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## **Getting a Better Balance on International Arbitration Tribunals**

*LUCY GREENWOOD & C. MARK BAKER*

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# Getting a Better Balance on International Arbitration Tribunals

by LUCY GREENWOOD & C. MARK BAKER \*

## ABSTRACT

*In this article the authors look at gender diversity in international arbitration tribunals and draw a comparison with gender diversity in the judiciary, in law firms and in major companies. Concluding that the lack of gender diversity in international arbitration tribunals cannot wholly be attributed to the lack of women at the senior end of the legal profession, the authors suggest that one way to diversify and expand the pool of arbitral candidates is for states to implement policy changes in the manner in which arbitrators are selected for investment treaty arbitrations. Changes made at this level will increase the visibility and profile of arbitral candidates and may result in a trickledown effect on appointments to commercial arbitration tribunals.*

## I. DIVERSITY ON INTERNATIONAL ARBITRATION TRIBUNALS

The lack of gender diversity in international arbitration tribunals is seen as an ‘ongoing issue . . . rearing its head now and again’.<sup>1</sup> In seeking to achieve a better balance on international arbitration tribunals, this article focuses on the ‘male’ element of the assertion made by Sarah Francois-Poncet in 2003, and often repeated, that most international arbitrators are ‘pale, male and stale’.<sup>2</sup> We leave for another day the questions surrounding the lack of diversity in relation to age

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<sup>1</sup> Posting by Sophie Nappert to [OGEMID@mailtalk.ac.uk](mailto:OGEMID@mailtalk.ac.uk) (Feb. 9, 2012, 03:29 am CST). OGEMID discussions are subject to the Chatham House rule. Those quoted in this article have given express permission for their comments to be attributed.

<sup>2</sup> See Michael Goldhaber, *Madame La Presidente*, 1 *Transnatl. Dis. Mgt.* (July 2004).

and ethnicity that are also evident in the composition of international arbitration tribunals.<sup>3</sup>

In this field, there are occasional blog postings about gender diversity,<sup>4</sup> intermittent flurries of discussion in internet forums,<sup>5</sup> and, much less frequently, the occasional publication of hard statistics about the composition of international arbitration tribunals.<sup>6</sup> There has been relatively little comment on the reasons underpinning the lack of gender diversity in international arbitration tribunals; in contrast, there appears to be general acceptance that this is the *status quo*.<sup>7</sup> International arbitration practitioners have become comfortable with the notion that women are a significant minority, if not a ‘tiny fraction’<sup>8</sup> of the international arbitrator population.

A major cause of the under-representation of women on international arbitration tribunals is the lack of women making it through to the upper echelons of the legal profession. However, the limited data that is available indicates that women are even more poorly represented on arbitral tribunals than at a senior level in law firms. It appears that the additional obstacles which an international arbitrator must overcome in order to succeed may penalize women disproportionately. The number of women appointed to international arbitration tribunals is therefore smaller than it should be, even taking into account the difficulties women face in getting to a stage at which they may be considered for an arbitral appointment.

<sup>3</sup> The opening paragraph of Dr. K.V.S.K. Nathan’s article *Well, Why Did You Not Get the Right Arbitrator?* sums up the general lack of diversity in international arbitration tribunals: ‘An observer from planet Mars may well observe that the international arbitral establishment on Earth is white, male and English speaking and is controlled by institutions based in the United States, England and mainland European Union. For the most part, arbitrators and counsel appearing actively in international arbitral proceedings originate from these countries. The majority in a multi-member international arbitral tribunal is always white. The red alien from Mars will be puzzled in his own way because the majority of the published disputes before international arbitral tribunals involve parties from the developing countries and nearly three-quarters of the people on Earth live in those countries and are not white and more than half the total population are women.’ Dr. K.V.S.K. Nathan, *Well, Why Did You Not Get the Right Arbitrator?*, 15 Mealey’s Intl. Arb. Rep. 24 (July 2000). The article dates from July 2000, but Dr Nathan’s observations appear to be equally true today.

<sup>4</sup> See, e.g. Lisa Bench Nieuwveld, *Women in Arbitration: Lots of Talk, Any Changes?*, Kluwer Arbitration Blog (Nov. 22, 2011), <http://kluwerarbitrationblog.com/blog/2011/11/22/women-in-arbitration-lots-of-talk-any-changes/>; Discussion by Lara Bander and Mehtap Tari Hirt in Matthias Scherer, *Arbitral Institutions under Scrutiny*, Kluwer Arbitration Blog (Oct. 5, 2011), <http://kluwerarbitrationblog.com/blog/2011/10/05/arbitral-institutions-under-scrutiny/>.

<sup>5</sup> Members of OGEMID can review the various discussion threads on diversity, which are archived online at <http://www.transnational-dispute-management.com/ogemid/>.

<sup>6</sup> See Susan Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. Rev. 1 (2007).

<sup>7</sup> An anonymous posting to OGEMID@mailtalk.ac.uk (30 June 2009 08.58 CST) thought that ‘too much was made of women in arbitration . . . It just so happens that in current circumstances there are more good men than good women.’

<sup>8</sup> *Per* Franck *supra* n. 6.

## II. THE UNDER-REPRESENTATION OF WOMEN ON INTERNATIONAL ARBITRATION TRIBUNALS

Although it is generally acknowledged that women are under-represented on international arbitration tribunals, it is nonetheless instructive to look at the available data and to place that data in context, as far as possible. In researching this article it was notable how little data was publicly available on this topic and how difficult additional data was to obtain.<sup>9</sup>

In 2006, Professor Susan Franck carried out detailed research into investment treaty arbitrations by analysing the population of investment treaty arbitrations that were publicly available at that time.<sup>10</sup> The population of her study comprised 102 awards, of which 100 had three-member tribunals and two were rendered by a sole arbitrator, resulting in 145 different arbitrators. Professor Franck concluded that women were a 'tiny fraction' of the arbitrators in the awards she analysed. There were 5 women (3%) in the population of 145 investment treaty arbitrators she reviewed. For this article, research was carried out into the constitution of ICSID tribunals as published on the 'concluded cases' section of ICSID website as at 1 March 2012, in order to update and revisit Professor Franck's research in relation to the representation of women in investment treaty arbitration tribunals.<sup>11</sup> The population of this study comprised 254 concluded ICSID cases,<sup>12</sup> from January 13, 1972 to January 18, 2012.<sup>13</sup> In these cases, 746 arbitrators were appointed.<sup>14</sup> 42 (5.63%) of those appointments were of female arbitrators. So while the percentages have almost doubled, the levels are still very low. It is of course, more difficult to replicate this process with international commercial

<sup>9</sup> The authors contacted the LCIA, SCC, ICDR, and the ICC requesting information on the gender of the arbitrators appointed in arbitrations administered by the institutions. In an email exchange with Lucy Greenwood on 17 February 2012 and subsequently followed up by a telephone call on 21 February 2012, the ICC confirmed that it did not maintain information on diversity. Note that Louise Barrington reported that in 1990 the ICC named 517 arbitrators, of whom 4 (0.78%) were women and in 1995, the ICC named 766 arbitrators, of whom 22 (3%) were women. Louise Barrington, *The Commercial Way to Justice* (Kluwer 1997). The Stockholm Chamber of Commerce responded to the author on 9 March 2012 that 6.5% of all appointed arbitrators (both party appointed and appointed by the SCC between 2003 and 2012) have been women and 8.4% of the arbitrators appointed by the SCC have been women. However, it did not maintain these statistics routinely. The LCIA reported to Lucy Greenwood by email on 20 March 2012 that of 336 arbitrator appointments in 2011, 22 (6.5%) were female. The ICDR did not provide statistics to the authors. The Arbitration Institute of the Finland Chamber of Commerce stated that 27 % of the arbitrators appointed by the FCC in 2011 were women, but indicated that 'very few' of the party-appointed arbitrators were female (email to Lucy Greenwood dated 20 June 2012).

<sup>10</sup> Franck *supra* n. 6.

<sup>11</sup> ICSID, *List of Concluded Cases*, <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtIsRH&actionVal=ListConcluded> (last visited Mar. 1, 2012).

<sup>12</sup> Concluded cases were defined as all awards (even where subsequently annulled), annulment decisions, resubmission decisions, and fully constituted tribunals in proceedings that were discontinued before an award was rendered. Rectification decisions, interpretation decisions, revision decisions, and conciliation proceedings were omitted. So defined, there was a total of 254 concluded cases: 246 three panel tribunals and 8 cases involving sole arbitrators.

<sup>13</sup> From *Holiday Inns S.A. and others v. Morocco* (ICSID Case No. ARB/72/1) to *Club Hotel Loutraki S.A. and Casinos Austria International Holding GmbH v. Republic of Serbia* (ICSID Case No. ARB/11/4).

<sup>14</sup> Of this figure, there were 8 sole arbitrator appointments. 738 appointments were made to 246 three-member tribunals. The figure only includes the final composition of the tribunal; any prior appointees were omitted.

arbitrations, as information on international commercial arbitrations is not routinely published. In the 2009 American Lawyer Scorecard of major arbitrations, Michael Goldhaber stated that around 4% of the 250 arbitrators involved in the cases he analysed were female.<sup>15</sup> The Stockholm Chamber of Commerce reported to the authors that 6.5% of all arbitrators appointed in its arbitrations have been women. The LCIA reported that in 2011, 6.5% of all arbitrators appointed in its arbitrations were women. Extrapolating from this data, it appears that the best estimate of the percentage of women appointed to international commercial arbitration tribunals is around 6%.<sup>16</sup>

(a) *Why Are Women Under-represented on International Arbitration Tribunals?*

Why are women so under-represented on international arbitration tribunals? The answer is not straightforward. The over-riding reason for the disproportionate appointment of men is rooted in the difficulties women continue to face in reaching the senior levels at law firms: there are simply not enough women reaching the top of the profession. However, the problem is then exacerbated by the peculiarities of international arbitration, in particular the lack of transparency in the appointment process.<sup>17</sup>

In 2012, it is probably fair to say that a significant number, if not the clear majority, of practicing international arbitrators came through the ranks as practicing lawyers acting as counsel in international arbitrations. It is therefore appropriate to focus on this route as the primary route most potential arbitrators will take in establishing their career.<sup>18</sup> Given the numbers of female lawyers entering the profession, there should be no shortage of supply of female potential arbitrators in the pipeline. Female students in the US and the UK have been accepted to study law at around the same rate as male students since the 1990s.<sup>19</sup> In fact, almost 65% of graduate trainees at entry level in the UK are women,

<sup>15</sup> Michael Goldhaber, *Deciding Women*, Focus Eur. 27 (Summer 2009).

<sup>16</sup> See *supra* note 9.

<sup>17</sup> As discussed by Catherine Rogers in *The Vocation of the International Arbitrator*, 20 Am. U. Int'l L. Rev. 957 (2005).

<sup>18</sup> In this article, we are focusing on legally qualified international arbitrators.

<sup>19</sup> In 2001, Jonathan Glater noted that 49.4% of American first year law students were women. He observed that '[w]omen are expected to be the majority of students entering law school this fall'. Jonathan Glater, *Women Are Close to Being Majority of Law Students*, New York Times (Mar. 26, 2001), available at <http://www.nytimes.com/2001/03/26/business/women-are-close-to-being-majority-of-law-students.html>. In the United Kingdom, 'the proportion of applicants accepted onto university law degree course who were women increased from 48 per cent in 1986 to 50 per cent in 1991'. *Law Society of England and Wales, Annual Statistical Report* 71 (1992), available at [http://www.lawsociety.org.uk/7C46A58E-4688-4C8B-AEEDD-A07ABD9F203E/secure/file/167800/e:/teamsite-deployed/documents/templatedata/Publications/Research%20Publications/Documents/trendsasr1992report.pdf](http://www.lawsociety.org.uk/7C46A58E-4688-4C8B-AEEDD-A07ABD9F203E/FinalDownload/DownloadId-8234B57A15A1575C817DF1AFC161A38E/7C46A58E-4688-4C8B-AEEDD-A07ABD9F203E/secure/file/167800/e:/teamsite-deployed/documents/templatedata/Publications/Research%20Publications/Documents/trendsasr1992report.pdf). By 2008, this number had risen to 64.26%. *Law Society of England and Wales, Annual Statistical Report* 29 (2009), available at <http://www.lawsociety.org.uk/7C46A58E-4688-4C8B-AEEDD-A07ABD9F203E/FinalDownload/DownloadId-04457F8EBB575F4FA28DF2306A10DC04/7C46A58E-4688-4C8B-AEEDD-A07ABD9F203E/secure/file/183555/e:/teamsite-deployed/documents/templatedata/Publications/Research%20Publications/Documents/asr2009report.pdf>.

according to a 2010 survey by the Law Society.<sup>20</sup> However, it is sobering to note that the 65% figure has dropped to less than 20% by the time those graduates reach partner level.<sup>21</sup> This is known as ‘pipeline leak’ by commentators, who attribute the leak to various 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.<sup>22</sup> At the potential international arbitrator level we are dealing with those who have reached the top of their profession, and the numbers are correspondingly extremely small. Thus, it can be posited that the main culprit for the scarcity of female arbitrators is the effect of pipeline leak. In the international arbitration field, once a female associate makes it through the pipeline to partnership, she is likely to find that almost nine out of ten of her partner colleagues are male, a stark comparison to when she started work, when only around four out of ten of her trainee colleagues would have been men.<sup>23</sup>

<sup>20</sup> *Law Society of England and Wales, Obstacles and Barriers to the Career Development of Woman Solicitors* (March 2010), available at <http://www.lawsociety.org.uk/secure/file/189203/e:/teamsite-deployed/documents/template%20data/Publications/Research%20Publications/Documents/Female%20lawyers.pdf>.

<sup>21</sup> The 2011 Diversity Survey published by the Black Solicitor’s Network surveyed 44 firms and found that 57.4% of trainees at participating firms were female, compared to 56.5% of associates and 23% of partners. *Black Solicitors’ Network, Diversity League Table 2011*, available at <http://satsumadesign.co.uk/DiversityLeagueTable2011-TMP/>. Participation in the survey was voluntary and therefore self-selecting. The survey found that there had been little change in these figures over the past five years. In *The Lawyer’s 200 Annual Report 2011*, the firm with the greatest proportion of female equity partners – SJ Berwin – had just 20%, with only 18 of the 200 firms having 10 or more percent female equity partners. *UK’s top firms fail to increase female equity partner figures*, *The Lawyer* (Sept. 14, 2011), <http://www.thelawyer.com/uk’s-top-firms-fail-to-increase-female-equity-partner-figures/1009165.article>.

<sup>22</sup> See, in particular, the pyramid at <http://www.catalyst.org/publication/132/us-women-in-business>, March 2012, which shows women at 51% of management, professional and related occupations, 14% of Fortune 500 Executive Officers, 16% of Fortune 500 board seats, 7.5% of Fortune 500 top earners and 3.4% of Fortune 500 CEOs. See also [http://www.pwc.com/en\\_GX/gx/women-at-pwc/assets/leaking\\_pipe\\_line.pdf](http://www.pwc.com/en_GX/gx/women-at-pwc/assets/leaking_pipe_line.pdf). *The Leaking Pipeline: Where are our female leaders?* March 2008. In this study, research commissioned by PwC UK indicated that, in most ‘first world’ countries, entry-level men and women in the professional services sector are hired at an equal rate. Women were lost from the pipeline through voluntary termination at a rate two or three times faster than men once they reached mid-career level. The study found no evidence of deliberate, conscious bias. Reasons for the pipeline leak included: lack of female role models; lack of mentoring opportunities; work/life challenges and perceived lack of flexibility; gender stereotyping; lack of opportunities; lack of clear career path; perceived lack of skills/experience.

<sup>23</sup> Eleven per cent of partners in the top 10 arbitration teams in the world (according to Global Arbitration Review in 2011) were female. To obtain this figure, the composition of the top ten arbitration teams according to Global Arbitration Review’s 2011 ‘GAR 100’ survey was analyzed. *Global Arbitration Review, GAR 100* (4th ed. 2011), available at [http://www.globalarbitrationreview.com/\\_img/\\_surveys/GAR30\\_table2011.jpg](http://www.globalarbitrationreview.com/_img/_surveys/GAR30_table2011.jpg). Freshfields 7% – 29 partners (2 women): <http://www.freshfields.com/practices/dispute/arbitration/people/>; Shearman & Sterling 13% – 15 partners (2 women): <http://www.shearman.com/practices/detail.aspx?practiceid=e89f53cf-5f6b-4264-84e0-0932dee4781c&disp=lawyers&Industry=False>; White & Case 10% 49 partners (5 women): <http://www.whitecase.com/attorneys/>. Search terms: ‘Partner level’ and ‘International Arbitration’; WilmerHale 13% 15 partners (2 women): <http://www.wilmerhale.com/biographies/biographies/whAttorneySearch.aspx> Search terms ‘Partner’ and ‘International Arbitration’; Debevoise & Plimpton 18% 11 partners (2 women).

Source: Website’s ‘International Dispute Resolution’ section, which is limited to international arbitration. Hogan Lovells 9% 66 partners (6 women): <http://www.hoganlovells.com/international-arbitration/>. ‘Our People’ King & Spalding 16% 25 partners (4 women): <http://www.kslaw.com/practices/International-Arbitration/People>. Allen & Overy 11% (There are 104 partners listed in ‘Dispute Resolution’ but 9 listed in international arbitration ‘Key People’. Of the 9: 1 is female): <http://www.allenoverly.com/AOWEB/>

However, the figures for female arbitrators appointed to international arbitration tribunals compare poorly to female representation in the judiciary and in companies, both of which suffer similarly from ‘pipeline leak’. In England and Wales in 2011, women made up a total of 22% of the judiciary, including 15% of High Court Judges, up from 14% and 8% respectively in 2001.<sup>24</sup> In the United States, 49 of the 162 active judges currently sitting on the thirteen federal courts of appeal are female (30.2%). Approximately 30% of active United States district (or trial) court judges are women.<sup>25</sup> The percentage of women directors on FTSE 100 companies has been constant at around 12% for the last three years,<sup>26</sup> with women holding 16.1% of the boardroom seats at Fortune 500 companies in 2011.<sup>27</sup> 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.<sup>28</sup> Accordingly it seems that international arbitration is suffering from more than the usual ‘pipeline leak’.

(b) *Arbitrator Selection*

Previous service as an arbitrator is considered to be the ‘pre-eminent qualification for an arbitrator-candidate’.<sup>29</sup> As so much of the arbitration process is confidential, information about an individual’s track record is limited and such information that is shared is usually kept within a small group. Largely due to the fact that there is

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AreasOfExpertise/PeopleList.aspx?contentTypeID=4&contentSubTypeID=19912&aofeID=302&practiceID=314&pno=1&prefLangID=410. Baker & McKenzie 9% (There are 270 partners listed in ‘Dispute Resolution’. To narrow this down, ‘arbitration’ was used as a keyword. This produced 86 results, of which there were 8 women): <http://www.bakermckenzie.com/ourpeople/List.aspx?keywordphrase=Arbitration&levels=0e65a907-b3c9-4595-b0c4-a39db5d7b729> Dechert 8% 13 partners (1 woman)

Source: <http://www.dechert.com/lawyers/list.aspx?Services=eefd727f-31b1-4668-a874-84023622e556>. An average of these figures is 11.4%.

Global Arbitration Review published a list of its top ‘45 under 45’ international arbitration specialists in 2006 and in 2011. Names that appeared on the 2006 list were excluded from the 2011 list. Both lists were compiled with input from practitioners and one of GAR’s stated aims in relation to the 2011 list was to ‘make the selection as diverse as possible’. *GAR 45 under 45 2011 – Introduction*, 6 Global Arbitration Review (Aug. 11, 2011), available at <http://www.globalarbitrationreview.com/journal/article/29699/gar-45-45-2011-introduction/>. In the 2011 list there were 10 women (22%). There were 9 women (20%) in the 2006 list.

The Chartered Institute of Arbitrators reports that 14% of its total membership and 10% of its Fellows are women. (The Chartered Institute of Arbitrators provided this information by email to Lucy Greenwood on 22 February 2012).

<sup>24</sup> Judiciary of England and Wales, *Diversity Statistics and General Overview*, <http://www.judiciary.gov.uk/publications-and-reports/statistics/diversity-stats-and-gen-overview> (last visited Feb. 28, 2012).

<sup>25</sup> Calculations based on data from the Federal Judicial Center’s website, available at <http://www.uscourts.gov>, as set out in: National Women’s Law Center, *Women in the Federal Judiciary: Still a Long Way to Go* (Feb. 23, 2012), [http://www.nwlc.org/resource/women-federal-judiciary-still-long-way-go-1#\\_edn4](http://www.nwlc.org/resource/women-federal-judiciary-still-long-way-go-1#_edn4).

<sup>26</sup> Cranfield University School of Management, *The Female FTSE Board Report* (2010), available at <http://www.som.cranfield.ac.uk/som/dinamic-content/research/documents/FemaleFTSEReport2010.pdf>.

<sup>27</sup> According to Catalyst, *2011 Catalyst Census: Fortune 500 Women Board Directors*, available at [http://www.catalyst.org/file/533/2011\\_fortune\\_500\\_census\\_wbd.pdf](http://www.catalyst.org/file/533/2011_fortune_500_census_wbd.pdf).

<sup>28</sup> See *supra* n. 23.

<sup>29</sup> Rogers, *supra* n. 17. Rogers identifies how, in her view, arbitrators ‘operate in a largely private and under-regulated market for services, access to which is essentially controlled by what might be considered a governing “cartel” of the most elite arbitrators’. She goes on to state that the market ‘is largely characterized by information asymmetries and barriers to entry’.



very little else to go on, the number of previous appointments held by an arbitrator candidate is viewed as a badge of quality.

Historically there has been nowhere counsel can easily go to identify arbitrators willing to serve, so there is a natural tendency to consider the 'elite' names that instantly spring to mind. Second, there is safety in numbers of appointments. Counsel need to have the courage to convince clients (and themselves) that a lesser-known arbitrator will do a good job. In 2011 American Lawyer identified ten 'top' arbitrators.<sup>30</sup> These arbitrators are not necessarily divided from the rest of the international arbitration world by talent alone. They are also there because it is human nature to look for validation in decisions and this is found in the awareness that others have appointed the same individuals to do the same job. However, purely because one person has been appointed a certain number of times more than another does not make him or her a certain number of times more efficient, more fair, more just or necessarily a better arbitrator. It does make him or her busier, which contributes to the situation in which many arbitration practitioners find themselves, of having to explain to clients that international arbitration is not in fact, quicker (or cheaper) than litigation before a national court. The unavailability of the 'elite' arbitrators contributes significantly to the delays faced in the arbitral process: in the appointing process, in fixing hearing dates, and receiving the award.

One of the difficulties faced by those wishing to appoint arbitrators for both commercial and investment treaty arbitrations is the lack of visibility of potential arbitrators. Service as an arbitrator is generally a second career, which is either concurrent with or subsequent to other professional service, such as serving as a member of the judiciary, a member of the bar, as an attorney or an academic. Women, who may have taken longer to reach a point at which they can begin to develop this second career, often suffer disproportionately from this lack of visibility. The issue is more acute with regard to commercial arbitrations, where there is little or no transparency in the arbitration process. In investment treaty arbitrations, there is a greater degree of transparency and, subsequently, more opportunity to make changes in the appointment process which could expand the pool of arbitrators under consideration.

There may also be other factors at play in the appointment process that affect the choice of an arbitrator. It has been posited that our social behaviour is not completely under our conscious control and that behaviour is driven by learned stereotypes.<sup>31</sup> Our brains categorize information about people largely by labelling

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<sup>30</sup> American Lawyer identified the 'arbitrators with the busiest caseloads in 2009-10'. Gabrielle Kaufmann-Kohler and Brigitte Stern tied for second with a total of 18 arbitrations each. American Lawyer, *Arbitration Scorecard 22* (Summer 2011). See also Gus Van Harten, *The (Lack of) Women Arbitrators in Investment Treaty Arbitration*, Columbia FDI Perspectives No. 59, Feb. 6, 2012. Mr Van Harten analysed investment treaty cases as at May 2010 and determined that 4% of those serving as arbitrators were women. Gabrielle Kaufmann-Kohler and Brigitte Stern accounted for 75% of the appointments of women.

<sup>31</sup> See Anthony Greenwald & M.R. Benaji, *In Implicit Social Cognition: Attitudes, Self-Esteem and Stereotypes*, 102 *Psychological Rev.* 4-27 (1995). The authors argue that much of our social behaviour stems from learned

– what used to be known as stereotyping. The notion of unconscious bias is based on the idea that individuals develop an embedded, unconscious belief and response system through repeated experiences and messaging.<sup>32</sup> Our brains are wired to categorize age, gender, race and role into the simplest way to enable easy recall of the information. Yet grouping information in this way often leaves us making unconscious assumptions which then affect our decision making.

Unconscious gender bias manifests itself in many ways. Studies have shown that men and women do not evaluate men and women equitably in professional capacities.<sup>33</sup> In one study, resumes and journal articles were rated lower by male and female reviewers when they were told the author was a woman.<sup>34</sup> A Swedish study of postdoctoral fellowships awarded showed that female awardees needed substantially more publications to achieve the same rating as male awardees. In this study the peer reviewers over-estimated male achievements and/or underestimated female performance.<sup>35</sup> Women are also disadvantaged through the tendency of individuals to appoint successors (and arbitrators) ‘in their own image’, i.e. where senior counsel chooses individuals who are similar to themselves in age, background, experience, and gender. The assumption that all arbitrators are male can be pervasive. In 2007, Professor Ilhyung Lee reported on a survey he carried out into the nationalities of international arbitrators with a view to determining how nationality influenced those appointing arbitrators.<sup>36</sup> Professor Lee looked, in particular, into what would influence someone making an appointment and asked his respondents to assume hypothetical situations in which they were making an appointment and to consider how various permutations involving an arbitrator’s nationality and national affiliation would affect their choice of arbitrator. The first

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stereotypes. Greenwald went on to develop the Implicit Association Test. See Anthony Greenwald, Debbie McGhee & Jordan Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 *J. Personality & Soc. Psychol.* 1464 (American Psychological Association, 1998), available at [http://faculty.washington.edu/agg/pdf/Gwald\\_McGh\\_Schw\\_JPSP\\_1998.OCR.pdf](http://faculty.washington.edu/agg/pdf/Gwald_McGh_Schw_JPSP_1998.OCR.pdf).

<sup>32</sup> There is an online test designed to test whether the participant has implicit bias in relation to associations of gender with career or family. This Implicit Association Test (IAT) is part of ‘Project Implicit’ which is run by a ‘virtual laboratory’ with scientists from Harvard University, the University of Washington, and the University of Virginia. See <https://implicit.harvard.edu/implicit/>.

<sup>33</sup> J. F. Dovidio & S.L. Gaertner, *Aversive Racism and Selection Decisions: 1989 and 1999*, 11 *Psychol. Sci.* 315–319 (2000); V. Valian, *Why So Slow? The Advancement of Women* (MIT Press 1998).

C. Wenneras & A. Wold, *Nepotism and Sexism in Peer Review*, 387 *Nature* 341–343 (1997), as cited in Naomi C. Chesler et al., *The Pipeline Still Leaks and More Than You Think: A Status Report on Gender Diversity in Biomedical Engineering*, *Annals of Biomedical Engineering* (2010).

<sup>34</sup> M.A. Paludi & W.D. Bauer, *Goldberg Revisited: What’s in an Author’s Name*, 9 *Sex Roles* 387–390 (1983); R. Steinpreis, K.A. Anders & D. Ritzke, *The Impact of Gender on the Review of the Curricula Vitae of Job Applicants and Tenure Candidates: A National Empirical Study*, *Sex Roles*, 41 (1999) 509–528, as cited in Naomi C. Chesler et al. *The Pipeline Still Leaks and More Than You Think: A Status Report on Gender Diversity in Biomedical Engineering*, *Annals of Biomedical Engineering*, (2010).

<sup>35</sup> C. Wenneras & A. Wold, *Nepotism and Sexism in Peer Review*, 387 *Nature* 341–343 (1997), as cited in Naomi C. Chesler et al., *The Pipeline Still Leaks and More Than You Think: A Status Report on Gender Diversity in Biomedical Engineering*, *Annals of Biomedical Engineering*, February (2010).

<sup>36</sup> Ilhyung Lee, *Practice and Predicament: The Nationality of the International Arbitrator (With Survey Results)*, 31 *Fordham Int’l L.J.* 603.

hypothetical situation promulgated by Professor Lee was that the potential arbitrator had a wife with a particular nationality.<sup>37</sup>

On occasion, unconscious bias can mutate into a deliberate (and occasionally articulated) choice to appoint a man rather than a woman. In 2003, Professor Thomas Wälde told Michael Goldhaber of his experience with a male general counsel who consciously favoured 'old boys' in making appointments, reasoning that 'because the other arbitrators on a panel are likely to be old boys' he maximized his chances of influencing them by appointing his own. This general counsel said to Professor Wälde 'we make appointments not to challenge perceived prejudices, but to cater to them'.<sup>38</sup> In a later article, Michael Goldhaber recounted a story told by Lucy Reed, co-head of Freshfields' International Arbitration Group, of a client being 'openly worried' as to how the arbitrators on the panel would regard his nominee if he chose a woman. He ultimately chose a 'usual (male) suspect'.<sup>39</sup>

In a 2007 survey of members of Arbitral Women conducted for Global Arbitration Review, 46% of respondents said they had experienced 'unwitting bias' during an international arbitration.<sup>40</sup> One possible contributor to this unwitting bias is the link that is often made between experience and quality.<sup>41</sup> As the majority of experienced international arbitrators are male, this leads to a tendency to qualify discussions of diversity with references to maintaining standards. The view that diversity may somehow dilute the quality of the tribunal or lead to discord within the tribunal percolates through a number of the sporadic online discussions on the subject.<sup>42</sup>

<sup>37</sup> Professor Lee's survey stated 'The prospective arbitrator is American, with US citizenship, lives in the US and is married to a Japanese women.' The survey asked respondents to indicate whether this raised concerns about the arbitrator's independence or impartiality.

<sup>38</sup> Michael Goldhaber, *Madame La Presidente*, Focus Europe 23 (2004).

<sup>39</sup> Michael Goldhaber, *Deciding Women*, Focus Europe 27 (Summer 2009) and Michael Goldhaber, *High Stakes*, Focus Europe (Summer 2011). The client did not give the co-arbitrators the opportunity to react (or not) to the appointment of a woman. The client's actions are reminiscent of the classic example of women not being given travel opportunities after returning to work post-children because of an assumption that they want or need to be at home overnight.

<sup>40</sup> Global Arbitration Review, *Women of Arbitration – Network Effects*, (Sep. 1, 2007), <http://www.globalarbitrationreview.com/journal/article/16302/women-arbitration-network-effects/>.

<sup>41</sup> See, for example, the anonymous comment 'I think too much is made of women in arbitration. My view is that you select the best arbitrator for the job, man or woman. It just so happens that in current circumstances there are more good men than good women. That is the result of historical circumstance, not of any innate difference between men and women. But I would ask those who say that the current situation is a disgrace: What would they do to remedy the situation? Would they risk a client's arbitration by selecting an inexperienced arbitrator just to promote diversity? I think that would border on malpractice.' Anonymous posting to Ogemid@mailtalk.ac.uk (30 June 2009, 07.56 am CST). Note the implicit suggestion in this posting that appointing a woman would not be appointing the best arbitrator for the job and the coy reference to 'inexperienced arbitrator' rather than woman.

<sup>42</sup> Comments such as 'I recall an esteemed colleague, who acts as both counsel and arbitrator, stating at a conference that, when asked by a client to select an arbitrator, the desirability of promoting diversity is the last feature on anyone's mind. "We are not being asked to make a statement" he said, "we are asked to pick the best person for the job"; posting by Sophie Nappert to Ogemid@mailtalk.ac.uk (9 Feb. 2012 03.27 CST) perpetuate the notion that gender diversity will result in the appointment of less skilled arbitrators. See also, the anonymous contribution to Ogemid quoted at the beginning of this article 'Diversity does not feature in parties' agendas... parties want an arbitrator who will hold sway vis-à-vis the others... a

Perhaps more so than in other fields, it is difficult to identify concrete reasons why we should care whether women are under-represented on private arbitration tribunals.<sup>43</sup> Women are under-represented at partner level in law firms, in companies and in the judiciary and we can more easily articulate reasons why diversity should be (and is) addressed in the context of those careers. It is simple to make excuses as to why we should not care about the representation of women on tribunals. We may be peripherally aware of the various studies showing that gender-balanced leadership improves corporate governance, lessens unnecessary risk-taking and reduces so-called ‘group-think’. We may know of the positive correlation between gender-balanced leadership and the bottom line which has also been established.<sup>44</sup> However, it is easy to argue that none of this is really applicable to international arbitration and the particular role played by arbitrators. Selecting arbitrators is a nuanced process, with a huge number of factors influencing the final choice. Diversity really is ‘the last feature on anyone’s mind’.<sup>45</sup> Counsel is likely to be far more pre-occupied with researching the potential arbitrator’s track record, his or her writings in the field, his or her language capabilities and in reviewing any previous decisions, rather than noting the potential arbitrator’s gender. This is a factor of the short-term nature of most

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“diverse” tribunal may risk divergence at every issue and bring the whole process into stalemate.’ (Anonymous posting cited in posting by Sophie Nappert to OGE MID@mailtalk.ac.uk (Feb. 10, 2012, 10:34 am CST). Similarly, the comment ‘While, of course, quality is always the top priority, I do give some thought to the sex of an arbitrator when thinking of appointments, because I wish to further my female colleagues’ by Gabrielle Nater-Bass in *Women of Arbitration*, <http://www.globalarbitrationreview.com/journal/article/16303/women-arbitration/> shows the need to qualify a comment on diversity, in order to reassure readers that quality will not be compromised in appointing a woman. In the same article Karyl Nairn also demonstrates the link that is so often made between diversity and quality ‘I consider the gender of an arbitrator when making appointments. I’ve proposed a woman candidate ahead of an equally good male one as I believe it is important to promote the many excellent but often lesser-known women arbitrators out there. I would not, however, appoint a woman ahead of a better male candidate.’

<sup>43</sup> In relation to investment treaty arbitration, this argument is even more difficult to make, see Gus Van Harten, *The (Lack of) Women Arbitrators in Investment Treaty Arbitration*, *supra* n. 30, ‘Representation of women is important, not because women would necessarily make different choices than men, but because arbitrators who make decisions of public importance should reflect the make-up of those affected by their decisions.’

<sup>44</sup> See, for example, Catalyst, *The Bottom Line: Connecting Corporate Performance and Gender Diversity* (2004), available at <http://www.catalyst.org/file/44/the%20bottom%20line%20connecting%20corporate%20performance%20and%20gender%20diversity.pdf>, and McKinsey & Company, *Women Matter: Gender Diversity, A Corporate Performance Driver* (2009) [http://www.mckinsey.com/locations/swiss/news\\_publications/pdf/women\\_matter\\_english.pdf](http://www.mckinsey.com/locations/swiss/news_publications/pdf/women_matter_english.pdf). The Catalyst Study (2004) examined 353 Fortune 500 companies, and noted at 2: ‘The group of companies with the highest representation of women on their top management teams experienced better financial performance than the group of companies with the lowest women’s representation. This finding holds for both measures analyzed: Return on Equity (ROE, which is 35.1 percent higher, and Total Return to Shareholders (TRS), which is 34.0 percent higher.’ The McKinsey study found that companies with at least three women in senior management perform better than all-male management teams. See also *Why Diversity Matters*, Catalyst, *Research Studies 2005-2010*, [http://integritybridges.com/cms/wp-content/uploads/2011/03/Catalyst-Why\\_Diversity\\_Matters\\_11-2-10.pdf](http://integritybridges.com/cms/wp-content/uploads/2011/03/Catalyst-Why_Diversity_Matters_11-2-10.pdf).

<sup>45</sup> Anonymous posting to OGE MID, *supra* n. 42. ‘I recall an esteemed colleague, who acts as both counsel and arbitrator, stating at a conference that, when asked by a client to select an arbitrator, the desirability of promoting diversity is the last feature on anyone’s mind. “We are not being asked to make a statement” he said, “we are asked to pick the best person for the job”’

arbitral appointments. Understandably, in-house counsel only has an interest in the arbitration he or she is facing.<sup>46</sup>

(c) *Achieving a Better Balance on International Arbitration Tribunals*

There is an argument that we do not need to do anything more than we are doing.<sup>47</sup> Some of the well-known female arbitrators have been quoted by journalists as being confident that women will ‘make their way’<sup>48</sup> and that ‘fair representation will come with time.’<sup>49</sup> Others think ‘we’ve already broken through the glass ceiling.’<sup>50</sup> Unfortunately, the statistics show that only limited progress has been made. Back in 1997, Professor Louise Barrington reported that in 1995, the ICC named 766 arbitrators, of whom 22 (3%) were women. In 1998, the LCIA

<sup>46</sup> As Professor Franck notes, *supra* n. 6, it would, of course, be useful to consider the role women play on international arbitration tribunals more systematically, so that an objective reason for taking gender into consideration could be established (or eliminated), but the numbers of women who are appointed as arbitrators are so small that results cannot achieve statistical significance. *Per* Professor Franck: ‘Should the number of women increase over time, one might usefully conduct studies that consider potential gender differences on issues such as party success, amount of awards, and treatment of costs. Such research might be of interest to parties considering arbitrator appointments and to stakeholders that are interested in the integrity of the process of resolving investment disputes.’ Until such time such research can be carried out, then we must seek to counter the argument that diversity should not be addressed simply for the sake of addressing diversity. A good example is the following anonymous comment made to Ogemid@mailtalk.ac.uk: (30 June 2009, 10.49 CST) ‘I do not understand “the value and benefit of a diverse workforce (over and above any moral dimension)”. I think that it is an easy thing to say, may make us all feel good about ourselves, make us think we are good, decent people, but the reality is that the point of a workforce is to get the job done. If diversity is a qualification for the job, then all well and good. But, if I were undergoing brain surgery, I do not see any additional value in the team being diverse. If I were putting together a baseball team, I see no additional value in diversity.’

<sup>47</sup> The networking association, Arbitral Women, has been instrumental in recent years in improving the number of women speaking at conferences and in raising the profile of women in arbitration generally. It currently has a membership of 278 women on a searchable database. It also runs a successful mentoring program that benefits women seeking to pursue a career in international arbitration. [www.arbitralwomen.org](http://www.arbitralwomen.org). CPR has a national task force on diversity and has made efforts to make its candidates more diverse. <http://cpradr.org/Committees/IndustryCommittees/NationalTaskForceonDiversityinADR/DiversityESource.aspx>. The AAA also has a diversity committee. [www.adr.org](http://www.adr.org). Interestingly, women’s arbitration groups have not taken off in the way that the “young” arbitration groups took off in the early 2000s. See, the LCIA, *Young International Arbitration Group*, [http://www.lcia.org/Membership/YIAG/Young\\_International\\_Arbitration\\_Group.aspx](http://www.lcia.org/Membership/YIAG/Young_International_Arbitration_Group.aspx) (last visited Feb. 28, 2012), ICC, *Young Arbitrators Forum*, <http://www.iccwbo.org/yaf/> (last visited Mar. 6, 2012), AAA, *ICDR Young & International*, <http://www.adr.org/sp.asp?id=24986> (last visited Mar. 6, 2012), ASA, *ASA Below 40*, <http://www.arbitration-ch.org/below-40/> (last visited Mar. 6, 2012), ICCA, *Young ICCA*, <http://www.arbitration-icca.org/YoungICCA/Home.html> (last visited Mar. 6, 2012), CIARB, *Young CIARB*, <http://www.ciarb.org/young-members/> (last visited Mar. 6, 2012). In addition to Arbitral Women, SWAN – the Swedish Women in Arbitration Network – which was founded in 2009 has 200 members. <http://www.sccinstitute.com/?id=29049>, seems to be the only other women in arbitration group.

<sup>48</sup> *Per* Gabrielle Kaufmann-Kohler, quoted in Michael Goldhaber, *Deciding Women*, FOCUS EUROPE 27 (Summer 2009), also published as Michael Goldhaber, *Too Few Women Among Top International Arbitrators*, LAW.COM (Jun. 30, 2009), available at <http://www.arbitralwomen.org/files/publication/13072117511343.pdf>.

<sup>49</sup> Michael Goldhaber, *Madame La Presidente*, 1 *Transnational Dispute Management* (July 2004), available at <http://www.arbitralwomen.org/files/publication/00072217081344.pdf>. In this 2004 article, Lucy Reed was stated to be ‘confident that fair representation would come with time’.

<sup>50</sup> *Per* Jennifer Kirby, quoted in Michael Goldhaber, *Deciding Women*, FOCUS EUROPE 27 (Summer 2009), also published as *Too Few Women Among Top International Arbitrators*, available at <http://www.arbitralwomen.org/files/publication/13072117511343.pdf>.

appointed 66 arbitrators, of whom one (1.5%) was female.<sup>51</sup> In all ICSID cases registered from 1972 to 1995, there were 36 tribunals constituted, 35 three-member panels and one sole arbitrator. Of the 106 arbitrators appointed, 3 (2.83%) were women. Seventeen years later the comparable figures for commercial arbitration (around 6%)<sup>52</sup> and ICSID arbitration (5%) indicates that a very long time indeed will need to elapse before there is fair representation.<sup>53</sup>

Many commentators place the onus for addressing diversity on the arbitration institutions.<sup>54</sup> In her essay, Professor Rogers considered the institutions to be the 'primary regulators' of international arbitrators and, as such, it is a simple extension of that notion to say that the institutions should take responsibility for promoting diversity in the candidates they appoint. The rules of the major arbitral institutions are silent on diversity.<sup>55</sup> Some arbitration institutions, like the ICC, seem to be ill-equipped to address gender diversity at all (as they do not appear to be in possession of the requisite information on the candidates).<sup>56</sup> Others make more of an effort. For example, the AAA established an Advisory Committee on Diversity in 2006 and states that the representation of women on its arbitrator panels increased from 11% in 2003 to 13% in 2007.<sup>57</sup> Anecdotally, it appears that efforts are made to produce names of diverse candidates, certainly by the institutions that use a list procedure, such as the ICDR.

<sup>51</sup> See *supra* n. 9.

<sup>52</sup> Based on Michael Goldhaber's figure from 2009, see *supra* n. 15 and the various figures provided by the LCIA and the SCC. The LCIA reported to the author by email on 20 March 2012 that in 1998 1 out of 66 (1.5%) of arbitrators appointed in its arbitrations were female, this proportion increased to 22 out of 336 (6.5%) in 2011. The figures from the Arbitration Institution of the Finland Chamber of Commerce, see *supra* n. 9, also support the view that institutions may appoint more women.

<sup>53</sup> In fact, according to figures in 2006, if women continue making partner at the same rate as in 2006, women will not achieve parity with men until 2115. Women's Bar Association of the District of Columbia, *Creating Pathways to Success: Advancing and Retaining Women in Today's Law Firms 11* (May 2006), available at [http://wba.timberlakepublishing.com/files/Advocacy%20&%20Endorsements%20Files/Initiative%20Reports/Creating\\_Pathways\\_to\\_Success-May\\_2006.PDF](http://wba.timberlakepublishing.com/files/Advocacy%20&%20Endorsements%20Files/Initiative%20Reports/Creating_Pathways_to_Success-May_2006.PDF).

<sup>54</sup> By way of an example of these views, see the posting by Baiju Vasani to OGE MID@mailto:talk.ac.uk (30 June 2009, 10.11 CST) 'Re a remedy, this may sound simplistic, but the onus has to be on the institutions. The anonymous author is correct in so far as it is difficult for counsel to advocate an inexperienced arbitrator even in what counsel – and we as a community (note the focus on "big dollar" cases in rankings and write-ups) – may perceive as a "smaller" case. To the client, who may not have many arbitrations on its books, its arbitration is not "small" at all. Not so institutions, who can put forward a new/female/diverse candidates in a "smaller" case.'

<sup>55</sup> In the rules of the major arbitral institutions (ICC, LCIA, ICDR) there is no provision equivalent to that found in the World Trade Organization's Understanding on Rules and Procedures Governing the Settlement of Disputes, which states: 'Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience' [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm).

<sup>56</sup> See *supra* n. 9.

<sup>57</sup> See, *Increasing Diversity Among Arbitrators A Guideline to What the New Arbitrator and ADR Community Should Be Doing to Achieve This Goal* By Sasha A. Carbone & Jeffrey T. Zaino, <http://www.nysdra.org/userfiles/Carbone-1-12.pdf>. The 2007 press release for the establishment of the AAA Advisory Committee on Diversity states 'currently, 22% of the AAA national roster of neutrals is diverse by gender, race, and ethnicity, with women making up 13% and ethnic minorities 7%. This is a substantial increase over the numbers in 2003, when the benchmark was first established for neutral diversity at 11% female and 6% ethnically diverse'. <http://www.adr.org/sp.asp?id=29590>.

It is notable from the limited data that is available that institutions do tend to appoint more diverse candidates than the parties. For example, the LCIA reports 336 appointments of arbitrators in 2011. Of these 336, 217 were selected by the parties or their nominees and 119 by the LCIA Court. 22 were female. Of these 22, 16 were selected by the LCIA Court (13.5% of 119) and 6 by the parties (3% of 217). The SCC reports that 6.5% of all appointed arbitrators between 2003 and 2012 (both party appointed and appointed by the SCC) have been women but that 8.4% of the arbitrators appointed by the SCC have been women.<sup>58</sup>

Gender diversity on international arbitration tribunals could be more easily addressed in the field of investment treaty arbitration, due to the greater level of public policy compliance that should be expected in this more public field of arbitrations. The ICSID Convention provides for arbitrators to be designated by ICSID Contracting States. Designated arbitrators then remain on the ICSID Panel of Arbitrators for six years.<sup>59</sup> The designated arbitrators are expected to be 'persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment'. In designating persons to serve on the panels, the Chairman is to 'pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity'.<sup>60</sup> There is no reference to the diversity of panel members, unlike the World Trade Organization's Understanding on Rules and Procedures Governing the Settlement of Disputes, which states: 'Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience'.<sup>61</sup> Each ICSID Contracting State may designate four individuals to the panel of arbitrators. While admittedly a small pool, the statistics show that 205 arbitrators are currently designated by Contracting States; of those, only 30, or 14.7%, are women.<sup>62</sup> This figure falls short of female representation in many national judiciaries. For example, the United States and Australia, both of which have made significant efforts to increase female representation in judicial appointments, have nominated between them eight men and no women to the ICSID Panel of Arbitrators.<sup>63</sup> Only one country, the Bahamas, has nominated more than two women.<sup>64</sup>

<sup>58</sup> Reports provided by email to the author by the LCIA on 20 March 2012 and the SCC on 9 March 2012.

<sup>59</sup> Arbitrators may be appointed from outside the Panel of Arbitrators, save where the Chairman is making a default appointment, ICSID Convention Article 40, [http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf)

<sup>60</sup> ICSID Convention Article 14, [http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf).

<sup>61</sup> See *supra* n. 57.

<sup>62</sup> This information was gathered from the October 2012 version of the ICSID listing of Members of the Panels of Conciliators and of Arbitrators. Only Contracting Party-appointed arbitrators whose terms had not yet expired were included in this total. See <http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&reqFrom=ICSIDPanels&language=English>.

<sup>63</sup> For American judicial statistics, see *supra* n. 25. Australian courts reflect similar levels of female participation, according to 2011 figures released by the Australasian Institute of Judicial Administration, On Australian federal courts, 29% of judges and magistrates were female; in New South Wales and Victoria this figure was 32% and 38% respectively. See *Australasian Institute of Judicial Administration, Judges and Magistrates (% of Women)*

The ICSID Panel of Arbitrators presents an opportunity for states to address the gender imbalance in international arbitration tribunals. Paralleling efforts made in relation to the appointment of individuals to the judiciary, states should designate higher numbers of women to the ICSID Panel of Arbitrators. This would allow these arbitrators to demonstrate their expertise in an open forum, where awards are publicly available. As a result, the visibility of arbitrators would be improved and the pool of candidates expanded.

Finally, in making an arbitral appointment, whether in the public or private sphere, we believe each individual must take personal responsibility for considering a diverse slate of candidates. This is because an overtly inclusive approach benefits the parties, the tribunal, counsel and the administration of justice, even in a private setting.<sup>65</sup> In advising in-house counsel as to the identity of potential arbitrators, lawyers should proactively take an inclusive approach.<sup>66</sup>

### III. CONCLUDING REMARKS

The peculiarities of international arbitration mean that no-one really owns the problem of diversity in international arbitration tribunals. The short-term nature of the relationship between party-appointed arbitrator and party contributes to the difficulties faced in seeking to address the issue. It is understandable that, when a party is making one appointment every few years, diversity is the ‘the last feature on anyone’s mind’.<sup>67</sup> Certainly, in the field of public arbitrations, greater effort should be made by states appointing individuals to the ICSID Panel of Arbitrators to ensure that their selections properly reflect the state’s public policy on diversity. This will go some way towards increasing the visibility of individual arbitrators and

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(2011), available at <http://www.aija.org.au/gender-statistics.html>. Norway, which introduced a 40% quota for women on the boards of public companies in 2004, nominated one woman out of its four designations to the Panel (terms expired on 17 October 2011).

<sup>64</sup> The countries with the highest number of female designations are the Bahamas, Cameroon, France, Germany, Lebanon, Panama, Peru, and Timor-Leste.

<sup>65</sup> ‘From the assembly line to the boardroom, it is an increasingly common management practice to include as many perspectives as possible in the problem-solving process, on the ground that different values and assumptions coming into the process will yield a more sophisticated result.’ It Remains A. White, *Male Game*, Natl. L. J. (Nov. 27, 1996) <http://cpradr.org/Portals/0/Resources/Articles/It%20remains%20a%20white,%20male%20game%20%28NLJ%29.pdf>.

<sup>66</sup> Companies have made efforts to improve diversity. In 1999, Charles Morgan, then general counsel of BellSouth Corp., launched an initiative titled ‘Diversity in the Workplace: A Statement of Principle’, more generally known as ‘The Morgan Letter’. The Morgan Letter was a statement by chief legal officers of more than 500 companies, who said: ‘Our companies conduct business throughout the United States and around the world, and we value highly the perspectives and varied experiences which are found only in a diverse workplace. Our companies recognize that diversity makes for a broader, richer environment which produces more creative thinking’: <http://cpradr.org/Portals/0/Resources/Articles/It%20remains%20a%20white,%20male%20game%20%28NLJ%29.pdf>. See also the 2004 Call to Action, which has been signed by more than 100 companies, see *Hitting the Legal Diversity Market Home: Minority Women Speak Out*, <http://digitalcommons.wcl.american.edu/> See also *supra* n. 43.

<sup>67</sup> Anonymous posting to OGE MID, *supra* n. 42. ‘I recall an esteemed colleague, who acts as both counsel and arbitrator, stating at a conference that, when asked by a client to select an arbitrator, the desirability of promoting diversity is the last feature on anyone’s mind. “We are not being asked to make a statement” he said, “we are asked to pick the best person for the job”’.



expanding the pool of potential candidates and, ultimately, should trickle down to the commercial arbitration field. In the meantime, those committed individuals making appointments need to assume personal responsibility for acknowledging and eliminating unconscious bias against the appointment of diverse candidates.

