate arbitrator information from other institutions including the Hong Kong International Arbitration Centre, the Kigali International Arbitration Centre, the Australian Centre for International Commercial Arbitration, the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, or the Dubai International Arbitration Centre. There is some data suggesting that the China International Economic and Trade Arbitration Commission (CIETAC) keeps track of the nationality of arbitrators, primarily by virtue of a listing process, albeit with mixed success in achieving diversity and results. Compare Jonathan H. Zimmerman, *When Dealing with Chinese Entities, Avoid the CIETAC Arbitration Process*, 53 *ADVOC.* 23, 23 (Idaho State Bar, 2010) (“CIETAC has been in existence since 1956, and boast [sic] that it has 274 foreign arbitrators (not Chinese Nationals) of its 969 listed arbitrators. Even with the foreign arbitrators, this method of arbitration is [sic] disagreeable prospect with foreign or North American companies; especially if you have experienced it.”), with Sarah R. MacLean, *CIETAC, From Underdog to Role Model: Bringing the ICC Back to the Forefront in the Field of International Arbitration*, 16 *GONZ. J. INT’L L.* 62, 72-73 (2012) (observing that CIETAC chairs are primarily Chinese nationals, U.S. parties’ win rates are roughly equal to cases lost and outcomes for parties involving other states—like Germany and Australia—has been fairly similar).

19. See LCIA, REGISTRAR’S REPORT 4 (2012), available at <http://www.lcia.org/LCIA/reports.aspx> (observing that for the 344 total appointments in 2012, 181 were exclusively U.K. nationals, and that of those, parties appointed 84, the LCIA Court appointed 73 and co-arbitrators appointed 24; the remaining 144 appointments were “Australian; Austrian; Bahraini; Bangladeshi; Belgian; Brazilian; Canadian; Colombian; Czech; Dutch; Egyptian; French; German; Greek; Indian; Irish; Lebanese; Maltese; New Zealand; Nigerian; Peruvian; Portuguese; Russian; Singaporean; South African; Swedish; Swiss; and U.S.,” but nineteen 19 were U.K. dual nationals, which means that 200 appointees were U.K. nationals or dual nationals for a total U.K. appointment rate of 58.1%).

20. See LCIA, DIRECTOR GENERAL’S REVIEW OF 2005 at 3 (2005), available at <http://www.lcia.org/LCIA/reports.aspx> (observing that 57 arbitrators appointed by the

the proportion of British appointees may reflect the need for additional arbitrators given the LCIA's 220% increase in appointments.<sup>21</sup> Even more recently, more than half of LCIA arbitrators were U.K. nationals.<sup>22</sup>

Other institutions also have a tendency to derive more than half of their arbitrators from the country where the institution is located. SIAC's 2013 annual report, for example, indicated that out of fifty-six new international arbitrations, around fifty-one percent of arbitrators were Singapore nationals, and approximately twenty percent of arbitrators were from the United Kingdom.<sup>23</sup> India and Malaysia also had prominent representation at SIAC, with slightly less than twenty percent of appointments, demonstrating a degree of national diversity.<sup>24</sup>

ICSID, which has jurisdiction over cases arising under certain commercial contracts, national investment law, and investment treaties, publishes a biannual summary of ICSID tribunals and *ad hoc* committees. By the end of 2013, there were 459 registered cases. ICSID provides information by region and country. ICSID arbitrators, conciliators, and *ad hoc* committee members came from seventy-seven different states; forty-nine percent were European nationals, twenty-two percent were from North America, thirteen percent were from Central or South America, ten percent were from Asia or the Pacific, and six percent were from Africa or the Middle East.<sup>25</sup> The most frequently appointed nationalities were the United

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parties were U.K. nationals, 36 nominated by the LCIA court were U.K. nationals, which means 93 of the 152 total appointments were U.K. nationals but failing to comment on the presence of dual nationals).

21. Compare LCIA REVIEW, *supra* note 20, at 3 (reflecting that the number of appointments in 2005 was 152), with LCIA REPORT, *supra* note 19, at 4 (reflecting that the number of appointments in 2012 was 344, an increase of 220% from 2005).

22. *But see* LCIA REVIEW, *supra* note 20, at 3 (suggesting that "a higher percentage of party nominees than of LCIA Court nominees are of English nationality" means that "any English 'bias' in the nationality of arbitrators has very much to do with the pragmatic selection of arbitrators qualified in the most-commonly-applicable law(s) and nothing to do with the English origins of the institution").

23. SING. INT'L ARB. CENTRE, ANNUAL REPORT 2013 (2013), [http://www.siac.org.sg/images/stories/articles/annual\\_report/SIAC\\_Annual\\_Report\\_2013.pdf](http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2013.pdf). These numbers were roughly stable over time. See *Resources*, SING. INT'L ARB. CENTRE, <http://www.siac.org.sg/2013-09-18-01-57-20/2013-09-22-00-27-02/annual-report> (last visited May 16, 2015) (provides prior annual reports).

24. ANNUAL REPORT 2013, *supra* note 23.

25. INT'L CENTRE FOR SETTLEMENT INVESTMENT DISPS. (ICSID), THE ICSID CASELOAD—STATISTICS (ISSUE 2014–1) 18 (2014), <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2014-1%20English.pdf> [hereinafter 2014-1 STATISTICS].

States (163 appointments), France (155), the United Kingdom (133), Canada (97), Switzerland (93), Spain (52), and Australia (50).<sup>26</sup> Waibel and Wu also identified the dominance of developed country arbitrators at ICSID. Specifically, for the 341 ICSID arbitrators sitting between 1978 and 2011, they identified sixty-six percent of ICSID arbitrators as nationals of OECD states.<sup>27</sup>

In investment treaty arbitration (ITA), scholars have begun identifying arbitrator demographics. A study of 102 ITA arbitration awards rendered before 2007 identified a pool of 145 ITA arbitrators: of that group, 75% were from OECD states and 3.5% percent were women.<sup>28</sup> Expanded research from 252 ITA awards rendered by January 2012 identified a pool of 247 different arbitrators wherein 80.6% were from OECD states and 3.6% were women. Given repeated appointments of certain female arbitrators, at least one woman was present in 18.3% of the ITA awards. Tribunals exclusively containing men constituted the majority (81.7%) of awards.<sup>29</sup> Other research replicates the general lack of female arbitrators in ITA,<sup>30</sup> and Rubins and Sinclair suggested in 2006 that,

26. *Id.* at 20; see also Noah Rubins & Anthony Sinclair, *ICSID Arbitrators: Is There a Club and Who Gets Invited?*, 1 GLOBAL ARB. REV. (Nov. 1, 2006), available at <http://globalarbitrationreview.com/journal/article/16468/icsid-arbitrators-club-gets-invited> (exploring the nationality of ICSID arbitrators with pre-2007 data, identifying 279 individuals from 57 different countries who have served as arbitrators, with nationals from the United States having the largest number of appointments, followed by French, British, Swiss, and Canadian nationals, but observing several Mexican arbitrators were appointed).

27. Michael Waibel & Yanhui Wu, *Are Arbitrators Political?*, 27–41 (Dec. 2011) (working paper) (on file with authors), available at <http://www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/dateien/waibelwinter11-12>; see also Puig, *supra* note 3, at 401 (discussing Waibel & Wu, *supra* note 27, and the underrepresentation of developing countries in the arbitration community).

28. Susan D. Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 75–82 (2007) [hereinafter Franck, *Empirically Evaluating*]; see also Susan D. Franck, *Development and Outcomes in Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 438, 459 (2009) [hereinafter Franck, *Development and Outcomes*] (noting that, using World Bank classifications for development status, in the pool of presiding arbitrators generating final awards, seventy-four percent were from high income states, seventeen percent were from upper-middle income states, eleven percent were from lower-middle income states, and there were no presiding arbitrators from low income states).

29. SUSAN D. FRANCK, *INVESTMENT TREATY ARBITRATION: MYTHS, REALITIES AND COSTS* (forthcoming).

30. Research conducted by Waibel and Wu identified that ninety-five percent of their sample was male and five percent was female. Waibel & Wu, *supra* note 27, at 27; see also Lucy Greenwood & C. Mark Baker, *Getting a Better Balance on International Arbitration Tribunals*, 28 ARB. INT'L 653, 656, 663–65 (2012) (analyzing ICSID cases to identify that 5.6% of all arbitrator appointments were women and suggesting that approximately 6% of

“data supports the view that ICSID belongs primarily to gentlemen.”<sup>31</sup>

## II. THE DATA AND METHODOLOGY

At the outset, we note that this was first generation research from the first dataset of its kind. We are unaware of anyone else ever having performed a live data-collection exercise on international arbitrators to collect holistic demographic information. Although there is some data on the “invisible college” available for ITA, there is minimal research on international commercial arbitration (ICA), which makes this data unique.

Our survey materials included survey questions exploring conference themes of precision and justice and requesting demographic information.<sup>32</sup> This Article focuses on demographics of the international arbitration community related to: (1) gender; (2) nationality; (3) age; (4) linguistic capacity; (5) legal training; and (6) professional experiences related to arbitration. We also asked targeted questions related to diversity within international arbitration.<sup>33</sup>

Our objective was to target the population of international arbitration practitioners and arbitrators. We acknowledge that precisely capturing the “international arbitration community” is challenging; there is no uniform definition and the community

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ICA tribunals contained a woman); Gus Van Harten, *The (Lack of) Women Arbitrators in Investment Treaty Arbitration*, COLUM. FDI PERSPS. NO. 59 (Feb. 6, 2012), [http://ccsi.columbia.edu/files/2014/01/FDI\\_59.pdf](http://ccsi.columbia.edu/files/2014/01/FDI_59.pdf) (observing that in 631 appointments in 249 known ITA cases, only 41 of appointments, namely 6.5%, were women). Gender diversity in private international commercial arbitration may be greater than in ITA. See Stipanowich, *supra* note 4, at 56–57 (identifying that in a sample of international arbitrators, roughly fifteen percent were women and exploring the literature related to gender diversity in international arbitration).

31. Rubins & Sinclair, *supra* note 26.

32. See Susan D. Franck et al., *International Arbitration: Demographics, Precision and Justice*, in INTERNATIONAL COUNCIL FOR COMMERCIAL ARBITRATION, LEGITIMACY: MYTHS, REALITIES, CHALLENGES, ICCA Congress Series No. 18, at 33–122 (Albert Jan Van Den Berg ed., 2015) (exploring issues related to precision—including advance articulation of the burden of proof, whether burdens of proof are outcome determinative, advance articulation of cost-shifting standards, document withholding, and tribunal preparation—as well as issues related to justice—including arbitrator incentives related to the prestige of arbitration, future interaction with co-arbitrators, consideration of future appointments, and fraud) [hereinafter ICCA MIAMI CONGRESS PROCEEDINGS].

33. See *infra* Annex 1.

changes as people enter and exit the profession, people age, and cores of the community are in motion.<sup>34</sup> In order to tap the population of interest, our sampling frame was the group of 1,031 ICCA registrants.<sup>35</sup>

ICCA is a prestigious non-governmental organization representing the international arbitration bar. ICCA's governing board includes some of the most prominent arbitrators in ICA and ITA, the secretary general of ICSID, two past presidents of the American Society of International Law, the Principal Legal Counsel for the Government of Mexico in negotiating NAFTA, the General Counsel of ExxonMobil, the Attorney General of Kenya, a former Attorney General of Pakistan, the Chief Justice of the Supreme Court of Singapore, the chair of the Hong Kong International Arbitration Centre, the director of the Cairo Regional Centre for International Commercial Arbitration, and authors of several of the most important international arbitration treatises.<sup>36</sup> Our assessment was that ICCA is an important group in the international arbitration community. As such, the biennial ICCA Congress is a critical event that international arbitration counsel and arbitrators will attend. While we acknowledge the risk of a selection effect, we nevertheless believe that ICCA and our data provide a representative sample of the international arbitration community and international arbitrators. The ICCA Congress is an elite "must go" event of the international arbitration community that is attended by influential members of that community.<sup>37</sup> The Congress has several advantages: A historical

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34. See DEZALAY & GARTH, *supra* note 2, at 12, 28, 61, 117, 157, 242, 248, 296 (discussing certain cores in international arbitration and the intersection spheres of related spheres); see also Rogers, *supra* note 2, at 167 (discussing the "core" of the international arbitration community).

35. Twelve of the registrants worked on the research team, and two people had reviewed earlier drafts of the material during beta-testing. As such, only 1,017 of the registrants were capable of answering the survey. This also meant that, out of the potential subjects, we obtained a 54.3% response rate. This was a reasonable response rate given similar previous studies. See Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L.J. 1263, 1278 (2007) (indicating that a response rate of approximately 61% of subjects in a judicial conference is "quite reasonable").

36. ICCA also prepares numerous arbitration publications with the help of the Permanent Court of Arbitration in The Hague, including the *Yearbook Commercial Arbitration* and the *International Handbook on Commercial Arbitration*. See generally *ICCA Governing Board*, INT'L COUNCIL FOR COM. ARB., <http://www.arbitration-icca.org/about/governing-board.html> (last visited May 16, 2015); *International Council for Commercial Arbitration*, INT'L COUNCIL FOR COM. ARB., (last visited May 16, 2015). ICCA is not affiliated with the research team, and none of the authors are ICCA members.

37. See, e.g., DEZALAY & GARTH, *supra* note 2, at 20 (discussing ICCA's elite and influential nature in connection with the "grand old men" of international arbitration); see

pedigree, substantive content exploring transnational legal innovations in arbitration, scarcity of programming (i.e. only every other year), and a transnational approach.<sup>38</sup> Assessing ICCA attendees therefore provides a singular opportunity to do “one-stop-shopping” for data collection on international arbitration. This high value was, in large part, why we selected the ICCA Congress as the forum for our research. Moreover, this methodological approach is standard, as it has similarly been used to conduct research on judges by way of providing surveys to judges at judicial conferences.<sup>39</sup>

During the first plenary session, all ICCA Congress registrants in attendance were offered a voluntary opportunity to complete a survey confidentially. While inevitably people who registered did not attend the conference or the initial plenary due to personal constraints or work obligations, our assessment was that if registrants were able to attend the first ICCA Plenary, they did so.<sup>40</sup> Upon delivering the materials to all subjects, 552 people completed the survey. After excluding responses of four subjects who asked that their responses not be used for published research, the sample contained 548 individuals (the “ICCA subjects”).<sup>41</sup>

After receiving the materials, subjects had approximately thirty-five minutes to complete all of the materials, and while they completed the materials we observed them focused on responding. While most subjects completed nearly all of the survey, given the voluntary nature, not all ICCA subjects completed all questions.<sup>42</sup>

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*also infra* note 53 and accompanying text (identifying that a selection effect incentivizing elite arbitration specialists to attend ICCA rather than newer entrants to the arbitration marketplace may limit inferences from the data).

38. *See generally* Veeder, *supra* note 7 (discussing the historical pedigree and unique nature of ICCA); *see also infra* note 53 and accompanying text.

39. *See, e.g.*, Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Chris Guthrie et al., *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477 (2009). We acknowledge the possibility of differences between conferences comprised wholly of U.S. judges and a conference where individuals must self-report arbitrator experience. For limitations to our survey, *see infra* Part VII. Nonetheless, we believe that our methodology reliably tested known arbitrators, *see infra* note 43.

40. ICCA Congress organizers also confirmed that, historically, the first plenary session is the most well-attended ICCA session.

41. Given the demographic information of the four subjects, which we promised not to reveal, their contributions form no part in the analyses of these sections and the small size has a *de minimis* effect.

42. All ICCA subjects returned the survey before leaving the plenary session; ten subjects returned blank surveys with all questions unanswered. This means, for individuals

For those who completed the materials, we distinguish types of information provided. For example, we provide information on the demographics of all ICCA subjects broken down by type of experience in international arbitration. Next, when we focus on arbitrators, we demarcate between groups of individuals who have served as an arbitrator and also focus on subsets of individuals with specific experience in ICA or ITA. Similarly, we distinguish between response patterns for: (1) all ICCA subjects answering the relevant question(s); (2) the subset of subjects responding that they had acted as an international arbitrator; and (3) the subset of subjects indicating that they served as counsel in international arbitration.<sup>43</sup>

We observed that many international arbitrators (including arbitrators with multiple appointments) completed the survey.<sup>44</sup> Although our survey did not reach one hundred percent of the population of known ITA arbitrators, there were responses from sixty-seven ITA arbitrators, which represented a healthy proportion (twenty-seven percent) of arbitrators identified in Franck's research on ITA awards.<sup>45</sup>

Inferences drawn from the data are only as strong as the representativeness of the sample from which the data derive.<sup>46</sup> Although limitations will be discussed in Part VII, it is appropriate to acknowledge that, should the registrants of ICCA Miami 2014 and those subjects completing the survey not reflect the larger

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at the first plenary, 98.2% answered at least one question.

43. It is possible that there may be a response bias generated from subjects who failed to answer all questions. While we cannot eliminate the risk of response bias, the large number of subjects who did respond to the vast majority of questions (and the small number of subjects who failed to answer) attests to the underlying validity of the gathered data. Nevertheless, replication is necessary to decrease the risk of error.

44. Of the 1,017 ICCA registrants capable of participating in the survey, there is publicly available documentation confirming that 496 registrants have served as international arbitrators. *See supra* note 35. As 262 subjects expressly identified themselves as arbitrators, at a minimum, our subjects reflected at least 52.8% of the arbitrators attending ICCA. *But see infra* Part VII for limitations to this conclusion. Given conference fees and others costs mentioned above, it is possible that we only sampled affluent senior counsel. The broader population of counsel in international arbitration may be meaningfully different. *See, e.g., supra* note 37 and accompanying text.

45. *See generally* FRANCK, *supra* note 29 (coding arbitrators on tribunals rendering public awards); *see also* Puig, *supra* note 3, at 403 (coding arbitrator appointments at ICSID from its inception, including both ICA and ITA cases, and identifying 419 different arbitrators receiving appointments).

46. All data was coded twice, and there was a ninety-seven percent inter-coder reliability rate. Final codes were made after consulting the raw materials.



international arbitration community, the value of the inferences in this Article decreases.

Selection effects may impact the results. First, as the conference was in Miami, it is possible that subjects from the United States or North America were over-represented. This generates the possibility that the data were systematically skewed. Second, it is possible that arbitration experts from non-North American countries were under-represented.<sup>47</sup> Although there was a high concentration of western European subjects, other countries that have active international arbitration centers experienced low representation at ICCA. For example, the China International Economic and Trade Arbitration Commission (CIETAC) reports that it has a heavy international arbitration caseload;<sup>48</sup> yet, there were relatively few attendees from China.<sup>49</sup> To address those twin concerns and evaluate the value of the baseline descriptive data, the demographic data collection should be replicated over time in other venues and as ICCA Congresses rotate among international venues. Forthcoming Congresses in Mauritius and Sydney, for example, provide the opportunity to reassess differences at geographical venues that are proximate to continents with the two largest global populations and presumably have large needs for international arbitration services. Third, as the ICCA proceedings were conducted in English,<sup>50</sup> it is

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47. Under-representation could derive from the need to secure a visa. Only thirty-eight countries qualify for the Visa Waiver program, which eliminates the need for an advance visa for U.S. visitors. *Visa Waiver Program*, U.S. VISAS: U.S. DEPARTMENT OF STATE, <http://travel.state.gov/content/visas/english/visit/visa-waiver-program.html> (last visited May 16, 2015). The location of ICCA Congress is known four years in advance, and ICCA had information on its website expressly devoted to U.S. entry issues and supported participants by providing letters of invitation in support of visas. *Congress Information: US Visa Waiver Program (VWP)*, INT'L COUNCIL FOR COM. ARB., <http://www.iccamiami2014.com/#USEntry>; *Registration Form*, INT'L COUNCIL FOR COM. ARB., <http://www.iccamiami2014.com>. This decreases, but cannot eliminate, potential distortions from visa-related issues.

48. Chi Manjiao, *Drinking Poison to Quench Thirst: The Discriminatory Arbitral Award Enforcement Regime under Chinese Arbitration Law*, 39 H.K. L.J. 541, 557-59 (2009); Alexander Zesch, *CIETAC's New Rules: A View through the Critics' Lens*, 16 VINDOBONA J. INT'L COM. L. & ARB. 283 (2012).

49. We observe that, even though the most recent ICCA Congress was in Singapore, there were few participants from Singapore.

50. English has become the dominant language of international arbitration. Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 86 (2003) ("English has become the *lingua franca* of international arbitration. One prominent arbitrator, Jan Paulsson, recently noted . . . that '[t]en years ago, half my cases were in French and half in English. Now, it's ninety percent English.'"); Stephan W. Schill, *W(h)ither Fragmentation? On the Literature and Sociology of International Investment*

possible that those whose mother tongue is not English (particularly arbitration specialists speaking Chinese, Spanish, Hindi, Arabic, Japanese, and French,<sup>51</sup> which are among the most prevalent languages on the planet) were also under-represented.<sup>52</sup> Fourth, it is possible that ICCA attendees were older and more elite international arbitration participants. Newer entrants to the international arbitration marketplace may have greater opportunity costs, with less immediate returns, to attending ICCA and the data may therefore under-represent newer or non-elite arbitration specialists.<sup>53</sup> Fifth, to the extent that ICCA is a relatively expensive conference—in terms of the conference fee,<sup>54</sup> flight, hotel, and opportunity costs of being away from work—it is possible that some economically disadvantaged specialists were systematically underrepresented.

We acknowledge the limitations that derive from the representativeness of our sampling frame and the data sample. We nevertheless believe that this first generation research provides a valuable historical baseline for future researchers and offers a

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*Law*, 22 EUR. J. INT'L L. 875, 887 (2011) (“As was the case with most investment treaty arbitrations, English became the *lingua franca* of international investment law.”). It is possible that a conference conducted in English does not generate a large selection effect as those without English language skills may not be actively engaged in international arbitration. Yet there are regional areas where international arbitration specialists may share a common non-English language.

51. The African continent has the most French speakers in the world. French is also the second most common language in Africa with approximately 120 million speakers. ORGANISATION INTERNATIONALE DE LA FRANCOPHONIE, LA FRANCOPHONIE DANS LE MONDE 2006–2007 (2007).

52. ICCA recognizes the need for greater linguistic options at its Congresses and says that it is likely to have simultaneous translation in French, English, and Portuguese at its 2016 Mauritius Congress. Salim Moollan, *Invitation to ICCA Mauritius 2016*, INT'L COUNCIL FOR COM. ARB., at 7:24–35, [http://www.arbitration-icca.org/AV\\_Library/ICCA\\_Mauritius\\_2016\\_by\\_Salim\\_Moollan.html](http://www.arbitration-icca.org/AV_Library/ICCA_Mauritius_2016_by_Salim_Moollan.html) (last visited May 16, 2015).

53. International arbitration is sometimes perceived as a club. Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47 (2010); Puig, *supra* note 3. ICCA historically had barriers to entry. As such, newer, non-elite arbitration specialists may hesitate to attend ICCA. Newer entrants may be more likely to attend local, regional, or international conferences, particularly if conducted in their native language and in a nearby location at low cost. Analyzing the international arbitration community at ICCA Miami was an initial effort to identify easily observable experts, but there are untapped aspects of the “invisible college.” We hope that this initial data collection process is expanded to consider other core groups to gather a more complete picture of the international arbitration community.

54. Recognizing the costs of ICCA's Mauritius Congress in 2016, participants from Africa will receive a fifty percent discount on their conference fees. See Moollan, *supra* note 52, at 7:16–22.

foundation for others to conduct research on international arbitration counsel and arbitrators.

### III. THE DEMOGRAPHICS OF INTERNATIONAL ARBITRATION

This Part presents the demographic characteristics of all ICCA subjects completing the survey. It first identifies subjects' professional experiences in international arbitration and dispute settlement. Next, it focuses exclusively on international arbitrators for variations in appointment levels by type of international arbitration. It then provides breakdowns of subjects' gender, age, legal training, languages, and nationality. Using subject nationality as a baseline, it also identifies how subjects' home states ranked on the development divide using three different measures to assess development status. Finally, it synthesizes those findings and identifies the data supporting the narrative of a relatively homogenous group of actors in international arbitration.

#### A. Experience Related to International Arbitration

As a preliminary matter, we first identify the professional experiences of the surveyed subjects. These demographics provide basic information to ICCA and other arbitration organizations about opportunities for strategic outreach.

Overall, the data reflected that ICCA subjects tended to have experience either as counsel, some service as an international arbitrator (whether ICA or ITA), or a combination of those professional experiences. Table 1 indicates that most subjects were involved as counsel in one or more international arbitrations (87%). For each subject serving as counsel, they were involved in an average of 27 cases (median=15). These figures contradict claims that there are only between 100–200 practitioners worldwide with repeat appointments in international arbitration.<sup>55</sup> International arbitrators were also prominent, with 60.4% of responding ICCA subjects indicating they had acted as arbitrator in at least one case. Subsection III(B) discusses the frequency of arbitral appointments in greater detail.<sup>56</sup>

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55. Christian Bühring-Uhle et al., *The Arbitrator as Mediator: Some Recent Empirical Insights*, 20 J. INT'L ARB. 81, 81–82 (2003). There may be variation in counsel roles as, in complex cases, global law firms may employ "local counsel" to handle domestic law issues without relinquishing control of case strategy.

56. We recognize that the broader ICCA membership may contain more international

Experts in international arbitration were moderately well represented. Although it is not clear how many experts there are in international arbitration globally, our data indicated that one-third of ICCA subjects had served as an expert in at least one arbitration case. The experts at ICCA, however, were not heavy repeat players. Table 1 indicates both measures of central tendency suggested a low number of cases, with a mean of 3.6 and a median of 2.

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arbitrators, and more international arbitrators were registered for the conference than participated in the survey. For the purposes of this Article, references to ICCA arbitrators (or the subset of ICCA arbitrators) incorporate this limitation.

**Table 1: Descriptive Data Identifying Frequency of Subjects' Professional Experience in International Arbitration for all ICCA Subjects<sup>57</sup> and the Mean, Median, and Maximum Number of Cases for ICCA Subjects with a Minimum of One Case in a Category of Professional Experience**

Categories of Professional Experience in Arbitration <sup>58</sup>	Percentage of Subjects (number of responses)	Mean Number of Cases	Median Number of Cases	Maximum Number of Cases	Standard Deviation
<b>Subjects Acting as Arbitration Counsel</b>	87.3% (n=413)	27.3	15	501	46.9
<b>All International Arbitrators</b>	60.4% (n=262)	34.6	10	501	64.6
<b>Expert</b>	32.3% (n=126)	3.6	2	51	6.4
<b>Judge in National Court</b>	9.3% (n=35)	571.3	51	10,001	1,740.7
<b>Adjudicator in Public International Law Dispute</b>	4.6% (n=17)	27.8	2	301	76.4

57. Some ICCA subjects failed to provide information on professional experiences. This may reflect their lack of experience or that the data underrepresents subjects' actual experience. Subjects failing to answer were therefore omitted from the percentage calculations. Of the 448 subjects analyzed, the following subjects expressly provided information about their appointments (or lack thereof): (1) counsel = 473 responses (75 missing); (2) expert = 390 responses (158 missing); (3) ICA arbitrators = 432 responses (116 missing); (4) ITA arbitrators = 386 responses (162 missing); (5) public international law adjudicators = 368 responses (180 missing); (6) judges = 376 responses (172 missing).

58. We based these categories on gateway experiences to international arbitration. We did not focus on employees of institutions or tribunal secretaries as these individuals do not technically adjudicate the disputes. Nevertheless, we acknowledge that tribunal secretaries can play a critical part in the process. See Constantine Partasides, *The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration*, 18 ARB. INT'L 147 (2002). Two subjects expressly identified themselves as tribunal secretaries. Although we did not code those appointments as arbitrators, it suggests future research might usefully explore the effect of tribunal secretaries. Given methodological and timing constraints, we did not code for information about participants or others with experience in academia, non-governmental organizations, policy think tanks, or unions. Future research might also explore representation of these groups.

There were at least two groups, however, with minimal representation at ICCA. First, few ICCA subjects had been judges in national courts. Table 1 indicates this was less than ten percent of subjects. The wide standard deviation, however, reflects variation in subject responses; while one set of subjects had extensive appointments, another set of subjects reported smaller appointment levels. Consequently, for the 35 individuals who had acted as judges, the mean number of proceedings was 571.3 but the median was 51. Second, independent of those subjects serving as ITA arbitrators, there were few subjects with experience adjudicating public international law disputes.<sup>59</sup> Only 17 subjects (or 4.6% of those responding) had served on at least one public international law proceeding. Of those subjects, there was a variation in relative levels of experience with subjects having an average of 27.8 cases and a median of 2 cases. This low level of representation may, however, reflect the small pool of public international adjudicators, such as the small number of adjudicators at institutions like the International Court of Justice or World Trade Organization.<sup>60</sup>

### *B. Experience as International Arbitrators*

One critical question involved how frequently arbitrators exercised their adjudicative functions.<sup>61</sup> Our survey asked subjects to report how many times they had served as an ICA arbitrator, and it separately asked how many times they served as an ITA arbitrator. Overall, as Table 1 reflects, 262 of our subjects (or a little less than half) served as an arbitrator in at least one case.

Table 2 reflects that, overall, ICCA subjects who acted as arbitrators were involved in an average of 34.6 cases and the statistically “median arbitrator” arbitrated 10 cases. The variation

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59. The survey and the data analysis differentiated between “public international law” and ITA cases. Subjects were therefore able to distinguish between traditional public international law cases and other types of international dispute settlement.

60. See, e.g., Shashank Kumar & Cecily Rose, *A Study of Lawyers Appearing Before the International Court of Justice 1999–2012*, 25 EUR. J. INT’L L. 893, 917 (2014); see also José Augusto Fontoura Costa, *Comparing WTO Panelists and ICSID Arbitrators: The Creation of International Legal Fields*, 1 OÑATI SOCIO-LEGAL SERIES 1, 3 (2011) (discussing pools of arbitrators involved in international trade and ICSID disputes).

61. See Kapeliuk, *supra* note 53, at 72–74 (defining “elite” ITA arbitrators as those who have served on four or more cases); see also James Clasper, *London’s Elite Arbitration Groups*, 1 GLOBAL ARB. REV. (Apr. 1, 2006) (exploring elite arbitration practices, and arbitrators, in London), available at <http://globalarbitrationreview.com/journal/article/18197/londons-elite-arbitration-groups>.

between those two measures of central tendency was driven by a small number of arbitrators arbitrating a large number of cases. 25 subjects sat on more than 100 arbitrations (whether ICA or ITA based), 12 subjects sat on more than 200 cases, and one arbitrator self-reported arbitrating more than 500 cases. Quartile breakdowns offer insight into how frequently people sit as arbitrators. Super-elite arbitrators in the top quartile arbitrated more than forty cases. Elite arbitrators in the second highest quartile arbitrated between eleven and forty cases. Experienced arbitrators, with relatively less experience, were in the second lowest quartile and arbitrated between four and ten cases. The least experienced arbitrators in the bottom quartile arbitrated only one to three cases.<sup>62</sup>

**Table 2: Descriptive Data of the Frequency of Cases for All ICCA Subjects Reporting Service as an Arbitrator in at Least One Case and Subsets of ICA and ITA Arbitrators**

	All Arbitrators	ICA Arbitrators	ITA Arbitrators
<i>Mean Number of Arbitration Cases</i>	34.6	33.2	6.6
<i>Appointment Quartiles</i>			
1 <sup>st</sup> quartile (25th percentile)	3	3	1
2 <sup>nd</sup> quartile (median)	10	10	2
3 <sup>rd</sup> quartile (75th percentile)	40	30	6
<i>Maximum Appointments</i>	501	501	60
<i>Standard Deviation</i>	64.6	63.0	11.6
<i>Total Number of Subjects</i>	262	260	67

While the data demonstrated that elite arbitrators had more appointments than others, the number of ICCA subjects with repeated arbitrator experience reflects that the arbitrator bench was not necessarily as narrow as one might perceive.<sup>63</sup> Acknowledging that

62. See Table 2.

63. See DEZALAY & GARTH, *supra* note 2, at 34–41 (claiming that “key source of conflict” in international arbitration practice is the influx of newcomers); see also Catherine A. Rogers, *The Vocation of the International Arbitrator*, 20 AM. U. INT’L L. REV. 957, 968

this may be a by-product of ICCA's elite nature, these findings should be re-evaluated in other contexts.

Table 2 reflects that the general patterns for all arbitrators mirrors ICA arbitrators. There was a somewhat different facial pattern for ITA arbitrators. More than half of ITA arbitrators had served in only one to two ITA cases. Super-elite ITA arbitrators (i.e. those in the top quartile of appointments) had six or more cases. These figures for ITA may, however, reflect the recent and small ITA caseload.

We would be remiss, however, to avoid focusing on one intriguing finding. For the sixty-seven ITA arbitrators, only two of those subjects identified that they had *not* also served as ICA arbitrators. Put differently, only two ITA arbitrators had never served on an ICA case. This provides evidence that serving as an ICA arbitrator may be a "gateway" experience or pre-requisite for serving as an ITA arbitrator.<sup>64</sup> Nevertheless, it is not conclusive that all ITA arbitrators must initially serve as ICA arbitrators, as there may be other pathways to ITA appointments. Alternatively, the data could reflect that being appointed in ITA expands ICA appointment opportunities.

### C. Gender, Age, Legal Training, Native Language, and Nationality of International Arbitrators and Counsel

Existing literature on arbitrators has provided some information on arbitrator background, usually from information released from individual institutions or specific subject matter. While difficult to prove a negative, we are unaware of any existing research that systematically explores the gender, age, and nationality of international arbitrators across institutions and subject matter.<sup>65</sup>

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(2005) (observing the "market for international arbitrators operates as a relatively closed system that is difficult for newcomers to penetrate").

64. This supports Anthea Robert's hypothesis that there is a public and private international law divide within ITA. Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AM. J. INT'L L. 45 (2013); see also Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L & COMP. L. Q. 573 (2011).

65. There is an emerging literature related to ITA arbitrators. See *supra* notes 28–30. Given ICSID's jurisdictional mandate, research on ICSID arbitrators combines ICA and ITA arbitrators without reliably distinguishing between the two. See Puig, *supra* note 3, at 17–18 (collecting information on ICSID arbitrators related to name, gender, and nationality); see also Waibel & Wu, *supra* note 27 (collecting information on ICSID arbitrators only including gender, nationality, age, and legal education). There is limited data on ICA, which makes this research particularly valuable. But see *supra* note 4.



Likewise, we are unaware of any research on demographic information about the background of counsel in international arbitration. This research offers a baseline for future inquiries. Although it provides quantitative information on counsel, the discussion in this section primarily focuses on international arbitrators.

There have been suggestions in the popular press that international arbitrators tend to be “pale, male, and stale.”<sup>66</sup> Presuming the phrase reflects public concerns about diversity in international arbitration, the question is whether inclusiveness (or lack thereof) is empirically verifiable. We acknowledge that it is difficult, if not impossible, to generate a unitary definition of diversity and inclusiveness in international arbitration. We therefore focus on several aspects to create a pluralistic assessment. First, we explored the gender composition of ICCA subjects, as gender is generally a stable characteristic. Second, we explored the age distribution of ICCA participants. Third, we identified variations in legal training, linguistic capacity, nationality, and development status.<sup>67</sup>

Given the existing literature reflecting questions about gender disparity in international arbitration, the descriptive data on gender is vital. Table 3 reflects the gender distribution of participants, arbitrators, and counsel. For all ICCA subjects and the subset of counsel, roughly three-quarters were men, and one quarter were women. The distribution shifted when evaluating those serving as arbitrators—with men becoming even more dominant. Namely, 82.4% of arbitrators were men and 17.6% were women.

The results also suggest a degree of a “gray hair factor” where, although all subjects were typically in their late forties, those individuals serving as arbitrators were somewhat older. Table 3 indicates that the mean age of all subjects was 48 (median=47); and mean counsel age (48) was similar (median=46). In contrast, the

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66. Michael D. Goldhaber, *Madame La Présidente: A Woman Who Sits As President of a Major Arbitral Tribunal Is a Rare Creature. Why?*, 1 TRANSNAT'L DISP. MGMT. (2004), [www.transnational-dispute-management.com/article.asp?key=158](http://www.transnational-dispute-management.com/article.asp?key=158) (“[A]rbitration is dominated by a few aging men, many of whom pioneered the field. In the words of Sarah Francois-Poncet of Salans, the usual suspects are ‘pale, male, and stale.’”).

67. We recognize that defining diversity in international law is complex as notions of “minority status” in national contexts may not apply on the international plane. For example, although Gabrielle Kirk MacDonald is a U.S. national, which is an OECD and high income state, she is an African-American woman. See *infra* note 142. We therefore look at each diversity-related variable in isolation but welcome a more nuanced scale for classifying diversity constructs in international law.

mean age of responding arbitrators was 54 (median=53). These results may not be unusual. Other research suggests the average age of an active member of the bar in California was 48, whereas the average age of California judges was 60;<sup>68</sup> but the age of median judges has been decreasing in several jurisdictions.<sup>69</sup>

**Table 3: Descriptive Statistics of Gender and Age for All ICCA Subjects, the Subset of those Working as Arbitrators, and the Subset of those Working as Counsel**

Variables	All	Arbitrators	Counsel
<b>Subject Gender:</b>			
Percentage (Frequency)			
Women	25.5% (n=134)	17.6% (n=46)	24.0% (n=99)
Men	74.5% (n=392)	82.4% (n=216)	76.0% (n=314)
<i>Total number of subjects</i>	<i>100% (n=526)</i>	<i>100% (n=262)</i>	<i>100% (n=413)</i>
<b>Subject Age:</b>			
Mean	48.5	54.4	48.0
Median	47.0	53.0	46.0
Minimum	24.0	29.0	24.0
Maximum	85.0	85.0	85.0
Standard deviation	12.7	11.7	12.3
<i>Total number of subjects</i>	<i>514</i>	<i>253</i>	<i>406</i>

68. Arden Rowell & Jessica Bregant, *Numeracy and Legal Decision Making*, 46 ARIZ. ST. L.J. 191, 225 n.120 (2014).

69. See M. Margaret McKeown, *The Internet and the Constitution: A Selective Retrospective*, 9 WASH. J.L. TECH. & ARTS 135, 142 (2014) (noting “the median age of active judges has declined: from 58 years old in 1990 to 50 years old in 2010”); Abhinav Chandrachud, *Does Life Tenure Make Judges More Independent? A Comparative Study of Judicial Appointments in India*, 28 CONN. J. INT’L L. 297, 305–06 (2013) (indicating the average age at appointment was fifty-four years for the Australian High Court, fifty-six years for the Canadian Supreme Court, and sixty-four years in the Supreme Court of Japan but noting that the average age at appointment was increasing in India and Japan).

<b>Age as a Function of Gender:<sup>70</sup></b>			
<b>Age of Women</b>			
Mean	42.0	47.5	41.3
Median	40.0	45.0	40.0
Minimum	27.0	32.0	27.0
Maximum	71.0	68.0	65.0
Standard deviation	10.0	9.3	8.4
<i>Total number of Women</i>	128	46	96
<b>Age of Men</b>			
Mean	50.6	55.8	50.0
Median	50.0	55.0	50.0
Minimum	24.0	29.0	24.0
Maximum	85.0	85.0	85.0
Standard deviation	12.8	11.7	12.5
<i>Total number of Men</i>	386	216	310

The age difference between male and female participants was statistically meaningful.<sup>71</sup> Using a *t*-test to analyze mean differences in age,<sup>72</sup> there was always a significant gender difference in the age of ICCA subjects ( $t(512)=6.872$ ,  $p<.001$ ,  $r=.29$ ,  $n=514$ ), those serving as counsel ( $t(404)=6.385$ ,  $p<.001$ ,  $r=.30$ ,  $n=406$ ), or those serving as arbitrators ( $t(251)=4.337$ ,  $p<.001$ ,  $r=.26$ ,  $n=253$ ). The effect sizes all suggested the size was statistically medium.<sup>73</sup> The direction was such that women attending ICCA, regardless of their

70. When looking at age as a function of gender, there were fewer subjects, as six men and six women identified their gender but not their age.

71. Statistical significance “provides a measure to help us decide whether what we observe in our sample is also going on in the population that the sample is supposed to represent.” TIMOTHY C. URDAN, STATISTICS IN PLAIN ENGLISH 62 (3d ed. 2010).

72. An independent samples *t*-test evaluates group differences for a parameter with two levels (like gender) and a normally distributed dependent variable (like age). *Id.* at 93.

73. See LOUIS COHEN ET AL., RESEARCH METHODS IN EDUCATION 113–16 (6th ed. 2007) (providing Cohen’s conventions for understanding effect sizes and indicating a “small” effect is present when  $r=.10$ , a “medium” effect is present when  $r=.30$ , and a “large” effect is present when  $r=.50$ ), whereas effect sizes below  $r=.10$  are less than “small” and arguably of trivial impact).

arbitration experience, were younger than men. Table 3 indicates that, for women arbitrators, the average age was 47.5 whereas the average age of male arbitrators was 55.8.

Another aspect of subjects' diversity is type of legal training received. Table 4 reflects that ICCA subjects had a variety of different legal training. For all ICCA subjects, common law was the dominant legal training, with 46% of the subjects exclusively trained in a common law jurisdiction. There was also a strong civil law component, with 30% of subjects trained exclusively as civil lawyers. There was also a hybrid as 24% of subjects had training in *both* common and civil law.<sup>74</sup> The dominance of common law training was also present in the subset of arbitrators, but was not as facially prominent. Specifically, 38.5% percent of ICCA arbitrators had training exclusively in common law whereas 33.8% of ICCA arbitrators were exclusively trained as civil lawyers, and 27.7% of ICCA arbitrators had training both in common and civil law.<sup>75</sup>

Language is another way to explore the diversity of international arbitration. ICCA subjects spoke fifty-eight different native languages. Although Mandarin and Spanish are the two most prevalent languages in the world,<sup>76</sup> this dominance was not present in the ICCA subjects, the subset of counsel, or the subset of arbitrators. For ICCA subjects generally and counsel, English, Spanish, and Portuguese were most dominant, together accounting for nearly seventy percent of the languages spoken. The proportions were slightly different for the subset of arbitrators, as the dominant languages were English, German, and French (responsible for over sixty percent of total language capacity). Given the dominance of the Chinese population worldwide, it was noteworthy that only four arbitrators' native language was either Mandarin or Cantonese.

As regards geography, ICCA subjects represented sixty different nationalities.<sup>77</sup> Table 4 indicates that, irrespective of

74. These proportions were similar for those serving as arbitration counsel.

75. The results reflect a case selection effect. In theory, more U.S. common-law trained lawyers attended, as Miami was a geographically convenient forum. Future ICCA researchers may wish to explore this issue further to see, as the venue changes, whether this demographic aspect fluctuates or remains stable.

76. *Summary by Language Size*, ETHNOLOGUE: LANGUAGES OF THE WORLD, <http://www.ethnologue.com/statistics/size> (last visited May 16, 2015).

77. For example, Asia has the largest population in the world, and Africa has the second largest. *Distribution of the Global Population 2014*, by Continent, STATISTA, <http://www.statista.com/statistics/237584/distribution-of-the-world-population-by-continent> (last visited May 16, 2015); see also *Current World Population*, ONE WORLD NATIONS ONLINE, [http://www.nationsonline.org/oneworld/world\\_population.htm](http://www.nationsonline.org/oneworld/world_population.htm) (last visited May 16,

whether analyzing ICCA subjects or the subset of arbitrators, the trend was to have the greatest representation from Europe and North America; the lowest proportions came from Africa and Asia.<sup>78</sup>

When focusing on the subset of arbitrators, some nationalities were arguably underrepresented. A potential assessment of under- or over-representation could be evaluated using nationality information about the parties or subject matter in dispute.<sup>79</sup> This information is, unfortunately, generally not publicly available, and international arbitration institutions like ICSID,<sup>80</sup> the LCIA,<sup>81</sup> the ICDR,<sup>82</sup> and the

2015).

78. There is a possible disjunction between arbitrators' place of residence and their state of origin or nationality. We used nationality, as it is an indicator of where individuals express political or civil rights. Future research might also explore the variance by state of residence, state where legal training was obtained, or another state reflecting a substantial tie (i.e., location of property ownership).

79. Articles 39 and 53(3) of the ICSID Convention have nationality requirements that would skew this analysis for ICSID Convention cases. Look at this rule for ad hoc committees, for example:

"None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute."

80. ICSID's statistics are relatively blunt. When focusing upon state respondents, information generally is grouped by geographic region and information on investors is either unavailable or grouped into geographic clusters. ICSID, *THE ICSID CASELOAD—STATISTICS (SPECIAL FOCUS—EUROPEAN UNION)* 6, 11 (2014), available at <https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/Stats%20EU%20Special%20Issue%20-%20Eng.pdf> [hereinafter *EU STATISTICS*]; 2014-1 *STATISTICS*, *supra* note 25, at 11, 25. *But see* *EU STATISTICS*, *supra* note 80, at 7 (identifying EU states involved in ICSID cases). Arbitrator appointments, however, are provided using arbitrator region and the specific nationality. *See* *EU STATISTICS*, *supra* note 80, at 23–24; 2014–1 *STATISTICS*, *supra* note 25, at 18–20, 30–32.

81. The LCIA provides statistics on party nationality in percentages, rather than filed cases, and also sometimes groups together states. The most recent report indicated, between 2012–13, approximately 16–19% of parties were from the United Kingdom, 7–8% of parties were from the United States, 3–5% of parties were Swiss, and 3–4% of parties were Russian. LCIA, *REGISTRAR'S REPORT 2* (2013), available at <http://www.lcia.org/LCIA/reports.aspx>.

82. The American Arbitration Association's Centre for Dispute Resolution (ICDR), makes general statements about expanding party nationality or provides grouped statistics using "Europe, Middle East and Africa" to report party nationality. AMER. ARB. ASS'N, 2013 ANNUAL REPORT & FINANCIAL STATEMENTS 18 (May 15, 2014), available at <https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021420&revision=latestreleased>; *see also* INT'L CENTRE FOR DISPUTE RESOLUTION, 3 *THE ICDR INTERNATIONAL ARBITRATION REPORTER* 2–4 (July 2012), <https://www.adr.org/aaa/ShowPDF?doc=>

SCC<sup>83</sup> do not provide systemic nationality data.<sup>84</sup> In the absence of such information, but the readily available information on global population, we use global population<sup>85</sup> and global gross domestic purchasing power parity (global GDP)<sup>86</sup> as comparative baselines.<sup>87</sup>

Although highest in world population (60.27%), Asian arbitrators were the second least represented (10%) of ICCA

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83. The SCC provides the most constructive information and identifies party nationality and number of cases. They report that Swedish parties dominate the caseload with over 158 parties, while there were 15 Russian parties, 12 Norwegian parties, 12 German parties, and 7 Swiss parties. ARB. INST. OF THE STOCKHOLM CHAMBER OF COMMERCE, STATISTICS 2013: A STRONG YEAR 2 (2013), available at <http://www.sccinstitute.com/media/45932/scc-statistics-2013.pdf>.

84. The ICC provides data on party nationality; but it is only available for a fee. *Statistical Reports*, INT'L CHAMBER OF COMMERCE: DISPUTE RESOLUTION LIBRARY, available at <http://www.iccdri.com/statisticalreports.aspx> (last visited May 16, 2015).

85. See *supra* note 77.

86. Given the temporal gap between commercial activity and the start of arbitration, we initially focused upon global GDP between 2000–2010. See *Report for Selected Countries and Subjects*, INT'L MONETARY FUND (October 2014), available at <http://www.imf.org/external/pubs/ft/weo/2014/02/weodata/weorept.aspx?pr.x=17&pr.y=6&sy=1980&ey=2016&scsm=1&ssd=1&sort=country&ds=.&br=1&c=512,941,914,446,612,666,614,668,311,672,213,946,911,137,193,962,122,674,912,676,313,548,419,556,513,678,316,181,913,682,124,684,339,273,638,921,514,948,218,943,963,686,616,688,223,518,516,728,918,558,748,138,618,196,522,278,622,692,156,694,624,142,626,449,628,564,228,283,924,853,233,288,632,293,636,566,634,964,238,182,662,453,960,968,423,922,935,714,128,862,611,716,321,456,243,722,248,942,469,718,253,724,642,576,643,936,939,961,644,813,819,199,172,184,132,524,646,361,648,362,915,364,134,732,652,366,174,734,328,144,258,146,656,463,654,528,336,923,263,738,268,578,532,537,944,742,176,866,534,369,536,744,429,186,433,925,178,869,436,746,136,926,343,466,158,112,439,111,916,298,664,927,826,846,542,299,967,582,443,474,917,754,544,698&s=NGDPD,PPPGDP&grp=0&a=>.

87. As discussed earlier, there is no central, public repository on information about arbitrators or all international commercial disputes. See *supra* notes 10–26 and accompanying text. As we appreciate that comparisons using party nationality or location of the subject matter of the dispute provide a better uniform baseline, we encourage international arbitration institutions to collaborate to create and provide such information to the public. Likewise, it might be useful to identify foreign investment flows as an alternative proxy, although selecting the time period for the comparison may prove challenging given shifts in global investment flows and the decades of accumulated experience from international arbitrators. Focusing on either inbound or outbound investment flows, however, may not fully capture trans-border economic activity and could miss other economic activity including locally financed assets, mergers and acquisitions, portfolio investment, intellectual property transfers, and other types of critical international commercial activity. Future research could therefore explore the appropriateness of other potential baselines and how those measures might suggest alternative understandings of representativeness in international arbitration.

arbitrators. Notably, although China and India together contain approximately 33% of the world's population and roughly 30.4% of global GDP, less than 3% of participating arbitrators were from those states. Meanwhile, despite Africa's second highest population (15.41%), only two African countries were in the twenty countries with the highest global GDP (Egypt and Nigeria—2.5%) and Africa exhibited the lowest level of representation (0.4%). Other nationalities were arguably over-represented. Europe has 10.37% of the world's population and roughly 12.8% of global GDP, but 48.2% of the arbitrators were European nationals. Similarly, the United States and Canada have 4.93% of the world's population and 14.5% of global GDP, but 27.9% of the ICCA arbitrators were from North America, and of the seventy arbitrators from North America, only one was from Mexico. Other states were somewhat more balanced in representation. For example, Australia and New Zealand contain not quite one percent of world population and less than one percent of global GDP;<sup>88</sup> they represented four percent of ICCA arbitrators. Although South America has 8.49% of world population, 9.6% of ICCA arbitrators were from South America.<sup>89</sup>

**Table 4: Percentages and Frequency Distributions (in parentheses) of Legal Education, Native Language, Continent, and Nationality for All ICCA Subjects, the Subset of those Working as Arbitrators and the Subset of those Working as Counsel**

Variables	All	Arbitrators	Counsel
<b>Legal Education</b>			
Common Law	45.7% (n=237)	38.5% (n=100)	44.6% (n=184)
Civil Law	30.3% (n=157)	33.8% (n=88)	29.1% (n=120)
Both	24.1% (n=125)	27.7% (n=72)	26.4% (n=109)
<i>Total number of subjects</i>	519	260	413
<b>Mother Tongue</b>			
English	48.6% (n=248)	43.3% (n=110)	47.4% (n=191)
Spanish	10.2% (n=52)	7.1% (n=18)	10.4% (n=42)
Portuguese	9.4% (n=48)	8.3% (n=21)	10.7% (n=43)

88. Using nominal GDP unadjusted for PPP, Australia had roughly 2.7% of GDP.

89. Table 4 reflects that the strongest representation from Latin America was Brazilian. Given ICCA-related outreach, it is possible that earlier ICCA Congresses and/or geographic proximity may affect participation in future conferences and grow the global arbitration community. Brazil, however, was also one of the top twenty largest contributors to global GDP, representing three percent of global GDP.

German	6.5% (n=33)	10.6% (n=27)	6.5% (n=26)
French	5.7% (n=29)	10.2% (n=26)	6.5% (n=26)
Dutch	2.2% (n=11)	3.5% (n=9)	2.7% (n=11)
Other languages	17.4% (n=89)	17.0% (n=43)	15.8% (n=64)
Total native languages	38	26	32
<i>Total number of subjects</i>	510	254	403
<b>Continent</b>			
Europe	36.4% (n=183)	48.2% (n=121)	37.2% (n=148)
North America	33.6% (n=169)	27.9% (n=70)	31.4% (n=125)
South America	12.7% (n=64)	9.6% (n=24)	14.3% (n=57)
Asia	10.9% (n=55)	10.0% (n=25)	11.1% (n=44)
Australia / New Zealand	4.6% (n=23)	4.0% (n=10)	4.8% (n=19)
Africa	1.8% (n=9)	0.4% (n=1)	1.3% (n=5)
<i>Total number of subjects</i>	503	251	398
<b>Nationality</b>			
United States	29.0% (n=145)	23.2% (n=58)	26.8% (n=106)
United Kingdom	10.6% (n=53)	9.6% (n=24)	10.4% (n=41)
Brazil	8.6% (n=43)	7.2% (n=18)	9.6% (n=38)
France	5.0% (n=25)	8.8% (n=22)	6.1% (n=24)
Australia	3.8% (n=9)	2.8% (n=7)	4.3% (n=17)
Germany	3.6% (n=18)	4.8% (n=12)	3.0% (n=12)
Canada	3.4% (n=17)	4.8% (n=12)	4.1% (n=16)
Switzerland	2.8% (n=14)	5.6% (n=14)	3.5% (n=14)
China	2.6% (n=13)	1.2% (n=3)	1.5% (n=6)
India	2.4% (n=12)	1.6% (n=4)	2.8% (n=11)
Sweden	2.4% (n=12)	2.8% (n=7)	2.8% (n=11)
Netherlands	1.8% (n=9)	2.4% (n=6)	2.3% (n=9)
Spain	1.8% (n=9)	2.4% (n=6)	2.0% (n=8)
South Korea	1.6% (n=8)	2.4% (n=6)	1.8% (n=7)
Italy	1.1% (n=6)	2.0% (n=5)	0.8% (n=3)
Argentina	1.0% (n=5)	0.4% (n=1)	1.0% (n=4)
Austria	1.0% (n=5)	2.0% (n=5)	1.0% (n=4)
Philippines	1.0% (n=5)	0.4% (n=1)	1.0% (n=4)
Portugal	1.0% (n=5)	1.2% (n=3)	1.3% (n=5)
Russia	1.0% (n=5)	1.6% (n=4)	0.5% (n=2)



Other Primary Nationalities	4.4% ( $n=82$ ) <sup>90</sup>	12.8% ( $n=32$ ) <sup>91</sup>	13.9% ( $n=53$ ) <sup>92</sup>
Total Number of Different Primary Nationalities	58 <sup>93</sup>	41	47
<i>Total number of Subjects</i>	500	250	395
<b>Dual Nationals</b>			
United States	17.6% ( $n=6$ )	—	19.4% ( $n=6$ )
Italy	14.7% ( $n=5$ )	10.0% ( $n=1$ )	16.1% ( $n=5$ )
United Kingdom	11.8% ( $n=4$ )	20.0% ( $n=2$ )	9.7% ( $n=3$ )
Germany	8.8% ( $n=3$ )	30.0% ( $n=3$ )	9.7% ( $n=3$ )
Australia	5.9% ( $n=2$ )	—	6.5% ( $n=2$ )
Brazil	5.9% ( $n=2$ )	10.0% ( $n=1$ )	3.2% ( $n=1$ )
Switzerland	5.9% ( $n=2$ )	20.0% ( $n=2$ )	6.5% ( $n=2$ )
Other Dual Nationalities	29.4% ( $n=10$ ) <sup>94</sup>	10% ( $n=1$ ) <sup>95</sup>	28.9% ( $n=9$ ) <sup>96</sup>
<i>Total number of Subjects</i>	34	10	31

90. This table reflects only those nationalities where, for all ICCA subjects, there were five or more nationals from the country. Thirty-eight other states had at least one but less than five subjects each, namely: Bahrain, Belgium, Bolivia, Colombia, Costa Rica, Cuba, Czech Republic, Denmark, Dominican Republic, Ecuador, Finland, Georgia, Ghana, Greece, Guatemala, Haiti, Ireland, Jamaica, Japan, Malaysia, Malta, Mexico, Morocco, New Zealand, Nigeria, Norway, Peru, Rwanda, Singapore, Slovakia, South Africa, Syria, Tanzania, Tunisia, Ukraine, Venezuela, and Vietnam.

91. The other primary nationalities of arbitrators were Belgium, Bolivia, Chile, Czech Republic, Denmark, Finland, Georgia, Greece, Guatemala, Ireland, Japan, Malaysia, Mexico, New Zealand, Nigeria, Peru, Singapore, Slovakia, Ukraine, Venezuela, and Vietnam.

92. The other primary nationalities of counsel were Belgium, Bolivia, Colombia, Cuba, Czech Republic, Denmark, Ecuador, Finland, Georgia, Greece, Guatemala, Jamaica, Japan, Malaysia, Malta, Mexico, Morocco, New Zealand, Nigeria, Peru, Singapore, Slovakia, South Africa, Ukraine, Venezuela, and Vietnam.

93. For both primary and secondary nationalities, there were sixty different states.

94. This table reflects only dual nationals where there were two or more nationals for all ICCA subjects. There were also single dual nationals from Czech Republic, France, New Zealand, Spain, Venezuela, Uruguay, Lebanon, Ireland, Nigeria, and Portugal.

95. This dual national arbitrator was from Nigeria.

96. There were also dual nationals from the Czech Republic, France, Ireland, Lebanon, Nigeria, Portugal, Spain, Uruguay, and Venezuela.

Historically, much literature has focused upon the prevalence of “western” parties in international law;<sup>97</sup> in a post-Cold War era with different policy concerns, this terminology is somewhat outmoded. As a final aspect for measuring the scope of diversity, we therefore explored the development status of subjects’ nationality.<sup>98</sup> Defining “Development Status” is a perpetual challenge, as there is no consistent legal definition.<sup>99</sup> Development has a degree of subtlety and can mean different things to different people. For example, the World Trade Organization does not offer a precise measurement for development; rather, it permits member states to self-define development.<sup>100</sup> The lack of a consistent definition has caused confusion in international law.<sup>101</sup> Without a predefined, exclusive measure, it is appropriate to use measures based upon “judgments made for entirely different purposes by *other researchers*.”<sup>102</sup>

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97. See, e.g., Kurt Gaubatz & Matthew MacArthur, *How International is “International” Law?*, 22 MICH. J. INT’L L. 239 (2001); see also Puig, *supra* note 3, at 19 (identifying that, for only ICSID arbitration, “most arbitrators are from specific developed countries. Individuals of seven nations (New Zealand, Australia, Canada, Switzerland, France, the UK, and the US) represent almost half of total appointments”).

98. Future analysis might explore country of residence, as nationality and residency are not necessarily equivalent. Given limited time and space constraints, we selected nationality to identify where the international arbitration pipeline derives, rather than where they reside currently. Using nationality and residency together might also provide evidence of the mobility of the international legal services market. David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1227, 1323–30 (2008); see also ORLY LOBEL, *TALENT WANTS TO BE FREE: WHY WE SHOULD LEARN TO LOVE LEAKS, RAIDS, AND FREE RIDING* (2013).

99. Marc L. Bush & Eric Reinhard, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, 37 J. WORLD TRADE 719, 719, 723 (2003) (analyzing development dimensions in GATT disputes and observing the difficulty in making distinctions between developed and developing states).

100. See *Who are the Developing Countries in the WTO?*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/devel\\_e/dlwho\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/dlwho_e.htm) (“There are no WTO definitions of ‘developed’ and ‘developing’ countries. Members announce for themselves whether they are ‘developed’ and ‘developing’ countries.”) (last visited May 16, 2015); see also Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT’L L.J. 1, 32 n.159 (2011) (“WTO rules do not contain a definition of a ‘developing country.’ Instead, states self-designate themselves as developed or developing countries as part of a political calculus.”); Andrew D. Mitchell & Joanne Wallis, *Pacific Pause: The Rhetoric of Special & Differential Treatment, The Reality of WTO Accession*, 27 WISC. INT’L L.J. 663, 696–97 (2010).

101. Benjamin L. Liebman, *Autonomy Through Separation?: Environmental Law and the Basic Law of Hong Kong*, 39 HARV. INT’L L.J. 231, 261–62 (1998).

102. GARY KING ET AL., *DESIGNING SOCIAL ENQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 157 (1994) (emphasis in original); see also Susan D. Franck et al.,

We used three measures to define development status.<sup>103</sup> First, development was operationalized as a binary categorical variable—OECD Status—that derived from a state’s membership in the Organisation for Economic Co-operation and Development (OECD). OECD membership is generally, but not always, associated with higher levels of development and therefore is a blunt proxy.<sup>104</sup> Second, development was also operationalized using a four-category variable—World Bank Status—that derived from a World Bank classification system grouping states as High Income, Upper-Middle Income, Lower-Middle Income, and Low Income.<sup>105</sup> The World Bank’s main criterion for classifying economies is gross national income per capita.<sup>106</sup> Third, development status was operationalized using a continuous variable—HDI status—from the United Nations Development Programme’s Human Development Index (HDI). HDI evaluates elements including life expectancy, education, and income. HDI is a continuous variable and ranges from 0.0 (undeveloped) to 1.0 (completely developed).<sup>107</sup>

Regardless of which measure was used, the results indicated that nationals from developed states dominated the roster of all ICCA subjects generally, as well as the subsets of counsel and arbitrators. For all groups, Table 5 demonstrates that seventy-five percent (or more for the subset of arbitrators) of subjects were from an OECD or High Income state; and we observe that none of the ICCA subjects were arbitrators or counsel from Low Income states. There were similar results for those who were dual nationals. Using HDI scores frames the demographics more starkly for the subset of arbitrators. The median HDI score for arbitrators meant that half of the

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*Through the Looking Glass: Understanding Social Science Norms for Analyzing International Investment Law*, 2010-11 Y.B. ON INT’L INVESTMENT L. & POL’Y 883 (2011).

103. Irrespective of the measure used for coding development, all codes were generated using the scores available in 2014.

104. Jan Wouters & Sven Van Kerckhoven, *The OECD and the G20: An Ever Closer Relationship?*, 43 GEO. WASH. INT’L L. REV 345 (2011).

105. The World Bank analytical classifications used for coding are available at *Country and Lending Groups*, WORLD BANK, <http://data.worldbank.org/about/country-and-lending-groups> (last visited May 16, 2015).

106. *Data: How we Classify Countries*, WORLD BANK, <https://datahelpdesk.worldbank.org/knowledgebase/articles/378834-how-does-the-world-bank-classify-countries> (last visited May 16, 2015).

107. As HDI coding methodology changed in 2011, we used data provided by Dr. Milorad Kovacevic, Chief Statistician at the Human Development Report Office of the United Nations Development Programme. All of scores from Dr. Kovacevic used the updated 2011 methodology to re-evaluate the historical and current rankings.

arbitrators were from states with “very high human development” as classified by the United Nations Development Programme (UNDP), and were in the top twelve most developed nations; using the mean meant that the average arbitrator came from a state whose HDI score put it in the top thirty most developed states in the world.<sup>108</sup>

**Table 5: Descriptive Statistics of the Development Status of All ICCA Subjects, the Subset of Arbitrators, and the Subset of Counsel as a Function of OECD Membership, World Bank Classification, and the Human Development Index.<sup>109</sup>**

<b>Variables</b>	<b>All</b>	<b>Arbitrators</b>	<b>Counsel</b>
<b>OECD Nationals:</b>			
Percentage (Frequency)			
OECD national	74.6% ( <i>n</i> =373)	82.4% ( <i>n</i> =206)	75.2% ( <i>n</i> =297)
Non-OECD national	25.4% ( <i>n</i> =127)	17.6% ( <i>n</i> =44)	24.8% ( <i>n</i> =98)
<i>Totals</i>	100% ( <i>n</i> =500)	100% ( <i>n</i> =250)	100% ( <i>n</i> =395)
<b>OECD Dual Nationals:</b>			
Percentage (Frequency)			
OECD national	79.4% ( <i>n</i> =27)	80.0% ( <i>n</i> =8)	80.6% ( <i>n</i> =25)
Non-OECD national	20.6% ( <i>n</i> =7)	20.0% ( <i>n</i> =2)	19.4% ( <i>n</i> =6)
<i>Totals</i>	100% ( <i>n</i> =34)	100% ( <i>n</i> =10)	100% ( <i>n</i> =31)
<b>World Bank Classification of Primary Nationality:</b>			
Percentage (Frequency)			
High income	76.4% ( <i>n</i> =382)	84.8% ( <i>n</i> =212)	76.5% ( <i>n</i> =302)
Upper-middle income	16.6% ( <i>n</i> =83)	10.8% ( <i>n</i> =27)	16.7% ( <i>n</i> =66)
Lower-middle income	6.4% ( <i>n</i> =32)	4.4% ( <i>n</i> =11)	6.8% ( <i>n</i> =27)
Low income	0.6% ( <i>n</i> =3)	—	—
<i>Totals</i>	100% ( <i>n</i> =500)	100% ( <i>n</i> =250)	100% ( <i>n</i> =395)

108. This shifted only slightly for arbitrators who were dual nationals. For those arbitrators with dual nationalities from states with “very high human development,” the median HDI score was in the top seventeen most developed states and the mean HDI score was in the top thirty-five states.

109. Forty-eight subjects did not provide nationality information.

<b>World Bank Classification of Secondary Nationality:</b> Percentage (Frequency)			
High income	85.3% (n=29)	80.0% (n=8)	87.1%(n=27)
Upper-middle income	11.8% (n=4)	10.0% (n=1)	9.7%(n=3)
Lower-middle income	2.9% (n=1)	10.0% (n=1)	3.2%(n=1)
Low income	—	—	—
<i>Totals</i>	100% (n=34)	100% (n=10)	100% (n=31)
<b>HDI Classification of Primary nationality</b>			
Mean	0.859	0.874	0.860
Minimum	0.434	0.471	0.471
1st quartile	0.816	0.875	0.816
2nd quartile (median)	0.909	0.909	0.909
3rd quartile	0.937	0.937	0.937
Maximum	0.955	0.938	0.938
Standard deviation	0.105	0.086	0.102
<i>Total number of subjects</i>	500	250	395
<b>HDI classification of Secondary nationality</b>			
Mean	0.868	0.842	0.870
Minimum	0.471	0.471	0.471
1st quartile	0.875	0.839	0.875
2nd quartile (median)	0.883	0.897	0.885
3rd quartile	0.924	0.920	0.937
Maximum	0.938	0.920	0.938
Standard deviation	0.094	0.142	0.095
<i>Total number of subjects</i>	34	10	31

It is possible that these data did not fully reflect the global international arbitration community. Nevertheless, the data offer previously unavailable cross-sectional information about the prevalence of men (Table 3), certain nationalities (Table 4), and developed world actors (Table 5).

The data may reflect a potential “pipeline” problem related to capacity-building in international arbitration. While an analysis of the origins of diversity challenges in international adjudication is

beyond the scope of this Article,<sup>110</sup> we note that not all states have the same level of legal infrastructure; and the men and women of states with less developed legal education systems might be less well represented in international arbitration.<sup>111</sup> Separately, not all states are equally supportive of women's education—legal education specifically—or may have other non-legal barriers that make women's professional work challenging. Even if states support of women's education today, they may not have historically invested in women's education or professional training. It is also possible that, as international law courts and tribunals generally exhibit diversity challenges,<sup>112</sup> the data reflect larger diversity challenges in international law. These findings require replication to assess their ongoing value and explore whether the international arbitration community changes over time.<sup>113</sup>

#### D. Key Findings

The data reflect that counsel and arbitrators were the primary ICCA attendees and presumably core members of the “invisible college.” The standard number of appointments for counsel ranged from a mean of thirty to a median of fifteen. For those appointed as

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110. Future work may explore theories explaining the systematic representation of women and/or developing world arbitrators. Others have explored the lack of women in judicial positions generally or international courts and tribunals, which could have similarities to in international arbitration. See Nienke Grossman, *Shattering the Glass Ceiling in International Adjudication* (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2472054](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2472054) (exploring theories to explain the lack of women adjudicators in public international law); see *infra* note 146 and accompanying text (exploring theories about women's lack of presence on the bench).

111. See Greenwood & Baker, *supra* note 30, at 654, 657 (identifying that “the additional obstacles which an international arbitrator must overcome in order to succeed may penalize women disproportionately” and discussing how factors “including office climate, difficulties in managing dual careers, lack of female role models and mentors, lack of flexible work options and attitudes to flexible working” can contribute to a “pipeline leak”).

112. See Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts*, 12 CHI. J. INT'L L. 647 (2012) (identifying the lack of women on international courts and tribunals).

113. Greenwood and Baker suggested that problems in international arbitration extend beyond having sufficient women in the pipeline. They acknowledge that even though there are fewer men than women entering U.K. law firms, more men become partners. They also observe that the “best estimates of 6% of women appointed as arbitrators on international arbitration tribunals is just over half the 11% figure for female partners on international arbitration teams.” Greenwood & Baker, *supra* note 30, at 658. *But see* Stipanowich, *supra* note 4, at 56 (identifying that roughly 15% of international arbitration respondents in his study were women).

arbitrators, individuals obtained thirty-five appointments on average, but only a median of ten. The number of ICA appointments was generally larger than ITA appointments. The ICCA data did not reflect large numbers of public international law and national court judges in the dataset.

ICCA subjects were representative of arbitration specialists from many continents, nationalities, languages, and legal training. Within that breadth, there were notable concentrations that tended to be dominant in terms of size; the data confirmed narratives regarding a lack of diversity in the field of international arbitration. Counsel and arbitrators were predominantly from developed states, with a higher concentration of developed state subjects in the subset of arbitrators. Likewise, counsel and arbitrators were predominantly male, with higher proportions of men in the subset of arbitrators. Meanwhile, we identified a statistically meaningful age difference between men and women arbitrators, such that males were older and females were younger.

The “median international arbitrator”<sup>114</sup> was a fifty-three year-old man who was a national of a developed state and had served as arbitrator in ten arbitration cases; and the median international counsel was a forty-six year-old man who was a national of a developed state and had served in fifteen arbitrations. The demographic data offers preliminary information about the practitioners and adjudicators of international dispute settlement. In contrast to the “invisible college” of international law professionals described by Schachter,<sup>115</sup> this information aids in the

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114. Other research has explored the attributes of median judges, often in the context of panel decision-making. See Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37, 47–49 (2008) (discussing “median judges” in various contexts); Andrew D. Martin, Kevin M. Quinn & Lee Epstein, *The Median Justice on the United States Supreme Court*, 83 N.C. L. REV. 1275, 1277 (2005) (discussing and defining the “median justice” in the context of the U.S. Supreme Court empirical research); see also Michael Abramowicz, *A Compromise Approach to Compromise Verdicts*, 89 CAL. L. REV. 231, 309–10 (2001) (discussing median judges). The “median arbitrator” is a composite of the median characteristics from this Article, which inevitably means the characteristics could refer to an individual who may not actually exist. We hope that the imbuing measures of central tendency within a single, albeit potentially fictional, repository offers a useful construct.

115. See Schachter, *supra* note 1, at 217 (“the professional community of international lawyers . . . though dispersed throughout the world and engaged in diverse occupations . . . [is] a kind of invisible college dedicated to a common intellectual enterprise.”); see also Harlan G. Cohen, *Lawyers and Precedent*, 46 VAND. J. TRANSNAT’L L. 1025 (2013); Tom Dannenbaum, *Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why it Must be Reversed*, 45 CORNELL INT’L L.J. 77, 129–31 (2012) (discussing the “invisible college” involved in international dispute settlement that begins from legal education and grows through transnational legal dialogues

demystification of international arbitration and offers data to the arbitration community.

#### IV. PERCEIVED DIVERSITY CHALLENGES

Several scholars identify that the diversity of those presiding over adjudicatory bodies, particularly international courts and tribunals, is an important factor for the legitimacy of those bodies.<sup>116</sup> Nienke Grossman argues that adjudicative bodies “where one sex is severely under- or over-represented lack normative legitimacy because they are inherently biased.”<sup>117</sup> Even if men and women do not decide cases differently,<sup>118</sup> she posits, “sex representation matters for sociological legitimacy because relevant constituencies believe they do” and “representativeness is an important democratic value.”<sup>119</sup> As a result, concerns related to diversity in international

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amongst law firms and other networks).

116. . See generally Grossman, *supra* note 110 (exploring how women’s participation on international courts and tribunals affects their legitimacy); see also Sally J. Kenney, *Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice*, 10 FEMINIST LEGAL STUD. 257, 265–66 (2002) (exploring whether the paucity of women on the European Court of Justice’s bench affects its legitimacy and why); Leigh Swigart, *The “National Judge”: Some Reflections on Diversity in International Courts and Tribunals*, 42 MCGEORGE L. REV. 223, 224 (2010) (“Like their domestic counterparts, international courts and tribunals depend on public faith in their judges to inspire confidence in court decisions and in the judicial system more generally.”).

117. Grossman, *Sex on the Bench*, *supra* note 112, at 652.

118. In other contexts, more diverse decision-makers have made different, and more legally accurate, legal assessments. See Jennifer L. Peresic, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759 (2005) (identifying that the presence of at least one female judge on panels reviewing sexual harassment and sex discrimination cases was more than twice as likely to find for plaintiffs); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 579 (2006) (finding that diversifying mock jury panels created broader information exchanges and decreased risk of error). It is possible, but not certain, that panels with diverse arbitrators could make different decisions.

119. Grossman, *Sex on the Bench*, *supra* note 112, at 652. Grossman suggests this is true only where men and women think differently or approach cases in a different way as those making decisions should reflect those affected by the decisions.



arbitration impact its symbolic legitimacy<sup>120</sup> and, more broadly, that of international courts and tribunals.<sup>121</sup>

For ITA, as a hybrid creature involving public international law, concerns about sociological legitimacy, democratic legitimacy, and democracy deficits are especially relevant.<sup>122</sup> Concerns about diversity also impact the legitimacy of ICA and disputes purely among private parties. Although the New York Convention<sup>123</sup> and UNCITRAL Model Law<sup>124</sup> require domestic judiciaries to give arbitration awards deference, that deference derives from trust in the integrity of arbitrators and the arbitral process. Consequently, domestic courts need not give international arbitration procedures or awards *carte blanche* and they retain the power to oversee the parties, their lawyers, and the arbitrators. Some jurisdictions have historically expressed a “judicial hostility” to arbitration, and others have perceived arbitration as an unwarranted intrusion into state authority.<sup>125</sup> States permit and honor arbitration proceedings, in part, because of their perceived utility; should those courts or legislatures believe that ICA is illegitimate or problematic, they retain the capacity to re-absorb those cases into judicial dockets. There have been calls to regulate international arbitration more closely regardless

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120. See *infra* notes 214, 223 and accompanying text (discussing Thomas Franck’s conceptions of legitimacy, including symbolic legitimacy, and implications for international law).

121. See Kumar & Rose, *supra* note 60, at 25–26 (calling for empirical research comparing diversity imbalances at the ICJ with international arbitration).

122. See Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT’L L. REV. 107 (2009) (discussing a sociological approach to legitimacy); Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61 (2013) (discussing a democratic theory of legitimacy); see also Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT’L L. 596, 601 (1999) (asserting that popular views about an authority comprise one dimension of that authority’s legitimacy); Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 ETHICS & INT’L AFF. 405, 405–06 (2006) (suggesting that a global public standard of legitimacy can help citizens distinguish legitimate institutions from illegitimate ones).

123. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention].

124. UNCITRAL Model Law on Int’l Com. Arb., G.A. Res. 61/33, U.N. Doc. A/40/17, annex I & A/61/17, annex I (July 7, 2006), available at [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf) (last accessed July 31, 2014).

125. See, e.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974) (noting “centuries of judicial hostility to arbitration agreements”); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION § 1.01 (2d ed. 2014) (providing a brief history of international commercial arbitration).

of whether a dispute involves a state or state-related entity.<sup>126</sup> Even private dispute resolution, therefore, is dependent on public trust.<sup>127</sup> As Salim Moollan observed, there are risks when international arbitration is viewed as an imposed, foreign process.<sup>128</sup> There is a risk that international arbitration could be seen not simply as an alternative method of dispute resolution, but as a shadow legal system.

Diversity concerns are not unique to international arbitration.<sup>129</sup> As a report by Oxford Economics explains, “[e]mployee diversity—across lines of gender, ethnicity, country of birth, age, and others—has become a hot boardroom topic across the globe. It is becoming not only a critical issue for human resources (HR) executives, but a major part of corporate strategy.”<sup>130</sup> Some suggest that, “diversity should be considered by both policymakers and businesses when making investment and policy decisions as it

126. See, e.g., Sundaresh Menon, *International Arbitration: The Coming of a New Age for Asia (and Elsewhere)*, Remarks at the Singapore ICCA Congress, ¶43 (2012), available at [http://www.arbitration-icca.org/media/0/13398435632250/ags\\_opening\\_speech\\_icca\\_congress\\_2012.pdf](http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf) (“As we contemplate these problems of moral hazard, ethics, inadequate supply and conflicts of interests associated with international arbitrators, it seems surprising that there are no controls or regulations to maintain the quality, standards and legitimacy of the industry.”); Sundaresh Menon, *Where We Have Been, Where We Should Go*, in *ICCA MIAMI CONGRESS PROCEEDINGS*, *supra* note 32, at 1035 (“I believe that this is the essential challenge of this age—we are moving very rapidly from a time when the key players knew one another; when they often looked similar and spoke similarly; and when they had a common legal, cultural and social background; to a period in which there is unprecedented growth in numbers and in diversity.”).

127. Parties only have the right to choose arbitration, and choose their arbitrators, where states generate laws granting parties those rights. This reflects that, while party autonomy is a critical value in international arbitration, it is not the only value.

128. See Moollan, *supra* note 52, at 2:12–3:16 (observing the disjunction between “the formal discourse repeated at every conference we go to emphasizing the inclusiveness of international arbitration” and “the perception of our field, in the developing world as predominantly Euro- and American-centric” and suggesting that this gives “rise to a risk of arbitration being perceived as foreign process imposed from abroad, as an unwanted but inevitable corollary of trade and investment flows” but suggesting “the answer to this is to make sure that the developing world has its say in the process and in its development and for international arbitration to progressively to become part and parcel of the legal culture of developing countries”).

129. Other aspects of diversity that are worthy of exploration, which we did not have the time or space to explore, involved sexual orientation, religion, marital status, disability, or medical condition. See generally Davis, *supra* note 4 (exploring the gender, race, disability, and sexual orientation of international arbitrators in the United States).

130. OXFORD ECON., *THE GLOBAL DIVERSITY REPORT: AN ANNUAL GUIDE TO MEASURE GLOBAL EMPLOYEE DIVERSITY* 1 (2011), available at <https://www.oxfordeconomics.com/my-oxford/projects/128931>.

can affect competitiveness which is key to economic growth and the quality of life of a nation's citizens."<sup>131</sup> This section, therefore, first explores the basic demographics of international arbitration and places those findings within a larger context. The section then explores subjects' perceptions about potential diversity challenges within international arbitration; and it then contrasts this with subjects' actual experiences as arbitrators and counsels to explore their actual experiences with the diversity of international arbitrators. Finally, it explores the implications for justice and legitimacy within international arbitration.

#### A. Contextualizing the Demographics of Diversity

Earlier, Tables 2–5 offered descriptive data on diversity levels within the international arbitration community. The data suggested the “median” ICCA subject and arbitration counsel was a male, forty-six years of age, with some common law legal training, from a developed state. In contrast, the “median” arbitrator at ICCA was a male, fifty-three years of age, with some training from a common law jurisdiction, and from a developed state. Less than eighteen percent of the arbitrators were women,<sup>132</sup> twenty percent (or less) were from

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131. *Id.* at 21.

132. We would be remiss not to recall that women arbitrators were statistically younger (forty-eight years old on average) than their male counterparts (fifty-six years old on average). Given this possibility, one might expect a slightly lower representation of women with the need to achieve the requisite years of experience. Greenwood and Baker suggest that female partners make up about eleven percent of international arbitration teams; and when compared to their data on arbitrators, they infer that less than half of that eleven percent serve as arbitrators and thereby suffer from “more than the usual ‘pipeline leak.’” Greenwood & Baker, *supra* note 30, at 658. This creates three possibilities. First, Greenwood and Baker’s extrapolation that women account for six percent of international arbitrators could be wrong, and their derivative inference is incorrect. Second, it means that the seventeen percent proportion of women arbitrators in our sample was over-representative of women arbitrators. This could reflect that either women who have multiple appointments elect to attend ICCA or benefit from ICCA networking opportunities. *But see* Stipanowich, *supra* note 4, at 56–57 (identifying that roughly fifteen percent of subjects in a survey of international arbitrators were women). Third, as several studies identified that women accounted for five to nine percent of the ITA arbitrator pool, there may be meaningful differences in the appointment of women in ICA and ITA arbitration and there may be comparatively more women acting as ICA arbitrators. At present, we believe the most plausible scenario is that our dataset reflects a slightly higher proportion of female arbitrators than the general population. For the subset of ITA arbitrators, there were nine female subjects (13.4%) and fifty-eight men (86.6%). This is facially distinguishable from recent research about ITA where, out of a pool of 248 arbitrators, there were nine women (3.6%) arbitrating cases generating a public award prior to 2012. FRANCK, *supra* note 29; *see also* Franck, *Empirically Evaluating*, *supra* note 28, at 81 (identifying 5 women (3.5%)

non-OECD or non-High Income states, and HDI scores reflected that the median arbitrator was from one of the top twelve most developed states in the world. These results suggest that: (1) women's presence in international arbitration has been relatively small; and (2) the proportion of developing world arbitrators has been relatively small.

Although international arbitration involves transnational dispute settlement, the measures of central tendency supported narratives of a relatively non-diverse, homogenous group populating international arbitration. Put another way, the descriptive data provide preliminary evidence suggesting that critiques that international arbitration lacks diversity are not stylized facts, but reflect empirically verified data. Nevertheless, the data must be viewed in context. While difficult to point to perfect diversity balance in elite positions, some communities meet diversity challenges better than others.

#### *B. More Relative Success with Diversity*

There are a variety of professional contexts in which women and minorities have been represented well, albeit not perfectly. These areas involve the public sector, including domestic legislative and judicial branches, and some areas within the private sector.

Several national legislatures exhibited better diversity indicators than international arbitration. For instance, as of 2013, the countries where women had the largest proportions of elected representatives included Sweden (forty-seven percent), Iceland (forty-three percent), Argentina (forty-three percent), The Netherlands (forty-two percent), and Finland (forty-two percent).<sup>133</sup> According to Women in National Parliaments, in 2014, out of the 149 countries surveyed, thirty-five countries (including Rwanda, Ecuador, Mexico, Serbia, and Burundi) had more than thirty percent female representation in their lower houses.<sup>134</sup> Recent data indicated

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out of a pool of 145 arbitrators in pre-2007 awards). If the third possibility is also correct, however, the sample may simply be over-representative of ITA, rather than ICA, women arbitrators. This is a realistic possibility as, for our subset of ICA arbitrators, 45 (17.3%) were women.

133. GLOBAL DIVERSITY REPORT, *supra* note 130, at 10 (citing the United Nations, Women's Indicators and Statistics Database).

134. *World Classification*, WOMEN IN NAT'L PARLIAMENTS (Apr. 1, 2014), <http://www.ipu.org/wmn-e/classif.htm>. There were, however, thirty-two states where women in national legislatures accounted for less than eleven percent. *Id.* There was also wide variation in women's representation in upper houses. Some states, however, have quotas that promote gender diversity. For example, the Government of Iraq and the Kurdish

that in OECD states the average proportion of female representation in parliaments was twenty-six percent; and while women in OECD states occupied over fifty percent of central government jobs, they held twenty-nine percent of elite management positions.<sup>135</sup>

Research on national judiciaries offers instructive comparative information about diversity related to gender and race. Many—but not all—countries do better than international arbitration in having women in positions of key adjudicative responsibility. Several countries in the European Union have had success in equalizing the representation of women in their domestic judiciaries.<sup>136</sup> Some countries have more than fifty percent women in their judiciaries including Bosnia and Herzegovina, Croatia, Czech Republic, France, Greece, Hungary, Latvia, Montenegro, Poland, Romania, Slovakia, Slovenia,<sup>137</sup> and Israel.<sup>138</sup> Yet even for countries that have experienced success in bringing women to the bench, many women were not in the most elite judicial positions.<sup>139</sup>

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Regional Government require quotas of twenty-five percent and thirty percent women respectively in their legislatures. Committee on the Elimination of Discrimination Against Women (CEDAW), Concluding Observations on the Combined Fourth to Sixth Periodic Reports of Iraq, ¶¶ 33–34, U.N. Doc. CEDAW/C/IRQ/CO/4-6 (Mar. 10, 2014), *available at* [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/IRQ/CO/4-6&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/IRQ/CO/4-6&Lang=En) [hereinafter Committee on the Elimination of Discrimination].

135. OECD, GOVERNMENT AT A GLANCE 2013, at 122–27 (2013), *available at* [http://www.oecd-ilibrary.org/governance/government-at-a-glance-2013\\_gov\\_glance-2013-en](http://www.oecd-ilibrary.org/governance/government-at-a-glance-2013_gov_glance-2013-en).

136. See EUR. COMM’N FOR THE EFFICIENCY OF JUSTICE, COUNCIL OF EUR., EVALUATION REPORT ON EUROPEAN JUDICIAL SYSTEMS 147–50, 275–86 (2012) [hereinafter REP. ON EUR. JUDICIAL SYSTEMS] *available at* [http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport\\_en.pdf](http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf) (highlighting the achievements of several European Union judiciaries in having proportionate numbers of women in their judiciaries).

137. The percentages break down as follows: Bosnia and Herzegovina: sixty-three percent; Croatia: sixty-seven percent; Czech Republic: sixty-one percent; France: sixty-four percent; Greece: sixty-five percent; Hungary: sixty-nine percent; Latvia: seventy-six percent; Montenegro: fifty-five percent; Poland: sixty-three percent; Romania: seventy-three percent; Slovakia: sixty-three percent; Slovenia: seventy-eight percent. See *id.* at 147–50, 275–81; see also GENDER AND JUDGING (Ulrike Schultz & Gisela Shaw eds., 2013) (exploring the experiences of women judges in nineteen different countries).

138. Eyal Katvan, *The Entry and Integration of Women into Judicial Positions in Israel*, in GENDER AND JUDGING, *supra* note 138, at 83.

139. See REP. ON EUR. JUDICIAL SYSTEMS, *supra* note 136, at 280 (observing that only six European states have more than fifty percent women in positions of power such as court presidents); OECD, *supra* note 135, at 124 (observing that women accounted for twenty-nine percent of court presidencies of trial and intermediate appellate courts in OECD states). See generally GENDER AND JUDGING, *supra* note 137 (providing articles indicating that women’s experience on the bench is most dominant in the lower levels of the judiciary and

Some countries exhibit relative success in diversifying their judiciaries to make them more representative of the population. Women have comprised nearly fifty percent of law school classes in the United States since 1992, yet they currently only occupy approximately thirty-three percent of positions within the federal judiciary;<sup>140</sup> and only roughly twenty-three percent of U.S. federal district court judges are minorities.<sup>141</sup> Similarly, within the United States, state courts experienced a range of gender diversity; despite increases over time, recent data indicate women hold 29.2% of state judicial positions.<sup>142</sup> Minorities held approximately 12.6% of overall state judicial positions in the United States.<sup>143</sup> In Germany, women account for approximately 59% of law graduates;<sup>144</sup> and in 2012, approximately 40% of national judges were women.<sup>145</sup> Similarly, in

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not in more elite positions in courts of last resort).

140. *Women in the Federal Judiciary: Still a Long Way to Go*, NAT'L WOMEN'S LAW CTR. (June 27, 2014), <http://www.nwlc.org/resource/women-federal-judiciary-still-long-way-go-1>; see also Jill D. Weingberg & Laura B. Nielsen, *Examining Empathy: Discrimination, Experience and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 347-348 (2012). This is an improvement from 1977, when data suggested that women represented 1.4% and minorities represented 4.4% of the federal judiciary. Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587, 588 (2011).

141. Weingberg & Nielsen, *supra* note 140, at 347; see also Gregory L. Acquaviva & John D. Castiglione, *Judicial Diversity on State Supreme Courts*, 39 SETON HALL L. REV. 1203, 1214, 1223 (2009).

142. The low was 5.6% in West Virginia and the high was 34.2% in Massachusetts.

143. Malia Reddick et al., *Racial and Gender Diversity on State Courts: An AJS Study*, 48 JUDGES J. 28 (2009). The states with the lowest proportion of minority candidates were Maine, Montana, New Hampshire, Vermont, and Wyoming (0%), with a high of 65.1% in Hawaii; the next states with the highest proportion of minority judges were Louisiana (20.6%) and New York (20.5%). *Id.* Research exploring women's variation in representation in U.S. state courts also identified that the size of the court matters, and larger courts are more likely to have more women. See Sally J. Kenny, *Choosing Judges: A Bumpy Road to Women's Equality and a Long Way to Go*, 2012 MICH. ST. L. REV. 1499, 1520-21 (2012); see also Margaret Williams, *Women's Representation on State Trial and Appellate Courts*, 88 SOC. SCI. Q. 1192, 1199 (2007).

144. *Ausbildungsstatistik*, BUNDESAMT FÜR JUSTIZ (Oct. 31, 2014), [https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Juristenausbildung\\_2013.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Juristenausbildung_2013.pdf?__blob=publicationFile&v=2).

145. In Germany, thirty-one percent of the Federal Constitutional Court is comprised of women. *Zahl der Richter, Richterinnen, Staatsanwälte, Staatsanwältinnen und Vertreter, Vertreterinnen des öffentlichen Interesses in der Rechtspflege der Bundesrepublik Deutschland*, BUNDESAMT FÜR JUSTIZ (Dec. 31, 2012), [https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Gesamtstatistik.pdf?\\_\\_blob=publicationFile&v=5](https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Gesamtstatistik.pdf?__blob=publicationFile&v=5). Scholars have identified, however, that women within the German judiciary "continue to be under-represented in leadership positions." Ulrike Schultz, "I was noticed

Canada, although women made up 51% of the Canadian population and 40% of practicing lawyers, only about 33% of judges were women. Canada, however, has had even weaker representation of minorities, with minorities comprising only 2.3% of federally appointed judges.<sup>146</sup> This suggests that, although these states did not exhibit perfect gender diversity, there were multiple instances where national judiciaries had proportionately better diversity than international arbitration. Nevertheless, given the difficulty of many states in reaching representative levels of gender and race, achieving diversity often requires long-term investments.

Other states' judiciaries experienced gender imbalance, but had better success than international arbitration. In 2010, women made up approximately 36% of the judiciary in Venezuela, 35% in Costa Rica, and 32% in Colombia.<sup>147</sup> In Kenya, although women lacked representation on the court of appeal, approximately 35.5% of advocates were women and women made up about 30% of the bench in 2010.<sup>148</sup> Even in Indonesia, in 2011, 23.4% of trial judges and 15.4% of appellate judges were women.<sup>149</sup>

Some national judiciaries, however, experience lower levels of diversity.<sup>150</sup> In the United Kingdom, the Ministry of Justice reported that, in 2010, the levels of women judges rose to 20.6%,

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and I was asked . . ." *Women's Careers in the Judiciary: Results of an empirical study for the Ministry of Justice in Northrhine-Westfalia, Germany*, in GENDER AND JUDGING, *supra* note 137, at 145.

146. Meredith Bacal, *Diversity and the Judiciary: Who is the Bench Representing Anyway?*, THE COURT (July 5, 2012), <http://www.thecourt.ca/2012/07/05/diversity-and-the-judiciary-who-is-the-bench-representing-anyway/> (citing Ryerson Univ. Diversity Inst., *Improving Representation in the Judiciary: A Diversity Strategy* (2012), available at <http://www.ryerson.ca/content/dam/diversity/resources/Powerpoint%20-%20Improving%20Representation%20in%20the%20Judiciary%20-%20June%2027.pdf>).

147. Sital Kalantry, *Women in Robes*, 6 AMERICAS Q. 83, 84 (2012).

148. Winifred Kamau, *Women Judges and Magistrates in Kenya: Challenges, Opportunities and Contributions*, in GENDER AND JUDGING, *supra* note 137, at 167, 170, 181.

149. Engy Abdelkader, *To Judge or Not to Judge: A Comparative Analysis of Islamic Jurisprudential Approaches to Female Judges in the Muslim World (Indonesia, Egypt, and Iran)*, 37 FORDHAM INT'L L.J. 309, 347 (2014).

150. There may be other states with worse representation or states with no gender diversity. Research on some Islamic law countries suggests this is the case. *See id.* (observing that other Muslim countries lack diversity and some countries even forbid women from serving as judges); Ulirke Schultz & Gisela Shaw, *Introduction: Gender and Judging: Overview and Synthesis*, in GENDER AND JUDGING, *supra* note 137, at 1, 8–9 (observing that Egypt, Kuwait, and the U.A.E. have female judges but noting that Saudi Arabia and Iran do not).

with only 4.8% minorities.<sup>151</sup> In Brazil, in 2010, 18% of judges in its highest court were women, which was an increase from 0% in 1999.<sup>152</sup> In Malawi, approximately 17% of justices on the Malawi High Court and Supreme Court of Appeal were women.<sup>153</sup> In Japan, the percentage of women in the judiciary was low (15%) but similar to the proportion of female Japanese lawyers (16%).<sup>154</sup> By contrast to the success they experienced in their legislative representation, only 6% of the Iraqi judiciary were women.<sup>155</sup>

The private sector also exhibited some success in putting women in elite corporate positions with arguably better results than international arbitration. In the United States, there is at least one woman on ninety-seven percent of corporate boards.<sup>156</sup> Acknowledging that “there is a consistent deficit between the gender and ethnic diversity of mid-grade employees and their managerial counterparts within any given business,”<sup>157</sup> an Oxford Economics Report observed that countries with the “highest female representation on corporate boards [were] Norway (thirty-six percent), followed by Philippines (twenty-three percent), Sweden (twenty-three percent), Latvia (twenty-two percent) and Slovakia (twenty-two percent).”<sup>158</sup>

151. Mary L. Clark, *Judicial Retirement and Return to Practice*, 60 CATH. U. L. REV. 841, 873 n.216 (2011). Recent data demonstrate low levels of women’s representation as, in 2013, 24.3% of judges were women and 4.8% were black or ethnic minorities. *Diversity Statistics and General Overview Breakdown 2013*, CTS. & TRIBUNALS JUDICIARY (July 11, 2013), <https://www.judiciary.gov.uk/publications/diversity-statistics-and-general-overview-2013> (click on “Tribunals Diversity Breakdown 2012–13”).

152. Kalantry, *supra* note 147, at 83.

153. Siri Gloppen & Fedelis E. Kanyongolo, *Courts and the Poor in Malawi: Economic Marginalization, Vulnerability and the Law*, 5 INT’L J. CONST. L. 258, 289 (2007).

154. David T. Johnson, *Japan’s Prosecution System*, 41 CRIME & JUST. 35, 49 n.8 (2012).

155. See CEDAW, *supra* note 134, ¶¶ 33–34.

156. Nizan Geslevich Packin, *It’s (Not) All About the Money: Using Behavioral Economics to Improve Regulation of Risk Management in Financial Institutions*, 15 U. PA. J. BUS. L. 419, 454 n.184 (2013). However, women only make up sixteen percent of the total number of directors and the average number of women on corporate boards is two. *Id.*

157. GLOBAL DIVERSITY REPORT, *supra* note 130, at 30.

158. *Id.* at 8; see also Kimberly Gladman, *2013 Women on Boards Survey*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (May 20, 2013), <http://blogs.law.harvard.edu/corpgov/2013/05/20/2013-women-on-boards-survey> (noting that “63% [of companies] have at least one female director” and “women make up a higher percentage of directors in developed markets”); EUR. COMM’N, REPORT ON WOMEN AND MEN IN LEADERSHIP POSITIONS AND GENDER EQUALITY STRATEGY MID-TERM REVIEW (Oct. 14, 2013), available at [http://europa.eu/rapid/press-release\\_MEMO-13-882\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-882_en.htm) (identifying



C. *Less Relative Success with Diversity*

International arbitration's diversity levels may not be unusual. First, as identified earlier, some national courts had little diversity. Second, empirical literature reflects that men from developed states have primarily populated international courts and tribunals.

In terms of gender diversity, one study estimated women accounted for only about five percent of appointments in international courts and tribunals.<sup>159</sup> Grossman's more comprehensive study identified slightly higher proportions in 2012. With only one outlier,<sup>160</sup> women historically comprised approximately twenty percent of international courts and tribunals. Grossman's 2012 article identified that women made up nineteen percent of the World Trade Organization's Appellate Body; women comprised eighteen percent of judges on the International Criminal Tribunal for Rwanda and the European Court of Human Rights; the International Criminal Tribunal for the Former Yugoslavia and African Court of Human and Peoples' Rights had fifteen percent women; the Inter-American Court of Human Rights (IACHR) had thirteen percent; the European Court of Justice had seven percent; the International Court of Justice had three percent; and the International

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that within the E.U. women accounted for 16.6%, or one in six, board members of the largest publicly listed company, including Finland (29.1%) and Latvia (29%), closely followed by France (26.8%) and Sweden (26.5%). This is, however, not necessarily a natural phenomenon as several European countries have gender quotas for corporate boards. See generally FIRMS, BOARDS AND GENDER QUOTAS: COMPARATIVE PERSPECTIVES (Fredrik Englestad & Mari Teigen eds., 2012). But see *Justice: Board Members*, EUR. COMM'N (Jan. 20, 2015), [http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/business-finance/supervisory-board-board-directors/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/business-finance/supervisory-board-board-directors/index_en.htm) (identifying that, for the European Union, twenty percent of board members of the largest publicly listed companies were women).

159. See Chiara Giorgetti, *Who Decides Who Decides in International Investment Arbitration*, 35 U. PA. J. INT'L L. 431, 459 n.99 (2014) (citing *LCHR's Chart Showing Gender and Regional Balance in Elections to International Courts and Tribunals*, LAWYERS COMM. FOR HUM. RTS., available at [http://www.humanrightsfirst.org/wp-content/uploads/pdf/judges\\_gender\\_region\\_040303.pdf](http://www.humanrightsfirst.org/wp-content/uploads/pdf/judges_gender_region_040303.pdf) (last visited May 16, 2015)).

160. The International Criminal Court was the one exception, with forty-four percent women. Grossman, *Sex on the Bench*, *supra* note 112, at 652–54, 679–81. Notably, the Rome Statute requires equitable geographical and gender representation. Rome Statute of the International Criminal Court art. 36(8), July 17, 1998, 2187 U.N.T.S. 38544, available at <http://legal.un.org/icc/statute/romefra.htm>; but see *Current Judges*, INTERNATIONAL CRIMINAL COURT, [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/judges.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/judges.aspx) (last visited May 27, 2015) (identifying that, in 2015, six of seventeen judges of the International Criminal Court are women but that a woman is the President of the Court).

Tribunal for the Law of the Sea (ITLOS) had never had a woman as a permanent judge at the time of the research, though it now has one.<sup>161</sup>

Beyond Grossman's historical research, the Iran-U.S. Claims Tribunal (IUSCT) at The Hague has nine members, and currently only one is a woman.<sup>162</sup> In 2013, our research only identified one other woman—Gabrielle Kirk McDonald—serving on the IUSCT since its inception in 1981. Only one of the seven members of the World Trade Organization (WTO) Appellate Body,<sup>163</sup> and only one member of the twenty-member ITLOS<sup>164</sup> was a woman. The IACHR currently has no women judges.<sup>165</sup> We identified only one woman who served as a commissioner on the United Nations Claims Commission (UNCC).<sup>166</sup>

Research by Cecily Rose and Shashank Kumar confirms a lack of female counsel in public international law. They identified that for all lawyers involved in contentious cases at the International Court of Justice (ICJ), female counsel only represented 11.2% of all advocates ( $n=23$ ), and only spoke 7.4% of the total time in ICJ proceedings.<sup>167</sup> For the subset of lawyers who were repeat ICJ counsel, women only represented 6.3% ( $n=4$ ) of the pool, and women's speaking time decreased to 2.9%.<sup>168</sup> One contrast was that, in advisory proceedings, female advocates accounted for 19% of the population and 18% of total speaking time, but these women tended

161. Grossman, *Sex on the Bench*, *supra* note 112, at 679–80; *see also infra* note 164.

162. *See* IRAN-U.S. CLAIMS TRIBUNAL, *Arbitrators*, <https://www.iusct.net/Pages/Public/A-Arbitrators.aspx> (last visited May 16, 2015) (listing Rosemary Barkett as the only female member on the Tribunal). Gabrielle Kirk, a U.S. appointee, was the only other woman.

163. Yuejiao Zhang is the current Chinese appointee. Former female Appellate Body members include Merit Janow (U.S.), Jennifer Hillman (U.S.) and Lilia Bautista (Philippines). *Biography*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/dispu\\_e/ab\\_members\\_bio\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm) (last visited May 16, 2015).

164. *See* Grossman, *supra* note 110, at Table 1; *see also* *Members*, INT'L TRIBUNAL FOR THE LAW OF THE SEA, <https://www.itlos.org/index.php?id=96> (last visited May 16, 2015) (listing Elsa Kelly as the only female on the Tribunal).

165. Grossman, *supra* note 110, at Table 2.

166. Professor Dr. Nayla Comair-Obeid was the sole female Commissioner. *See* Report and Recommendations Made by the Panel of Comm'rs Concerning the Fourth Instalment of Palestinian "Late Claims" for Damages Up to USD 100,000 (Category "C" Claims), U.N. Comp. Comm'n Governing Council, U.N. Doc. S/AC.26/2005/3 (Mar. 10, 2005), *available at* <http://www.uncc.ch/sites/default/files/attachments/documents/r2005-03.pdf> (showing a signature by "N. Comair-Obeid").

167. Kumar & Rose, *supra* note 60, at 904.

168. *Id.* at 904.

to be government officials and state diplomats,<sup>169</sup> suggesting that having a healthy proportion of women in key domestic positions could generate a trickle-down effect on diversity in international law.

International courts and tribunals also experience diversity challenges related to nationality and development. One study commented on “the extent of the Western monopoly of international legal practice at the ICJ” and argued that international law “is not as *international* as its name implies.”<sup>170</sup> Gaubatz and MacArthur questioned the legitimacy of the ICJ given the lack of diversity in the judiciary and counsel. For judges, their 2002 data indicated that all seven of the OECD judges received their education entirely in OECD states, and all but one of the non-OECD judges received the majority of their legal education in OECD states.<sup>171</sup> Although the ICJ has arguably done better in recent history,<sup>172</sup> the data were in contrast to the Statute of the ICJ which requires electors to “bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.”<sup>173</sup>

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169. *Id.* at 914.

170. Gaubatz & MacArthur, *supra* note 97, at 240–41.

171. *Id.* at 261–63.

172. As of July 2014, the judges of the ICJ were nationals of Brazil, China, France, India, Italy, Japan, Mexico, Morocco, New Zealand, Russia, Slovakia, Somalia, Uganda, the United States, and the United Kingdom. See *Current Members*, INT’L COURT OF JUSTICE, <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1> (last visited July 31, 2014).

173. Statute of the International Court of Justice art. 9, June 26, 1945, 33 U.N.T.S. 993, available at <http://www.icj-cij.org/documents/?p1=4&p2=2>. The ITLOS has a similar mandate requiring “representation of the principal legal systems of the world and equitable geographical distribution . . . .” It also states that “[t]here shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations.” Statute of the International Tribunal for the Law of the Sea arts. 2(2), 3(2), Dec. 10, 1982, 1833 U.N.T.S. 561, available at [http://www.un.org/depts/los/convention\\_agreements/texts/unclos/annex6.htm](http://www.un.org/depts/los/convention_agreements/texts/unclos/annex6.htm). Notably, the ITLOS does not mandate gender representation. Compare *id.*, with *supra* note 160 and accompanying text (requiring gender and geographical balance at the International Criminal Court). Although the ITLOS has low gender representation it arguably does better on the matrix of nationality. As of July 2014, the judges of the International Tribunal for the Law of the Sea were nationals of Algeria, Argentina, Austria, Brazil, Cape Verde, China, France, Germany, Grenada, India, Japan, Lebanon, Malta, Poland, South Korea, Tanzania, Trinidad and Tobago, and Ukraine. See *Members*, INT’L TRIBUNAL FOR THE LAW OF THE SEA, <https://www.itlos.org/en/the-tribunal/members/> (last visited July 31, 2014); see also Jacob Katz Cogan, *Representation and Power in International Organization: The Operational Constitution and its Critics*, 103 AM. J. INT’L L. 209, 220–24 (2009) (suggesting that mandates requiring diversity in international law are limited, but there are hortatory suggestions for representation and

Gaubatz and MacArthur also identified a dearth of developing-world advocates.<sup>174</sup> New research by Rose and Kumar replicates those earlier findings with more recent data. From 1999–2012, the majority of the 205 different lawyers appearing before the ICJ were from the developed world. Specifically, 72.2% were nationals of OECD states, 71.5% were from states the World Bank classified as High Income, and 72.9% were from states with HDI scores that put them in the category of “very high human development”; for counsel who were repeat players at the ICJ, the balance was even more skewed towards representation by lawyers from developed states.<sup>175</sup>

The private sector also has its challenges with diversity. When power is concentrated into a single position, gender balance is not as prevalent. For example, the *Fortune 500* announced in 2014 that women exhibited their best showing in history by comprising 4.8% of CEOs in the top 500 corporations in the United States.<sup>176</sup> In contrast, when membership is more diffuse—such as when there are multiple positions on a corporate board—there is broader female representation, as 63% of top corporations have at least one female board member.<sup>177</sup> This latter phenomenon might reflect the tendency for larger structures to generate greater opportunities for diversity.

balance).

174. Gaubatz & MacArthur, *supra* note 97, at 247, 251–53.

175. Kumar & Rose, *supra* note 60, at 902–06; *but see* TERRIS ET AL., *supra* note 2, at 223 (concluding that “[t]here was once a time when the ‘invisible college’ of international judges consisted of a small band of men, principally Europeans, clustered tightly in The Hague” but observing that “[t]oday’s more extensive network has much more diversity in terms of geography, race, and gender”).

176. Caroline Fairchild, *Number of Fortune 500 Women CEOs Reaches Historic High*, FORTUNE (June 3, 2014, 6:00 AM), <http://fortune.com/2014/06/03/number-of-fortune-500-women-ceos-reaches-historic-high/>. The European Union exhibited similar difficulties with less than three percent of the largest listed companies having a female CEO. EURO. COMM’N, GENDER BALANCE ON CORPORATE BOARDS: EUROPE IS CRACKING THE GLASS CEILING 2 (Mar. 2014), *available at* [http://ec.europa.eu/justice/gender-equality/files/documents/140303\\_factsheet\\_wob\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/140303_factsheet_wob_en.pdf).

177. Gladman, *supra* note 158 (“63% [of companies] have at least one female director, and 13% have at least three women”). Even with this success, the popular press notes that those women CEOs are still likely to be paid less than their male counterparts and more likely to be fired. *See* Edward Helmore, *The Facts Show It: Female CEOs are More Likely Than Men to be Fired*, GUARDIAN, May 17, 2014, <http://www.theguardian.com/world/2014/may/17/female-ceos-more-likely-than-men-to-be-fired>; Claire Cain Miller, *An Elusive Jackpot: Riches Come to Women as C.E.O.s, but Few Get There*, N.Y. TIMES, June 7, 2014, [http://www.nytimes.com/2014/06/08/business/riches-come-to-women-as-ceos-but-few-get-there.html?\\_r=1](http://www.nytimes.com/2014/06/08/business/riches-come-to-women-as-ceos-but-few-get-there.html?_r=1) (observing that women CEOs make \$1.6 million less than male counterparts).

Researchers observed this phenomenon in U.S. state courts whereby larger state courts exhibited larger proportions of women.<sup>178</sup>

Meanwhile, law firms have also struggled with diversity. In 2014, Linklaters reported that, globally, only 17% of its partners were female, with a high of 28% female partners in Asia and a low of 7% female partners in Europe; 88.37% of U.S. partners were Caucasian.<sup>179</sup> Linklaters' experience is not unique given the lack of women partners in U.S. and U.K. law firms.<sup>180</sup> These examples raise the possibility that the diversity data in arbitration reflect an international pipeline problem, as not all countries have the same level of women or minority lawyers (to say nothing of women and minority lawyers who are interested in international arbitration).<sup>181</sup>

It is worth observing that—by comparison to many national judiciaries and legislatures—international courts and tribunals experience challenges about their representativeness, generating concerns about their institutional legitimacy. The question remains as to whether the international arbitration community wishes to be a leader in the diversity amongst the international law community or is content with its current position.

#### *D. Self-Reflection on the “Invisible College’s” Perceived Diversity Levels*

Regardless of the appropriate comparative baseline for international arbitration, the data reflected that there were concerns about diversity challenges within the international arbitration community.<sup>182</sup> To explore issues about diversity from a broad

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178. See *supra* note 143 and accompanying text.

179. LINKLATERS, DIVERSITY STATISTICS: 2014, at 1, 6 (2014), <http://www.linklaters.com/Responsibility/Pages/Diversity.aspx>.

180. See AM. BAR ASS'N, A CURRENT GLANCE AT WOMEN IN THE LAW 2 (Feb. 2013), available at [http://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_feb2013.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_feb2013.authcheckdam.pdf) (indicating that women make up 19.9% of partners in the United States); Joanne Harris, *Diversity Efforts Fail to Pay Off at Top End of Profession*, LAW. (Aug. 5, 2013), available at <http://www.thelawyer.com/analysis/the-lawyer-management/management-news/diversity-efforts-fail-to-pay-off-at-top-end-of-profession/3008182.article> (observing that the Lawyer's UK 200 showed that women made up 18.6% of all partners).

181. See also Sally J. Kenny, *Which Judicial Selection Systems Generate the Most Women Judges? Lessons from the United States*, in GENDER AND JUDGING, *supra* note 137, at 461, 462–69 (identifying various explanations for poor female representation in judiciaries).

182. Arbitration's diversity concerns are somewhat reminiscent of commentary about the glass ceiling in transitioning to the judiciary. See Kalantry, *supra* note 147, at 85 (“Across the globe, women judges report that an ‘old boys’ club’ mentality surround[s]”

perspective, we asked a wide-ranging question. Specifically, we asked subjects to respond to the following statement: “International arbitration has diversity challenges related to gender, nationality, or age.”<sup>183</sup> Subjects then ranked their answer using a 1–5 numerical scale, with “1” being “strongly disagree,” “3” being “neither agree nor disagree,” and “5” being “strongly agree.”<sup>184</sup>

Overall, the responses reflected that ICCA subjects self-identified diversity issues in international arbitration. For the 513 ICCA subjects responding to the question, both the most frequent answer and median answer was “4”,<sup>185</sup> indicating that subjects somewhat agreed that there are diversity challenges in international arbitration related to gender, nationality or age.<sup>186</sup>

**Table 6: Percentages and Frequency of Responses of all ICCA Subjects in Response to Question about whether International Arbitration has Diversity Issues related to Gender, Nationality, or Age.**

Response Type	Response Percentage	Frequency
1 Strongly Disagree	6.2	32
2 Somewhat Disagree	9.2	47
3 Neither Agree nor Disagree	27.1	139
4 Somewhat Agree	30.8	159
5 Strongly Agree	26.7	137
<i>Total</i>	<i>100.0</i>	<i>513</i>

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judicial appointment [and] poses a crucial barrier to entry . . .”).

183. See *infra* Annex 1.

184. *Id.*

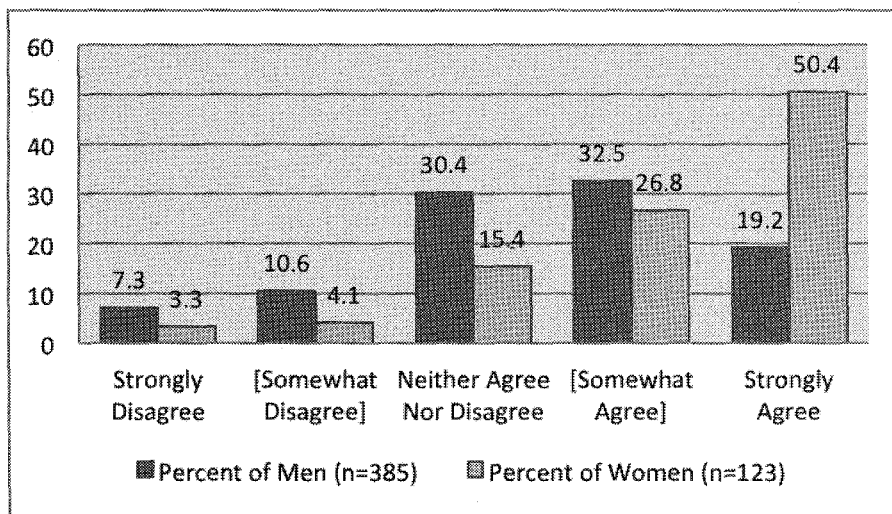
185. Thirty-five subjects failed to respond to this question. The mean response was 3.63 (SD=1.153).

186. See Table 6. For the subset of ICCA subjects who had served as counsel or arbitrator, the 445 subjects had nearly identical response patterns, with 6.3% strongly disagreeing ( $n=28$ ), 10.3% somewhat disagreeing ( $n=46$ ), 26.5% neither agreeing nor disagreeing ( $n=118$ ), (4) 30.1% somewhat agreeing ( $n=134$ ), and (5) 26.7% strongly agreeing ( $n=119$ ) about international arbitration experiencing diversity concerns.

We analyzed whether there were meaningful differences in how men and women evaluated diversity-related concerns. A *t*-test revealed a meaningful gender difference in the mean response to the diversity question ( $t(506)=-6.189$ ;  $p<.001$ ;  $r=.27$ ;  $n=508$ ).<sup>187</sup> For male subjects, the mean score was 3.46 (SD=1.13;  $n=385$ ). In contrast, for female subjects the mean score was 4.17 (SD=1.05;  $n=123$ ), indicating that the majority of women believed there was a problem and identified that they “somewhat agreed” to “strongly agreed” with the possibility of diversity challenges related to gender, nationality, or age. In addition, the *r*-value reflected a medium-sized difference, suggesting the gender variation was non-trivial.

Figure 1 reflects that men were more likely than women to either disagree with the idea that there are diversity challenges or not take a position on diversity challenges. By contrast, women were more likely than men to “strongly agree” that international arbitration experiences diversity challenges, with fifty percent of all women selecting that response.

**Figure 1: Percentage of all ICCA Subjects identifying diversity challenges as a function of subject gender**



We computed a correlation coefficient to evaluate a possible linear relationship between age and subject response. The results demonstrated a significant relationship between subject age and

187. The effect was also significant for the subset of ICCA participants who were counsel and/or arbitrators ( $t(443)=-5.736$ ;  $p<.001$ ;  $r=.26$ ;  $n=445$ ).

subject response ( $r(497)=-.17$ ;  $p<.001$ ). The direction of the relationship was such that, as subject age increased, subjects were *less* likely to identify a diversity problem in international arbitration. In contrast, as subject age decreased, subjects were *more* likely to identify a diversity problem in international arbitration.

The results evaluating the relationship between a subject's development status and response were more mixed. While one might hypothesize that, much like gender and age where women and younger practitioners were more sensitized to issues of diversity, this was not the case for subjects' development status. The results, however, suggested that subjects' development status was either irrelevant or operated in the *opposite* direction of that stated hypothesis.

We also analyzed subjects' primary nationality in three ways, namely: (1) OECD membership; (2) World Bank classification; and (3) HDI classification. The results generated a puzzle, as two measures failed to identify a reliable link between development status and responses to the diversity question, but one measure of development status revealed an unexpected result.

First, an ANOVA<sup>188</sup> was unable to identify a meaningful group difference in response to the diversity question for subjects' World Bank status ( $F(3,480)=1.802$ ;  $p=.15$ ;  $r=.11$ ;  $n=484$ ). Follow-up analyses using a conservative test also failed to identify any significant pairwise comparisons. A more liberal follow-up test, however, identified a latent relationship where nationals of upper-middle income states expressed *lower* levels of concerns about diversity, whereas nationals of High Income states expressed *higher* level of concerns about diversity.

Second, correlation coefficients<sup>189</sup> analyzed response variations to the diversity question and the continuous variable of subject's HDI ( $r(484)=.07$ ;  $p=.15$ ). The facial, but non-significant, trend was that subjects who were nationals of more developed states expressed greater concern about lack of diversity. As any latent effect was less than statistically small ( $r<.10$ ), there is a theoretical but unlikely risk of insufficient power.<sup>190</sup> In any event, *a priori*

188. The one-way ANOVA was necessary to analyze variation in the diversity question on the basis of the four-category variable of subjects' World Bank development status. See URDAN, *supra* note 71, at 105–10.

189. A Pearson's Product Moment Correlation Co-efficient explores linear relationships between two continuous variables. *Id.* at 79–83.

190. See JACOB COHEN ET AL., STATISTICAL POWER ANALYSIS FOR THE BEHAVIORAL SCIENCES 3–6, 115 (2d ed. 1988) (explaining a priori power analyses); Franck, *Development and Outcomes*, *supra* note 28, at 461 n.132 (applying Cohen's power analysis to arbitration).



power analyses reflect that it is impossible to reliably conclude the lack of an effect until there is data from over 781 subjects; further research is therefore required.

Third, a *t*-test<sup>191</sup> revealed a meaningful difference in the mean response to the diversity question ( $t(482)=-2.255$ ;  $p=.03$ ;  $r=.10$ ;  $n=484$ ) for OECD and non-OECD subjects. The difference was in an unexpected direction. Subjects from OECD countries were *more* likely to identify diversity issues ( $M=3.69$ ;  $SD=1.14$ ;  $n=362$ ). In contrast, subjects from non-OECD countries were *less* likely to identify diversity challenges ( $M=3.42$ ;  $SD=1.16$ ;  $n=112$ ). The effect size was statistically small ( $r=.10$ ), which indicates that the reliably present effect was not large.<sup>192</sup> Figure 2 reflects that non-OECD nationals were slightly more likely than OECD nationals to either disagree with the idea that there are diversity challenges or not take a position. By contrast, OECD nationals were more likely than non-OECD nationals to either somewhat or “strongly agree” that international arbitration experiences diversity challenges.

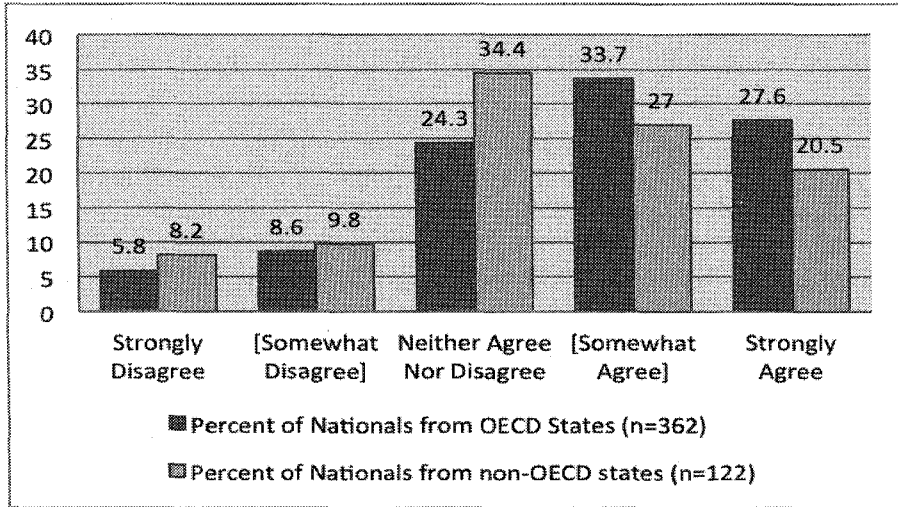
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The *post hoc* power of an analysis is determined using power tables to estimate the probability of committing a Type II error (Type II error rate = 1 – power). As the power of the analysis was small ( $r \leq .10$  and  $n=144$ ), there is a seventy to eighty percent risk of having incorrectly identified no relationship. When there is less than a “small” non-significant effect, social science literature does not generally perceive a power problem.

191. As OECD status is a two-level variable, a *t*-test is necessary. See URDAN, *supra* note 71, at 93.

192. The effect was also significant and small for the subset of ICCA subjects who were counsel and/or arbitrators ( $t(482)=-2.255$ ;  $p=.03$ ;  $r=.10$ ;  $n=484$ ).

**Figure 2: Percentage of all ICCA subjects identifying diversity challenges as a function of subject’s OECD status**



In these circumstances, it is possible that non-OECD nationals perceived international arbitration as comparatively better at promoting diversity and thereby evaluated the status quo as less problematic. It may also reflect that individuals from developing countries may have different approaches to social norms related to diversity.<sup>193</sup> Irrespective of potential competing causal explanations, there is value in identifying the phenomenon. The observation also suggests it is appropriate to acknowledge addressing diversity concerns transnationally requires a nuanced approach, where approaches to diversity that are appropriate in a national context may not apply transnationally.

Overall, the international arbitration community indicated that there were concerns on issues of diversity related to gender, nationality, or age. Women and younger participants reliably identified the difference more distinctly. Although the results were mixed, there was some evidence suggesting that the arbitration community from the developed world may perceive greater concerns

193. See, e.g., Ronald Inglehart & Wayne E. Baker, *Modernization, Culture Change, and the Persistence of Traditional Values*, 54 AM. SOC. REV. 1 (2000) (identifying how cultural values can vary according to economic development levels); Yiming Jing & Michael Harris Bond, *Linking a Citizen’s Trust of Regulatory Institutions and Out-groups to Tolerance for Morally Questionable Practices: The Role of National Context for Child Socialization* (forthcoming) (copy on file with authors) (discussing cultural variations to sensitive social issues and exploring variations related to economic development).

than developing world counterparts. As demonstrated with subjects' actual experiences with diversity, these perceptions may require reassessment.<sup>194</sup>

## V. EXPERIENCED DIVERSITY PROBLEMS

Perception can be different than reality. Scholarship in cognitive psychology reflects that assessments can be influenced by heuristics that make certain experiences seem more prevalent or generate selective perception.<sup>195</sup> For this reason, we tested demographic data and perceptions against reported experiences in international arbitration.

This subsection first analyzes how frequently those acting as arbitrators receive appointments, both as a function of gender and development status. It then explores counsels' and arbitrators' experience with diverse appointments. To minimize response bias, we asked about subjects' experiences with international arbitration in a portion of the Survey that was separate from the demographic questions and the survey item about diversity. Specifically, we asked questions to identify—in their experience as arbitrator and counsel—how frequently subjects had worked with tribunals comprised of at least one woman and/or tribunals with at least one developing country arbitrator.<sup>196</sup>

### A. Gender and Development: Variations in Frequency of Appointments

Tables 1 and 2 reflected that the average number of appointments per arbitrator for all types of arbitration was thirty-five; and given the variation in the number of appointments, the median number of total arbitration appointments per arbitrator (both in ICA and ITA) was ten. The question remained whether the scope of those appointments varied according to arbitrators' gender or development status. For women, it was *not* possible to identify a meaningful

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194. The data reflected a reliable pattern whereby developing world arbitrators experienced lower numbers of appointments than their developed world counterparts, but were also likely to sit with other developing world arbitrators. We were unable to identify a meaningful difference between the appointment levels of men and women.

195. See, e.g., CHRISTOPHER CHABRIS & DANIEL SIMONS, *THE INVISIBLE GORILLA: HOW OUR INTUITIONS DECEIVE US* (2010); FRANCK, *supra* note 29, at ch. 2.

196. Methodological constraints related to timing and formatting prevented us from asking questions beyond those identified in Annex 1. Further research could more precisely explore subjects' experiences.

difference in number of arbitral appointments; but for nationals of developing countries, it *was* possible to identify a meaningful difference in the number of appointments.

For gender, we conducted two types of tests to assess meaningful differences between men and women in the number of arbitration appointments. First, a Mann-Whitney two-sample U-test<sup>197</sup> failed to reveal a statistically significant difference in the median number of appointments ( $U=4564.5$ ;  $p=.39$ ). The median number of appointments for women was nine (IQR=3-22);<sup>198</sup> and the median for men was ten and a half (IQR=3-40).<sup>199</sup> When analyzing subsets of ICA and ITA arbitrators, we were also unable to find a reliable gender difference in appointment levels.<sup>200</sup>

For development status, we conducted multiple tests—using different definitions of development status—to explore potential differences in the appointment levels of developed and developing world arbitrators.<sup>201</sup> First, a Mann-Whitney U-test<sup>202</sup> identified a reliable difference in appointments between OECD and non-OECD nationals ( $U=3247.5$ ;  $p<.01$ ) such that OECD nationals reliably obtained more appointments. While the median number of appointments for arbitrators from non-OECD countries was 5 (IQR=2-19.25), the median number of appointments for arbitrators from OECD countries was 11.5 (IQR 4-40). Second, a Kruskal-

197. When exploring group differences in a binary variable (like gender), it is appropriate to use a Mann-Whitney test when means are skewed. GREGORY W. CORDER & DALE I. FOREMAN, *NONPARAMETRIC STATISTICS FOR NON-STATISTICIANS: A STEP-BY-STEP APPROACH* (2009); URDAN, *supra* note 71, at 96, 161.

198. The range of an IQR reflects the quartile breakdown. In this case the twenty-fifth quartile is three; the median was nine; and the seventy-fifth percentile was twenty-two. For IQR=3–22, the three reflects the twenty-fifth quartile and the twenty-two reflects the seventy-fifth quartile.

199. Out of an abundance of caution, even though the data was skewed, we also used a *t*-test to explore potential gender differences in appointment levels. The test also failed to reveal any mean difference in appointment levels for men and women ( $t(260)=0.293$ ;  $p=.77$ ;  $r=.02$ ;  $n=262$ ). The mean number of appointments for women was thirty-two (SD=79.39;  $n=46$ ), and the mean number of appointments for men was thirty-five (SD=61;  $n=216$ ).

200. Mann-Whitney tests were unable to detect a reliable link between gender and arbitration appointments in either ICA ( $U=4511.5$ ;  $p=.48$ ) or ITA ( $U=3020.5$ ;  $p=.23$ ).

201. Different tests were necessary because of the different variable types. A Mann-Whitney test compares differences between two groups and a continuous variable; a Kruskal-Wallis test compares differences between multiple groups and a continuous variable; and correlations are used when there are two continuous variables, like HDI status and number of appointments.

202. See *supra* note 197 (noting Mann-Whitney tests are appropriate for binary variables, like OECD status).

Wallis test<sup>203</sup> identified a reliable difference between World Bank classifications of an arbitrator's home state ( $\chi^2=12.091$ ;  $p<.01$ ;  $r=.22$ ;  $n=250$ ) such that developing world arbitrators obtained fewer appointments than their developed country colleagues. Specifically, the median number of appointments for an arbitrator from a High Income state was 11 (IQR=4-40); the median number of appointments for arbitrators from an Upper-middle Income state was 8 (IQR=2-25); and the median number of appointments for arbitrators from a Lower-middle Income state was 2 (IQR=1-8). There were no arbitrators from Low Income states. Third, a correlation coefficient<sup>204</sup> identified a reliable difference between HDI classifications of an arbitrator's home state and the number of appointments ( $r(250)=.13$ ;  $p=.04$ ). The direction was such that, the more developed the home state, the greater number of appointments; and the less developed the arbitrator's home state, the fewer the number of appointments.

Overall, the results suggested that, for women, once they become arbitrators by having at least one appointment, the frequency of appointments was roughly equivalent to those of men. By contrast, for developing world arbitrators, the number of their appointments was statistically lower than their developed world counterparts; and the effect sizes suggest development status generates a small-to-medium sized effect on the number of reported arbitral appointments.

This generates a puzzle. It means that women were more likely to perceive real diversity challenges; and the difficulty was apparent when examining the small number of women acting as arbitrators (particularly when compared to women in positions of authority in national courts and legislatures). Nevertheless, once women joined the arbitrator pool, they obtained roughly equivalent levels of appointments. The diversity challenge for women appears to relate to obtaining initial access or breaking through the "glass ceiling." For developing world arbitrators, it means they were less likely to perceive diversity challenges, even though there were small numbers of developing world arbitrators and they received fewer appointments. Part of the explanation may be the contrast with the arguably worse representation of developing world adjudicators in international courts and tribunals, which is buttressed by the number

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203. A Kruskal-Wallis test analyzes non-normal continuous variables (like appointment levels) and group differences in a multi-categorical variable (like World Bank classifications). CORDER & FOREMAN, *supra* note 196; URDAN, *supra* note 71, at 161.

204. See *supra* notes 189, 201 and accompanying text (noting correlations are appropriate for continuous variables).

of tribunals where developing world arbitrators sat with other developing world arbitrators. Nevertheless, in contrast to the diversity challenges experienced by women, it suggests that developing world arbitrators may require a different solution to achieve broader representation in the pool of arbitrators.

### *B. Arbitrators' Experiences with Diversity*

We asked subjects whether, in their experience as arbitrators, they had served on a tribunal with a woman (or another woman). We then invited subjects to respond by ticking a box indicating that they had: (1) never sat on a tribunal with a woman; (2) they had sat on such a tribunal one to five times; (3) they had sat on such a tribunal six to ten times; or (4) they had sat on a tribunal with a woman more than ten times.<sup>205</sup>

First, we adjusted responses to reflect women's self-reported arbitral appointments; there were many instances where women who had served on tribunals but failed to identify their own service as arbitrators in their answers.<sup>206</sup> This made it possible to correct for potential under-reporting. The mode and median response was 2, reflecting that most arbitrators experienced at least 1 to 5 arbitrations containing at least one woman. Table 7 provides a frequency breakdown of subject responses, which indicate a significant proportion of arbitrators reported they had "never" been on a tribunal with a woman and more than 75% of arbitrators indicated the maximum number of times they had sat on a tribunal with a female co-arbitrator was 5. A primary basis for the presence of a female arbitrator on a tribunal resulted from ensuring that women's own appointment experiences were reflected in the analysis.<sup>207</sup>

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205. See *infra* Annex 1.

206. For example, if a woman had indicated that she had "never" (=1) sat on a tribunal with a woman, but she sat on twenty cases, the response was re-coded as "more than ten times" (=4) to reflect her own appointments.

207. Without adjusting for a woman's own appointments, there was nearly a dead heat between subjects answering they had "never" or only "1-5 times" sat with a woman. Those two categories garnered nearly eighty-four percent of all responses. Only 7.8% of subjects indicated they had sat with a woman more than ten times. The only reason for the variation between those responses and the responses reported in Table 7 was that, for those subjects who were female arbitrators, it was necessary to ensure that their own experience as arbitrators were included in the systemic responses.

**Table 7: Percentages and Frequency of Responses of ICCA Subjects Serving as Arbitrators, Describing the Frequency of Having at Least One Woman on a Tribunal (including Women's Self-Reported Appointments)**

Response Type	Response Percentage	Frequency
No Tribunal with a Woman	32.2	83
1-5 Tribunals with a Woman	43.4	112
6-10 Tribunals with a Woman	8.9	23
10+ Tribunals with a Woman	15.5	40
<i>Total</i>	<i>100.0</i>	<i>258</i>

Second, using the subset of 46 female arbitrators, we identified how many times women worked on tribunals containing two or more women. The results suggested that, more often than not, these women were the only women on their tribunals. Specifically, 52.2% ( $n=24$ ) indicated they had never sat with another woman; 37% ( $n=17$ ) indicated they had sat with another woman 1-5 times; and 1.5% ( $n=4$ ) indicated they had sat with another woman between 6-10 times. Only one female arbitrator indicated that she had been empaneled with another woman on more than ten occasions. Since many international arbitration tribunals consist of three members, the rarity for multiple women to serve as co-arbitrators was noteworthy.

Turning to nationality and variation in development background, we asked whether arbitrators had served on tribunals with an arbitrator from a developing country.<sup>208</sup> We then invited subjects to respond by ticking a box indicating that they had: (1) never sat on such a tribunal; (2) sat on such a tribunal one to five times; (3) sat on such a tribunal six to ten times; or (4) sat on a tribunal with a developing world arbitrator more than ten times.<sup>209</sup> We cross-checked a subject's own development status to ensure that their responses did not ignore their own experience in being appointed to tribunals, although we recognize that respondents could encounter difficulties in their self-definitions of development status. We classified arbitrators' development status using OECD, World

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208. As identified earlier, there is no uniform definition of a "developing" nation. Subjects answering this question may have experienced difficulties when reflecting on their own experiences and generated non-uniform responses. Survey responses were, however, buttressed by the demographic data showing similar homogeneities.

209. See *infra* Annex 1.

Bank, and HDI status. Results were nearly identical irrespective of how the subjects' development status was coded.<sup>210</sup> Table 8 provides a frequency distribution of the OECD status results where we ensured that, for nationals of non-OECD states, they did not under-represent their experiences with developing world arbitrators by ignoring their own experience as an arbitrator.

**Table 8: Percentages and Frequency of Responses of ICCA Subjects Serving as Arbitrators, Describing the Frequency of Having at Least One Developing World Arbitrator on a Tribunal (including Subjects' Self-Reported Appointments using their OECD Status)**

Response Type	Response Percentage	Frequency
No Tribunal with a Developing World Arbitrator	40.2	102
1-5 Tribunals with a Developing World Arbitrator	38.6	98
6-10 tribunals with a Developing World Arbitrator	9.8	25
10+ tribunals with a Developing World Arbitrator	11.4	29
<i>Total</i>	<i>100</i>	<i>254</i>

Like the results for arbitrators experiencing the presence of a single woman, nearly one-half of arbitrators had never had an opportunity to collaborate with a developing world arbitrator on a tribunal. Looking to the mean appointments of 35 and median of 10, the data suggests that, at best, a developing world arbitrator sat on one half to perhaps one third of tribunals. There were fourteen

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210. When analyzing subjects using the World Bank classification of their home state (and classifying non-High Income arbitrators as "developing world" arbitrators): (1) 40.2% ( $n=102$ ) had never sat with a developing country arbitrator; (2) 38.6% ( $n=98$ ) had sat with one developing world arbitrator 1–5 times; (3) 9.8% ( $n=25$ ) had sat with a developing world arbitrator 6–10 times; and (4) 11.4% ( $n=29$ ) had sat with a developing world arbitration eleven or more times. When subjects were analyzed using their home state's HDI score (and classifying arbitrators as "developing" when they were not in the top thirty most developed states): (1) 39.0% ( $n=99$ ) had never sat with a developing country arbitrator; (2) 39.4% ( $n=100$ ) had sat with one developing world arbitrator 1–5 times; (3) 9.8% ( $n=25$ ) had sat with a developing world arbitrator 6–10 times; and (4) 11.8% ( $n=30$ ) had sat with a developing world arbitration eleven or more times.

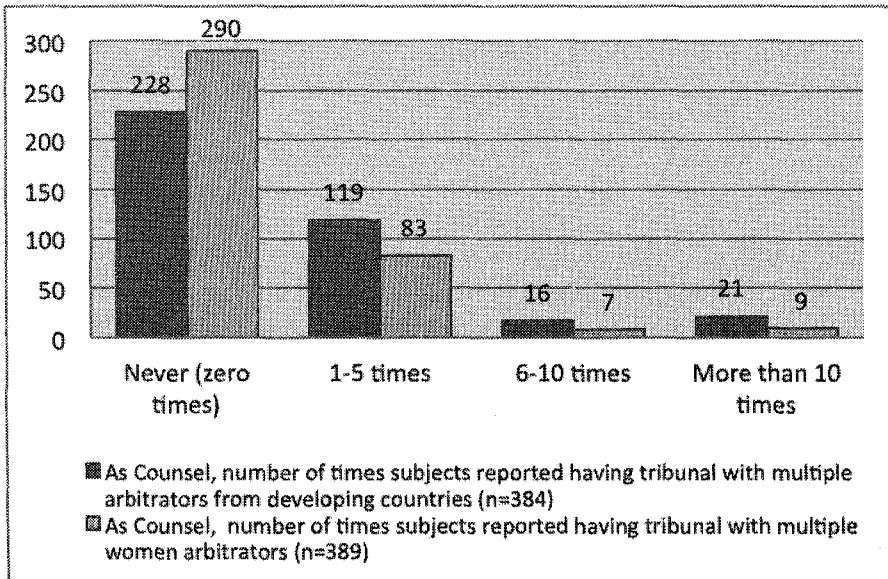


subjects who indicated that they had sat on 100+ arbitrations, but had sat with developing world arbitrators in less than 10 cases. With a broad pool of talent in international arbitration extending across national borders and encompassing all genders, the concentration of arbitration appointments suggests that there may be untapped value in diversifying the pool of arbitrators.

### *C. Counsel's Experiences with Diversity*

For those who had acted as counsel, we asked two questions regarding their experiences. The first question related to how frequently subjects had tribunals with multiple female arbitrators and the second question related to how frequently subjects had arbitral tribunals with multiple arbitrators from the developing world.

In the first question, the mode and median answers were "never," and the vast majority of counsel had never argued before a tribunal with multiple women. Specifically, 74.6% ( $n=290$ ) of counsel had never had a tribunal with multiple women; 21.3% ( $n=83$ ) of subjects had only experienced a tribunal with multiple women 1-5 times; 1.8% ( $n=7$ ) of counsel experience tribunals with multiple women 6-10 times; and the remaining 2.3% ( $n=9$ ) had acted in more than ten cases where there were multiple women. The light gray bar in Figure 3 provides a frequency breakdown demonstrating that the majority of counsel had never had more than one woman on a tribunal at a time; and only a sliver (less than 5%) had experienced two or more female arbitrators in more than five cases. Contrasted with Table 1, where those serving as counsel had served in an average of 27 cases, the lack of experience with tribunals containing multiple female arbitrators is noteworthy. It suggests perceptions of diversity imbalance in international arbitration were justified.

**Figure 3: Frequency of Counsel's Experience with Diverse Tribunals**

On the theory that female counsel might advise appointment of female arbitrators—or that clients willing to retain female counsel may be likely to appoint female arbitrators—we explored whether counsel's gender was linked to the number of tribunals with multiple female arbitrators. Using a *t*-test, we were unable to detect a reliable link between mean subject response and gender ( $t(387)=0.957$ ;  $p=.34$ ;  $r=.05$ ;  $n=389$ ). Although *a priori* power analysis indicates a

sample of over 780 subjects could reliably isolate an effect, the non-significant latent effect was less than statistically small.<sup>211</sup>

For counsel's experience with developing world arbitrators, the results were similar but with a small twist. The mode and median answer were "never", meaning the majority of counsel had never argued before a tribunal with two or more individuals from

211. The *r*-values were less than 0.10, which means they were less than statistically small. COHEN ET AL., *supra* note 190, at 24–26, 115; COHEN ET AL., RESEARCH METHODS IN EDUCATION, *supra* note 73 and accompanying text; *see also* URDAN, *supra* note 71, at 68–71. A *post-hoc* power analysis indicates that to reliably detect the latent effect for gender, the minimum sample size would need to be 781 to establish .80 power (20% risk of a Type II error) and 1045 to establish .90 power (10% risk of a Type II error).

developing countries. Specifically, 59.4% ( $n=228$ ) of counsel had never had a tribunal with two or more developing world arbitrators; 31.0% ( $n=119$ ) only experienced a tribunal with multiple developing country arbitrators 1-5 times; 4.2% ( $n=16$ ) of counsel experience tribunals with multiple developing country arbitrators 6-10 times; and the remaining 5.5% ( $n=21$ ) had acted in more than ten cases where there were multiple arbitrators from the developing world. The dark gray bar in Figure 3 provides a frequency breakdown demonstrating that, when acting as counsel, the majority of subjects had never had multiple developing world arbitrators on a tribunal; but a small number (less than 10%) experienced two or more developing world arbitrators in more than five cases.

Of note, in response to this question, one subject offered an unsolicited comment: "when you do Brazil work . . . every tribunal is Brazilian."<sup>212</sup> This raised the question of whether counsel from developing states reliably experienced having tribunals with multiple developing world arbitrators. Regardless development status, there was always a significant and large statistical effect between a subject's development status and experience on tribunals containing multiple developing world arbitrators.

First, using a *t*-test to assess a binary variable, we identified a reliable link between mean subject response and OECD status ( $t(365)=9.445$ ;  $p<.001$ ;  $r=.44$ ;  $n=367$ ). The direction was such that non-OECD counsel were more likely to have experienced tribunals with multiple developing world arbitrators. In contrast, counsel from OECD states were less likely to have experienced tribunals with multiple developing world arbitrators.

Second, using an independent groups ANOVA to analyze the multiple-category variable, there was a reliable relationship between mean subject response and World Bank Status ( $F(2,364)=52.360$ ;  $p<.001$ ;  $r=.48$ ;  $n=367$ ).<sup>213</sup> Follow-up analyses using conservative and liberal tests revealed that both upper-middle or lower-middle income subjects were both more likely to advocate before tribunals with multiple developing world arbitrators than high income subjects. There was, however, no meaningful difference in how frequently upper-middle and lower-middle income counsel had tribunals with developing world arbitrators.

Third, using a correlation coefficient to assess the two continuous variables, there was a reliable link between subject's HDI

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212. Subject number 381 made this comment.

213. Follow-up analyses using both conservative and liberal measures reflected that all sub-comparisons were significant save one.

status and experience with diverse tribunals HDI ( $r(367)=-.42$ ;  $p<.001$ ). Like the other tests, where counsel were from less developed states, they were more likely to have worked with tribunals containing multiple arbitrators from developing countries; and the greater the development levels of counsel's country of origin, the less likely they were to have experienced tribunals from developing states.

The results were uniformly significant and all bordered on statistically large effects. These findings may begin to explain why developing world arbitrators perceived less of a diversity problem in international arbitration. If the actual experience of developing world arbitrators reflects that they are more likely to have worked with several tribunals composed of primarily developing world arbitrators, one could infer that subjects would be less likely to identify a problem with diversity. By contrast, where developed world arbitrators were *not* experiencing a caseload with arbitrators from a broad cross-section of arbitrators with various arbitrators from states across a developmental divide, they might identify an imbalance related to nationality or development.

## VI. DISCUSSION

The results of the data indicate that there were non-trivial issues related to diversity in international arbitration related to age, gender, and nationality. The international arbitration community should explore what factors contribute to the backgrounds of the current arbitration bench and bar. Focusing on these aspects, and the factors contributing to those demographics, provides an opportunity to explore what inhibits the full utilization of untapped talent to permit broader systemic value and avoid waste of human capital. There are several systemic benefits to such an undertaking.

First, taking diversity issues seriously offers an opportunity to strengthen and create infrastructure for international arbitration's future. As the core group of international arbitrators (and counsel) continues to age, it is worthwhile investing in a new generation of arbitrators and counsel to ensure that know-how and capacity is not lost over time. Efforts and mentoring programs, such as Young ICCA and other groups focused on developing the next generation of the arbitration community, offer constructive solutions to address this gap. Bringing younger individuals into the fold increases diversity and the breadth of ideas and experiences, and could benefit the community as a whole.

The benefits of diversity go beyond age. The parties involved

in dispute settlement, who control the appointment of lawyers and often exercise choice in the appointment of arbitrators, may benefit from the diversity. Shareholders and boards focusing on diversity, for example, may wish to use their choice of counsel and arbitrators to showcase their commitment to diversity. Similarly, state parties involved in international arbitration might have transparency requirements requiring them to comply with equal opportunity or diversity obligations. Moreover, parties may not always identify with, feel fully heard by, or be able to communicate in a manner that is fully forthright with lawyers within the international arbitration community; this, in turn, suggests arbitration services might be enhanced through expanded market competition.

Second, exploring diversity levels and identifying methods for enhancing diversity could serve to enhance legitimacy, public trust, and procedural justice.<sup>214</sup> When considering long-term efficacy, the international arbitration community could benefit from exploring how to maintain and develop reservoirs of goodwill during a time of global economic transition. One strategic way of enhancing legitimacy is to have appropriate and balanced representation before courts and tribunals, international or domestic. Where adjudication is “representative of the people, [it] will be considered more legitimate, and can count on greater trust and confidence from the public at large. Conversely, lack of diversity in [adjudication] could undermine public confidence . . . .”<sup>215</sup> The former Chief Judge of the United States Court of Appeals for the Eleventh Circuit, Deanell Tacha, notes that, “diversity is about bringing together collective knowledge, born from an array of experiences, in order to ensure the judiciary and its decisions are respected and followed.”<sup>216</sup> These concerns translate to the international context, whether international

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214. See generally THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1998); THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990) [hereinafter FRANCK, THE POWER]; Charles H. Brower II, *Structure, Legitimacy and NAFTA's Investment Chapter*, 36 VAND. J. TRANSNAT'L L. 37 (2003). While beyond the scope of our analysis, we observe that political scientists often link legitimacy to the “‘reservoir’ of good will” on which institutions rely in the short term to address unpopular decisions as well as long-term deep-seated support. Scherer, *supra* note 140, at 625; see also DAVID EASTON, A FRAMEWORK FOR POLITICAL ANALYSIS 124–26 (1965); Gregory A. Caldera & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 636–37 (1992).

215. Kalantry, *supra* note 147, at 87.

216. Deanell Tacha, *Diversity in the Judiciary: A Conversation with Deanell Tacha*, 59 U. KAN. L. REV. 1037, 1038 (2011); see also Kalantry, *supra* note 147, at 88. (“there must be gender parity in the judiciary to further equality of opportunity for all people, enhance courts’ legitimacy and strengthen the rule of law.”).

courts and tribunals<sup>217</sup> or international arbitration.<sup>218</sup> As Chiara Giorgetti explains, an “important measure that can be taken to strengthen the international arbitration system is to enlarge the pool of arbitrators. More arbitrators from outside Europe and North America, and more women, are needed.”<sup>219</sup> Observing that it “is widely accepted both at domestic and international levels that ‘a diverse judiciary is an indispensable requirement of any democracy,’”<sup>220</sup> Giorgetti argues that in a transnational setting with global economic implications like international arbitration, broad representation is even more important.<sup>221</sup> International arbitration could therefore benefit from enhanced legitimacy and procedural justice by having adjudicators who reflect the society to whom they are responsible. Particularly for ITA, which involves policy matters, it is critical to both do and be seen to do justice.<sup>222</sup> Given the value of symbolic legitimacy,<sup>223</sup> there is untapped value in having an

217. See Grossman, *Sex on the Bench*, *supra* note 112; Grossman, *Legitimacy and International Adjudicative Bodies*, *supra* note 121; Grossman, *The Normative Legitimacy of International Courts*, *supra* note 122; Kumar & Rose, *supra* note 60.

218. Jan Paulsson has also observed that, “[a]rbitration obviously cannot endure if those asked to consent to its authority are mystified and disaffected. The process will be rejected if it is perceived that while the arbitrants come from the four corners of the world, rights of advocacy and the power to decide are reserved to mandarins or high priests operating in a few dominant cities.” Jan Paulsson, *The Alexander Lecture at the Chartered Institute of Arbitrators: Universal Arbitration—What We Gain, What We Lose* (Nov. 29, 2012), (transcript available at [http://www.globalarbitrationreview.com/cdn/files/gar/articles/jan\\_Paulsson\\_Universal\\_Arbitration\\_-\\_what\\_we\\_gain\\_what\\_we\\_lose.pdf](http://www.globalarbitrationreview.com/cdn/files/gar/articles/jan_Paulsson_Universal_Arbitration_-_what_we_gain_what_we_lose.pdf)).

219. Giorgetti, *supra* note 159, at 480–81.

220. *Id.* at 481 (citing Centre for Int’l Cts. & Tribunals, *Selecting International Judges: Principle, Process and Politics* 37, UNIV. COLL. LONDON DISCUSSION PAPER, available at [http://www.ucl.ac.uk/laws/cict/docs/Selecting\\_Int\\_Judges.pdf](http://www.ucl.ac.uk/laws/cict/docs/Selecting_Int_Judges.pdf) (quoting Lady Hale, *The Appointment and Removal of Judges: Independence and Diversity*, International Association of Women Judges 8th Biennial Conference (May 3–7, 2006)) (last visited May 16, 2015).

221. Tom Tyler’s research reflects that enhanced levels of procedural justice are more likely to generate voluntary compliance with the law, even when a judicial decision is adverse. See, e.g., TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006); Tom R. Tyler, *Procedural Justice, Legitimacy and the Effective Rule of Law*, 30 *CRIME & JUST.* 283 (2003).

222. See *Libananco Holdings Co. Ltd. v. Republic of Turk.*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, ¶ 79 (Jun. 23, 2008), available at <http://www.italaw.com/sites/default/files/case-documents/ita0465.pdf> (“The Tribunal recalls the well-known saying, very frequently repeated in legal discussion, that it is not enough that justice should be done, it must also manifestly be seen to be done.”).

223. See generally FRANCK, *THE POWER*, *supra* note 214, at 91–101 (discussing how symbolic validation impacts legitimacy); Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 *AM. J. INT’L L.* 596; Grossman, *Legitimacy and International Adjudicative Bodies*, *supra* note 122, at

inclusive group of international adjudicators that provides expressive, representational and modeling functions.

Third, although more speculative, it is possible that greater diversity could facilitate distributive justice and higher quality outcomes. Having greater representation of different perspectives during deliberation could aid a more comprehensive appreciation of parties' positions and underlying evidence. This, in turn, could generate higher quality awards.<sup>224</sup> There is, however, difficulty in demonstrating that appointing non-median arbitrators creates different outcomes—or that different types of diversity will generate specific effects on the process or the outcome.<sup>225</sup>

Generating diversity, however, could prove challenging as international arbitration permits parties to directly control two arbitrator appointments (and potentially the appointment of the chair, as well). Parties have incentives to select arbitrators that either maximize the likelihood of their preferred result in a given case or minimize the possibility of a negative result. Likewise, parties may wish to appoint known-qualities in their arbitration counsel and arbitrators and thereby decrease the risks outcomes generated by untested arbitrators. These incentives place new international arbitrators at a disadvantage, which minority status may exacerbate.<sup>226</sup> Nevertheless, boards of directors or other entities could create pressure to foster diversity in their use of lawyers and arbitrators,<sup>227</sup> or there may be natural incentives to appoint more

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224. See *supra* note 118 and accompanying text.

225. For example, in the context of ITA, research suggests that presence of tribunals with presiding arbitrators from developing countries may not affect outcome or potentially be linked to developing country arbitrators finding against developing states; the data has been unable to find that tribunals containing women were reliably different in terms of outcomes. Franck, *Development and Outcomes*, *supra* note 28; see FRANCK, *supra* note 29. The results, however, may also reflect the small proportions of female arbitrators and arbitrators from developing countries. It is possible that, as the population expands, that there may be a meaningful link with arbitration outcomes.

226. See, e.g., Ilhung Lee, *Practice and Predicament: The Nationality of the International Arbitrator*, 31 *FORDHAM INT'L L.J.* 603 (2007) (providing results of how party appointment attitudes varied in ICA depending upon arbitrators' nationalities or the nationalities of their spouses).

227. See, e.g., Andrew Bruck & Andrew Canter, *Supply, Demand, and the Changing Economics of Large Firms*, 60 *STAN. L. REV.* 2087, 2112 (2008) (discussing initiatives by the Minority Corporate Counsel Association to promote diversity in legal hiring and observing how after Rick Palmore, Sara Lee's general counsel, circulated a petition for companies to terminate relationships with law firms failing to promote diversity, "[s]tories began circulating, many of them apocryphal, about general counsels dumping some of the nation's

broadly.<sup>228</sup> Where such incentives do not exist, arbitral institutions such as ICSID, the LCIA, the ICC, or the Permanent Court of Arbitration at The Hague can generate increased diversity by strategically utilizing those appointments they control. Initial analyses exploring ITA cases reflected that chair appointments by institutions like ICSID exhibited greater diversity (in terms of development status) as compared to appointments made by co-arbitrators.<sup>229</sup> This suggests that stakeholders may wish to follow institutions' lead in promoting greater diversity in international arbitration.

Comparatively, many national courts have arguably done better at promoting gender equity than international arbitration. Quantitative analyses on the prevalence of women and developing world lawyers in international courts and tribunals indicate that international arbitration is roughly equivalent but certainly not worse.<sup>230</sup> Yet, this is arguably not the appropriate basis for comparing international arbitration, and the better frame of reference is to compare international arbitration to other international courts and tribunals that also exhibit low diversity levels. Two critical questions are therefore worthy of consideration by the international arbitration community. First, what is the appropriate yardstick against which to measure diversity levels in international arbitration? Second, does international arbitration wish to be a leader or a laggard in promoting diversity in international law? Given the potential effect of diversity imbalances on perceived legitimacy, the international arbitration community should consider taking the lead in educating stakeholders about the value of diversity in international adjudication. Diversity can be a function of market forces as parties to a dispute typically hold the power in obtaining counsel and appointing arbitrators. With an increasing focus in both the public and private spheres on gender and other forms of diversity, there is minimal harm in educating stakeholders about the benefits for them

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most prestigious law firms over diversity issues”).

228. See, e.g., Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 *FORDHAM L. REV.* 2791, 2803 (2012) (“[S]enior in-house attorneys insist on diverse teams from their outsourcers. Senior managers also insist on diverse teams internally. This is because, as a senior legal counselor of a large, publicly traded corporation contended, ‘combining a broad range of backgrounds and experiences—in our outside counsel, in our in-house legal team and in our greater work force—leads to the development of creative strategies and sophisticated ideas.’”) (footnotes omitted).

229. FRANCK, *supra* note 29.

230. There were also similar patterns in some data related to large law firms. See *supra* notes 176–77 and accompanying text.



to opt for balance. Arbitral institutions with the capacity to appoint arbitrators should also be conscious of the value of promoting diversity without sacrificing quality.

Given the enforcement regime available to international arbitration awards, it is in the long-term interest of the international arbitration community to redress areas of concern to promote its longevity and legitimacy. As Salim Moollan observed:

on the one hand, the formal discourse repeated at every conference we go to emphasizing the inclusiveness of international arbitration, and, on the other hand, the perception of our field, in the developing world as predominantly Euro- and American-centric. This gives rise to a risk of arbitration being perceived as foreign process imposed from abroad, as an unwanted but inevitable corollary of trade and investment flows.<sup>231</sup>

He further explained that the conceptual premise of holding an ICCA Congress in Mauritius:

is that the answer to this is to make sure that the developing world has its say in the process and in its development and for international arbitration to progressively to become part and parcel of the legal culture of developing countries. The aim is accordingly to create a platform run for the benefit of the region as a whole to build capacity in the field of international dispute resolution so that, within a generation Africa can draw on the expertise of specialist African arbitrators and lawyers.<sup>232</sup>

Ultimately, the data reflect that diversity issues in international arbitration are complex and not subject to a uniform narrative. Nevertheless, the data shed light on the core demographics of international arbitration and raise questions about the way to improve diversity and enhance its legitimacy. International arbitration could benefit from an identification of those factors that generate barriers and the consideration of structural and incremental solutions to address concerns and generate a sustainable international arbitration system for the future.

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231. Moollan, *supra* note 52, at 2:13–2:40.

232. *Id.* at 2:41–3:16.

## VII. LIMITATIONS

It is important to identify research limitations to prevent consumers of scientific research from drawing unwarranted inferences and to aid assessment of the research's value. Throughout this Article, we have included cautions (in the primary text and in footnotes) about the limitations of survey questions generally and our questions specifically, the limitations of statistical tests, and the limitations of the analyzed sample. We identified concerns related to sample representativeness, the risk of selection effects that derive from the potential over-inclusion of North American subjects, the under-inclusion of other subjects, the use of English language in an international dispute settlement conference, the potential focus on elite players rather than newer entrants, and fiscal cost of attendance. Beyond traditional caveats about drawing inferences from scientific research,<sup>233</sup> it is appropriate to highlight other issues.

First, as ICCA participants had the option to not attend the initial plenary and also not complete the survey, there is a risk of a self-selection bias that may limit inferences. Only fifty-five percent of ICCA registrants attended the first plenary. This means, although the response rate was reasonable, a number of conference participants were not represented in the survey results. Similarly, although distributing surveys at elite conferences may improve response rates, the method also necessarily limits the sample to those arbitration practitioners interested in the conference, willing to attend, and able to attend.<sup>234</sup>

Second, as the survey involved self-reporting, there is a risk of error. The error might take the form of misremembered information. For example, while subjects might identify whether they had served as counsel or arbitrator, subjects' memory may not accurately reflect the precise number of cases. Similarly, subjects may intentionally misreport to inject error into their responses. Finally, self-reporting may generate error related to a self-serving bias should subjects answer in what they deem to be a socially desirable manner or are otherwise overly optimistic.<sup>235</sup>

Third, there is a risk of external validity over time. The data

233. Franck et al., *supra* note 102, at 885–99.

234. See Cheng, *supra* note 35, at 1279 (identifying similar concerns in distributing surveys to judges at judicial conferences).

235. TALY SHAROT, THE OPTIMISM BIAS: A TOUR OF THE IRRATIONALLY POSITIVE BRAIN 16–18 (2011); see Emily Pronin, et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions in Self Versus Others*, 111 PSYCHOL. REV. 781 (2004).

from ICCA are now a historical snapshot. It is possible that several of the findings will change over time. Certain findings related to diversity might change over time as the group of arbitrators expands. Future research should reassess these aspects periodically with more sophisticated measures and models. In this way, we can reconsider what we know now as we add to our knowledge over time.<sup>236</sup>

Fourth, for those instances where we conducted tests to look for group differences and obtained non-significant results, it is not possible to claim there is no relationship. As discussed, even with a base sample of over 500 subjects, the effect sizes were so small that some tests were technically underpowered.<sup>237</sup> Future research with an expanded sample size is required before reaching definitive conclusions about the lack of a statistically reliable effect. For many of the non-significant results, the effect sizes were small or less than small suggesting that any latent differences may not be practically meaningful; and a sample with sufficient power to detect even the small effects will require between 1,200-1,600 subjects. A well-attended future ICCA Congress or similar event where there is a transnational and critical mass of arbitration specialists would be an appropriate venue for such an undertaking.

More research is required to create the sufficient power, stability, statistical control, and enhanced validity necessary to reach more definitive conclusions. Given the practical challenges in obtaining a sufficiently large set of subjects, it may be challenging to recreate this research. Those challenges do not diminish the value of future research providing replication that confirms—and expands—upon existing research.

## CONCLUSION

The data reflect that the modern “invisible college” of international arbitration is complex and not subject to a flat, unitary narrative. An appreciation of the nuance and complexity creates a powerful opportunity. The data can aid the international arbitration community’s exploration of evidence-based solutions to identifiable challenges rather than reliance on unrepresentative anecdotes.<sup>238</sup>

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236. See Franck et al., *supra* note 102, at 888–89, 900–02.

237. See *supra* notes 190, 211 and accompanying text.

238. See Jeffrey J. Rachlinski, *Evidence-Based Law*, 96 CORNELL L. REV. 901 (2011) (exploring opportunities for evidence-based law); see also David L. Sackett et al., *Evidence Based Medicine: What It Is and What It Isn't*, 312 BRIT. MED. J. 71 (1996) (discussing evidence-based approaches to the practice of medicine).

The demographics of key actors in international arbitration reflected bright spots but likewise reflected areas for improvement. International arbitration has moved past historic Cold War divides. The data demonstrated that arbitrators and counsel comprised a broad spectrum of nationalities, continents, and languages. Nevertheless, the data reflected disproportionate levels of representation by men from states in North America and Europe, which have high levels of economic development. Only 24% of counsel and 17.6% of arbitrators were women.<sup>239</sup> Meanwhile, 68.6% of counsel and 76% of arbitrators were from Europe and North America; 75.2% of counsel and 82.4% of arbitrators were from OECD states, and 76.5% of counsel and 84.8% of arbitrators were from high-income countries. The data supported claims that international arbitration is a “white male game.”<sup>240</sup>

Diversity challenges within international arbitration are some of the most challenging, but also the most rewarding, as they generate an opportunity for arbitration to take a leadership role within the broader community of international courts and tribunals. More than 75% of ICCA subjects identified that they agreed (either somewhat or strongly) with the proposition that international arbitration experiences diversity challenges. Yet, the data reflected heterogeneities in perceived challenges. Women and younger subjects were *more* likely to identify diversity challenges than men or older subjects. Subjects from developing countries (no matter how defined) were *less* likely than their developed world counterparts to identify diversity challenges. These perceived experiences, however, were juxtaposed with actual experiences related to gender and development status.

The data also reflected that becoming an international arbitrator can be challenging, and the proportion of women arbitrators was only 17.6%. Once women broke the “glass ceiling,” statistical tests could not identify a meaningful difference in the number of appointments that women obtained as compared to men. Yet, roughly one-third of arbitrators had never sat on a tribunal with

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239. There was some evidence that, for the subset of arbitrators, the ICCA respondents had a disproportionately large number of women arbitrators. See *supra* note 132 and accompanying text.

240. Peter F. Phillips, *ADR Continental Drift: It Remains a White, Male Game*, NAT'L L.J., Nov. 27, 2006, available at [http://www.businessconflictmanagement.com/pdf/BCMpress\\_08.pdf](http://www.businessconflictmanagement.com/pdf/BCMpress_08.pdf); Maria R. Volpe et al., *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field*, 35 FORDHAM URBAN L.J. 119 (2008).

a woman, and more than 75% of counsel reported they had never had a tribunal with multiple female arbitrators.

Analyzing the development status of international arbitration specialists also reflected diversity was complex. Recognizing that developing world arbitrators were *less* likely to identify diversity problems in international arbitration, two aspects were noteworthy. The first was the demographic data reflecting that OECD and/or high-income arbitrators made up more than 75% of the arbitrators in our sample. The second was, irrespective of how development status was defined, developing world arbitrators experienced statistically lower numbers of appointments than their developed world colleagues. Even counting developing world arbitrators' own appointments, approximately 40% of arbitrators reported never having sat on a tribunal with a developing world arbitrator; and 59.4% of counsel reported never having worked with a tribunal containing multiple arbitrators from developing countries. Those findings must be contextualized against tests demonstrating that counsel from developing countries were much more likely to experience tribunals comprised of developing world arbitrators.

There is an important normative question about what is the appropriate baseline against which diversity in international arbitration should be evaluated. On the one hand, one might look to baselines established by national legislatures and judiciaries. On the other hand, given the transnational nature of international arbitration, perhaps the baseline offered by public international law is most appropriate. Using either baseline, the small size of the pool of women and developing world arbitrators was noteworthy. As suggested by Sundaresh Menon<sup>241</sup> and Salim Moollan,<sup>242</sup> discussions about diversity are worthwhile and may enhance arbitration's long-term legitimacy and sustainability. In a time when there is a broad pool of talent in international arbitration, and that talent extends across national borders<sup>243</sup> and encompasses both genders, there is untapped value in diversifying the pool of arbitrators.

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241. See Menon, *supra* note 126, ¶¶ 74–76 (observing that the international arbitration community should take into account the unique circumstances of developing nations and make an effort to engage developing countries into the development of norms); see also Menon, *Where We Have Been*, *supra* note 126, at 1035 (“I believe that this is the essential challenge of this age—we are moving very rapidly from a time when the key players knew one another; when they often looked similar and spoke similarly; and when they had a common legal, cultural and social background; to a period in which there is unprecedented growth in numbers and in diversity.”).

242. See *supra* note 128 and accompanying text.

243. See LOBEL, *supra* note 98; Law, *supra* note 98, at 1323–30.

There may also be pragmatic reasons to consider how best to diversify the “invisible college” of arbitrators. First, as international business activity becomes more complex and international arbitration expands, it is critical to have a pool of arbitrators who are available to resolve disputes and appreciate the unique context from which the dispute arises. This minimizes risk of delay, decreases costs and increases stakeholder satisfaction. Second, as the existing pool of international arbitrators continues to age, it is necessary to ensure institutional and historical knowledge is transferred to the next generation. The objective should be to prevent an over-concentration of arbitration experience, so that a broad pool of arbitrators can continue to offer quality adjudicative services in the future. Third, to the extent that conflicts of interests within law firms or subject-matter conflicts of interest limit the services that arbitrators can provide, it is necessary to have both breadth and depth in the pool of potential appointees. Finally, as more countries’ economies grow, the demand for international legal services may increase and generate new opportunities for individuals in developing world legal systems.

The results provided in this Article are designed to elucidate the “invisible college” of international arbitrators and identify the tip of a larger empirical iceberg. We applaud ICCA for taking the first step in generating transparent information about international arbitration. In light of the data, we offer some suggestions. First, we encourage researchers to continue exploring how to generate scientifically rigorous data that can inform stakeholders and permit reasoned discussions about how best to improve international arbitration. Second, given the self-awareness of diversity concerns, it would be constructive to explore factors creating impediments to maximizing untapped arbitration talent. Third, it could be constructive to identify opportunities for the diversification and capacity building of counsel and arbitrators that neither sacrifice quality nor unduly burden party autonomy. We hope this Article offers a constructive basis for a dialogue about evidence-driven approaches to enhance the legitimacy of international arbitration and promote viable systems of dispute settlement for the future.

## ANNEX 1: RELEVANT SURVEY MATERIALS

Demographic Questions

Your Sex (Male or Female):

Your Nationality (or Nationalities):

Your Current Age:

Your Mother Tongue:

Please identify other languages that you speak and/or write proficiently:

Please indicate jurisdiction(s) where you received your legal education:

Common Law  Civil Law  Both

Please indicate the number of cases where you have acted as:

*Counsel* in international arbitration:

*Expert* in international arbitration:

*Arbitrator* in an international *commercial* arbitration:

*Arbitrator* in an international *investment treaty* arbitration:

*Adjudicator* in a *public international law dispute* (International Court of Justice, World Trade Organization proceedings, etc.):

*Judge* in a *national court* proceeding:

ICCA Questions

International arbitration has diversity challenges related to gender, nationality, or age. [1 (Strongly Disagree) to 5 (Strongly Agree)]

In my experience as arbitrator, I have sat with a/another woman: [More than 10 times; 6-10 times; 1-5 times; Never]

In my experience as arbitrator, I have sat with an arbitrator from a developing country: [More than 10 times; 6-10 times; 1-5 times; Never]

In my experience as arbitrator, I have sat with more than one arbitrator from a developing country: [More than 10 times; 6-10 times; 1-5 times; Never]

In my experience as counsel, I have had an arbitral tribunal that has multiple women: [More than 10 times; 6-10 times; 1-5 times; Never]

In my experience as counsel, I have had a arbitral tribunal with multiple arbitrators from developing countries: [More than 10 times; 6-10 times; 1-5 times; Never]