

American University Washington College of Law

Digital Commons @ American University Washington College of Law

Contributions to Books

Scholarship & Research

5-8-2015

International Arbitration: Demographics, Precision and Justice

Susan Franck

American University Washington College of Law, sfranck@wcl.american.edu

James Freda

United Nations

Kellen Lavin

Washington and Lee University

Tobias A. Lehmann

University of St. Gallen - LS: School of Law, Students

Anne van Aaken

University of Hamburg, Law School; Max Planck Institute for Research on Collective Goods

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_bk_contributions



Part of the [Civil Law Commons](#), [Dispute Resolution and Arbitration Commons](#), [Evidence Commons](#), [International Law Commons](#), [International Trade Law Commons](#), and the [Law and Gender Commons](#)

Recommended Citation

Franck, Susan; Freda, James; Lavin, Kellen; Lehmann, Tobias A.; and van Aaken, Anne, "International Arbitration: Demographics, Precision and Justice" (2015). *Contributions to Books*. 312.

https://digitalcommons.wcl.american.edu/facsch_bk_contributions/312

This Book Chapter is brought to you for free and open access by the Scholarship & Research at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Contributions to Books by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

TABLE OF CONTENTS

PREFACE	
Albert Jan van den Berg, General Editor	v
ICCA CONGRESS 2016	vii
TABLE OF CONTENTS	ix
KEYNOTE ADDRESS: In Defense of Bilateral Investment Treaties	
Judge Stephen M. Schwebel	1

Opening Plenary Session

Chairs: Lucy Reed and Meg Kinnear
Rapporteurs: James Freda and Tobias Lehmann

Setting the Scene: What Are the Myths? What Are the Realities?
What Are the Challenges

James Freda and Tobias Lehmann	
Report on the Opening Plenary Session	15
Annex: “Precision” and “Justice” Stream Panel Propositions	22

Arbitration and Decision-Making: Live Empirical Study

Susan D. Franck, James Freda, Kellen Lavin, Tobias Lehmann and Anne van Aaken	
International Arbitration: Demographics, Precision and Justice	33
Annex: Survey Materials	121

A. PRECISION STREAM

A-1 Proof: A Plea for Precision

Chair: David Brynmor Thomas
Rapporteur: Timothy L. Foden

Anne Véronique Schlaepfer	
The Burden of Proof in International Arbitration	127

TABLE OF CONTENTS

Jennifer Smith and Sara Nadeau-Séguin The Illusive Standard of Proof in International Commercial Arbitration	134
Richard Kreindler Practice and Procedure Regarding Proof: The Need for More Precision	156
<i>A-2 Early Stages of the Arbitral Process: Interim Measures and Document Production</i>	
<i>Chair: John Barkett</i>	
<i>Rapporteur: Natalie Reid</i>	
Natalie L. Reid and John Barkett Report on the Session Early Stages of the Arbitral Process: Interim Measures and Document Production	185
Murray L. Smith Reliance Document Management	190
Stephen L. Drymer and Valérie Gobeil Document Production in International Arbitration: Communicating Between Ships in the Night	205
Nicolas Swerdloff, Hagit Elul and Andreas Baum Arbitrators' Power to Sanction Non-Compliance in Discovery in International Commercial Arbitration	221
Hilary Heilbron QC Interim Measures in International Commercial Arbitration – Useful Weapon or Tactical Missile: By What Standards Should Arbitral Tribunals Fire the Shots?	241
Francisco González de Cosío Interim Measures in Arbitration: Towards a Better Injury Standard	260
Robert Sills The Continuing Role of the Courts in the Era of the Emergency Arbitrator	278

TABLE OF CONTENTS

A-3 Matters of Evidence: Witness and Experts

Chair: Nathalie Voser

Rapporteur: Nicholas Lingard

Nicholas Lingard	
Report on the Session Matters of Evidence: Witness and Experts	299
Laurence Shore	
Do Witness Statements Matter – And If So, How Can They Be Improved?	302
Judith Levine	
Can Arbitrators Choose Who to Call as Witnesses? (And What Can Be Done If They Don't Show Up?)	315
Santiago Dellepiane, Lucia Quesada and Pablo T. Spiller	
A Primer on Damages Assessment: Towards a Framework for Fair Compensation	357
Howard Rosen	
How Useful Are Party-Appointed Experts in International Arbitration?	379
Annex I: Sachs Protocol and Traditional System	409
Annex II: Arbitration Rules and the Expert Witness	411
Annex III: Summary of Valuation Approaches in ICSID Decisions	417
Annex IV: Spreadsheet for Joint Expert Meetings	429

A-4 Treaty Arbitration: Pleading and Proof of Fraud and Comparable Forms of Abuse

Chair: Klaus Reichert SC

Rapporteur: Elizabeth Karanja

Klaus Reichert SC	
Introduction to the Session Treaty Arbitration: Pleading and Proof of Fraud and Comparable Forms of Abuse	433
Elizabeth Karanja	
Report on the Session Treaty Arbitration: Pleading and Proof of Fraud and Comparable Forms of Abuse	439
Aloysius Llamzon and Anthony Sinclair	
Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct	451

TABLE OF CONTENTS

Utku Coşar Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanctions	531
---	-----

Carolyn B. Lamm, Eckhard R. Hellbeck and M. Imad Khan Pleading and Proof of Fraud and Comparable Forms of Abuse in Treaty Arbitration	557
---	-----

B. JUSTICE STREAM

B-1 Who Are the Arbitrators?

Chair: Adriana Braghetta

Rapporteur: Ricardo Dalmaso Marques

Ricardo Dalmaso Marques “To Diversify or Not to Diversify”? Report on the Session Who Are the Arbitrators?	579
--	-----

Christophe Seraglini Who Are the Arbitrators? Myths, Reality and Challenges	589
--	-----

Darius J. Khambata Tensions Between Party Autonomy and Diversity	612
---	-----

Jacomijn J. van Haersolte-van Hof Diversity in Diversity	638
---	-----

V.V. Veeder Who Are the Arbitrators?	652
---	-----

*B-2 Premise: Arbitral Institutions Can Do More to
Further Legitimacy. True or False?*

Chair: Salim Moollan

Rapporteur: Belinda McRae

Belinda McRae Introduction to the Session Arbitral Institutions Can Do More to Foster Legitimacy. True or False?	663
--	-----

Survey: Arbitral Institutions Can Do More to Foster Legitimacy. True or False?	667
---	-----

TABLE OF CONTENTS

***B-3 Treaty Arbitration: Is the Playing Field Level and Who Decides
Whether It Is Anyway?***

***Chair: Anna Joubin-Bret
Rapporteur: Neeti Sachdeva***

Catherine M. Amirfar	
Treaty Arbitration: Is the Playing Field Level and Who Decides Whether It Is Anyway?	755
Annex: Bibliography of Empirical Studies Regarding BITs and FDI	774
David D. Caron	
Investment Disputes and the Public Interest	776

***B-4 Universal Arbitration: An Aspiration Within Reach or a
Sisyphean Goal?***

***Chair: Dushyant Dave
Rapporteur: Kathleen Claussen***

Kathleen Claussen	
Report on the Session Universal Arbitration: An Aspiration Within Reach or a Sisyphean Goal?	785
Stephan W. Schill	
Developing a Framework for the Legitimacy of International Arbitration	789

***Plenary Session: Spotlight on International Arbitration in Miami
and the United States***

***Chair: John Barkett
Rapporteur: Frank Cruz-Alvarez***

Frank Cruz-Alvarez	
Introduction to the Session Spotlight on International Arbitration in Miami and the United States	831
Eduardo Palmer	
Miami's Favorable International Arbitration Climate	837
Rachael Kent and Marik String	
Availability of Class Arbitration Under US Law	853

TABLE OF CONTENTS

Jack J. Coe Jr. A Progress Report on the Restatement of the Law (Third) on the U.S. Law of International Commercial Arbitration	877
---	-----

Daniel E. González and María Eugenia Ramírez Enforcement of International Arbitral Awards in Florida and the United States: Judicial Consistency	881
--	-----

*Breakout Sessions on Arbitral Legitimacy: The Users'
And Judges' Perspectives*

*Chairs: José Astigarraga, Melanie van Leeuwen, Joseph Matthews and
Edna Sussman*

*Rapporteurs: Luis González García, Amanda Lees, Ruth Mosch and
L Andrew S. Riccio*

Amanda Lees, Luis González García, L Andrew S. Riccio and Ruth Mosch Report on the Breakout Sessions on Arbitral Legitimacy: The Users' and Judges' Perspectives	901
--	-----

*Lunch Seminar:
Latin America: Hottest Issues, Country by Country*

Chair: R. Doak Bishop

Rapporteur: Ricardo Dalmaso Marques

Ricardo Dalmaso Marques Report on the Lunch Seminar Latin America: Hottest Issues, Country by Country	913
---	-----

*Lunch Seminar:
Power of Arbitration to Fill Gaps in the
Arbitration Agreement and Underlying Contract*

Chair: John H. Rooney, Jr.

Rapporteur: Elodie Dulac

Alan Scott Rau "Gap Filling" by Arbitrators	935
--	-----

Cristiano de Sousa Zanetti Filling the Gaps: A Civil Law Tradition	1006
---	------

TABLE OF CONTENTS

Closing Plenary

Rapporteurs: James Freda and Tobias Lehmann

Legitimacy: Examined Against Empirical Data

Chair: Jan Paulsson

James Freda and Tobias Lehmann
Report on the Closing Plenary Session 1027

Where We Have Been, Where We Should Go

Chair: Albert Jan van den Berg

Sundaresh Menon SC, Chief Justice of Singapore
Where We Have Been, Where We Should Go 1033

LIST OF PARTICIPANTS 1041

LIST OF ICCA OFFICERS AND GOVERNING BOARD MEMBERS 1097

International Arbitration: Demographics, Precision and Justice

Susan D. Franck, James Freda,** Kellen Lavin,*** Tobias Lehmann† and
Anne van Aaken‡*

TABLE OF CONTENTS	Page
I. Introduction	34
II. Demographics	35
III. ICCA Themes: Legitimacy as Precision	61
IV. ICCA Themes: Legitimacy as Justice	78
V. Limitations	115
VI. Conclusion	116
Annex: Survey Materials	121

* Professor of Law, Washington & Lee University Law School.

** Senior Associate, Freshfields Bruckhaus Deringer US LLP (New York). The views expressed within this Article are solely those of the author and not those of Freshfields Bruckhaus Deringer or its clients.

*** J.D. Washington & Lee University Law School (2013).

† Ph.D. Candidate, University of St. Gallen; M.A. Economics, M.A. Law and Economics, University of St. Gallen.

‡ Professor of Law and Economics, Legal Theory, Public International Law and European Law, University of St. Gallen.

The authors express gratitude to the ICCA Miami 2014 Congress Host Committee, led by Burton Landy, for providing logistical and financial support to the research team. We must also thank the Congress's Program Committee for allowing us to perform our survey and experiment, especially Lucy Reed and Meg Kinnear, who both provided gracious assistance. We are especially thankful to all participants who took the research seriously and gave generously of their time. The authors deeply appreciate the diligent assistance of Washington & Lee University Law School students, namely George Mackie, Stephen Halpin, Krystal Swendsboe, Sharon Jeong, Trista Bishop-Watt, Rachael Kurzweil and Bret Marfut. Stephanie Miller and the Washington & Lee University Law Library also provided critical data transformation services. The Washington & Lee Administration, Frances Lewis Law Center, and Transnational Law Institute, as well as the University of St. Gallen Law School provided generous research support. We acknowledge the assistance of Catherine Rogers who offered us constructive comments, within a very tight timeframe, which permitted us to improve the quality of this Paper. Last but not least, we must thank John Barkett who provided us with the use of Shook, Hardy & Bacon's Miami office to compile our initial results; and we also thank Penny Perrin of Shook Hardy for her administrative support throughout the ICCA Congress.

I. INTRODUCTION

In 2012, the International Council for Commercial Arbitration (ICCA) asked our research team to enter uncharted waters and provided us with unprecedented access to evaluate international arbitration empirically. We remain humbled by that trust and appreciate the opportunity. Our objective was to generate scientifically rigorous research to test others' theories and our own assumptions against verifiable data with the goal of improving international dispute settlement.

Two weeks before the conference and our planned "data collection exercise", V.V. Veeder asked the international arbitration community "to act now to regulate itself or risk 'reputational disaster'" and encouraged the use of data to begin that process.¹ At the outset of the Congress, Jan Paulsson reminded participants that ICCA should identify how to make international arbitration better. The twin observations of Veeder and Paulsson underscored both the importance and the risk of our research. While a daunting task, particularly given temporal restraints,² the effort to understand the international arbitration community more thoroughly and to identify areas for value-enhancing reforms warranted the risks.

We hope our data and analysis will further ICCA's broader institutional mission. When ICCA was formed in the early 1960s, the goal of its Congress was to bridge a number of divides. These included "the massive political divisions during the Cold War and the divide between academic, professional and state practitioners, both 'privatistes' and 'publicistes'; and both lawyers and non-lawyers".³ By its fourth and fifth Congresses, ICCA had bridged gaps by holding meetings in Moscow (the Cold War east) and New Delhi (the non-aligned and developing world).⁴ More recently, ICCA has developed a broader membership structure, which now includes mentoring programs for young professionals in international arbitration⁵ and programs to train national judiciaries

-
1. Leo SZOLNOKI, "Veeder backs Paulsson's call to self-regulate", *Global Arb. Rev.*, 27 Mar. 2014, at <<http://globalarbitrationreview.com/journal/article/32528/london-veeder-backs-paulssons-call-self-regulate/>> (last accessed 30 June 2014).
 2. We note this is first generation research from the first dataset of its kind. While the data were initially entered within 36 hours of the survey in April 2014, Washington & Lee students recoded all of the data in May 2014. We note that there was 97% inter-coder reliability between the two coding rounds; and, for every divergence, we generated an agreed code upon consultation with the raw materials. Gathering the survey data and producing a report on a tight schedule for this Congress Paper was inevitably challenging. Given our timing constraints and the importance of transparency, we plan to make the dataset publicly available and welcome corrections, criticisms and insights others may have.
 3. V.V. VEEDER, "Remarks on the 50th Anniversary of ICCA", 19 May 2011, p. 3 at <www.arbitration-icca.org/media/0/13087091952910/v.v._veeder_speech.pdf> (last accessed 30 June 2014).
 4. *Ibid.*, pp. 6-7.
 5. Information on the ICCA Mentoring Programme for young members is located at: <www.arbitration-icca.org/YoungICCA/Membership_and_mentoring.html> (last accessed 30 June 2014).

around the world.⁶ One goal of our survey was to identify what divides still exist in international arbitration so that ICCA and the broader international legal community can engage constructively on those issues.

Whereas the divide between “east” and “west” dominated ICCA’s early years, our survey indicates there are two remaining divisions within international arbitration related to development status and gender. Although the results identified areas for improvement, there were also bright spots. Even challenges generate an opportunity as international arbitration can engage in self-reflection and proactive improvement. In an effort to address the legitimacy of international arbitration, this Paper therefore provides information about the international arbitration community and assessments of the ICCA 2014 themes of justice and precision in international arbitration.

Part II of this Paper identifies the demographics of the respondents, with a specific focus on ICCA participants generally, the sub-set of arbitrators and the sub-set of arbitration counsel. Part III of this Paper examines the ICCA theme of legitimacy through the lens of precision, concentrating on issues involving burdens of proof, costs, document production, and arbitrator preparation for hearings. Part IV explores legitimacy by virtue of justice-related issues. These primarily relate to the prestige of international arbitration, issues of re-appointment and interaction with co-arbitrators, fraud and diversity within international arbitration. Part V acknowledges the limitations of the analyses. The Paper concludes that the data have identified areas that could benefit from improvement (whether structural or incremental). Efforts at improving quality will ultimately prove helpful in promoting both justice and precision.⁷

II. DEMOGRAPHICS

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 transforming international law.⁸ At that moment in history, little was known about those involved in the “Invisible College” of the global international arbitration community. Yet with the classic socio-legal study by Dezalay and Garth,⁹ tranches of discrete information published by arbitral institutions

6. For a listing of ICCA’s New York Convention Road Shows, which have included locations such as Myanmar, Rwanda and Indonesia, see <www.arbitration-icca.org/NY_Convention_Roadshow.html> (last accessed 3 June 2014).

7. The “survey” also involved a psychological experiment related to cognition and decisionmaking. As that research is beyond the scope of this Paper, we anticipate publishing those results in due course.

8. Oscar SCHACHTER, “The Invisible College of International Lawyers”, 72 N.W. L. Rev. (1977) p. 217; see also Diana CRANE, *Invisible Colleges: Diffusion of Knowledge in Scientific Communities* (University of Chicago Press 1972).

9. Yves DEZALAY and Bryant G. GARTH, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996); see also Thomas SCHULTZ and Robert KOVACS, “The Rise of a Third Generation of Arbitrators: Fifteen Years after Dezalay and Garth”, 28 Arb. Int’l (2012) p. 161 (updating the scholarship of Dezalay and Garth); Maya STEINITZ, “Transnational Legal Process Theories”, in Cesare P.R. ROMANO,

and the recent work of some empirical scholars, we have begun to uncover slowly a degree of information about key actors in international arbitration.¹⁰ There is, however, still a dearth of systematically gathered scientific data that cut across arbitral institutions and subject matters and explore the identities of those involved in the “Invisible College” of international arbitration. In an effort to bring further transparency to the “Invisible College”, this section addresses an existing gap within the literature and provides reliable data about demographic information of members of the global community of lawyers involved in international arbitration.¹¹

The section first outlines the existing literature on the identities and demographics of those within the international arbitration community. It then provides basic background information on ICCA respondents, focusing on the prevalence of different experiences in international arbitration and identifies respondents’ experiences. Next, it focuses upon demographic information including the gender, age, legal training, native language and

Karen J. ALTER and Yuval SHANY, eds., *The Oxford Handbook of International Adjudication* (Oxford University Press 2014) p. 339 at pp. 350-352 (discussing the “invisible college” of international arbitration); Daniel TERRIS, et al., *The International Judge: An Introduction to the Men and Women Who Decide the World’s Cases* (Brandeis University Press 2007) (conducting a similar process to interview 30 international judges to offer a portrait of the public international law judiciary); but see Catherine A. ROGERS, “Gulliver’s Troubled Travels, or the Conundrum of Comparative Law”, 67 *Geo. Wash. L. Rev.* (1997) p. 149 at pp. 153, 166-168 (identifying concerns related to the methodology of Dezalay and Garth).

10. See José E. ALVAREZ, “The Democratization of the Invisible College”, *Transnational Dispute Management* (2009) available at <www.transnational-dispute-management.com/article.asp?key=1365> (last accessed 30 June 2014) (identifying the “democratization of the invisible college”); see also David KENNEDY, “The Politics of the Invisible College: International Governance and the Politics of Expertise”, 5 *Eur. Hum. Rights L. Rev.* (2001) p. 463 at <www.law.harvard.edu/faculty/dkennedy/publications/european.pdf> (last accessed 30 June 2014); Sergio PUIG, “Social Capital in the Arbitration Marketplace”, 25 *Eur. J. Int’l L.* (2014) p. 387 (identifying a network effect among ICSID arbitrators).
11. In commercial arbitration, Queen Mary has worked with several partners to elucidate aspects of international arbitration through a series of surveys and interviews. See, e.g., Paul FRIEDLAND and Stavros BREKOULAKIS, “2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process” (2012) at <<http://bit.ly/Ps3inZ>> (last accessed 30 June 2014) (henceforth *White & Case/Queen Mary Survey*); Paul FRIEDLAND and Loukas MISTELIS, “2010 International Arbitration Survey: Choices in International Arbitration” (2010) at <www.whitecase.com/files/upload/fileRepository/2010-International-Arbitration-Survey-Choices-International-Arbitration.PDF> (last accessed 30 June 2014); Gerry LAGERBERG and Loukas MISTELIS, “Corporate Choices in International Arbitration: Industry Perspectives” (2013) at <<http://tinyurl.com/kwj8wpa>> (last accessed 30 June 2014); see also Christopher R. DRAHOZAL and Richard W. NAIMARK, *Towards a Science of International Arbitration: Collected Empirical Research* (Kluwer Law 2005) (collecting empirical research related to commercial arbitration). Likewise, in treaty arbitration, there are a handful of studies and most focus on ICSID without demarcating between its ICA and ITA caseload. See Susan D. FRANCK, “Development and Outcomes in Investment Treaty Arbitration”, 50 *Harv. Int’l L.J.* (2009) p. 438 (henceforth *Development*); PUIG, *op. cit.*, fn. 10; Michael WAIBEL and Yanhui WU, “Are Arbitrators Political?”, Working Paper (December 2011) at <www.wipol.uni-bonn.de/lehrveranstaltungen-1/lawecon-workshop/archive/dateien/waibelwinter11-12> (copy on file with the authors) (last accessed 30 June 2014).

nationality of international arbitrators and counsel. It then discusses different ways to assess the development status of respondents' nationality to address claims of the lack of "western" arbitrators in international arbitration. Finally, it identifies the limitations of the demographic information and highlights the key findings.

1. Existing Literature

There is an unfortunate lack of empirical evidence about the identity of actors in international arbitration, particularly those individuals who actually serve or might serve as arbitrators. Certain websites and organizations offer a degree of information about potential arbitrators. For example, the International Arbitration Institute¹² and Arbitral Women¹³ offer a website where one can search through the biographies of registered arbitrators. Institutions like the American Arbitration Association's Centre for Dispute Resolution, the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA) and the International Centre for Settlement of Investment Disputes (ICSID) also maintain a general roster or database of people willing to serve as international arbitrators.¹⁴ Other commercial services distribute lists of highly regarded arbitration experts.¹⁵ Despite this general information on those who might – in theory – act as arbitrators, there is no central public repository providing information about individuals who have actually served as arbitrators that would permit one to identify and analyze core demographic information about international arbitrators.¹⁶

12. International Arbitration Institute, Search the IAI Directory, available at <www.iaiparis.com/drm_search.asp> (last accessed 8 June 2014).

13. Arbitral Women, Find a Practitioner, available at <www.arbitralwomen.org/index.aspx?sectionlinks_id=7&language=0&pageName=MemberSearch> (last accessed 30 June 2014).

14. Raymond G. BENDER, Jr., "Three Practical Steps to Avoid an Erroneous Arbitration", 30 *Alternatives to High Cost of Lit.* (Sept. 2012) p. 155.

15. 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. *Who's Who Legal, Most Highly Regarded Firms: Commercial Arbitration 2013*, available at <<http://whoswholegal.com/news/analysis/article/30104/most-highly-regarded-firms-commercial-arbitration-2013/>> (last accessed 30 June 2014). Similarly, 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. Chambers & Partners, *International Arbitration Worldwide*, available at <www.chambersandpartners.com/12788/738/editorial/5/1> (last accessed 30 June 2014); Global Arbitration Review, *GAR 100 – 7th Edition*, at <<http://globalarbitrationreview.com/gar100/>> (last accessed 30 June 2014).

16. Catherine Rogers has suggested creating publicly available information about arbitrators, or what she identifies as "Arbitrator Intelligence". Catherine A. ROGERS, "Piloting Arbitrator Intelligence", *Kluwer Arbitration Blog*, 10 Apr. 2014, at <<http://kluwerarbitrationblog.com/blog/2014/04/10/piloting-arbitrator-intelligence/>> (last accessed 3 July 2014); see also Catherine A. ROGERS, "Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct", 41 *Stan. J. Int'l L.* (2005) p. 53; Catherine A. ROGERS, "Fit and Function in Legal Ethics: Developing a Code of Conduct for International Arbitration", 23 *Mich. J. Int'l L.* (2002) p. 341; Catherine ROGERS, "The International Arbitrator Information Project: From an Ideation to Operation", *Kluwer Arbitration Blog*, 10 Dec. 2010, at <<http://kluwerarbitrationblog.com/blog/2012/12/10/the-international-arbitrator-information->

Given the general lack of central information, it is perhaps unsurprising that the major multilateral arbitration institutions do not offer broad, public demographic data about their arbitrators. Where individual institutions have the internal capacity to gather and analyze the data on their own arbitrators, the data they publicize focuses nearly exclusively on basic information about arbitrator nationality; more systematic information is not available. Beyond individual stories published in *American Lawyer* or *Global Arbitration Review*,¹⁷ there is little information available on the views, experience and identities of the international arbitration bar. As such, it is perhaps unsurprising that international arbitration functions essentially as a classic “invisible college”.

Given the lack of a holistic analysis, understanding the baseline about who acts as counsel or arbitrator can be viewed by considering major international institutions on a case-by-case basis. The richest data come from information on arbitrators. This section therefore reviews information provided by institutions publicly offering information, including the ICC,¹⁸ LCIA, Singapore International Arbitration Centre (SIAC) and ICSID.¹⁹

project-from-an-ideation-to-operation/> (last accessed 30 June 2014); see also Hans SMIT, “The Future of International Commercial Arbitration: A Single Transnational Institution?”, 25 *Colum. J. Transnat’l L.* (1986) p. 9 at pp. 30-32.

17. See, e.g., The American Lawyer, “Arbitration Scorecard 2013”, available at <www.americanlawyer.com/id=1202608198051/Arbitration-Scorecard-2013> (last accessed 30 June 2014); Global Arbitration Review, “GAR 45 Under 45 2011” at <<http://globalarbitrationreview.com/surveys/article/29699/%20gar-45-45-2011-introduction/>> (last accessed 30 June 2014); IA Reporter, “Arbitrator Profiles”, available at <www.iareporter.com/categories/profiles> (last accessed 30 June 2014); see generally, Global Arbitration Review, “Portrait of the Arbitrator” (6 May 2014) at <<http://globalarbitrationreview.com/news/article/32586/portrait-arbitrator/>> (last accessed 30 June 2014); New York City Bar, “International Commercial Arbitration Practice”, available at <www.nycbar.org/career-development/your-career-1/spotlight-on-careers/1464-lucy-reed> (last accessed 30 June 2014); see also Catherine ROGERS, “The Vocation of the International Arbitrator”, 20 *Am. U. Int’l L. Rev.* (2005) p. 957.
18. In response to a separate questionnaire 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”. 2014 ICCA Congress, Panel B-2 Questionnaire, Draft Responses of John Beechey for the International Chamber of Commerce, Response to Question 2, this volume, pp. 667-752. The ICC also noted some demographic shifts in the location of parties and places of arbitration over the past decade, stating that “whereas the percentage of parties from Africa, Latin America, Central and East 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)”. *Ibid.*, Response to Question 1.
19. We were unable to locate holistic demographic data on the websites or elsewhere from the following international arbitral institutions: American Arbitration Association’s International Centre for Dispute Resolution (AAA-ICDR); Stockholm Chamber of Commerce (SCC); Hong Kong International Arbitration Centre (HKIAC); and Kigali International Arbitration Centre (KIAC). With the AAA-ICDR, for example, parties can pay US\$750 for a list of five potential arbitrators, but we were unable to identify anywhere on the AAA-ICDR website where general demographic information about arbitrators (or some other list of arbitrators) was publicly available for free. American Arbitration Association, “Arbitrator and Mediator Section: Arbitrator Select”, at <<http://bit.ly/T2Zxxn>> (last accessed 30 June 2014). Other regional arbitration institutions

Public LCIA reports indicate that, in 2012, the LCIA had 265 new international arbitrations. Of those cases, 52.6% of arbitrators were purely nationals from the United Kingdom.²⁰ As the 2005 rate of UK arbitrators at the LCIA was roughly 61% in 2005,²¹ descriptively, this decrease in the proportion of British nationals is intriguing but could reflect the over 220% increase in the number of LCIA appointments.²² Nevertheless, even recently, more than half of LCIA arbitrators were nationals of the United Kingdom.²³

Other institutions have tended to have more than half of their arbitrator pool from the country where the institution's primary administrative office is located. SIAC's 2013 annual report, for example, indicated that – out of 56 new international arbitrations – around 51% of arbitrators were nationals from Singapore. Approximately 20% of the

failed to provide information on arbitrator demographics, including: the Australian Centre for International Commercial Arbitration (ACICA); Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC); Dubai International Arbitration Centre (DIAC); and Santiago Arbitration and Mediation Center (CAM Santiago). 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 *Advocate* (Feb. 2010) p. 23 at p. 23 ("CIETAC has been in existence since 1956, and boast that it has 274 foreign arbitrators (not Chinese Nationals) of its 969 listed arbitrators. Even with the foreign arbitrators, this method of arbitration is 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.* (2012) p. 62 at pp. 72-73 (observing that CIETAC chairs are primarily Chinese nationals, US parties' win rates are roughly equal to cases lost and outcomes for parties involving other states – such as Germany and Australia – have been fairly similar).

20. See LCIA, *Registrar's Report* (2012) at p. 4, available at <www.lcia.org/LCIA/Casework_Report.aspx> (last accessed 30 June 2014) (observing that for the 344 total appointments in 2012, 181 were exclusively UK nationals, and of those UK nationals, parties appointed 84, the LCIA Court appointed 73 and co-arbitrators appointed 24); *ibid.* (observing that 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 US"); but see *ibid.* (noting that 19 appointees were UK dual nationals, which means that 200 appointees were UK nationals or dual nationals for a total UK appointment rate of 58.1%).
21. See LCIA, *Director General's Report* (2005) p. 3, available at <www.lcia.org/LCIA/Casework_Report.aspx> (last accessed 30 June 2014) (observing that 57 arbitrators appointed by the parties were UK nationals, 36 nominated by the LCIA court were UK nationals, which indicates 93 of the 152 total appointments were UK nationals but failing to indicate whether any of the arbitrators appointed were dual nationals).
22. See *op. cit.*, fns. 20- 21 (reflecting the number of appointments in 2005 was 152 and the number in 2012 was 344).
23. But see *op. cit.*, fn. 21 (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").

arbitrators were from the United Kingdom. India and Malaysia were prominently represented at SIAC, with slightly less than 20% of appointments, demonstrating a degree of national diversity.²⁴

ICSID, which has jurisdiction over cases arising under commercial contracts, national investment law and investment treaties, publishes summaries of ICSID tribunals and *ad hoc* committees. By the end of 2013, there were 459 registered cases. ICSID helpfully provides information both about individual countries and regions. By region, ICSID arbitrators, conciliators and *ad hoc* committee members came from seventy-seven different states; 49% were European nationals, 22% were from North America, 13% were from Central or South America, 10% were from Asia or the Pacific, and 6% were from Africa or the Middle East.²⁵ The most frequently appointed nationalities were the United States (163 appointments), France (155), the United Kingdom (133), Canada (97), Switzerland (93), Spain (52), and Australia (50).²⁶ Waibel and Wu's study of ICSID arbitrators similarly identified the dominance of developing-country arbitrators. For the 341 ICSID arbitrators sitting between 1978 and 2011, their data indicated 66% of arbitrators were nationals of OECD states.²⁷

In investment treaty arbitration (ITA), scholars have used publicly available data to identify core arbitrator demographics. The first study of 101 ITA arbitration awards rendered prior to 2007 identified a pool of 145 ITA arbitrators; and of that group, 75% were from OECD states and 3.5% were women.²⁸ Expanded research from analyzing 252 ITA awards rendered by January 2012, identified a pool of 247 different arbitrators where 80.6% were from OECD states and only 3.6% were women. On the issue of gender, given repeated appointments of certain female arbitrators, at least one woman was present in 18.3% of the awards; but tribunals exclusively containing men generated the vast majority (81.7%) of awards.²⁹ Studies by other scholars have replicated the

24. SIAC, *Annual Report* (Singapore International Arbitration Centre, 2013) p. 10. These numbers were roughly stable over time. Previous annual reports are available at <www.siac.org.sg/>.

25. ICSID, *The ICSID Caseload – Statistics, Issue 2014-1* (2014) p. 18, available at <<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics>> (last accessed 30 June 2014).

26. *Ibid.*, p. 20; see also Noah RUBINS and Anthony SINCLAIR, “ICSID Arbitrators: Is there a club and who gets invited?”, 1 *Global Arb. Rev.* (Nov. 2006) at <<http://globalarbitrationreview.com/journal/article/16468/icsid-arbitrators-club-gets-invited/>> (last accessed 30 June 2014) (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. WAIBEL and WU, *op. cit.*, fn. 11, pp. 27 et seq.

28. Susan D. FRANCK, “Empirically Evaluating Claims about Investment Treaty Arbitration”, 86 *N.C. L. Rev.* (2007) p. 1 at pp. 75-82 (henceforth *Empirically Evaluating*); see also FRANCK, *Development*, *op. cit.*, fn. 11, p. 459 (noting that, on the basis of World Bank classification of development status, for final awards, 74% of presiding arbitrators were from High Income states, 17% were from upper-middle income states, 11% were from lower-middle income states and there were no presiding arbitrators from low income states) and PUIIG, *op. cit.*, fn. 10.

29. Susan D. FRANCK, *Investment Treaty Arbitration: Myths, Realities and Costs* (forthcoming Oxford University Press) (henceforth *Myths and Realities*).

findings about the lack of women arbitrators in ITA³⁰ and their representation within the caseload. Preliminary research by Waibel and Wu also indicated that, for ICSID arbitrators, 42% had the preponderance or all of their legal education in a common law jurisdiction, 26% were full-time academics.³¹ This finding is not new as, in 2006, Rubins and Sinclair observed their analysis revealed that “[c]ertainly the data supports the view that ICSID belongs primarily to gentlemen.”³²

2. ICCA Respondents

During the first plenary session, all ICCA Congress registrants in attendance were offered an opportunity to complete a survey voluntarily and confidentially. The survey materials relevant to this Paper included three pages of questions. One page asked demographic questions; and two other pages asked questions relevant to the ICCA themes of precision and justice.

Out of the 1,031 ICCA registrants,³³ 552 people completed the survey (the ICCA respondents).³⁴

This Section presents the demographic characteristics of all ICCA respondents completing the survey.³⁵ While most respondents completed the entire questionnaire, given the voluntary nature of the survey, not all ICCA respondents completed all questions. For those who completed the materials, we distinguish between types of information provided. For example, we initially provide information on the

30. Research conducted by Waibel and Wu identified that 95% of their sample was male and 5% was female. WAIBEL and WU, *op. cit.*, fn. 11, pp. 27 et seq.; see also Lucy GREENWOOD and C. Mark BAKER, “Getting a Better Balance on International Arbitration Tribunals”, 28 *Arb. Int’l* (2012) p. 653 at pp. 656, 663-665 (analyzing ICSID cases to identify that 5.6% of all arbitrator appointments were women and suggesting that, given statistics from the LCIA, SCC and American Lawyer that approximately 6% of ICA tribunals involve women); Gus VAN HARTEN, “The (Lack of) Women Arbitrators in Investment Treaty Arbitration”, 59 *Columbia FDI Perspectives*, No. 59 (6 Feb. 2012) at <http://ccsi.columbia.edu/files/2014/01/FDI_59.pdf> (last accessed 30 June 2014) (observing that in 631 appointments in 249 known cases, only 41 of the appointments, namely 6.5% of appointments, were women).

31. WAIBEL and WU, *op. cit.*, fn. 11, pp. 27-29.

32. RUBINS and SINCLAIR, *op. cit.*, fn. 26.

33. 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 1017 of the registrants were capable of answering the survey. Any attendee who self-selected to attend the first plenary could voluntarily participate. This also meant that, out of the potential respondents, we obtained a 54.3% response rate. This was a reasonable response rate. See Edward K. CHENG, “Independent Judicial Research in the *Daubert* Age”, 56 *Duke L.J.* (2007) p. 1264 at p. 1278 (identifying a response rate of approximately 60% of subjects in a judicial conference was “quite reasonable”).

34. Only four of the 552 respondents objected to the use of their responses in published materials, which permitted us to analyze 548 respondents. As such, their contributions form no part in the analyses of these sections and the small size had a *de minimis* effect.

35. See Susan D. FRANCK, et al., “The Diversity Challenge: Exploring the ‘Invisible College’ of International Arbitration”, *Columbia J. Transnat’l L.* (forthcoming 2015) (exploring aspects of this Paper involving demographics and diversity challenges in greater detail).

demographics of all ICCA respondents broken down by experience in international arbitration. Next, when we focus on arbitrators, we demarcate the general group of anyone who has served as an arbitrator and also include breakdowns for the subsets of individuals reflecting their experience in international commercial arbitration (ICA) or ITA. Similarly, we distinguish between response patterns for: (1) all ICCA respondents answering the relevant question(s); (2) the subset of respondents indicating they served as an international arbitrator; and (3) the subset of respondents indicating they served as counsel in international arbitration.³⁶

a. Experience related to international arbitration

Before turning to more specific analyses, we first identify the respondents' professional experiences. We hope that, moving forward, these demographics provide information to ICCA conference organizers for their consideration in connection with strategic outreach.

Overall, the data reflected that ICCA respondents tended to have experience either as counsel, experience as an arbitrator (whether in ICA or ITA) or a combination thereof. Table 1 indicates that most respondents acted as counsel in at least one international arbitration (87%). Each respondent serving as counsel was involved in an average of twenty-seven cases (median=15). International arbitrators were also prominent, with 60.4% of responding ICCA respondents indicating they had acted as arbitrator in at least one case. Sub-sect. II.2.b discusses the frequency of arbitral appointments in greater detail.³⁷ The data provide a counterpoint to claims that there are only between 100 and 200 practitioners worldwide with repeat appointments in arbitration.³⁸

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 respondents had been experts 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 two.

36. It is possible that there may be a response bias generated by those respondents who failed to answer all questions and those answers may have been meaningfully different from the answers that were provided. While we cannot eliminate the risk of response bias, the large number of respondents who answered the vast majority of questions (and the small number of respondents who failed to answer) attests to the underlying validity of the data. Nevertheless, replication is necessary to decrease the risk of error.

37. We recognize that the broader ICCA membership may contain more international arbitrators than were registered for the conference or participated in the survey. For the purposes of this Paper, references to ICCA arbitrators (or the subset of ICCA arbitrators) necessarily incorporate this limitation.

38. Christian BÜHRING-UHLE, et al., "The Arbitrator as Mediator: Some Recent Empirical Insights", 20 J. Int'l Arb. (2003) p. 81 at pp. 81-82. We cannot, however, discount that there may be distinctions in what role counsel plays in a particular case. On complex international cases, global law firms may employ "local counsel" to handle issues of domestic law while not relinquishing control of overall case strategy.

Table 1: Descriptive Data Identifying the Percentage and Frequency of Respondents' Professional Experience Related to International Arbitration for ICCA Respondents³⁹ and the Mean, Median and Maximum Number of Cases for ICCA Respondents with a Minimum of One Case in a Category of Professional Experience

<i>Categories of Professional Experience in Arbitration⁴⁰</i>	<i>Percentage (and Frequency) of Cases</i>	<i>Mean Number of Cases</i>	<i>Median Number of Cases</i>	<i>Maximum Number of Cases</i>	<i>Standard Deviation</i>
Respondents Acting as Arbitration Counsel	87.3% (n=413)	27.3	15	501	46.9
All International Arbitrators	60.4% (n=262)	34.6	10	501	64.6
Expert	32.3% (n=126)	3.6	2	51	6.4
Judge in National Court	9.3% (n=35)	571.3	51	10001	1740.7
Adjudicator in Public International Law Dispute	4.6% (n=17)	27.8	2	301	76.4

39. Some ICCA respondents failed to provide information on their professional experiences. This may reflect their lack of experience or a possibility that the data underrepresent respondents' actual experience. Given the lack of clarity, respondents failing to answer were omitted from the percentage calculation. Of the 448 respondents analyzed, the following respondents 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).

40. We based these categories on experiences we identified as typical gateway experiences to international arbitration. We did not focus on institutional appointments or tribunal secretaries as these individuals do not technically decide disputes. Nevertheless, we acknowledge that tribunal secretaries can play a critical part in the arbitration process. See Constantine PARTASIDES, "The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration", 18 *Arb. Int'l* (2002) p. 147. At least two respondents volunteered they had served as tribunal secretaries. Although we did not code those appointments as arbitrators, future research should focus upon tribunal secretaries. Similarly, given methodological and timing constraints, we did not code for experience in academia, non-governmental organizations, policy think tanks, or labor unions. Future research might also explore representation of these groups at prominent international arbitration events.

There were at least two groups, however, that we were able to identify with minimal representation at ICCA.

First, few of the ICCA respondents had been judges in national courts. Table 1 indicates this was less than 10% of respondents. The wide standard deviation, however, reflects variation in responses; there was one group of respondents who had an extensive number of cases and a second group who had a smaller number. Consequently, for the thirty-five individuals who acted as judges, the mean number of proceedings was 571.3 but the median was fifty-one.

Second, independent of those respondents serving as ITA arbitrators, there were also only a few respondents with experience adjudicating public international law disputes.⁴¹ Specifically, only thirty-five of respondents (9.3%) had served on at least one public international law proceeding. Of those respondents, there was a variation in relative levels of experience with respondents having an average of 27.8 cases and a median of two cases. This low level of representation at ICCA may, however, reflect the relatively small pool of public international adjudicators, such as the small number of elite adjudicators at institutions including the International Court of Justice and World Trade Organization (WTO).

ICCA Congresses therefore offer opportunities to interact with international arbitrators and counsel and, to a lesser degree, experts. Future ICCA Congresses may wish to expand existing outreach to national court judges and international law adjudicators. These latter groups represent potentially untapped groups that are affected by and interested in international arbitration. Continued outreach would also support ICCA's roadshows with domestic judiciaries that provide a venue for generating dialogue with national courts.⁴²

b. Experience as international arbitrators

One critical question involved how frequently arbitrators exercised their adjudicative functions.⁴³ Our survey asked respondents to report how many times they acted as an arbitrator in ICA, and it separately asked how many times they served as an arbitrator in ITA. Overall, as Table 1 reflected, 262 of our respondents (or a little more than half) served as an arbitrator in at least one case. Yet these blunt figures lack a degree of nuance.

Table 2 reflects that, overall, those at ICCA who had acted as arbitrators reported being involved in an average of 34.6 cases; and the statistically "median arbitrator" arbitrated ten cases. The variation between those two measures of central tendency was

41. The survey and the data analysis differentiated between "public international law" and ITA cases. Respondents were therefore able to distinguish between traditional public international law cases and other cases.

42. See fn. 6 for a discussion of these roadshows.

43. See Daphna KAPELIUK, "The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators", 96 *Cornell L. Rev.* (2010) p. 47 (defining "elite" ITA arbitrators as those who have served on four or more cases); James CLASPER, "London's Arbitration Elite", 1 *Global Arb. Rev.* (Apr. 2006) at <<http://globalarbitrationreview.com/journal/article/18197/london-elite-arbitration-groups/>> (last accessed 30 June 2014) (exploring elite arbitration practices, and arbitrators, in London).

driven by a small number of arbitrators sitting on a large number of cases. Twenty-five respondents sat on more than 100 arbitrations (whether ICA or ITA based), twelve respondents 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 11-40 cases. Experienced arbitrators, with substantial but relatively less experience, were in the second lowest quartile and arbitrated between 4-10 cases. The least experienced arbitrators, namely those in the bottom quartile, arbitrated only 1-3 cases. See Table 2.

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

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

While the data demonstrate that particularly elite arbitrators have more appointments than others, the sheer number of ICCA respondents with repeat experience as arbitrators reflects that the arbitrator bench is not necessarily as closed as one might initially perceive.⁴⁴ Acknowledging that this may be a by-product of the elite nature of ICCA conferences, these findings should be explored in other international arbitration venues.

The general patterns identified benefit from further analysis of individuals' specific experiences with ICA or ITA. Table 2 reflects that the general patterns of all arbitrators mirrors the pattern of arbitrators involved in ICA cases. Yet, there is a somewhat

44. See DEZALAY and GARTH, *op. cit.*, fn. 9 at pp. 34-41 (claiming that "key source of conflict" in international arbitration practice is the influx of newcomers); Catherine A. ROGERS, "The Vocation of the International Arbitrator", 20 Am. U. Int'l L. Rev. (2005) p. 957 at p. 968 (henceforth Vocation) (observing the "market for international arbitrators operates as a relatively closed system that is difficult for newcomers to penetrate".).

different facial pattern for ITA arbitrators. Specifically, more than half of the ITA arbitrators had only arbitrated 1-2 ITA cases. To be a super-elite arbitrator in ITA (i.e., in the top quartile), it was only necessary to have six or more cases. These figures for ITA may, however, reflect the recent and relatively small ITA caseload.

We note, however, that for the 67 ITA arbitrators, only two identified they had *not* also served as an ICA arbitrator. Put differently, it was highly unusual for ITA arbitrators at ICCA to have never sat on an ICA case. This provides evidence that acting as an ICA arbitrator may be a “gateway” experience or pre-requisite for serving as an ITA arbitrator,⁴⁵ but this is not conclusive as there may be alternative pathways to ITA appointments. Alternatively, the data may reflect that being appointed in ITA expands appointment opportunities in ICA.

c. *Gender, age, legal training, native language and nationality of international arbitrators and counsel*

Existing literature on arbitrators offers some information on arbitrator background, but the information usually is institution or subject matter specific. 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.⁴⁶ Likewise, we are unaware of any research on demographic information about the background of counsel in international arbitration. As such, this research provides a core baseline for future inquiries into the “invisible college” of international arbitration. While more is arguably known about the “invisible college” of ITA arbitration, the data is particularly valuable for ICA as those awards are confidential and minimal information is publicly available.⁴⁷ Although it also discusses counsel, this Section primarily focuses on international arbitrators.

There have been suggestions that international arbitrators tend to be “pale, male and stale”.⁴⁸ The question is whether that narrative is empirically verifiable. Our research

45. 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.* (2013) p. 45; See also Bruno SIMMA, “Foreign Investment Arbitration: A Place for Human Rights?”, 60 *Int’l & Comp. L. Quart.* (2011) p. 573.

46. There is an emerging literature related to the identity of ITA arbitrators including gender and nationality. See, e.g., fn. 11 and accompanying text; FRANCK, *Empirically Evaluating*, *op. cit.*, fn. 28, pp. 78-81 (exploring the gender and OECD status of arbitrators); PUIG, *op. cit.*, fn. 10, pp. 17-18 (collecting information on ICSID arbitrators related to name, gender and nationality); WAIBEL and WU, *op. cit.*, fn. 11 (collecting information on ICSID arbitrators only including gender, nationality, age and legal education). The limited quantitative data on ICA makes this research particularly critical. But see *op. cit.*, fn. 11 (identifying sources of empirical research on ICA).

47. See *op. cit.*, fn. 11 and accompanying text.

48. Michael D. GOLDHABER, “Madame La Présidente: A Woman Who Sits as President of a Major Arbitral Tribunal Is a Rare Creature. Why?”, *Am. Lawyer: Focus Europe* (Summer 2004) at <<https://fr.groups.yahoo.com/neo/groups/arbitrage-adr/conversations/messages/447>> (last accessed 30 June 2014) (“Arbitration is dominated by a few aging men, many of whom pioneered the field. In the words of Sarah François-Poncet of Salans, the usual suspects are ‘pale, male, and stale’.”).

therefore explored the gender composition of ICCA respondents. It also investigated other aspects of diversity including age, legal training, linguistic capacity, nationality, and development status.

Given the existing literature reflecting questions about gender disparity in international arbitration, the basic descriptive data on gender composition is of interest. Table 3 reflects the gender distribution of all respondents, arbitrators and counsel. For all ICCA respondents and the subset of counsel, roughly three-quarters were men, and one quarter were women. The distribution shifted slightly, however, when evaluating those serving as arbitrators with the proportion of men becoming larger. Namely, 82.4% of respondents who had been arbitrators were men and 17.6% were women.⁴⁹

The results also suggest that although all respondents were typically in the late 40s, the subset of arbitrators tended to be somewhat older. Table 3 indicates that the mean age of all respondents was 48 (median=47); and counsel age was similar with a mean age of 48 (median=46). In contrast, the mean age of responding arbitrators was 54 (median=53). This may not necessarily be unusual. Other research suggests the average age of an active member of the bar in California was 48 whereas the average of California judges was 60,⁵⁰ but that the age of median judges has been decreasing in several jurisdictions.⁵¹

49. As a caution, there is some evidence that, for the subset of arbitrators, the ICCA respondents had a disproportionately large number of women arbitrators. See *infra* fn. 244 and accompanying text.

50. Arden ROWELL and Jessica BREGANT, "Numeracy and Legal Decision Making", 46 *Ariz. St. L.J.* (2014) p. 191 at p. 225 n. 120.

51. See M. Margaret McKEOWN, "The Internet and the Constitution: A Selective Retrospective", 9 *Wash. J.L. Tech. & Arts* (2014) p. 135 at p. 142 ("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.* (2013) p. 297 at pp. 305-306 (indicating the average age at appointment was 54 years for the Australian High Court, 56 years for the Canadian Supreme Court, and 64 years in the Supreme Court of Japan but noting that the average age at appointment was increasing in India and Japan).

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

<i>Variables</i>	All	Arbitrators	Counsel
Respondent Gender: Percentage and 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 Respondents</i>	<i>100% (n=526)</i>	<i>100% (n=262)</i>	<i>100% (n=413)</i>
Respondent Age:			
Mean	48.5	54.4	48.0
Median	47.0	53.0	46.0
Min	24.0	29.0	24.0
Max	85.0	85.0	85.0
Standard deviation	12.7	11.7	12.3
<i>Total Respondents</i>	<i>514</i>	<i>253</i>	<i>406</i>
Age as a Function of Gender:⁵²			
<u>Age of Women</u>			
Mean	42.0	47.5	41.3
Median	40.0	45.0	40.0
Min	27.0	32.0	27.0
Max	71.0	68.0	65.0
Standard deviation	10.0	9.3	8.4
<i>Total Number of Women</i>	<i>128</i>	<i>46</i>	<i>96</i>
<u>Age of Men</u>			
Mean	50.6	55.8	50.0
Median	50.0	55.0	50.0
Min	24.0	29.0	24.0
Max	85.0	85.0	85.0
Standard deviation	12.8	11.7	12.5
<i>Total Number of Men</i>	<i>386</i>	<i>216</i>	<i>310</i>

52. When looking at age as a function of gender, there was a smaller number of respondents. Six men and six women identified their gender but not their age and, as such, could not be analyzed.

It is also noteworthy that the age difference between male and female respondents was statistically meaningful,⁵³ irrespective of whether all ICCA respondents ($t(512)=6.872$; $p<.001$; $r=.29$; $n=514$), counsel ($t(404)=6.385$; $p<.001$; $r=.30$; $n=406$) or arbitrators ($t(251)=4.337$; $p<.001$; $r=.26$; $n=253$) were analyzed. The effect sizes all suggested the size of the gender difference was statistically medium.⁵⁴ The direction was such that women attending ICCA, regardless of their arbitration experience, were reliably younger than the men. Table 3 indicates that for women arbitrators, the average age was 47.5 whereas the average age of male arbitrators was 57.8.

Another way to consider respondents' diversity is legal training. Table 4 reflects that ICCA respondents had a variety of training. For all ICCA respondents, common law was the dominant legal training, with 46% of the respondents exclusively trained in a common law jurisdiction. There was also a strong civil law component, with 30% of respondents trained exclusively as civil lawyers. There was also an intriguing hybrid as 24% of respondents had training from *both* common and civil law jurisdictions.⁵⁵ The dominance of common law training was also present in the subset of arbitrators but was not as facially prominent. More specifically, 38.5% 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 were trained in both common and civil law.⁵⁶

Language is another way to explore the diversity of international arbitration. Linguistically, ICCA respondents spoke fifty-eight different native languages. Although Chinese and Spanish are the two most prevalent languages in the world,⁵⁷ this dominance was not present in the ICCA respondents, the subset of counsel or the subset of arbitrators. For ICCA respondents generally and counsel, English, Spanish and Portuguese were most prevalent, together accounting for nearly 70% of the languages spoken. The proportions were slightly different for the subset of arbitrators, as the dominant languages were English, German and French (and accounted for over 60% of total language capacity). Only four arbitrators' native language was either Mandarin or Cantonese.⁵⁸

53. 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*, 3rd ed. (Routledge 2010) p. 62.

54. Because gender is a two-category variable, these analyses used independent samples *t*-tests to explore the potential gender variance in the continuous variable of age. See *infra* fn. 118 for a discussion of the underlying statistical tests.

55. These proportions were similar for the subset of those who have been arbitration counsel.

56. The results may be a function of a case selection effect. In theory, more US 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.

57. Paul LEWIS, et al., eds., *Ethnologue: Languages of the World*, 17th ed. (SIL International Online 2013) available at <www.ethnologue.com> (last accessed 30 June 2014).

58. This may reflect that the ICCA 2014 Congress in Miami occurred exclusively in English.

As regards geography, ICCA respondents and arbitrators appeared in proportions that did not reflect global population patterns.⁵⁹ For example, ranking continents from highest population to lowest yields: Asia; Africa; Europe; South America (including Central America and the Caribbean); North America and Oceania.⁶⁰ In contrast, Table 4 indicates that, irrespective of whether analyzing ICCA respondents or the subset of arbitrators, the trend was to have the greatest representation of nationals from Europe and North America and the lowest proportions came from Asia and Africa.⁶¹

For the subset of arbitrators, some states were underrepresented. Although highest in world population (60.27%), Asian arbitrators were the second least well represented (10%) of ICCA arbitrators. Ironically, although China and India together contain approximately 33% of the world's population, less than 3% of the ICCA arbitrators were from those states. Meanwhile, despite Africa's second highest population (15.41%), Africa exhibited the lowest level of representation (0.4%). Other states were arguably over-represented. Although Europe has 10.37% of the world's population, 48.2% of the arbitrators were European nationals. Similarly, North America has 4.93% of the world's population, 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, however, were more balanced in their representation. For example, although Australia and New Zealand contain not quite 1% of world population, they represented 4.0% of ICCA arbitrators. The closest level of balance came from South America, with 8.49% of world population and 9.6% of ICCA arbitrators.⁶²

59. For the purposes of this Paper, we used global population as a comparative baseline for basic demographic information. We acknowledge that better comparisons would evaluate the nationalities of the parties involved in international arbitration and/or the location of the subject matter of the dispute. As we are unaware of any such data on this topic gathered in a scientifically reliable and comparable manner, these comparisons are not currently possible. We encourage future research to identify whether the baselines identified in this Paper vary meaningfully from the nationality of those stakeholders actively using international arbitration.

60. STATISTA, Distribution of the global population mid-2013, The Statistics Portal, 2014, at <www.statista.com/statistics/237584/distribution-of-the-world-population-by-continent/> (last accessed 30 June 2014); NATIONS ONLINE, Current World Population, Nations online, at <www.nationsonline.org/oneworld/world_population.htm> (last accessed 30 June 2014).

61. Given our focus on nationality, there is a possible disjunction between where arbitrators reside and their nationality. Future research might also explore the variance generated by the distinction between where the international arbitration community originates from and with what countries they may currently have ties. In the interim, for a more nuanced discussion of the appropriate baselines regarding nationality in international arbitration, see FRANCK, et al., fn. 35.

62. Table 4 reflects that the strongest representation from Latin America came from the large contingent of Brazilians. In terms of ICCA-related outreach, it is possible that earlier ICCA Congresses and/or geographic proximity may affect participation in future Congresses and serve to grow the global arbitration community.

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

<i>Variables</i>	All	Arbitrators	Counsel
Legal Education			
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 Respondents</i>	519	260	413
Mother Tongue			
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)
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 Respondents</i>	510	254	403
Continent			
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 Respondents</i>	503	251	398

<i>Variables</i>	All	Arbitrators	Counsel
Nationality			
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	14.4% (n=82) ⁶³	12.8% (n=32) ⁶⁴	13.9% (n=53) ⁶⁵
Total Number of Different Primary Nationalities	58 ⁶⁶	41	47
<i>Total Respondents</i>	500	250	395

63. This table reflects only those nationalities where, for all ICCA respondents, there were five or more nationals from the country. Thirty-eight other states had at least one but less than five respondents 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.

64. 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.

65. 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.

66. For both primary and secondary nationalities, there were 60 different states.

<i>Variables</i>	All	Arbitrators	Counsel
Dual Nationals			
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) ⁶⁷	10% (n=1) ⁶⁸	28.9% (n=9) ⁶⁹
<i>Total Respondents</i>	34	10	31

Historically, literature has focused upon the prevalence of “western” parties in international law;⁷⁰ yet, in a post-Cold War era with different policy concerns, this terminology is potentially arcane and not reflective of meaningful variance. As a final aspect for measuring the scope of diversity, we therefore explored the development status of respondents’ nationality. Defining “Development Status” is challenging.⁷¹ There is no consistent legal definition of this concept. Development is subtle and, at the margins, 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 level.⁷² As the lack of a consistent definition

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

68. This dual-national arbitrator was from Nigeria.

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

70. See, e.g., Kurt GAUBATZ and Matthew MACARTHUR, “How International Is ‘International’ Law?”, 22 Mich. J. Int’l L. (2001) p. 239; see also PUIIG, *op. cit.*, fn. 10, p. 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”).

71. Marc L. BUSH and Eric REINHARD, “Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement”, 37 J. of World Trade (2003) p. 719 at pp. 719, 723 (analyzing development dimensions in GATT disputes and observing the difficulty in making distinctions between developed and developing states).

72. See World Trade Organization, “Who Are the Developing Countries in the WTO?”, at <www.wto.org/english/tratop_e/devel_e/dlwho_e.htm> (last accessed 30 June 2014) (“There are no WTO definitions of ‘developed’ and ‘developing’ countries. Members announce for themselves whether they are ‘developed’ and ‘developing’ countries); Anu BRADFORD and Eric A. POSNER, “Universal Exceptionalism in International Law”, 52 Harv. Int’l L.J. (2011) p.1 at n. 159 (“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.”);

has caused confusion in international law,⁷³ it is appropriate to use measures based upon “judgments made for entirely different purposes by *other researchers*”.⁷⁴

We used three pre-existing measures to define development status. 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.⁷⁵ 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.⁷⁶ The World Bank’s main criterion for classifying economies is gross national income (GNI) per capita.⁷⁷ Third, development status was operationalized using a continuous variable – HDI Status – derived from the United Nations Development Programme’s Human Development Index (UNDP HDI). HDI evaluates elements including life expectancy, education and income. HDI is also a continuous variable and ranges from 0.0 (undeveloped) to 1.0 (completely developed).⁷⁸

Regardless of the measure used, the results indicated that nationals from developed states dominated the roster of all ICCA respondents generally, and the subsets of counsel and arbitrators. Table 5 demonstrates that 75% (or more for the subset of arbitrators) of respondents were from an OECD and High Income state; and we observe that none of the ICCA respondents were arbitrators from low income states. There were similar results for dual nationals. HDI scores, however, make the point starkly for the subset of arbitrators. The median HDI score meant that half the arbitrators were from states the UNDP classified as having “very high human development” and reflected the top twelve most developed nations in the world. The mean also reflected that the statistically

Andrew D. MITCHELL and Joanne WALLIS, “Pacific Pause: The Rhetoric of Special & Differential Treatment, the Reality of WTO Accession”, 27 *Wisc. Int’l L.J.* (2010) p. 663 at pp. 696-697.

73. Benjamin L. LIEBMAN, “Autonomy Through Separation?: Environmental Law and the Basic Law of Hong Kong”, 39 *Harv. Int’l L.J.* (1998) p. 231 at pp. 261-262.

74. Gary KING, et al., *Designing Social Enquiry: Scientific Inference in Qualitative Research* (Princeton University Press 1994) p. 157 (emphasis in original); see also Susan D. FRANCK, et al., “Through the Looking Glass: Understanding Social Science Norms for Analyzing International Investment Law”, 2010-2011 *Y.B. on Int’l Investment Law & Pol’y* (2011) p. 883.

75. Jan WOUTERS and Sven VAN KERCKHOVEN, “The OECD and the G20: An Ever Closer Relationship?”, 43 *Geo. Wash. Int’l L. Rev.* (2011) p. 345.

76. The World Bank analytical classification is available at <<http://goo.gl/LrGDO>>. The Classifications used for coding were available at <<http://bit.ly/907M8u>>.

77. WORLD BANK, “Data: How We Classify Countries”, at <<http://bit.ly/cgOu7t>> (last accessed 30 June 2014).

78. As the methodology for coding HDI changed in 2011 and was applied to all the data retroactively, previously published Human Development Reports were not used to code HDI levels. The research used data directly provided by Dr. Milorad Kovacevic, Chief Statistician at the Human Development Report Office of the United Nations Development Programme. All of the scores Dr. Kovacevic provided used the updated 2011 methodology to re-evaluate the historical and current rankings of states.

average arbitrator at ICCA came from a state with a HDI score in the top thirty most developed states.⁷⁹

Table 5: Descriptive Statistics of the Development Status of All ICCA Respondents, the subset of Arbitrators and the Subset of Counsel as a Function of OECD Membership, World Bank Classification and the Human Development Index⁸⁰

<i>Variables</i>	All	Arbitrators	Counsel
OECD Nationals: Percentage (Frequency)			
OECD national	74.6% (n=373)	82.4% (n=206)	75.2% (n=297)
Non-OECD national	25.4% (n=127)	17.6% (n=44)	24.8% (n=98)
<i>Totals</i>	100% (n=500)	100% (n=250)	100% (n=395)
OECD Dual Nationals: Percentage (Frequency)			
OECD national	79.4% (n=27)	80.0% (n=8)	80.6% (n=25)
Non-OECD national	20.6% (n=7)	20.0% (n=2)	19.4% (n=6)
<i>Totals</i>	100% (n=34)	100% (n=10)	100% (n=31)
World Bank Classification of Primary Nationality: Percentage (Frequency)			
High income	76.4% (n=382)	84.8% (n=212)	76.5% (n=302)
Upper-middle income	16.6% (n=83)	10.8% (n=27)	16.7% (n=66)
Lower-middle income	6.4% (n=32)	4.4% (n=11)	6.8% (n=27)
Low income	0.6% (n=3)	--	--
<i>Totals</i>	100% (n=500)	100% (n=250)	100% (n=395)
World Bank Classification of Secondary Nationality: Percentage (Frequency)			
High income	85.3% (n=29)	80.0% (n=8)	87.1%(27)
Upper-middle income	11.8% (n=4)	10.0% (n=1)	9.7%(3)
Lower-middle income	2.9% (n=1)	10.0% (n=1)	3.2%(1)
Low income	--	--	--
<i>Totals</i>	100% (n=34)	100% (n=10)	100% (n=31)

79. The results shifted only slightly for arbitrators who were dual nationals. Those respondents were classified as coming from states within “very high human development”; the median HDI score was in the top seventeen most developed states, and the mean HDI score placed respondents in the top thirty-five most developed states.

80. Forty-eight respondents did not provide nationality information.

<i>Variables</i>	All	Arbitrators	Counsel
HDI Classification of Primary Nationality			
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 Respondents</i>	500	250	395
HDI classification of Secondary Nationality			
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 Respondents</i>	34	10	31

As discussed in Sect. II.3, and as with any survey research, it is possible that the data did not reflect the global international arbitration community. Nevertheless, the data set an important initial baseline about the predominance of men (Table 3), particular nationalities (Table 4) and developed-world actors (Table 5). The data may reflect potential “pipeline” problems of capacity in law generally and international arbitration specifically. While a full analysis of the origins of diversity challenges in international adjudication is beyond the scope of this Paper, 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.⁸¹

As international law courts and tribunals generally exhibit diversity challenges,⁸² the lack of representation by women and developing-country respondents could reflect broader diversity challenges in international law. International law is a creature of state practice and those who use it. As parties often control the selection of lawyers and core

81. See GREENWOOD and BAKER, *op. cit.*, fn. 30, pp. 654, 657 (stating “the additional obstacles which an international arbitrator must overcome in order to succeed may penalize women disproportionately” and discussing how “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”).

82. See Nienke GROSSMAN, “Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts”, 12 *Chi. J. Int’l L.* (2012) p. 647 (identifying the lack of women on international courts and tribunals).

aspects of arbitrator appointment, variance could be a by-product of private choice. Irrespective of causal factors, these initial findings require replication to assess their ongoing value and to explore changes in the international arbitration community over time.⁸³ Diversity challenges are addressed in Sect. IV.4.⁸⁴

3. Representativeness of ICCA Respondents

Inferences drawn from descriptive data are only as strong as the representativeness of the sample from which the data derive. Although the limitations will be discussed further in Sect. V,⁸⁵ it is important to acknowledge that should the respondents completing the survey not reflect the larger international arbitration community, the value of the inferences from the research decreases. Precisely capturing the “international arbitration community” is challenging as the community changes when people enter and exit the profession, individuals continue to age, and the spheres and cores of the community are in relatively constant motion.⁸⁶

Our working supposition was that ICCA is an important group in the international arbitration community. As such, the ICCA Congress – given that it occurs biennially and is a prestigious event – is a critical event that international arbitration specialists will attend. While inevitably people will not attend the Congress or the initial plenary due to personal constraints or work obligations, our practical assessment was that if registrants were able to attend the first ICCA Plenary, they did.⁸⁷ We anticipated (but cannot scientifically confirm) that those registered for ICCA and taking the survey were representative of the international arbitration community and international arbitrators.

Selection effects, however, may impact the results in several ways. First, as the conference was in Miami, it is possible that respondents from the United States and/or North America were over-represented; this generates the possibility that the data may be systematically skewed. Second, the converse is that there was an under-representation of arbitrators from non-North American states even though there is a high concentration of international arbitration there. For example, CIETAC arguably has the largest international arbitration caseload in the world;⁸⁸ yet there were relatively few attendees

83. Greenwood and Baker suggested that the problems of international arbitration are beyond simply having sufficient women in the pipeline. They first concede that even though there are fewer men entering law firms in the United Kingdom than women, more men are making it to the partner position. Yet, they observe that, the “best estimates of 5% of women appointed as arbitrators on international arbitration tribunals is just over half the 11% figure for female partners on international arbitration teams”. GREENWOOD and BAKER, *op. cit.*, fn. 30, p. 658.

84. See also FRANCK, et al., fn. 35.

85. The limitations of case selection effects are also an orienting principle of FRANCK, et al., fn. 35.

86. See DEZALAY and GARTH, *op. cit.*, fn. 9, pp. 12, 28, 61, 117, 157, 242, 248, 296 (discussing certain cores in international arbitration and the intersection spheres of related spheres); see also ROGERS, *op. cit.*, fn. 9, p. 167 (discussing “cores” in the international arbitration community).

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

88. Chi MANJIAO, “Drinking Poison to Quench Thirst: The Discriminatory Arbitral Award Enforcement Regime Under Chinese Arbitration Law”, 39 Hong Kong L.J. (2009) p. 54 at pp. 557-559; Alexander ZESCH, “CIETAC’s New Rules: A View Through the Critics’ Lens”, 16 *Vindobona J. Int’l Comm. L. & Arb.* (2012) p. 283.

from China.⁸⁹ To address those twin concerns and evaluate the value of the baseline descriptive data, over time, as ICCA Congresses rotate among venues, the demographic data collection could be replicated. The forthcoming conferences in Mauritius and Sydney, for example, provide a unique opportunity to assess differences at geographical venues that are proximate to continents with the two largest populations on the planet and presumably need international arbitration services. Third, as the ICCA proceedings were conducted in English, it is possible that those whose mother tongue is not English (particularly arbitration specialists speaking Chinese, Spanish, Hindi, Arabic, Japanese and French⁹⁰ which are among the most prevalent languages on the planet) were also under-represented.⁹¹ Finally, to the extent that ICCA is a relatively expensive conference – in terms of the conference fee,⁹² flight, hotel, and lost opportunity cost of being away from work – it is possible that those who are economically disadvantaged but nevertheless part of the international arbitration community, were systematically underrepresented in the analyses.

While we acknowledge the risk, we nevertheless believe our data offer a respectable, solid and representative sample of the international arbitration community and international arbitrators. The view, rightly or wrongly, of the research team was that an ICCA Congress is the elite “must go” event of the international arbitration community.⁹³ The Congress has both a historical pedigree, the substantive content exploring transnational legal innovations in arbitration, the scarcity of its programming (i.e., only every other year), and its transnational approach makes it a uniquely valuable event.⁹⁴

89. We observe that, even though the most recent ICCA Congress was in Singapore, there was a relatively small number of Asian participants at the ICCA Miami Congress. It is uncertain whether this reflects saturation of the Asian arbitration market, the geographical distance, the finances related to travel, or some other variable(s).

90. We note that Africa is the continent with the most French speakers in the world. French is the second most common language in Africa with approximately 120 million people speaking French. Christian VALANTIN, et al., *La Francophonie dans le monde* (Nathan 2006).

91. ICCA has recognized the need for greater linguistic options at its Congresses and has pledged to have simultaneous translation in French, English and Portuguese at its Mauritius Congress in 2016. Salim MOOLLAN, Invitation to ICCA Mauritius 2016 (9 April 2014) available at <<http://bit.ly/1o0sML3>> at 7:24-35 (last accessed 1 July 2014).

92. Recognizing the costs, for ICCA’s Mauritius Congress in 2016, participants from Africa will receive a 50% discount in their conference fees. See *ibid.*, 7:16-22.

93. New entrants to the international arbitration marketplace may, however, not necessarily use ICCA as their first “gateway experience” to the larger international arbitration community. As they 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 – it is possible that our sample underrepresents newer or non-elite entrants. Analyzing the international arbitration elites at the ICCA Miami Congress was an initial effort to identify those experts who were easily observable; but this necessarily means that there are untapped aspects of the “invisible college” of international arbitration. We hope that this initial data collection process is expanded to account for other core groups within the international arbitration community to have a more complete picture of the international arbitration community.

94. ICCA started in 1961 as a close-knit gathering of international arbitration experts. It was and is a unique group, as ICCA is a non-governmental organization untethered to any group or state. See, generally, V.V. VEEDER, “Gala Dinner Speech”, ICCA 50th Anniversary Speech (2011) available at <http://www.arbitration-icca.org/media/0/13087091952910/v.v._veeder_speech.pdf>

Assessing ICCA attendees therefore provides a unique opportunity for “one-stop-shopping” of 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, given that other empirical research designed to systematically study judges and the judiciary used an identical strategy of providing surveys to domestic court judges, the scientific methodology is sound.⁹⁵

During a visual confirmation conducted while walking through the Plenary Session, many international arbitrators (including arbitrators with multiple appointments) completed the questionnaire. While we will *not* reveal the individual identities given our undertakings of confidentiality to all respondents, we observed that many of the individuals completing the survey had conducted international arbitrations.⁹⁶ In addition, while our survey did not reach 100% of the population of known-ITA arbitrators, there were responses from sixty-seven ITA arbitrators, which represents a healthy proportion (27%) of the arbitrators identified in Franck’s most current research on ITA awards.⁹⁷

As a final matter, we observe the potential risks related to language. English is a *lingua franca* in many worldwide contexts – irrespective of whether international arbitration is involved,⁹⁸ but English has also become dominant for those pursuing careers in international arbitration.⁹⁹ As such, it is possible that a conference conducted entirely in

www.arbitration-icca.org/media/0/13087091952910/v.v._veeder_speech.pdf> (last accessed 30 June 2014).

95. See, e.g., Chris GUTHRIE, et al., “Inside the Judicial Mind”, 86 *Cornell L. Rev.* (2001) p. 777; Chris GUTHRIE, et al., “Blinking on the Bench: How Judges Decide Cases”, 93 *Cornell L. Rev.* (2007) p. 1; Chris GUTHRIE, et al., “The ‘Hidden Judiciary’: An Empirical Examination of Executive Branch Justice”, 58 *Duke L.J.* (2009) p. 1477.
96. We note that of the 1017 ICCA registrants capable of participating in the survey, see *op. cit.*, fn. 33, there is publicly available documentation confirming that 496 of those registrants served as international arbitrators in the past. We also observe that this means, given the 262 respondents expressly identifying their service as arbitrators, at a minimum, our respondents reflected at least 52.8% of the arbitrators attending ICCA. Given conference fees and others costs mentioned above, it is possible that we only sampled affluent senior counsel; and the broader population of counsel in international arbitration may be meaningfully different.
97. FRANCK, *Myths and Realities*, *op. cit.*, fn. 29 (coding arbitrators who were on tribunals rendering public awards); see also PUIG, *op. cit.*, fn. 10, p. 18 (coding arbitrator appointments at ICSID from its inception, including both ICA and ITA cases, and identifying 419 different arbitrators receiving appointments).
98. See, e.g., Timothy LAU, “Offensive Use of Prior Art to Invalidate Patents in the US and Chinese Patent Litigation”, 30 *UCLA Pac. Basin L.J.* (2013) p. 201 at p. 250 (observing that, despite China’s scientific advances and publications, “the prior art is indisputably in English, the *lingua franca* of the scientific and technical communities”); Ayelet SHACHAR and Ran HIRSCHL, “Recruiting ‘Super Talent’: The New World of Selective Migration Regimes”, 20 *Ind. J. Global Legal Stud.* (2013) p. 71 at p. 97 (noting that the Max Planck Society “has adopted English as the *lingua franca*”).
99. Roger P. ALFORD, “The American Influence on International Arbitration”, 19 *Ohio St. J. Disp. Resol.* (2003) p. 69 at p. 86 (“English has become the *lingua franca* of international arbitration. One prominent arbitrator, Jan Paulsson, recently noted that 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 Law”, 22 *Eur. J. Int’l L.* (2001) p. 875 at p. 887 (“As was the case with most investment treaty arbitrations,

English generates a selection effect such that those without English language skills, but actively engaged with international arbitration, were not in attendance. The risk is noteworthy as those conducting international arbitrations in other regions (i.e., South America, francophone Africa, or Asia) may share a common non-English language.

4. *Key Findings*

The data unsurprisingly reflect that counsel and arbitrators were the primary ICCA attendees and presumably the core members of the “invisible college” of international arbitration. The standard number of appointments for counsel ranged from a mean of thirty to a median of fifteen. For those appointed as arbitrators, individuals on average obtained 35 appointments but had only a median of ten appointments; and ICA arbitrators experienced facially larger numbers of appointments than ITA arbitrators. Although samples from other studies might demonstrate differently, we were unable to isolate large numbers of public international law and national court judges in the dataset.

On a positive note, ICCA respondents were representative of arbitration specialists from many continents, nationalities, languages and legal training. This reflects ICCA’s historical achievements in bridging the east/west divide. Yet, within that breadth, there were notable concentrations that tended to be dominant in terms of sheer size; and the data confirmed narratives regarding a lack of diversity in the field of international arbitration. Counsel and arbitrators were primarily from developed-world states, with a higher concentration of developed-world respondents in the subset of arbitrators. Likewise, counsel and arbitrators were predominantly male, with somewhat higher proportions of men in the subset of arbitrators. Meanwhile, we identified a statistically meaningful gender difference between men and women, such that male arbitrators were older and female arbitrators were younger. We explore whether the demographics of international arbitration generate diversity concerns in Sect. IV.4.

Ultimately, the demographic data offer important, yet preliminary, information about the practitioners and adjudicators of international dispute settlement. Rather than perpetuating an “invisible college”,¹⁰⁰ this information aids the demystification of international arbitration and offers rigorously gathered data about the international arbitration community.

English became the lingua franca of international investment law.”)

100. See SCHACHTER, *op. cit.*, fn. 8 at p. 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 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.* (2012) p. 77 at pp. 129-131 (discussing the “invisible college” involved in international dispute settlement that begins from legal education and grows through transnational legal dialogues amongst law firms and other networks); Harlan G. COHEN, “Lawyers and Precedent”, 46 *Vand. J. Transnat’l L.* (2013) p. 1025.

III. ICCA THEMES: LEGITIMACY AS PRECISION

One critical aspect of legitimacy relates to its procedural precision. Procedural integrity is crucial, as psychological research demonstrates people are more likely to defer to decisions and rules – and perceive the institutions as legitimate – when they view adjudicators as having provided procedural justice.¹⁰¹ Such procedural justice includes, for example, following one’s own internal rules, providing clear guidance about applicable standards, listening actively to parties, treating parties respectfully, offering procedural quality, and access to adverse information.¹⁰²

In an effort to understand how norms of procedural precision affect international arbitration, we asked a series of questions related to burden of proof, advance notice of costs allocation rules, document withholding, and advance preparation by tribunals. This Section addresses each of those issues and then synthesizes the results. While there were meaningful differences in how common and civil law lawyers regarded procedural integrity related issues of proof and costs, there are several areas of procedural precision that could be improved to enhance arbitral legitimacy.

1. *Burden of Proof*

Burden of proof is critical to any legal system. Proof affects case outcomes when the evidence on the record is equivocal or scant.¹⁰³ Burden of proof distributes risk between the parties, and the burden identifies what adjudicators must do in the absence of evidence. Arbitral rules generally give tribunals discretion about how to manage issues of evidence but without providing express standards on burden of proof;¹⁰⁴ yet the

101. Tom R. TYLER, *Why People Obey the Law* (Princeton University Press 2006); Tom R. TYLER, et al., “Legitimacy and Criminal Justice: International Perspectives” in Tom R. TYLER, ed., *Legitimacy and International Criminal Justice: International Perspectives* (Russell Sage 2007) pp. 9-10.

102. James L. GIBSON, “Institutional Legitimacy, Procedural Justice and Political Tolerance”, 23 *Law & Soc’y Rev.* (1989) p. 469; Jerald GREENBERG and Robert FOLGER, “Procedural Justice, Participation and the Fair Process Effect in Groups and Organizations” in P.B. PAULUS, ed., *Basic Group Processes* (Springer 1983) p. 235; Tom R. TYLER, “Social Justice: Outcome and Procedure”, 35 *Int’l J. of Psych.* (2000) p. 117; Alexandra D. LAHAV, “Portraits of Resistance: Lawyer Responses to Unjust Proceedings”, 57 *UCLA L. Rev.* (2010) p. 725 at pp. 777-779; Kristina MURPHY, et al., “Nurturing Regulatory Compliance: Is Procedural Justice Effective When People Question the Legitimacy of Law?”, 3 *Regulation & Governance* (2009) p. 1; Andrea K. SCHNEIDER, “Bargaining in the Shadow of (International Law): What the Normalization of Adjudication in International Governance Regimes Means for Dispute Resolution”, 4 *N.Y.U. J. Int’l L. & Pol’y* (2009) p. 789 at pp. 821-822.

103. Martin F. GUSY, et al., *A Guide to the ICDR International Arbitration Rules* (Oxford University Press 2011) p. 189; see also Christoph SCHREUER, et al., *The ICSID Convention. A Commentary*, 2nd ed. (Cambridge University Press 2009) pp. 669-670 (discussing issues related to burden of proof); Andreas REINER, “Burden and General Standard of Proof”, 10 *Arb. Int’l* (1994) p. 328 at p. 331.

104. Whereas UNCITRAL and ICDR have express provisions dealing with issues of evidence, whereas other institutions provide less particularized guidance. Compare U.N. Comm’n Int’l Trade [UNCITRAL] Arbitration Rules (revised 2010) 20 Aug. 2010, Art. 27(1), available at <<http://bit.ly/1l6ndra>> (last accessed 30 June 2014) (henceforth 2010 UNCITRAL Rules); Convention on the Settlement of Investment Disputes between States and Nationals of Other

general practice is to require each party to prove the facts upon which it relies to establish its case.¹⁰⁵ Commentators stress the importance of the parties having advance notice about who bears the burden of proof with respect to the issues in the case.¹⁰⁶ Policy justifications for this sensible rule include considerations of fairness, procedural justice, due process, efficiency and cost effectiveness.¹⁰⁷

Beyond those common denominators, there is no other universal theory or treatment of burden of proof. The legal concept of burden of proof differs between civil and common law jurisdictions in at least three ways. First, in the civil law tradition, burden of proof and proof allocation is a matter of substantive law; whereas in common law, the same concepts traditionally fall into the concept of procedural law.¹⁰⁸ Second, in civil law countries, the burden of proof has only one meaning and refers to the duty of each party to prove their claims. In contrast, common law systems divide burden of proof into different concepts, namely: (1) a “burden of going forward”, (2) the burden of evidence, and (3) the “burden of persuasion”.¹⁰⁹ Third, there is a difference in when proof is required. In civil law countries, the burden is “frontloaded”, and claimants detail the facts and offer proof in the initial statement of a claim; but in common law countries, both the facts and the law may not be particularly detailed in the initiating phase.¹¹⁰ Yet, international arbitration involves a mixture of actors from different legal traditions and backgrounds.¹¹¹ It is therefore constructive to understand how the international arbitration community understands burden of proof issues.

We therefore asked two critical questions related to tribunals’ activities related to proof, namely advance articulation of burden of proof issues and whether those burdens were outcome determinative. First, we asked, “In your experience as arbitrator or

States, opened for signature 18 Mar. 1965, 17 U.S.T. 1270, 575 U.N.T.S. 160 (henceforth ICSID Convention) Art. 43; with Int’l Ctr. For Dispute Resolution, International Dispute Resolution Procedures, Art. 19(1) (2010) available at <<http://bit.ly/1lsFU8S>> (last accessed 30 June 2014) (henceforth ICDR Rules); LCIA, LCIA Arbitration Rules (2010) Art. 22.1(f), at <<http://bit.ly/1r74cx3>> (last accessed 30 June 2014) (henceforth LCIA Rules); ICC, 2012 Arbitration Rules (2010), Art. 25, App. IV <<http://bit.ly/1staN3O>> (last accessed 30 June 2014) (henceforth ICC Rules).

105. Alan REDFERN, “Practical Distinction Between the Burden of Proof and the Taking of Evidence – an English Perspective”, 10 Int’l Arb. (1994) p. 317 at p. 321; George M. VON MEHREN and Claudia T. SALMON, “Submitting Evidence in an International Arbitration: The Common Lawyer’s Guide”, 20 J. Int’l Arb. (2003) p. 284 at p. 291.

106. Richard KREINDLER, “Practice and Procedure Regarding Proof: The Need for More Precision,” this volume, p. 156 et seq.

107. Michelle T. GRANDO, *Evidence, Proof, and Fact-Finding in WTO Dispute Settlement* (Oxford University Press 2009) p. 151; Edward EVELEIGH, et. al., “The Standards and Burden of Proof in International Arbitration”, 10 Int’l Arb. (1994) pp. 317 et seq.

108. Anne Vernonique SCHLAEPFER, “The Burden of Proof in International Arbitration”, this volume, p. 127; see also Restatement (First) of Conflict of Laws (1934) §§ 594-595; Restatement (Second) of Conflict of Laws (1971) Sects. 133-135.

109. GRANDO, *op. cit.*, fn. 107, p. 74 et seq.

110. KREINDLER, *op. cit.*, fn. 106, p. 159.

111. See Sect. II.2.c. Common and civil lawyers can differ in how they anticipate dividing responsibilities between the parties and the courts. This likely affects expectations related to burden of proof.

counsel, how often do tribunals articulate in advance what burden of proof they will require parties to meet?" Second, we asked, "In your experience as arbitrator or counsel, how often has the burden of proof been outcome determinative?"¹¹² For both questions, respondents then ranked their experience on a 1-5 ordinal scale of frequency, where: 1=never, 2=occasionally, 3=sometimes, 4=frequently, and 5=always.

For the first question, for those ICCA respondents who had served either as arbitrators and/or arbitration counsel, respondents tended to believe that tribunals rarely articulated the burden of proof and generally tended to not offer outcome determinative guidance. The median and mode response was that tribunals "occasionally" articulated the burden of proof in advance.¹¹³ Specifically, (1) 25.8% stated tribunals "never" articulated the burden ($n=114$); (2) 36.9% stated tribunals "occasionally" articulated the burden ($n=163$); (3) 27.4% stated tribunals "sometimes" articulated the burden ($n=121$); (4) 8.4% stated tribunals "frequently" articulated the burden in advance ($n=37$); and (5) 1.6% stated tribunals "always" articulated the burden ($n=7$).¹¹⁴ The dark gray bar in Figure 1 identifies the frequency of responses for those who have been counsel and/or arbitrators to the question of whether tribunals provide advance articulation of burden of proof.

For the second question related to whether proof was outcome determinative, for those serving as either arbitrators and/or counsel, the results were nearly a mirror image of the responses to the previous question. The most common response was that burden of proof was "frequently" outcome determinative.¹¹⁵ More particularly, (1) 7.9% stated burden of proof was "never" outcome determinative ($n=35$); (2) 20.9% stated burden of proof was "occasionally" outcome determinative ($n=93$); (3) 31.8% stated burden of proof was "sometimes" outcome determinative ($n=141$); (4) 34.9% stated burden of proof was "frequently" outcome determinative ($n=155$); and (5) 4.5% stated proof was "always" outcome determinative ($n=20$).¹¹⁶ The light gray bar in Figure 1 identifies the frequency of responses for those who have been counsel and/or arbitrators to the question of whether burden of proof is outcome determinative.

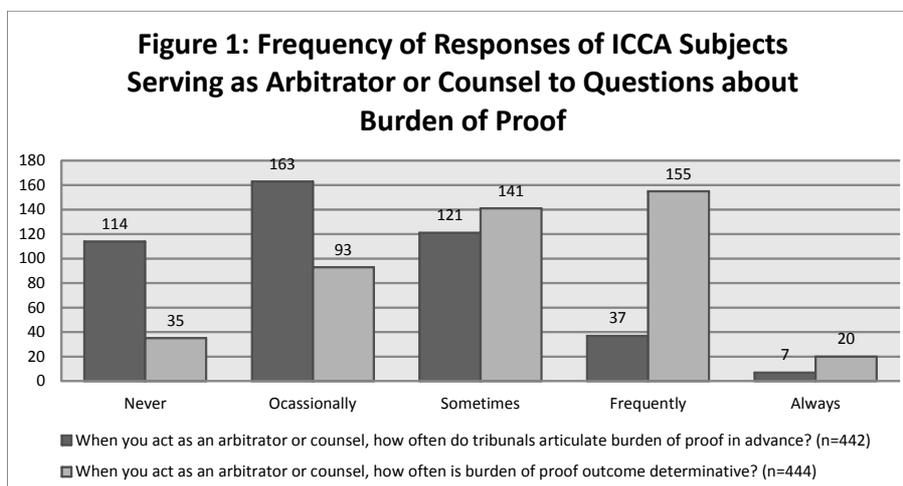
112. See Annex: Survey Materials, this volume, pp. 121-122.

113. The mean was 2.23 (SD=.979; $n=442$) indicating respondents "occasionally" experienced tribunals articulating the burden of proof in advance.

114. Eight respondents who were arbitrators or counsel did not answer the question. For the group of all ICCA respondents, 492 responded with similar results: (1) 24.4% stated tribunals "Never" articulated the burden ($n=120$); (2) 36% stated tribunals "occasionally" articulated the burden ($n=177$); (3) 27.2% stated tribunals "sometimes" articulated the burden ($n=134$); (4) 10.8% stated tribunals "frequently" articulated the burden in advance ($n=53$); and (5) 1.6% stated tribunals "always" articulated the burden ($n=8$).

115. The median was also 3 and the mean was 3.07 (SD=1.025; $n=444$), suggesting burden of proof was "sometimes" outcome determinative.

116. Six respondents who were arbitrators or counsel did not answer the question. The mirror image pattern, with respondents believing proof was outcome determinative but not articulated in advance, was also present in the group of all ICCA respondents. For the 493 respondents answering the question, (1) 7.3% stated burden of proof was "never" outcome determinative ($n=36$); (2) 20.3% stated burden of proof was "occasionally" outcome determinative ($n=100$); (3) 31.4% stated burden of proof was "sometimes" outcome determinative ($n=155$); (4) 36.1% stated burden of proof was "frequently" outcome determinative ($n=178$); and (5) 4.9% stated proof was "always" outcome determinative ($n=24$).



Overall, these two sets of results suggest an interesting contrast. Although respondents agreed proof issues were generally important, they also observed that tribunals did not generally articulate that burden in advance. Failure to articulate an outcome determinative burden in advance prevents parties from generating efficient and precise dispute resolution strategies and potentially generates a risk of party dissatisfaction. It also suggests that parties may wish to minimize this risk by requiring tribunals to provide advance articulation of proof issues. Meanwhile, the apparent disconnect between the importance of proof issues and lack of advance clarity generates a potentially constructive area for exploring how tribunals explain, address, and implement burdens of proof.

Despite efforts of the international law community to harmonize procedural traditions from common and civil law,¹¹⁷ one might hypothesize that primary legal training might nevertheless anchor one's instinctive understanding of international proof issues. Given the different legal traditions, it is possible that variation in legal training generates divergent views on burden of proof questions. Analyses confirmed that there were statistically significant differences in survey responses depending upon a respondent's primary legal training.

Table 3 provides basic demographics about the legal training of respondents; yet Figure 1 reflects the composite responses for all arbitrators and counsel, irrespective of whether they have common and civil law legal training. The question remained, however, whether the answers of arbitrators and counsel varied meaningfully as a function of their legal education. To test whether responses on evidence issues were

117. International Bar Association Rules on the Taking of Evidence in International Arbitration (2010), available at <www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx> (last accessed 30 June 2014) (henceforth IBA Rules).

meaningfully different, we used a one-way Analysis of Variance (ANOVA)¹¹⁸ to isolate the effect of legal background. Our independent variable was therefore a three-category variable grouping respondents according to whether they were trained in common law, civil law, or both; the dependent variables were how respondents answered the proof questions using a 1-5 ordinal scale.

For the question related to whether tribunals indicated the burden of proof in advance, overall, there was a statistically significant relationship with legal training ($F(2,438)=5.060$; $p<.01$; $r=.15$; $n=441$).¹¹⁹ Table 6 provides the mean responses for all respondents. The results suggest the overall effect was associated with different responses from common versus civil law lawyers; whereas those who were trained in both systems did not exhibit meaningful differences and tended to experience proof issues in international arbitration somewhere between the two poles exhibited by those with purely common law or civil law backgrounds.

Table 6: Mean Responses of ICCA Respondents Who Have Served as Arbitrators or Counsel to Question About Whether Tribunals Articulate Burdens of Proof in Advance

Legal Training	Mean Response	Standard Deviation	Total
<i>Common Law</i>	2.09	.911	202
<i>Civil Law</i>	2.44	.899	126
<i>Both Common and Civil Law</i>	2.23	1.134	113
<i>Total</i>	2.23	.979	441

118. In layman's terms, an independent samples *t*-test analyzes mean group differences in a continuous variable when there is one binary independent variable. That makes *t*-tests appropriate for a variable distinguishing between men and women. ANOVAs also analyze group differences in mean responses but explore differences in a variable with three or more categories. URDAN, *op. cit.*, fn. 53, pp. 53, 93-98, 105-113, 126-128. With statistics from a *t*-test (*t*-test statistic) or an ANOVA, using the sample size, degrees of freedom and degrees of freedom error, it is possible to calculate an *r*-statistic to identify the effect size of any group differences. See FRANCK, Development, *op. cit.*, fn. 11, pp. 457-458 (explaining effect sizes (*r*) and Cohen's conventions for understanding the relative size); Jacob COHEN, *Statistical Power Analyses for the Behavioral Sciences*, 2nd ed. (L. Erlbaum Associates 1988) at pp. 24-26, 115; see also URDAN, *op. cit.*, fn. 53, pp. 62, 68-71. The *r*-statistic reflects similar values to correlation coefficients calculated using Pearson's *r*.

119. Using a Kruskal-Wallis test to address the risk of a non-normal distribution across the three types of legal training likewise revealed a meaningful link between legal training and responses to advance articulation of proof ($X^2=11.494$; $p<.01$; $r=.16$; $n=441$).

Follow-up analyses revealed that the facial trend in Table 6 was statistically significant. In other words, although respondents tended to identify that tribunals only “occasionally” (ranked “2”) identified burden of proof in advance, lawyers with common law training were more likely to trend towards believing advance articulation occurred “occasionally” and bordered on “never”. In contrast, civil lawyers tended to respond that tribunals “occasionally” articulated and bordering on “sometimes”. Despite the statistically significant difference, the *r*-value bordered on the small-to-medium range, indicating that the meaningful difference was not large.

Although in theory there should be no difference since it is a factual question, perception did significantly vary, but not in a large scale. These results may reflect actual experience, namely that civil law lawyers had arbitral tribunals that actually articulated the burden in advance. The results may also reflect that civil law lawyers are used to addressing burden of proof independently and at the outset (without express specific guidance from the tribunal); as such, civil law lawyers may remember an “implicit” direction that may not have been either expressly stated by the tribunal or implicitly understood by all counsel involved. As such, civil law lawyers may be less focused on requiring direct guidance and precision from tribunals on proof matters.

Given earlier analyses, there was also a latent question as to whether the common/civil law divide also impacted how respondents viewed whether proof issues were outcome determinative. Since burden of proof is considered a matter of substantive law in civil law countries, the immediate importance to the outcome of the case may be more salient than in common law countries. An ANOVA explored the effect of legal background.

The results revealed, once again, that respondents with different legal training had different views as to whether proof questions were outcome determinative ($F(2,439)=10.281$; $p<.01$; $r=.21$; $n=442$).¹²⁰ Table 7 provides the mean responses for all respondents to the question. The results suggest the overall effect was primarily attributable to differences in responses from common versus civil law lawyers; whereas those who were trained in both systems did not exhibit meaningful differences, but rather had experience somewhere between the two poles exhibited by the common law and civil law backgrounds.¹²¹

120. A Kruskal-Wallis test also revealed a meaningful link between the three types of legal training and responses to whether proof was outcome determinative ($\chi^2=20.393$; $p<.01$; $r=.21$; $n=442$).

121. Using a sensitive follow-up test (LSD), there was also a statistically significant difference whereas those trained in *both* common and civil law were less likely to believe than those trained wholly in civil law that proof issues were outcome determinative. The more conservative follow-up test (HSD) was non-significant ($p=.08$).

Table 7: Mean Responses of ICCA Respondents Who Have Served as Arbitrators or Counsel to Question About Whether Burden of Proof Is Outcome Determinative Advance

Legal Training	Mean Response	Standard Deviation	Total
<i>Common Law</i>	2.86	1.082	201
<i>Civil Law</i>	3.38	.896	128
<i>Both Common and Civil Law</i>	3.10	.982	113
<i>Total</i>	3.07	1.027	442

These results suggest that civil law respondents believed more strongly that the burden of proof was outcome determinative in arbitration.

Further research is warranted to explore the issues related to proof. In spite of the divide of experience between common and civil lawyers about whether tribunals give parties advance guidance on burden of proof, all of those who had served as arbitrator or counsel generally found it lacking. Given that ICCA respondents who served as counsel and arbitrators also viewed proof issues as outcome determinative, it is reasonable to infer that there is a gap in precision of international arbitration. This, in turn, generates a problem with the legitimacy of how tribunals address burden of proof. The plea for more precision is therefore justified.

2. Costs

Costs of adjudication are a subject of intense debate across dispute resolution systems. Costs implicate sensitive normative concerns about who should bear the risk of exposure to adjudication expenses and under which conditions, what is the appropriate legal basis and rationale for those assessments, and how costs affect the provision of and access to transnational justice. Costs have been described as a “hot issue” or “the sting in the tail”.¹²² This is perhaps unsurprising as arbitration costs can swell into millions of dollars, and even the *New York Times* has commented on the size of costs in international arbitration.¹²³

122. Klaus REICHERT and James HOPE, “Costs – The Sting in the Tail”, 1 *Global Arb. Rev.* (2006) p. 30; Chiara GEORGETTI, “Costs and their Apportionment in International Investment Arbitration”, *Int’l Disp. Resol. Q.* (Fall 2009) p. 6; Sébastien MANCIAUX, “*Cirdi, Chronique des sentences arbitrales*”, 2012 *J. Droit Int’l* (2012) p. 265; Susan D. FRANCK, “Rationalizing Costs in Investment Treaty Arbitration”, 88 *Wash. U. L. Rev.* (2012) p. 769 (henceforth *Rationalizing Costs*); John Y. GOTANDA, “Awarding Costs and Attorneys’ Fees in International Commercial Arbitrations”, 21 *Mich. J. Int’l L.* (1999) p. 1.

123. Elizabeth OLSON, “Growth in Global Disputes Brings Big Paychecks for Lawyers”, *New York Times* (26 Aug. 2013) available at <http://dealbook.nytimes.com/2013/08/26/growth-in-global-disputes-brings-big-paychecks-for-law-firms/?_php=true&_type=blogs&mid=pl-share&_r=0> (last accessed 30 June 2014); see also FRANCK, *Myths and Relatiies*, *op. cit.*, fn. 29

Concerns implicate not merely fiscal exposure but also the ultimate liability for arbitration costs. National jurisdictions, however, have different normative baselines about whether (and how) costs should be shifted. Roughly speaking these approaches are: (1) complete cost shifting (“loser-pays”),¹²⁴ (2) no cost shifting (“pay-your-own-way”),¹²⁵ and (3) partial cost shifting derived from parties’ relative success or other factors (“factor dependent”).¹²⁶ Given international arbitration’s transnational legal practice, one might reasonably conclude that – where millions of dollars of fiscal risk are involved – it might prove useful to manage potentially divergent party expectations on costs.

In an effort to manage these risks, several institutions have rules providing a degree of guidance about arbitration costs. UNCITRAL historically (and in its recent revisions)¹²⁷ provided costs guidance for international arbitration.¹²⁸ Even where rules provide initial baselines, they grant tribunals broad discretion to vary the rules’ application. The question, therefore, is whether tribunals provide advance notice of whether they will adhere to (or vary) existing baselines and how tribunals will exercise that discretion.

Having a full appreciation of the potential economic risk aids parties and counsel in making strategically accurate risk assessments and decisions about the net value of international arbitration and specific procedural tactics. Existing empirical research in ITA indicates that tribunals rarely offer early guidance about cost assessments (for example at a jurisdictional phase or earlier);¹²⁹ and we are unaware of empirical evidence

(identifying that, on average, each party pays approximately US\$5 million in legal fees); Susan D. FRANCK, “Using Investor-State Mediation Rules to Promote Conflict Management: An Introductory Guide”, 29 ICSID Rev. (2014) p. 66 (same). Smaller ICA claims may, however, involve smaller arbitration costs; whereas large, complex ICA claims may be equivalent to or perhaps larger than ITA-related arbitration costs.

124. This is sometimes referred to as the “English” rule or the “costs-follow-the-event” rule. GOTANDA, *op. cit.*, fn. 122; David P. REISENBERG, “Fee Shifting in Investor-State Arbitration: Doctrine and Policy Justifying Application of the English Rule”, 60 Duke L.J. (2011) p. 977 at pp. 979, 989-990.

125. REISENBERG, *op. cit.*, fn. 124, pp. 989-990.

126. Some might combine categories one and three on the belief that these both reflect a “costs-follow-the-event” approach. See *International Thunderbird Gaming Corp. v. Mexico*, UNCITRAL, award (26 Jan. 2006) at 213, available at <www.italaw.com/sites/default/files/case-documents/ita0431.pdf> (last accessed 30 June 2014); Baiju S. VASANI and Anastasiy UGALE, “Cost Allocation in Investment Arbitration: Back Toward Diversification”, Columbia FDI Perspectives, No. 100 (29 July 2013) at <http://ccsi.columbia.edu/files/2014/01/FDI_100.pdf> (last accessed 30 June 2014). Doctrinally, the degree and basis of cost shifting is nuanced and deserves a thorough analysis.

127. 2010 UNCITRAL Arbitration Rules, *op. cit.*, fn. 104, Art. 42(2).

128. See generally, UNCITRAL Arbitration Rules, G.A. Res. 31/98, arts. 38-41, U.N. GAOR, 31st Sess., Supp. No. 17, U.N. Doc. A/31/17 (15 Dec. 1976), at <<http://bit.ly/Paq3vX>> (last accessed 30 June 2014); 2010 UNCITRAL Rules, *op. cit.*, fn. 104, Arts. 40-43; LCIA Rules, *op. cit.*, fn. 104, Art. 28; ICC Rules, *op. cit.*, fn. 104, International Chamber of Commerce, International Court of Arbitration Rules, Arts. 36-37; Stockholm Chamber of Commerce, Arbitration Rules (2007), Arts. 43-45, at <<http://bit.ly/1cVU7t5>> (last accessed 30 June 2014).

129. FRANCK, *Rationalizing Costs*, *op. cit.*, fn. 122; see also FRANCK, *Myths and Realities*, *op. cit.*, fn. 29.

identifying whether ICA exhibits similar challenges. We therefore explored respondents' experiences with tribunals' willingness to provide early articulation about how they anticipated exercising their cost-related discretion. Specifically, we asked, "In your experience as arbitrator or counsel, how often do tribunals indicate in advance how they will exercise their discretion to shift arbitration costs?"¹³⁰

For those respondents who had served either as arbitrators and/or arbitration counsel, the responses tended to suggest that tribunals rarely articulated how they would articulate their cost shifting discretion. Respondents answered using a 1-5 ordinal scale. There was a tie for the most common response, where respondents said that tribunals either "never" or "occasionally" gave advance notice of how they would exercise their discretion to shift costs.¹³¹ Table 8 provides the respondent answers.¹³²

Table 8: Percentages and Frequency of Responses of ICCA Respondents Who Have Served as Arbitrators or Counsel to Question About Whether Tribunals Articulate in Advance How They Will Exercise Discretion on Costs

Answer	Response Percentage	Response Frequency
<i>Never</i>	33.2	147
<i>Occasionally</i>	33.2	147
<i>Sometimes</i>	23.0	102
<i>Frequently</i>	9.9	44
<i>Always</i>	0.7	3
<i>Total</i>	100.0	443

Much like the patterns related to the advance articulation of the burden of proof, the dominant trend was for respondents to experience tribunals either "never" or only "occasionally" identifying in advance how they would address cost shifting. Moreover, it was a rarity (slightly under 11%) for counsel and arbitrators to have tribunals "frequently" or "always" articulate an advance burden. These results supported Justice Menon's comments at the ICCA Singapore Congress in 2012 expressing concerns about the lack of a "coherent doctrine or approach to determining costs".¹³³ It would therefore

130. See Annex: Survey Materials, this volume, pp. 121-122.

131. The median was also "occasionally" (2), and the mean was 2.12 (SD=1.004; n=443).

132. Seven who were arbitrators or counsel did not answer the question. For the group of all ICCA respondents, 489 responded with somewhat similar results: (1) 31.5% stated tribunals "never" gave advance warning of how costs discretion would be exercised (n=154); (2) 33.1% stated "occasionally" (n=162); (3) 23.5% stated "sometimes" (n=115); (4) 10.8% stated "frequently" (n=53); and (5) 1% stated tribunals "always" gave advance notice of the exercise of costs discretion (n=5).

133. Sundaresh MENON, "International Arbitration: The Coming of a New Age for Asia (and Elsewhere)", Remarks Delivered at the ICCA Singapore 2012 Congress, para. 49 available at <www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_

seem prudent for the international arbitration community to redress this so that parties (and counsel) have more advance warning about large fiscal components affecting decisionmaking.

Given the different jurisdictional traditions in cost shifting, it is an open question as to whether the experiences of arbitrators and counsel varied meaningfully as a function of their legal training. Given that most civil law jurisdictions follow the “loser-pays” model but prominent common law jurisdictions like the United States follow the “pay-your-own-way” model, this makes variation in experiences useful to identify. To test whether responses were meaningfully different, we used an ANOVA to isolate the effect of legal background. Our primary independent variable grouped respondents according to their common, civil, or mixed legal training; and the dependent variable was how respondents answered on the 1-5 scale.

Overall, there was a statistically significant relationship between legal training and respondents’ experience with tribunal advance articulation of discretion for cost shifting ($F(2,438)=5.988; p<.01; r=.16; n=441$).¹³⁴ A *t*-test also revealed that whether or not the respondent was from the United States was linked with experience of advance articulation of cost shifting standards ($t(420)=2.016; p=.04; r=.10; n=422$). Although the effect was smaller than the overall results, US respondents less frequently experienced advance articulation of cost-shifting rules than non-US respondents. Table 9 provides the mean responses for all respondents to the question as a function of primary legal training.

Table 9: Mean Responses of ICCA Respondents Who Have Served as Arbitrators or Counsel to Question About Whether Tribunals Articulate in Advance How They Will Exercise Discretion on Costs

Legal Training	Mean Response	Standard Deviation	Total
<i>Common Law</i>	1.99	1.012	203
<i>Civil Law</i>	2.37	.971	128
<i>Both Common and Civil Law</i>	2.06	.984	111
<i>Total</i>	2.12	1.005	442

Follow-up analyses revealed that the facial trend in Table 9 was statistically significant. Although the respondents tended to experience tribunals only “occasionally” (ranked “2”) addressing costs discretion in advance, lawyers with common law training were more likely to trend towards believing advance articulation occurred “occasionally” and bordered on “never” as compared to civil law lawyers. Similarly, even lawyers with *both* common and civil law training were more likely to have experienced relatively fewer

congress_2012.pdf> (last accessed 1 July 2014).

134. Non-parametric tests were unnecessary as the skewing of responses for experience of tribunals’ advance articulation of cost was within acceptable levels (0.416; SE=0.110).

advance articulations as compared to lawyers with only civil law training. Despite the significant difference, the *r*-value bordered on the small-to-medium range, indicating that while there was a meaningful difference, the difference was not necessarily large.¹³⁵

In any event, the analyses suggest that it is reasonable to conclude that there is a gap in precision of international arbitration for cost matters. This, in turn, generates a problem with the legitimacy of when and how tribunals address cost issues. The international arbitration community may therefore wish to explore ways to encourage greater precision for cost-related matters. Perhaps the most straightforward way is, for parties concerned about advance notice for cost-shifting, to draft those obligations directly into the arbitration agreement.

3. *Withholding of Documents*

Document disclosure in international arbitration poses a dilemma. On one hand “document production can be extremely useful to the parties and arbitrators” for the purposes of fact-finding, but on the other hand “document production is inherently subject to tactical abuse”.¹³⁶ Even in the complete absence of tactical abuse, document production can be especially contentious between lawyers from different legal traditions where document production is either a frequent or a rare occurrence. Document disclosure is intended “to avoid unfair surprise at ... [a] hearing and to discover the facts and get to the truth in order to create the record necessary for a just result”.¹³⁷ Yet disclosure generates tension with other international arbitration values, including parties’ desire for neutral procedural rules and the economical and expeditious resolution of disputes.

Regardless of the legal, practical and theoretical tensions, document production in international arbitration practice has become increasingly common. Gary Born explains, “[t]here is an emerging consensus among experienced arbitrators and practitioners that a measure of document disclosure is desirable in most international disputes”.¹³⁸ Indeed, “[m]ost institutional rules provide arbitrators, in languages of varying degrees of clarity, with express authority to order discovery or disclosure by the parties [and] arbitral tribunals [have] consistently concluded that they have the authority to order disclosure from the parties to an arbitration”.¹³⁹ Empirical data buttress this perception. The 2012 White & Case/Queen Mary University study identified that 62% of respondents stated that more than half of their arbitrations involved requests for document disclosure (although this answer was more typical of lawyers from a common law tradition).¹⁴⁰ Moreover, 59% responded, “that documents obtained through document production

135. For the ANOVA involving US and non-US respondents, the *r*-value was barely in the statistically small range.

136. James H. CARTER, “Five Fundamental Things about Document Production, and a Question” in *International Arbitration 2006: Back to Basics?*, ICCA Congress Series no. 13 (2008) (henceforth *ICCA Congress Series no. 13*) p. 592.

137. Robert H. SMIT and Tyler ROBINSON, “E-Disclosure in International Arbitration”, 24 *Arb. Int’l* (2008) p. 105 at p. 126.

138. Gary B. BORN, *International Commercial Arbitration*, 2nd ed. (Wolters Kluwer 2014) at p. 2345.

139. *Ibid.*, p. 2336.

140. White & Case/Queen Mary Survey, *op. cit.*, fn. 11, p. 20.

materially affected the outcome of at least one-quarter of their arbitrations”.¹⁴¹ Document production is therefore a frequent and material part of international arbitral practice.

With the growth of document production in international arbitration has come the development of substantive legal standards to govern its use. Perhaps the most familiar to users are the International Bar Association’s Rules on the Taking of Evidence in International Arbitration (2010) (IBA Rules),¹⁴² which limits parties’ request for production to a specific document or a narrow and specific category of documents that are both relevant and material to the outcome of a dispute.¹⁴³

Yet even with governing standards, the fear of tactical misconduct related to document production looms large. Practitioners raise the specter of “guerrilla tactics” and the abuse of document production. “Guerilla tactics” involve “a range of behaviors and may include: late submission of evidence; expansive requests for document disclosure; [and] failure to produce documents, or to do so reasonably timely”.¹⁴⁴ The IBA Rules have explicit sanctions for such misbehavior by a party¹⁴⁵ and the recently issued IBA Guidelines on Party Representation on International Arbitration (2013) (IBA Guidelines) now provide guidance to counsel on these matters as well.¹⁴⁶ Yet the concern over these tactics may not be unanimous. One prominent commentator stated that the IBA Guidelines only address “what in reality appears only as a marginal problem”.¹⁴⁷ Whether the concern for procedural abuse is a myth or reality makes the issue ripe for empirical assessment.

To explore one type of procedural abuse, we asked a question related to document production. Specifically we asked, “[i]n your experience as arbitrator or counsel, how often have you believed one or both parties have withheld responsive documents?”¹⁴⁸ Respondents ranked their experiences on a 1-5 ordinal scale. Table 10 provides the distribution in responses.¹⁴⁹

141. *Ibid.*

142. IBA Rules, *op. cit.*, fn. 117. The White & Case/Queen Mary survey noted that 53% of arbitrations used the IBA Rules as guidelines and 85% of survey participants responded that they found the IBA Rules useful. White & Case/Queen Mary Survey, *op. cit.*, fn. 11, p. 2.

143. IBA Rules, *op. cit.*, fn. 117, Art. 3(3); see also ICC Commission Report: Managing E-Document Production, para. 1.5 (2012) at <www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Arbitration-Commission-Report-on-Managing-E-Document-Production/> (last accessed 30 June 2014) (noting there “is no automatic right to the production of documentary evidence in the possession or control of another party” in international arbitration).

144. R. Doak BISHOP and Magrete STEVENS, “Safeguarding the Fair Conduct of Proceedings – Report” in *International Arbitration: The Coming of a New Age*, ICCA Congress Series no. 17 (2013) p. 486.

145. IBA Rules, *op. cit.*, fn. 117, Arts. 9(5), (6), (7).

146. International Bar Association Guidelines on Party Representation in International Arbitration (2013), Guidelines 12-17, at <www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Default.aspx> (last accessed 30 June 2014).

147. Michael E. SCHNEIDER, “President’s Message: Yet Another Opportunity to Waste Time and Money on Procedural Skirmishes: The IBA Guidelines on Party Representation”, 31 *ASA Bulletin* (2013) p. 496.

148. See Annex: Survey Materials, this volume, pp. 121-122.

149. Six respondents failed to answer this question.

Table 10: Percentages and Frequency of Responses of ICCA Respondents Who Have Served as Arbitrators or Counsel to Question About Whether Parties Have Withheld Responsive Documents

Answer	Response Percentage	Response Frequency
<i>Never</i>	1.6	7
<i>Occasionally</i>	24.5	109
<i>Sometimes</i>	40.5	180
<i>Frequently</i>	30.6	136
<i>Always</i>	2.7	12
<i>Total</i>	100.0	444

Table 10 demonstrates the most common response to questions about document withholding was “sometimes”.¹⁵⁰ Yet it also shows that 73% of respondents who had served as counsel and/or arbitrators believed withholding of responsive documents occurs either “sometimes” or more often, with 33.5% of respondents stating that the practice occurs “frequently” or “always”. Given that document production may be an infrequent practice in many jurisdictions, we also queried whether a difference in legal training might result in different results to this question. Unlike responses related to burden of proof and cost issues, the 442 respondents analyzed did not permit us to identify a meaningful difference in responses to the question of document withholding as a function of respondents’ legal training in common law, civil law or a combination thereof.¹⁵¹

Nearly seventy percent of sampled subjects believed that document withholding was occurring at least “sometimes” or “frequently” in international arbitration. The data reflect a meaningful concern about procedural impropriety in document disclosure by parties and counsel. This concern occurs despite the sanctions that arbitral tribunals can use to curb procedural misconduct. For example, the IBA Rules provide for costs sanctions for the failure to produce relevant documents,¹⁵² a sanction enjoying broad support in the arbitration community.¹⁵³ The IBA Rules further provide that the failure to produce documentary evidence can lead an arbitral tribunal to draw adverse

150. The median was also “sometimes” (3), and the mean was 3.08 (SD=.847; n=444).

151. An ANOVA failed to reveal a meaningful difference ($F(2,439)=0.333$; $p=.72$; $r=.04$; $n=442$), and all follow-up comparisons were non-significant. Using a Kruskal-Wallis test to address the risk of a non-normal distribution across the three types of legal training also failed to reveal a statistically meaningful link between legal training and responses to withholding of documents ($\chi^2=0.566$; $p=.75$; $r=.04$; $n=442$). Although we cannot rule out the possibility of a meaningful relationship as the sample was underpowered and exhibited an unacceptable probability of a Type II error, we note that any latent effect size was less than statistically small ($r<.10$) and *a priori* power analysis indicates need at least 1172 subjects in future to reliably rule out effect. Future research is therefore necessary before reaching a definitive conclusion about the lack of a meaningful relationship.

152. IBA Rules, *op. cit.*, fn. 117, Art. 9(7).

153. White & Case/Queen Mary Survey, *op. cit.*, fn. 11, pp. 5, 41.

inferences against a party who fails to produce a given document; however, the use of adverse inferences may be limited in practice.¹⁵⁴ The White & Case/Queen Mary study noted that tribunals have explicitly drawn adverse inferences only in a limited number of cases,¹⁵⁵ which suggests tribunal reluctance to take stringent measures against parties or perhaps the difficulty of crafting properly drawn adverse inferences (the latter also being an issue of precision). If tribunals are reluctant to take stiff measures against parties for withholding documents, it would seem unlikely for tribunals to admonish counsel, who often control arbitrator appointments, for the same behavior under the IBA Guidelines. Yet the data reflect, in our view, that the use of some form of sanction to ensure compliance with document production orders is necessary to guard the procedural integrity of an international arbitration.¹⁵⁶

Perhaps the best remedy for document disclosure abuse is prevention. Parties should carefully structure document disclosure processes from the outset of arbitration – or require the tribunal to keep and fix firm guidelines – to reduce the risk of misconduct.¹⁵⁷ Such procedures signal a desire for active management and policing of document production procedures and also redress potential procedural deficiencies in arbitration. In turn, stronger case management and procedural control could reduce the perception of misconduct highlighted by our data and thereby minimize concerns related to the legitimacy of international arbitration.

4. *Arbitrator Preparation for Hearings*

At ICCA's Montreal Congress in 2006, Laurent Lévy and Lucy Reed described “[e]videntiary hearings [as] a most onerous part of arbitration, measured by time and expense”.¹⁵⁸ Although writing from the perspective of arbitrators, their statement also holds true for parties. As a practical matter, sophisticated firms representing complex commercial and investment treaty cases engage in extensive mock hearings to prepare for real hearings. Given the substantial fiscal and temporal investment of their own preparation, parties rightfully expect their arbitrators to be fully prepared for hearings as well. Since arbitration also requires parties to pay non-trivial fees to arbitrators for

154. IBA Rules, *op. cit.*, fn. 117, Art. 9(5).

155. White & Case/Queen Mary Survey, *op. cit.*, fn. 11, p. 21; see also BORN, *op. cit.*, fn. 138, p. 2367 (noting “the only sanction for destruction of relevant evidence being the drawing of (often weak) adverse inferences”).

156. While others might respectfully disagree with this view, the community as a whole may benefit from a considered debate on this topic. We nevertheless observe that the literature from Gary Born and Queen Mary demonstrate: (1) the arbitration community broadly supports costs as a sanction for document production abuse; (2) adverse inferences are often weak in practice; and (3) tribunals rarely use adverse inferences.

So how does one reduce document production abuse? We give two ways, stricter sanction and more active document production management.

157. BISHOP and STEVENS, *op. cit.*, fn. 144, p. 486; ICC Commission Report: Managing E-Document Production, *op. cit.*, fn. 143, para. 51.

158. Laurent LÉVY and Lucy REED, “Managing Fact Evidence in International Arbitration” in *ICCA Congress Series no. 13* at p. 635; see also ICC Commission Report, “Controlling Time and Costs in Arbitration”, para. 69 (2012) at <<http://bit.ly/V3nUNe>> (last accessed 30 June 2014) (“Hearings are expensive and time-consuming”).

their arbitration services, arbitrators have legal duties (whether based in tort or contract) to provide parties devoted and expert attention.¹⁵⁹

The benefits of a fully prepared arbitral panel at an evidentiary hearing are myriad. A fully prepared arbitral tribunal can manage hearings more efficiently, recognize important issues in a case more clearly and perhaps render their awards more efficiently.¹⁶⁰ A number of ideas have been advanced to improve an arbitrator's preparation prior to a hearing from checklists¹⁶¹ to pre-hearing retreats.¹⁶² Given preparation's intrinsic link to the theme of arbitral "precision," we explored how ICCA respondents viewed the preparation of their fellow arbitrators or the arbitrators before whom they appeared. Specifically, we asked, "In your experience as arbitrator or counsel, how often are all members of the tribunal fully prepared for a hearing?" Respondents could answer on an ordinal scale of 1-5 with 1 representing "never" and 5 representing "always".¹⁶³ The results focusing on the responses of those indicating they had served as either an arbitrator or as counsel are presented in Table 11.

159. John E. BEERBOWER, "International Arbitration: Can We Realise the Potential?", 27 *Arb. Int'l* (2011) p. 75 (describing the additional overhead costs of international arbitration); Susan D. FRANCK, "The Liability of International Arbitrators: A Comparative Analysis and Proposal for Qualified Immunity", 20 *N.Y.L.S. J. Int'l & Comp. L.* (2000) p. 1 at pp. 3-11 (describing the bases of arbitrator duties under contract and tort theory).

160. For example, David Rivkin has proposed a model of international arbitrators as "town elders" who manage and resolve disputes for parties accurately, fairly and expeditiously. In order to fulfill that role effectively, he states that "arbitrators must be more proactive and willing to assume control. *They must learn as much as they can about the case at an early stage.*" David W. RIVKIN, "Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited", 24 *Arb. Int'l* (2008) p. 375 at p. 384 (emphasis added).

161. Michael J. MOSER, "The 'Pre-Hearing Checklist' – A Technique for Enhancing Efficiency in International Arbitral Proceedings", 30 *J. of Int'l Arb.* (2013) p. 155. A variety of other professional contexts (physicians, pilots, etc.) also recognize the value in generating simple checklists to reduce the probability of error and increase the likelihood of positive outcomes. Atul GAWANDE, *The Checklist Manifesto: How to Get Things Right* (Metropolitan Books 2009).

162. Lucy REED, "Arbitral Decision-Making: Art, Science or Sport?", 30 *J. of Int'l Arb.* (2013) p. 85 at pp. 94-95.

163. See Annex: Survey Materials, this volume, pp. 121-122.

Table 11: Percentages and Frequency of Responses of ICCA Respondents Who Had Experience as Arbitrator or Counsel to Question Regarding Full Preparation of Arbitrators for a Hearing

Answer	Response Percentage	Response Frequency
<i>Never</i>	1.1	5
<i>Occasionally</i>	14.8	66
<i>Sometimes</i>	31.9	142
<i>Frequently</i>	47.0	209
<i>Always</i>	5.2	23
<i>Total</i>	100.0	445

Table 11 reflects that both the median and the mode response was, for those with experience as counsel or arbitrators, to believe that all members of the tribunal were “frequently” fully prepared.¹⁶⁴ Specifically, a majority of ICCA respondents who were arbitrators or counsel (52.2%) stated that, in their experience, all members of arbitral tribunals were either “frequently” or “always” fully prepared for hearings. The mean answer was also 3.4 (SD=.84; $n=445$) reflecting that a more ordinal measure indicated full tribunal preparation was typical (bordering between “sometimes” and “frequently”); the data reflected that it was an outlier case for all members of the tribunal to be unprepared. Respondents were, therefore, generally positive in their views about levels of arbitrator preparation.¹⁶⁵

Yet, given the expense and expectation of parties, one surmises that all members of arbitral tribunals ought to be fully prepared for their hearings on a frequent basis and that such a response, in an ideal world, would serve as a baseline and not as an achievement. Although not a majority view, the fact that 47.8% of qualifying respondents found that members of arbitral tribunals were only “sometimes” or less frequently fully prepared

164. For the subset of those who only acted as counsel and who never served as an arbitrator, the pattern of results was roughly equivalent. Namely 1.6% responded “never” ($n=3$), 20.8% responded “occasionally” ($n=38$), 30.1% responded “sometimes” ($n=55$), 42.6% responded “frequently” ($n=78$), and 4.9% ($n=183$) responded that members of the tribunal were “always” fully prepared.

165. Unlike responses related to burden of proof and cost issues, we were unable to identify a reliable difference in responses related to full tribunal preparation based upon respondents’ legal training in common law, civil law or a combination thereof. An ANOVA failed to reveal a meaningful difference ($F(2,440)=0.349$; $p=.71$; $r=.04$; $n=443$), and all follow-up comparisons were non-significant. Using a Kruskal-Wallis test to address the risk of a non-normal distribution across the three types of legal training also failed to reveal a statistically meaningful link between legal training and responses to withholding of documents ($\chi^2=0.686$; $p=.71$; $r=.04$; $n=443$). Although we cannot rule out the possibility of a meaningful link as the sample was underpowered and exhibited an unacceptable probability of a Type II error, any latent effect size was less than statistically small ($r<.10$) and *a priori* power analysis indicates a need for at least 1172 subjects in the future to reliably rule out effect. Future research is therefore necessary before reaching a definitive conclusion about the lack of a reliable effect.

for hearings signifies a potential source of discontent about arbitrator preparation despite respondents' generally positive responses.

Given its direct nature on a sensitive subject, it is possible that the question itself generated a self-serving bias where respondents answered more positively than their actual contemporaneous experiences might reflect.¹⁶⁶ Nevertheless, to the extent that the large constituents of arbitration counsel wanted to use the question to voice their displeasure with the lack of preparation by arbitrators in a confidential manner, this may negate response bias. In any event, the results offer an intriguing baseline for future research into the satisfaction of service providers and users within the international arbitration community.

5. *Key Findings*

The data reflected that, should the international arbitration community wish to continue to improve its legitimacy, there are several opportunities to enhance procedures and precision. Two areas – burden of proof and costs – could benefit from the international arbitration community or tribunals themselves providing clearer guidance.

On issues of proof, it was noteworthy that, although arbitrators and counsel reflected that tribunals were most likely to *not* provide advance notice of the burden of proof, arbitrators and counsel were more likely to view proof as outcome determinative. The disjunction between those two questions suggests that a degree of enhanced precision – perhaps by placing proof issues on a checklist tribunals use to give parties' early notice of procedures – would minimize the gap and also provide greater clarity. Focus on this issue may also either encourage tribunals to take initiative in encouraging earlier discussions about proof matters or that counsel may advocate addressing proof-related matters at an early phase.

On issues of cost, there was also a lack of advance notice on how tribunals would exercise their discretion on costs, with 66% of counsel and arbitrators saying that tribunals either “never” or only “occasionally” provided advance notice on costs; and the rarity (barely 10%) was for tribunals to “frequently” or “always” provide advance notice on costs. This may reflect a lack of precision or an underlying difficulty for tribunals in providing that advance notice themselves.¹⁶⁷

A nuanced approach may be required when developing appropriate normative solutions on these two issues. Subtlety in addressing certain procedural matters is prudent, as responses were meaningfully different on matters related to burden of proof and cost questions; and responses varied depending upon whether a respondent was trained exclusively in common law or exclusively in civil law. For questions of procedure, common law lawyers were less likely to experience tribunal's advance articulation of burden of proof than their civil law colleagues; but common law lawyers were also less likely to say burden of proof was outcome determinative. Generating awareness of latent variations related to proof could also generate efficiencies. Given the reliable differences, arbitrators could strategically target burden of proof to understand

166. Fn. 220 also discusses self-serving biases and cognitive blind spots.

167. An early articulation of standards that tribunals will use in the exercise of discretion offers useful precision and prevents unfair surprise about ultimate liability for costs.

why and when guidance is necessary, and counsel may also better appreciate the expectations of the other side. On questions of costs, common law lawyers generally (and also US lawyers in some instances) were less likely to experience tribunals providing an advance articulation of how costs discretion would be exercised. While those group differences were relatively small, it does suggest that procedural reforms may require a degree of negotiation. In any event, should institutions not take an initiative to encourage tribunals to use a checklist or otherwise provide parties with guidance on key procedural issues, parties may wish to explore altering their arbitration agreements to require tribunals to provide parties with advance notice of applicable standards.

One other area raises procedural concerns. On issues of document production, approximately 70% of respondents identified that parties “sometimes” or “frequently” withhold documents. It is troubling for parties not to provide those documents for which there is a legal obligation to do so, as it both generates a risk of imprecision and inhibits accurate delivery of justice. Tribunals may therefore wish to become more proactive in their response to document production challenges so as to ensure, at the macro level, that arbitration is not viewed as a dispute resolution process where parties can skirt justice or hide relevant materials.

An area for cautious optimism, however, was the full preparation of tribunals. Nearly 79% of counsel and arbitrators indicated that tribunals were either “sometimes” or “frequently” fully prepared for hearings. It was rare for respondents to identify that tribunals were either “never” prepared or “occasionally” prepared. While Sect. 3.4 identified the possibility of skewed responses to this question, the results offer an intriguing baseline for future research into the internal satisfaction of service providers in international arbitration.

Nevertheless, the data reflect that there are at least three different subject areas within international arbitration – proof, costs, and document production – which could benefit from enhanced precision. By focusing on ways to generate that precision, those efforts stand to enhance the legitimacy of international arbitration as well as enhance its attractiveness to future users.

IV. ICCA THEMES: LEGITIMACY AS JUSTICE

Legitimacy also relates to themes of substantive justice.

In an effort to understand how justice-related themes affect the legitimacy of international arbitration, we asked questions about the prestige of arbitration, the re-appointment of arbitrators and interaction with co-arbitrators, fraud, and diversity. This Section addresses each of those issues in turn. Overall, the data suggest that ICCA respondents identified areas of international arbitration where the arbitration community may wish to strategically address justice-related concerns to enhance legitimacy.

1. *Prestige of International Arbitration*

Acting as an international arbitrator can be both prestigious and financially lucrative. Yet there has been little study of how pecuniary and non-pecuniary factors influence

individuals to seek and obtain arbitral appointments.¹⁶⁸ While the literature on what motivates adjudicators is comparatively robust,¹⁶⁹ the literature is divided over whether individuals pursuing arbitration appointments are motivated by material gains, their personal prestige, or the pursuit of good policy and justice.¹⁷⁰

There is undoubtedly a fiscal incentive to serve as an arbitrator and receive remuneration. In the context of ITA, historical data indicated tribunal and institutional costs were in order of US\$600,000;¹⁷¹ and tribunal costs in ICA cases can also be substantial.¹⁷² As many respondents indicated that they served both as arbitrators and counsel,¹⁷³ their livelihoods were not exclusively dependent upon arbitration appointments.¹⁷⁴ Acting as counsel in an international arbitration may actually be more financially lucrative than acting as arbitrator. Non-pecuniary factors are therefore critical incentives.

One of the non-pecuniary factors that may lead arbitrators to seek appointments is prestige.¹⁷⁵ In the early 1990s, Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit speculated that US federal judges, who are granted life tenure and whose salary cannot be diminished while in office, are motivated, in part, due

168. Some of the closest scholarship comes from Sergio Puig analyzing network effects of international arbitrators. PUIG, *op. cit.*, fn. 10. We also observe that re-appointment and positive interaction with one's colleagues are methods to generate prestige, gain goodwill, enhance one's reputation, and ultimately produce income. These issues will be addressed in the next Sub-section.

169. See, e.g., David E. KLEIN and Gregory MITCHELL, *The Psychology of Judicial Decision Making* (Oxford University Press 2010) pp. 4-14; Richard A. POSNER, *How Judges Think* (Harvard University Press 2008) (henceforth *How Judges Think*) p. 31 et seq.

170. See, e.g., Joshua KARTON, *The Culture of International Arbitration and the Evolution of Contract Law* (Oxford University Press 2013); Stavros BREKOULAKIS, "Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making", 4 J. Int'l Dispute Settlement (2013) p. 553. Compare Thomas J. STIPANOWICH, "Arbitration and the Multiparty Dispute: The Search for Workable Solutions", 72 Iowa L. Rev. (1987) p. 473 at p. 513 n. 220 ("While one would hope that arbitrators are primarily motivated by the desire to perform a service for the industry or the community and not by the need to generate an alternative source of income, there may be legitimate concerns regarding the ability of one or more arbitrators to address ... issue[s] free of self-interest.") with Alan REDFERN, "Opinions in International Commercial Arbitration: The Good, the Bad and the Ugly", 20 Arb. Int'l (2004) p. 223 at p. 224 ("Arbitrators in international arbitrations are expected to behave like judges, in the sense that they are expected to be impartial and independent of the parties").

171. FRANCK, *Rationalizing Costs*, *op. cit.*, fn. 122; see also FRANCK, *op. cit.*, fn. 123 (identifying average tribunal-related costs and expenses).

172. Louis FLANNERY and Benjamin GAREL, "Arbitration costs compared: the sequel", *Global Arb. Rev.* (15 Jan. 2013) at <<http://globalarbitrationreview.com/news/article/31092/arbitration-costs-compared-sequel>> (last accessed 1 July 2014) (exploring arbitration costs at a variety of international arbitration institutions).

173. Out of all 548 ICCA respondents, 225 respondents had experience as both counsel and international arbitrator.

174. Counsel practicing in large multinational law firms may experience disincentives in seeking appointments. Depending upon the applicable law, conflict of interest rules within a firm may prevent counsel from accepting arbitral appointments.

175. SCHULTZ and KOVACS, *op. cit.*, fn. 9, p. 162 (noting that "symbolic wealth" includes "prestige").

to prestige. Judge Posner asserted that “[t]he thirst for prestige [among US judges] is manifested primarily in opposition to any large increase in the number of judges, at least high-level judges, and to extending the title ‘judge’ to lower-level judicial personnel...”.¹⁷⁶ Judge Posner surmises that judges maximize prestige by limiting the size of the federal judiciary. If prestige is a valuable commodity, presumably the difficulty in obtaining the position makes it more valuable; and those with access to the commodity have an incentive to keep it scarce.

For US judges, Judge Posner noted that, “there is little an individual judge can do to enhance his prestige as a judge”.¹⁷⁷ The same is not necessarily true for an international arbitrator. Arbitrators can enhance prestige by both the number of appointments they take, the types of cases they arbitrate, and their role within a tribunal. One can hypothesize that international arbitrators not only compete with other arbitrators for monetary gain but also for other non-monetary goods like prestige and reputation.¹⁷⁸ Commentators observe that international arbitral appointments “are perceived as desirable personal benefits”;¹⁷⁹ and others opine that appointments to ITA cases have particular “prestige and glamour”.¹⁸⁰ Parties may also use perceived prestige as a proxy for influence and the desirability of appointing an individual to an arbitral tribunal,¹⁸¹ so the loop becomes self-reinforcing.

Our survey was a first foray in evaluating the non-pecuniary factors that may motivate international arbitrators. As we hypothesized, that prestige might vary according to context, we asked multiple questions about arbitral prestige. We provided alternative frames that differentiated between ICA and ITA. The first question was: “How prestigious is it to have an appointment in *international commercial arbitration*?” The second related question was: “How prestigious is it to have an appointment in *investment treaty arbitration*?”¹⁸² Respondents answered using a 1-5 ordinal scale with 1 representing “not prestigious” and 5 representing “very prestigious”.

176. Richard A. POSNER, “What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)”, 3 *Sup. Ct. Econ. Rev.* (1993) p. 1 at p. 13.

177. *Ibid.*, p. 14.

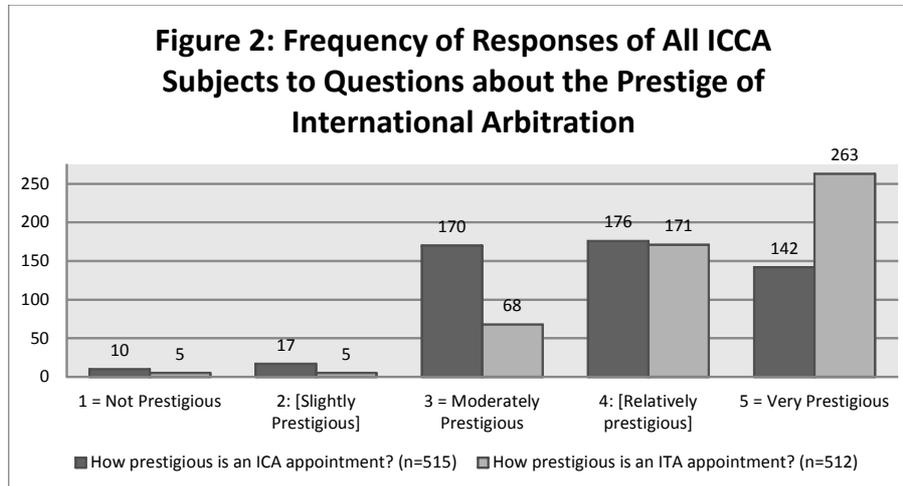
178. See Richard POSNER, “What Do Arbitrators Maximize?” in Peter NOBEL, et al., eds., *Law and Economics of International Arbitration, Series in Law and Economics, Fifth International Conference on Law and Economics at the University of St. Gallen* (Schulthess Verlag 2014) (henceforth *What do Arbitrators Maximize?*) p. 123 (“My conception of people including judges and arbitrators is that, in economic terms, everybody has a utility function. You have preferences and constraints and these will guide and influence your positions. I think there are no fundamental differences between judges, arbitrators, workers and politicians. They (or better we) all are self-interested, and I mean that not in any bad sense. It’s human nature to think about one’s life and an adequate income, to do a good job and to pursue, to a certain extent, also personal interests.”).

179. BEERBOWER, *op. cit.*, fn. 159, p. 79.

180. Hans VAN HOUTTE and Maurizio BRUNETTI, “Investment Arbitration – Ten Areas of Caution for Commercial Arbitrators”, 29 *Arb. Int’l* (2013) p. 553 at p. 554.

181. BEERBOWER, *op. cit.*, fn. 159, p. 78 (“[P]arties want only the most experienced arbitrators”).

182. See Annex: Survey Materials, this volume, pp. 121-122 (emphasis in original). We are aware that issues of prestige and influence are complex. Future research should explore those concepts using refined methodological tools. In the interim, we seek to simplify these issues for the sake of tractability and generating information for preliminary dialogue.



For both ICA and ITA, respondents did not indicate that international arbitration had low prestige. Rather, the vast majority of respondents identified both types of arbitration as – at a minimum – “moderately prestigious”. While there was a degree of variation in how prestigious each type of arbitration was, the facial trend was for ICA to be equivalently prestigious across the most prestigious categories, whereas the perceived prestige of ITA was even higher and respondents tended to give it the most prestigious ranking. Figure 2 offers a frequency breakdown for how all ICCA respondents viewed the prestige of ICA (dark gray) and ITA (light gray).

For ICA, the median and the mode ranked ICA appointments between “moderately prestigious” and “very prestigious”, indicating respondents felt ICA appointments were relatively prestigious.¹⁸³ This perception was widespread with 94.8% of ICCA respondents stating that an ICA appointment was, at a bare minimum, “moderately prestigious”. More specifically, 27.6% ($n=142$) viewed appointments as “very” prestigious; 34.2% ($n=176$) ranked ICA as relatively prestigious; 33% ($n=170$) ranked ICA as “moderately prestigious”; 3.3% ($n=17$) identified ICA had slight prestige with a score of 2; and 1.9% ($n=10$) indicated ICA was “not prestigious” at all.

For ITA, by contrast, the means and mode were five, reflecting that ITA appointments were viewed with the highest level of prestige and considered “very prestigious”.¹⁸⁴ Nearly 85% of all respondents gave ITA one of the two most prestigious rankings possible. More specifically, 51.4% ($n=263$) viewed ITA as “very prestigious”; 33.4% ($n=171$) viewed ITA appointments as relatively prestigious; 13.3% ($n=68$) indicated ITA appointments were “moderately prestigious”; 1% ($n=5$) indicated ITA had only slight prestige; and 1% ($n=5$) indicated ITA was “not prestigious”.

183. The mean score for the prestige of ICA appointments was 3.82 (SD=.939).

184. The mean score for the prestige of ITA appointments was 4.33 (SD=.815).

It is not possible to eliminate the possibility that there was a difference in how arbitration specialists and non-specialists evaluate the prestige of ICA and ITA. Nevertheless, on the basis of our data, we were unable to identify a meaningful difference in patterns of perceived prestige when we looked at response patterns between those ICCA respondents who had either been an arbitrator or counsel and those who had not.¹⁸⁵

There was, however, a variable that did generate a statistically significant effect in how groups evaluated the prestige of international arbitration, namely: gender.¹⁸⁶ The general pattern was consistent when examining prestige evaluations for ICA and ITA.

First, to test whether the prestige of ICA was meaningfully different across genders, a *t*-test analyzed the independent variable of gender and the dependent variable of relative ICA prestige. There was a reliable gender difference in how respondents perceived the prestige of ICA ($t(508)=2.491$; $p=.01$; $r=.11$; $n=510$). Women were more likely than men to find an ICA appointment prestigious.¹⁸⁷ Table 12 provides the mean responses of men and women and demonstrates that women were more likely to view ICA arbitration appointments as prestigious than their male counterparts.

Second, another *t*-test explored whether ITA prestige varied according to whether the respondent was a man or a woman. Those results also identified a meaningful gender difference in perceived prestige of ITA ($t(505)=-2.443$; $p=.02$; $r=.11$; $n=507$).¹⁸⁸

185. Using a Chi-square test of independence to evaluate a difference in response pattern in how respondents ranked the prestige of ITA depending on whether or not they had been arbitrator, counsel or both ($\chi^2=3.940$; $p=.41$; $r=.09$; $n=481$). Similarly, a Chi-square test to identify response patterns related to the question of ITA prestige was unable to detect a meaningful relationship ($\chi^2=5.107$; $p=.28$; $r=.10$; $n=478$). The null results, however, lack sufficient statistical power to definitively exclude the possibility that such a relationship exists. Particularly as ICCA respondents have a degree of sophistication and the fiscal cost of the conference suggests participants have more than a passing interest in arbitration, a lay audience with broader variance may generate different results.

186. As our results were somewhat mixed, it is possible that legal training may also generate a difference in perceived prestige of arbitration. For example, using ANOVAs, there was a statistically meaningful difference based upon legal training ($F(2,500)=4.673$; $p=.01$; $r=.14$; $n=503$), such that civil lawyers found ICA more prestigious than their common law counterparts. Using a Kruskal-Wallis test to address the risk of a non-normal distribution across the three types of legal training also identified the same statistically meaningful link between legal training and responses to ICA prestige ($\chi^2=10.782$; $p=.01$; $r=.15$; $n=442$). Using ANOVAs, we were unable to isolate any meaningful difference on the prestige of ITA, however ($F(2,497)=.494$; $p=.61$; $r=.05$; $n=500$). A Kruskal-Wallis test also failed to identify a link between legal training and ITA prestige responses ($\chi^2=3.076$; $p=.22$; $r=.08$; $n=439$). Why those with a civil law training background view commercial arbitration as more prestigious than common law counterparts is a puzzle that requires further investigation.

187. The skewness of responses for ICA prestige was within acceptable levels (-0.443 ; $SE=0.108$). Non-parametric tests also identified a meaningful difference in men's and women's perceived prestige of ICA ($U=20738.5$; $p=.02$). Although the median response for men and women was both 4, reflecting a relatively prestigious appointment, the mode for men was 4 but the mode for women was 5.

188. The skewness of responses for ICA prestige was beyond normally acceptable levels (-1.222 ; $SE=0.108$). A Mann-Whitney U test is therefore the preferred test for exploring group differences. The non-parametric test nevertheless also revealed a meaningful gender difference

Table 12 provides the mean responses and demonstrates that women reliably viewed ITA appointments as more prestigious than men.

Table 12: Descriptive Statistics, as a function of Gender, for ICCA Respondents Regarding Prestige of International Arbitration

Arbitration Type and Respondent Gender	Mean Response	Standard Deviation	Total
ICA			
Men	3.77	.946	386
Women	4.01	.870	124
<i>Total</i>	3.83	.933	510
ITA			
Men	4.29	.836	384
Women	4.50	.658	123
<i>Total</i>	4.34	.801	507

Previous studies suggested that fewer than 10% of ITA arbitrators were women, and Table 3 reflects that women arbitrators at ICCA comprised less than 20%. This suggests it is still a relatively rare achievement for women to break into the role of international arbitrator.¹⁸⁹ This may explain, in part, why women view international arbitral appointments as more prestigious than men. Perhaps women view scarce arbitral appointments as an even more valuable commodity on both a personal and financial level given the extreme scarcity. Breaking through the glass ceiling is, therefore, a measure of considerable professional success and thus particularly prestigious.

2. *Reappointment and Interaction with Co-Arbitrators*

As explained earlier, international arbitration is prestigious, in part, because of the scarcity of appointments and competition in the arbitrator marketplace. The causal basis permitting entrance to the “invisible college” of arbitrators has been the subject of much speculation.¹⁹⁰ Irrespective of how one initially enters the arbitrator network,¹⁹¹ it is

in perceived prestige of ITA appointments ($U=20862.5$; $p=.03$). The median response was 4 for men, but the median was 4.5 for women.

189. As noted in Section IV.4.c.i, for those women who had served as arbitrators, we were unable to detect a statistically meaningful difference between the number of appointments for men and women.

190. DEZALAY and GARTH, *op. cit.*, fn. 9; ROGERS, *Vocation, op. cit.*, fn. 44; see also David SCHNEIDERMAN, “Judicial Politics and International Arbitration: Seeking an Explanation for Conflicting Outcomes”, 30 *Nw. J. Int’l L. & Bus.* (2010) p. 338 (expressing concern about the

unclear how one *stays* in the arbitrator marketplace and becomes a repeat player. The only way of remaining in the college of international arbitration is reappointment, which is driven by counsel, other arbitrators and professionals within arbitral institutions. Presumably, re-appointment is a complicated function involving one's current professional reputation and the quality of one's historical adjudicative skill.¹⁹²

a. *Theoretical approaches to arbitral re-appointment*

Beyond prestige, other non-pecuniary factors can motivate adjudicators. National court judges, for instance, can be influenced by various extra-legal factors including the desirability of collegial interactions with colleagues,¹⁹³ panel effects and group psychology,¹⁹⁴ popularity and public opinion.¹⁹⁵ Arbitrators, in many respects, are similar to judges in that they adjudicate disputes; and similar factors may therefore motivate international arbitrators. Several scholars and Judge Posner¹⁹⁶ suggest that supposition is correct. Mentschikoff and Haggard, for example, argued that “who the arbitrator is in terms of expertise and prior experience is the single most important factor in both decisional and the consensus processes” and influences the interactions with and decisions of other arbitrators.¹⁹⁷ Dezalay and Garth similarly identified the importance of arbitrator reputation on the arbitration process.¹⁹⁸ Yet, arbitrators are distinguishable from judges and instead similar to service providers and must compete in the arbitral marketplace for

closed “club” of ITA).

191. See Tom GINSBURG, “The Culture of Arbitration”, 36 *Vanderbilt J. Transnat'l L.* (2003) p. 1337 (arguing arbitrators function as a network and identifying a “relatively closed world of international arbitration”); PUIIG, *op. cit.*, fn. 10, pp. 22-26 (identifying a network effect in ICSID appointments).

192. See, e.g., GREENWOOD and Baker, *op. cit.*, fn. 30, p. 658 (“Previous service as an arbitrator is considered to be the ‘pre-eminent qualification for an arbitrator-candidate’”).

193. POSNER, *How Judges Think*, *op. cit.*, fn. 169; Lee EPSTEIN, et al., “Why (and When) Judges Dissent: A Theoretical Empirical Analysis”, 3 *J. Legal Analysis* (2011) p. 101 at pp. 122 et seq.

194. Mark F. STASSON, “Group Consensus Processes on Cognitive Bias Tasks: A Social Decision Scheme Approach”, 30 *Japanese Psych. Research* (1988) p. 68; see also KAPELIUK, *op. cit.*, fn. 43, p. 273 (observing collegial enterprises involve “dynamics by which each member has to consider and respond to her colleagues as she performs her task”); Lewis A. KORNHAUSER and Lawrence G. SAGER, “The One and the Many: Adjudication in Collegial Courts”, 81 *Cal. L. Rev.* (1993) p. 1 at pp. 3-5 (1993) (identifying four varieties of collective enterprises: distributed, team, redundant and collegial).

195. Lee EPSTEIN and Jack KNIGHT, “Reconsidering Judicial Preferences”, 16 *Ann. Rev. Pol. Sci.* (2013) p. 11 at p. 21.

196. See POSNER, *What Do Arbitrators Maximize?*, *op. cit.*, fn. 176, p. 123 (stating that “there are no fundamental differences between judges [and] arbitrators”).

197. Soia MENTSCHIKOFF and Ernest A. HAGGARD, “Decision Making and Decision Consensus in Commercial Arbitration” in June Louin TAPP and Felice J. LEVINE, eds., *Law, Justice, and the Individual in Society: Psychological and Legal Issues* (1977) p. 295 at p. 307.

198. See DEZALAY and GARTH, *op. cit.*, fn. 9, p. 9 (suggesting that “the parties well understand that the ‘authority’ and ‘expertise’ of arbitrators determine their clout within the tribunal”); see also KAPELIUK, *op. cit.*, fn. 43, p. 277 (“prior experience, which, in effect, establishes an arbitrator’s reputation, is considered an important attribute that plays a significant role in collegial dynamics”); MENTSCHIKOFF and HAGGARD, *op. cit.*, fn. 197, p. 305 (suggesting that “there is an implicit and relatively subtle struggle for dominance” among panel members).

appointments.¹⁹⁹ Arbitrators' hybrid characteristic—as both service provider paid by the parties and impartial adjudicator—generates a possibility that arbitrators' incentive structures are different from judges'.²⁰⁰ As Judge Posner explained, arbitrators must “think very carefully about what impact their decision will have on their future employment. And that is what we particularly don't want judges to do (i.e., to be thinking about their future employment). That's the reason for life tenure in the judiciary.”²⁰¹

While two different schools of thought agree that international arbitrators strive to obtain repeat appointments and care deeply about how their peers perceive them, there is not uniform agreement about what reputational aspects arbitrators maximize to secure repeat appointments.

One group of theorists posit that arbitrators effectively function as partisans, irrespective of an obligation to remain impartial and independent, as they are seeking re-appointment and those derivative financial rewards.²⁰² As Kapeliuk explains, an “arbitrator motivated by creating a reputation for being impartial might decide the dispute differently than an arbitrator who has an incentive to be reappointed in future disputes by the appointing party”.²⁰³ Under this theoretical framework, providing repeat parties (and repeat counsel making arbitrator recommendations) with favorable outcomes enhances the “good” reputation that generates repeat appointments, fiscal remuneration and even more prestige. Decisionmaking therefore presumably involves treating arbitrators more as agents²⁰⁴ making conscious choices to generate palatable results favoring a specific party, type of party or law firm.

199. Robert D. COOTER, “The Objectives of Private and Public Judges”, 41 *Pub. Choice* (1983) p. 107 at p. 107 (“private judges have to attract business, so they are exposed to the same market pressures as anyone who sells a service”).

200. This presumes, however, that the judicial appointments are stable. We note, however, that there are many jurisdictions in the United States where judges are not appointed for life or a fixed term, but rather those judges must stand for public election. The effect of a democratic electorate, which functions as public marketplace for adjudicators, is not wholly dissimilar to the private marketplace for arbitrators.

201. POSNER, “What Do Arbitrators Maximize?”, *op. cit.*, fn. 178, p. 130.

202. KAPELIUK, *op. cit.*, fn. 43 at pp. 291-292; see also Yuval SHANY, “Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings”, 30 *Loy. L.A. Int'l & Comp. L. Rev.* (2008) p. 473 at p. 483 (“party-appointed adjudicators are pre-disposed to vote in favor of their appointing party”).

203. KAPELIUK, *op. cit.*, fn. 43, pp. 294-295; see also Gilat LEVY, “Careerist Judges and the Appeals Process”, 36 *RAND J. of Econ.* (2005) p. 275 at pp. 278-281 (modeling effect of reputation-seeking behavior on judicial decision-making); Catherine A. ROGERS, “The Politics of International Investment Arbitration”, 12 *Santa Clara J. Int'l L.* (2014) (henceforth *Politics*) p. 223 at p. 226 (“Critics hypothesize that investment arbitrators favor their appointing party in a self-interest effort to increase the likelihood of future appointments”).

204. Karen ALTER, “Agents or Trustees? International Courts in their Political Context”, 14 *Eur. J. Int'l Rel.* (2008) p. 33; see also Paul B. STEPHAN, “Courts, Tribunals and Legal Unification – The Agency Problem”, 2 *Chi. J. Int'l L.* (2002) p. 333 at p. 337 (“Knowing that they can be replaced, the members of the [international] tribunal have an incentive not to do anything that will upset the countries with nominating authority”).

In contrast, others posit that the arbitrators are incentivized to be as neutral as possible.²⁰⁵ In this context, a “good” reputation involves providing a portfolio of cases with balanced outcomes that favors neither one type of claimant nor respondent. As explained in recent scholarship by Klement and Neeman, “arbitrators want to increase their chances of being selected to decide future disputes and therefore want to acquire a good reputation for being unbiased”.²⁰⁶ Yet they caution that this approach generates a risk of negative externalities when arbitrators become overly focused on having a balanced record of outcomes that is unwarranted by underlying facts and law. As Klement and Neeman state, arbitrators “may decide incorrectly to avoid acquiring a bad reputation”.²⁰⁷ Under this paradigm, where facial adjudicative neutrality is the coin of the realm, arbitrators wishing to be perceived as neutral may make strategic decisions to appear balanced, decrease the risk of perceived bias and thereby enhance their reputation – even when the result is improper or may cause delay.

There may, however, be another narrative to explain what incentivizes arbitrators’ decisionmaking. A third paradigm might involve arbitrators enhancing their professional reputations by acting as a “trustee” of the international arbitration system. As such, arbitrators maximize their reputations, and the possibility of reappointment, by being as neutral as possible on procedural matters to ensure all parties obtain equal treatment and have a chance to present their cases but, on substantive matters, take a firm stance on the basis of their independent evaluation when merited by the underlying facts and law.²⁰⁸

There is a reasonable possibility that these three different theories about what incentivizes arbitrators are not mutually exclusive. Arbitrators are not a purely homogeneous population. It is possible, if not probable, that different arbitrators within the international arbitration pool are incentivized differently and thereby decide cases

205. Alon KLEMENT and Zvika NEEMAN, “Does Information About Arbitrators’ Win/Loss Ratios Improve their Accuracy?”, 42 J. Leg. Stud. (2013) p. 369 at pp. 385-386; Charles N. BROWER and Stephan W. SCHILL, “Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?”, 9 Chi. J. Int’l L. (2009) p. 471 at p. 492 (arguing that arbitrators’ self-interest is in developing reputations for impartiality); Alec Stone SWEET, “Investor-State Arbitration: Proportionality’s New Frontier”, 4 Law & Ethics Hum. Rts. (2010) p. 47 at p. 75 (“it seems suicidal for arbitrators to proceed . . . with a very heavy thumb pressed permanently down on the investors’ side in cases with very high political stakes”).

206. KLEMENT and NEEMAN, *op. cit.*, fn. 205, pp. 385-386; Alan Scott RAU, “Integrity in Private Judging”, 38 S. Tex. L. Rev. (1997) p. 485 at p. 522 (“An arbitrator may perceive that his award is likely to have an impact on his own acceptability, that is, on the probability of his being appointed again”).

207. KLEMENT and NEEMAN, *op. cit.*, fn. 205, pp. 381-382, 385-386. In theory, legally incorrect outcomes might derive from “splitting the baby” within a single case when such conduct is unwarranted given the underlying facts or law; likewise, it might involve an arbitrator strategically pursuing a balanced overall adjudicative track record where, in some cases, arbitrators follow their independent judgment in one case but not another.

208. See ALTER, *op. cit.*, fn. 204; see also Anne van AAKEN, “Control Mechanisms in International Investment Law” in Zacharias DOUGLAS, Joost PAUWELYN and Jorge VINUALES, eds., *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014) pp. 409-435.

differently.²⁰⁹ Some arbitrators may be more concerned with how their peers and parties perceive them because they wish to be viewed as service providers. Other arbitrators may eschew this approach and instead hone their reputation by appearing to be as neutral as possible – regardless of their independent evaluation of a case’s merits. It is also possible that an individual arbitrator may adhere to different approaches when adjudicating different disputes or involving different subject matters. A classic example of that phenomenon might be an arbitrator who views his/her role through one lens in ICA but takes a different approach in ITA disputes. Given the possible variance, it is constructive to consider these dynamics carefully.

b. Empirically exploring dynamics related to re-appointment

We are, unfortunately, unaware of any empirical scholarship that explores what factors incentivize international arbitrators generally or how those factors impact decisionmaking.²¹⁰ Presumably, arbitrator incentives and extra-legal factors affecting outcomes are complicated.²¹¹ In an effort to begin a systematic assessment of those issues, we asked three questions designed to elucidate aspects of arbitrator collegiality and future appointments. While not directly addressing questions of incentives, it was an indirect effort to explore what factors, including co-arbitrator collegiality, might link to reappointment. As we anticipated that there may be differences in the incentives between ICA and ITA arbitrators we asked two separate questions. First, we asked, “When I am sitting as an international *commercial* arbitrator, I consider whether I will be appointed in the future.” Second, we asked, “When I am sitting as an *investment treaty* arbitrator, I consider whether I will be appointed in the future.” Finally, to explore how arbitrators evaluated the importance of collegiality and reputation, we asked, “When acting as arbitrator, I consider how I will interact with my co-arbitrators in future cases.”²¹² We then asked respondents to answer on a 1-5 ordinal scale with 1 representing “strongly disagree”, 5 representing “strongly agree” and 3 representing “neither agree nor disagree”.

For the subset of respondents who had served as ICA arbitrators, the tendency was for arbitrators to disagree with the idea that they considered future appointments. The most common answer was that respondents “strongly disagreed” with the idea that they considered future appointments in ICA. The median was “2” indicating that respondents somewhat disagreed with the proposition that they considered future appointments when arbitrating ICA disputes.²¹³ More specifically, 32.8% ($n=84$) strongly disagreed; 17.6% ($n=45$) somewhat disagreed; and 27.3% ($n=70$) neither agreed nor disagreed that they considered future appointments when arbitrating ICA disputes. There was a group that did indicate that they considered their future appointments, namely 14.5% ($n=37$)

209. The same arbitrator might also behave differently in different disputes or different subject matters (i.e., ICA and ITA disputes).

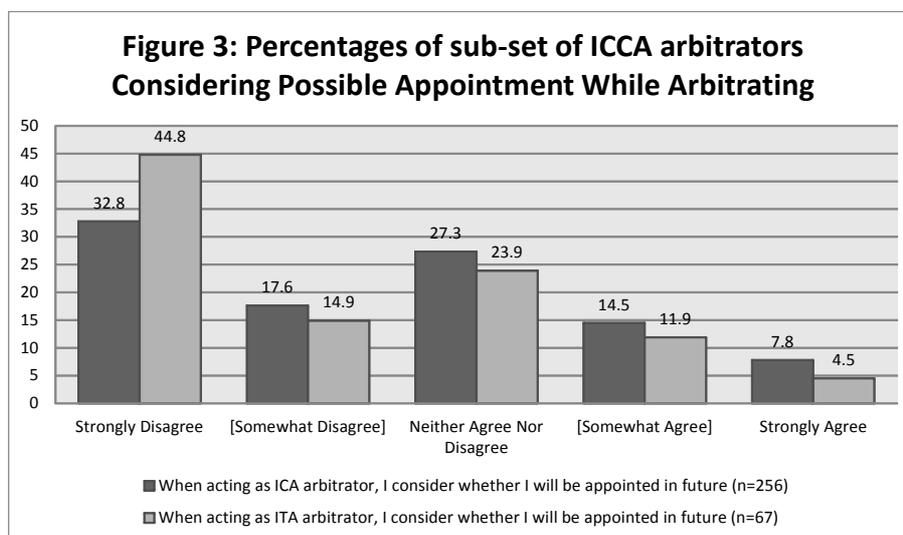
210. The scholarship of Kapeliuk (analyzing the effect of repeat arbitrators on ICSID outcomes), Waibel and Wu (isolating extra-legal factors like legal training, education and gender on ICSID outcomes), and Puig (exploring the web of relationships among ICSID arbitrators) comes the closest. KAPELIUK, *op. cit.*, fn. 43; WAIBEL and WU, *op. cit.*, fn. 11; PUIG, *op. cit.*, fn. 10.

211. ROGERS, *Politics*, *op. cit.*, fn. 203, p. 226-228.

212. See Annex: Survey Materials, this volume, pp. 121-122 (emphasis in original).

213. The mean response was 2.47 (SD=1.292; $n=256$).

indicated that they somewhat agreed with the idea that they considered future appointments, and the remaining 7.8% ($n=20$) indicated they strongly agreed with the idea that they considered future appointments when arbitrating ICA disputes. For the subset of ICA arbitrators, Figure 3 provides a percentage breakdown (in dark gray) of whether ICA arbitrators self-identified as considering the possibility of future appointments when resolving ICA disputes.



For the smaller subset of respondents who served as ITA arbitrators, the dominant tendency was also for arbitrators to disagree strongly with the idea that they considered future appointments. Like ICA, the most common answer for ITA arbitrators was that respondents “strongly disagreed” with the idea that they considered future appointments in ITA; and the median was “2” indicating that respondents somewhat disagreed that they considered future appointments when arbitrating ITA disputes.²¹⁴ More specifically, 44.8% ($n=30$) strongly disagreed; 14.9% ($n=10$) somewhat disagreed; and 23.9% ($n=16$) neither agreed nor disagreed that they considered future appointments when arbitrating ITA disputes. There was a group that did indicate that they considered their future appointments, namely 11.9% ($n=8$) indicated that they somewhat agreed with the idea that they considered future appointments, and the remaining 4.5% ($n=3$) indicated they strongly agreed with the idea that they considered future appointments when arbitrating ITA disputes. For the subset of ITA arbitrators, Figure 3 provides a percentage breakdown (in light gray) of whether ITA arbitrators self-identified as considering the possibility of future appointments when resolving ITA disputes. The only

214. The mean response was 2.16 (SD=1.25; $n=67$).

noteworthy facial pattern was, when compared to their ICA colleagues, a greater proportion of ITA arbitrators “strongly” disagreed with the idea they considered future appointments.

Tests for both the subset of ICA²¹⁵ or ITA²¹⁶ arbitrators also failed to reveal any statistically meaningful difference in respondents’ answer to the reappointment questions deriving from legal training or gender to the re-appointment questions.

To begin exploring the potential role of tribunal collegiality and its effects, we asked the subset of arbitrators whether arbitrators considered the possibility of future interaction with co-arbitrators. Recognizing the research was exploratory, the idea was to consider how the interconnectedness among arbitrators might impact group decisionmaking. The results focusing on the responses of respondents who indicated that they had served as an arbitrator are presented in Table 13.

215. We were unable to establish a reliable difference in responses for the ICA reappointment question based upon respondents’ legal training in common law, civil law or a combination thereof. An analysis of mean differences was appropriate as skewness of responses was within acceptable levels (-0.240; SE=0.165). An ANOVA failed to reveal a meaningful difference ($F(2,253)=0.505$; $p=.60$; $r=.06$; $n=256$), and all follow-up comparisons were non-significant. We were also unable to identify a statistically meaningful link with gender and responses related to future appointments by ICA arbitrators ($t(254)=-0.496$; $p=.62$; $r=.03$; $n=256$). Although we cannot rule out the possibility of meaningful links as the sample was underpowered and exhibited an unacceptable probability of a Type II error, we note that latent effects were all less than statistically small, and *a priori* power analysis indicates a need for at least 1172 subjects in the future to reliably rule out effect. Future research is therefore necessary before reaching a definitive conclusion about the lack of a reliable effect.

216. We were unable to establish a reliable difference in responses for the ITA reappointment question based upon respondents’ legal training. An analysis of mean differences was appropriate as skewness of responses was within acceptable levels (0.638; SE=0.293). An ANOVA failed to reveal a meaningful difference ($F(2,62)=0.532$; $p=.59$; $r=.12$; $n=65$), and all follow-up comparisons were non-significant. We were unable to identify a statistically meaningful link with gender and reappointment responses ($t(65)=.0136$; $p=.89$; $r=.02$; $n=67$). The non-significant facial trend was for, on average, women to be more likely to more strongly disagree that they considered the possibility of future ITA appointments. Although we cannot rule out the possibility of meaningful links as the sample was underpowered and exhibited an unacceptable probability of a Type II error, we note that latent effects were statistically small or less than small, and *a priori* power analysis indicates the need for at least 1172 subjects in the future to reliably rule out effect. Future research is necessary before definitively concluding there is no reliable relationship.

Table 13: Percentages and Frequency of Responses of ICCA Respondents Serving as Arbitrators to Question About Whether They Consider How They Will Interact with Co-arbitrators on Future Cases

Answer	Response Percentage	Response Frequency
1 – Strongly Disagree	27.3	71
2 – (Somewhat Disagree)	12.3	32
3 – Neither Agree nor Disagree	34.2	89
4 – (Somewhat Agree)	15.8	41
5 – Strongly Agree	10.4	27
Total	100.0	260

Overall, Table 13 demonstrates that both the median and mode were “3”, namely that arbitrators neither agreed nor disagreed with the idea that they considered how they interact with co-arbitrators in future cases (34.2%; $n=89$).²¹⁷ The other common response was for respondents to disagree strongly with the idea that they considered how they would interact in the future with their co-arbitrators (27.3%; $n=71$). Barely one-quarter of respondents suggested they agreed in any way with the idea that they considered how they would interact with co-arbitrators in future cases. Qualifying respondents were therefore either ambivalent about the potential impact of collegiality or otherwise strongly disagreed that it affected their decisionmaking.

For the question related to considerations of future interactions with co-arbitrators, we were unable to identify any statistically reliable relationships, as a function of either the respondent’s legal training or gender.²¹⁸ Similarly, using a Pearson’s Product Moment Correlation Coefficient²¹⁹ to explore the possibility of a link between the number of a respondent’s appointments and how they responded to the interaction with co-arbitrators, we were unable to identify any meaningful relationship ($r(262)=-.07$; $p=.26$). While we recognize the need for replication given the potentially underpowered

217. The mean was 2.7 (SD=1.305; $n=260$).

218. None of the tests were able to identify a reliable variation in the response pattern to the question of interaction with co-arbitrators irrespective of gender or legal training. An analysis of mean differences of future interaction of arbitrators was appropriate as skewness was within acceptable levels (-0.116; SE=0.151). For considerations of future interactions, we were unable to identify meaningful links in responses with either a respondent’s legal training ($F(2,254)=0.425$; $p=.65$; $r=.06$; $n=257$) or gender ($t(258)=-.619$; $p=.54$; $r=.04$; $n=258$). Although we cannot rule out the possibility of meaningful links as the sample was underpowered and exhibited an unacceptable probability of a Type II error, we note that latent effects were all less than statistically small, and *a priori* power analysis indicates the need for at least 1172 subjects in the future to reliably rule out effect. Future research is therefore necessary before reaching a definitive conclusion about the lack of a reliable effect.

219. In layman’s terms, this is a standard test to look only for a reliable statistical correlation. Stephen M. STIGLER, “Francis Galton’s Account of the Invention of Correlation”, 4 *Statistical Sci.* (1989) p. 73. Other analyses of correlation coefficients in this Paper use this test.

nature of the sample, we nevertheless observe that – even with a sample of more than 250 arbitrators – the potentially latent effect was less than statistically small.

c. Synthesis: Understanding the implications

Overall, the general patterns of responses suggest that ICCA respondents serving as arbitrators did not tend to support the theory that arbitrators act as partisans. More particularly, there were strong disagreements, particularly in the context of ITA, that respondents were actively considering their re-appointment while involved in an international arbitration. Similarly, the evidence suggested that arbitrators were not necessarily interested in collegiality. The majority of respondents either expressed lack of concern about future interaction with co-arbitrators or disagreed that it was a meaningful consideration.

This provides initial, but non-conclusive, evidence that arbitrators associated with ICCA were more interested in models of adjudication that reflect arbitral neutrality. While they also respected the prestige of both ICA and ITA appointments, the arbitrators in our sample appeared to care less about potential reappointments or tribunal collegiality. While they might enjoy obtaining more appointments, which presumably would enhance their personal prestige and generate fiscal compensation, they expressed doubt that the possibility of a repeat appointment influenced their contemporaneous decisionmaking. Similarly, they did not self-report that they were impacted by potential future relationships with co-arbitrators.

Nevertheless, given the nature of the questions, it is possible that responses exhibited a self-serving bias. Rather than thinking of themselves as biased adjudicators, it is possible that respondents searched for responses that generated cognitive ease; alternatively, the responses may reflect introspective illusions, egocentrism biases, or blind spot biases where respondents were unaware of the impact of potential cognitive illusions on their responses.²²⁰ In theory, one might have expected all reappointment and collegiality questions to have a “neither agree nor disagree” response if these aspects do not influence decisionmaking in any manner. Nevertheless, the expression of sharp disagreement, particularly in the context of ITA, indicates that exploring the impact of emotive responses is worthy of future research.

Future research is therefore necessary to explore these issues more thoroughly, perhaps in a more nuanced way, so as to avoid the risk of error generated by response bias. We welcome suggestions about how best to create an objective measure that does not involve self-assessment to assess how prestige, collegiality and re-appointment affect

220. In 2004, US Supreme Court Justice Antonin Scalia and Vice President Dick Cheney went on a duck-hunting trip together a few weeks before the Supreme Court agreed to take an appeal involving Cheney. Although Scalia stated, “I do not think my impartiality could reasonably be questioned,” he ultimately (along with a majority of justices) voted in Cheney’s favor. Scholars use this as an illustration of people tending to judge other people’s biases according to their behavior but judge their own conduct according to internal feelings, thoughts and motivations. Sharot suggests Scalia experienced an introspection illusion whereby people strongly believe they have accurately identified their underlying mental state when, in fact, they have not. Tali SHAROT, *The Optimism Bias: A Tour of the Irrationally Positive Brain* (Random House 2011) pp. 16-18; see also Emily PRONIN, et al., “Objectivity in the Eye of the Beholder: Divergent Perceptions in Self versus Others”, 111 *Psych. Rev.* (2004) p. 781.

international arbitrators. Presumably, future research might also usefully explore, in a more direct manner, what factors most motivate and impact the decisionmaking of international arbitrators as the rational actor model of economics suggests that arbitrators should be motivated to seek reappointment. Ultimately, it is worthwhile exploring sensitivities related to the claim that incentives to seek future appointments may affect decisionmaking in the present.

3. Fraud

The presence of fraud, illegality or corruption in international arbitration – whether in the proceeding itself or in the underlying transaction – poses challenges to parties, arbitral tribunals, and courts tasked with enforcing arbitral awards. Since 1963, when Judge Gunnar Lagergren rendered the award in ICC Case No. 1110,²²¹ fraud and corruption have been serious concerns for the international arbitration community in light of their impact on the legitimacy of the international arbitral process. ICCA has explored the subject of fraud for well over a decade.²²² Fraud in international arbitration generates a series of concerns including arbitrability,²²³ the burden and standard of proof,²²⁴ the development of an international public policy dealing with fraud and corruption,²²⁵ and the need to incorporate specific provisions for fraud in international investment agreements.²²⁶

221. See J. Gillis WETTER, “Issues of Corruption Before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren’s 1963 Award in ICC Case No. 1110”, 10 *Arb. Int’l* (1994, no. 3) p. 277 (annexing text of award).

222. See, e.g., Karen MILLS, “Corruption and Other Illegality in the Formation and Performance of Contracts and in the Conduct of Arbitration Relating Thereto” in *International Commercial Arbitration: Important Contemporary Questions*, ICCA Congress Series no. 11 (2002) (henceforth *ICCA Congress Series no. 11*) p. 288; Peter V. TYTELL, “The Detection of Forgery and Fraud” in *ICCA Congress Series no. 11*, p. 314. More recently, a survey on investor misconduct in international treaty arbitration was presented by Anthony Sinclair and Aloysius Llamzon at the XXII ICCA Congress in Miami in April 2014 and is published in this volume, pp. 451-530.

223. Gary BORN, et al., “Bribery and an Arbitrator’s Task”, *Kluwer Arbitration Blog*, (11 October 2011) at <<http://kluwerarbitrationblog.com/blog/2011/10/11/bribery-and-an-arbitrator%E2%80%99s-task/>> (last accessed 16 June 2014); Cécilia A.S. NASARRE, “International Commercial Arbitration and Corruption: The Role and Duties of the Arbitrator”, *TDM* 3 (2013) at <www.transnational-dispute-management.com/article.asp?key=1965> (last accessed 30 June 2014).

224. See, e.g., Michael HWANG and Kevin LIM, “Corruption in Arbitration – Law and Reality”, 8 *Asian Int’l Arb. J.* (2012) p. 1 at pp. 21-36; Sophie NAPPERT, “Nailing Corruption: Thoughts For a Gardener” in Patrick WAUTELET, et al., eds., *The Practice of Arbitration: Essays in Honour of Hans van Houtte* (Hart Publishing 2012) p. 161; Constantine PARTASIDES, “Proving Corruption In International Arbitration: A Balanced Standard for the Real World”, 25 *ICSID Rev.* (2010) p. 47.

225. Carolyn B. LAMM, et al., “Fraud and Corruption in International Arbitration” in Ángel FERNÁNDEZ-BALLESTEROS and David ARIAS, eds., *Liber Amicorum Bernardo Cremades* (Kluwer Law International 2010) p. 699 at pp. 705-718.

226. Jason Webb YACKEE, “Investment Treaties and Investor Corruption: An Emerging Defense for Host States?”, 52 *Va. J. Int’l L.* (2012) p. 723 at pp. 742-743.

It is, of course, not the purpose of this Paper to survey the literature or arbitral jurisprudence relating to fraud, illegality and corruption. Rather, we sought to determine how the international arbitration community generally, and ICCA respondents specifically, perceived the prevalence of fraud issues in international arbitration. Some commentators posit that issues of fraud, illegality and corruption in international arbitration occur regularly.²²⁷ To test the prevalence of this view and respondents' experiences, we asked: "How often do you believe issues of fraud – in the underlying dispute or the arbitration itself – are involved in international arbitration?" As with other questions, respondents were asked to judge frequency on an ordinal scale of 1-5 with 1 representing "never" and 5 representing "always".²²⁸

Table 14 offers those results.

Table 14: Percentages and Frequency of Responses of All ICCA Respondents in Response to Question About How Often Does Fraud Arise in International Arbitration

Answer	Response Percentage	Response Frequency
<i>Never</i>	3.6	18
<i>Occasionally</i>	53.9	268
<i>Sometimes</i>	31.2	155
<i>Frequently</i>	10.9	54
<i>Always</i>	0.4	2
<i>Total</i>	100.0	497

Table 14 shows the most common response to the question was that issues of fraud appear only "occasionally" in international arbitration – an answer that was selected by a clear majority of ICCA respondents.²²⁹ Indeed, 88.7% of respondents stated that fraud occurs in international arbitration "sometimes" or less frequently. This result stands in contrast to the results of Sect. III.3 regarding document withholding, a form of procedural misconduct that arbitrators and counsel perceived to be more prevalent.

Table 14 also, however, refers to all ICCA respondents, including those who have never served as either counsel or arbitrator. One might rightfully ask whether the

227. Cecily ROSE, "Questioning the Role of International Arbitration in the Fight Against Corruption", 31 J. of Int'l Arb. (2014) p. 183 at p. 183 ("[I]nternational arbitral tribunals have had to consider allegations of corruption with increasing frequency"); PARTASIDES, *op. cit.*, fn. 224, at para. 7 ("It is against this backdrop that issues of illegality and corruption are featured in the landscape of international arbitration with greater regularity today than ever before."); LAMM, et al., *op. cit.*, fn. 225, p. 699 ("Allegations of fraud and corruption are *often* encountered in international arbitration")(emphasis added).

228. See Annex: Survey Materials, this volume, pp. 121-122.

229. The median and mode were both "occasionally" (2). The mean also tended in this direction (M=2.5; SD=.75; n=497) but suggested respondents experienced fraud issues in a range between "occasionally" and "sometimes".

responses of those experienced with international arbitration were markedly different from others. The answer is: yes, there were meaningful differences in response patterns, such that arbitration counsel and arbitrators were *less likely* to identify problems with fraud in international arbitration.

To test whether responses were meaningfully different, a *t*-test explored the effect of arbitration experience. For one test, our independent variable was whether the respondent had ever been arbitration counsel; and for the second test, the independent variable was whether the respondent ever served as an ICA and/or ITA arbitrator. The dependent variable was how respondents responded on the 1-5 ordinal scale. First, the results revealed that there was a link between experience as counsel and perceived issues with fraud in international arbitration ($t(453)=2.272$; $p=.02$; $r=.11$; $n=455$). For that subset, the mean score for those *without* arbitration counsel experience was 2.73 ($SD=.918$; $n=51$), whereas those *with* counsel experience was 2.46 ($SD=.733$; $n=404$). Second, there was also a statistically significant relationship between experience as an arbitrator and perceived fraud ($t(415)=2.522$; $p=.01$; $r=.12$; $n=417$). For the subset of arbitrators, the mean score was 2.41 ($n=259$; $SD=.649$); whereas the non-arbitrators had a somewhat higher mean of 2.59 ($n=158$; $SD=.845$). Even for those respondents with some type of experience as either counsel or arbitrator, we were likewise unable to isolate any meaningful link between the number of those appointments and responses to the fraud question.²³⁰

The critical finding was that there were statistically significant gaps in perception with regard to fraud among arbitrators, counsel and those who had not acted in either role. For example, those who served as arbitrators responded that fraud occurred less frequently than those who had not served as arbitrators. This difference was statistically meaningful and there is minimal risk that the results were due to chance alone. Furthermore, those respondents who served as arbitrator or counsel believed fraud occurred less frequently in international arbitration than respondents who had not served in either of these roles.

The survey question, like any survey instrument designed to assess perceptions and personal views, gauges perceptions rather than verifiable objective frequency of fraud issues in international arbitration, through, for example, a review of arbitral decisions. While we would welcome such research using an archival data, one can nevertheless infer that it is possible that fraud in international arbitration does not occur sufficiently frequently so as to register markedly with respondents who have experience as arbitrators or counsel. If this inference is accurate, the difference in perception between those with arbitrator experience and those without is more concerning from a legitimacy perspective. It would mean that, at the very least, the international arbitral community

230. For subjects who had acted as counsel, a correlation coefficient was unable to identify a reliable linear relationship between the number of cases as counsel and responses to the question on fraud ($r(404)=.004$; $p=.95$). For those subjects who had acted as arbitrator, a correlation coefficient was unable to ascertain a reliable linear relationship between a respondent's total number of cases as an arbitrator and responses to the fraud question ($r(259)=-.02$; $p=.76$). Given the risk of insufficient statistical power, it is possible that a larger sample of over 700 subjects could identify a link between relative arbitration experience and perceived experiences with fraud. Nevertheless, the effect sizes were less than statistically small and the *p*-values were far from significant.

should consider how to educate the public and arbitration users to allay concerns over systemic integrity.

4. *Issues of Diversity*

Several scholars identify that the diversity of those presiding over adjudicatory bodies, particularly international courts and tribunals, contributes meaningfully to those tribunals' legitimacy.²³¹ In a poignant example, Nienke Grossman argues that adjudicative bodies "where one sex is severely under- or over-represented lack normative legitimacy because they are normatively biased". She further posits that, even if men and women do not decide cases differently, "sex representation matters for sociological legitimacy because relevant constituencies believe they do" and "representativeness is an important democratic value".²³² As a result, concerns related to diversity in international arbitration impact its legitimacy and, more broadly, to that of international courts and tribunals.²³³

For ITA, as a hybrid creature involving public international law, concerns about sociological legitimacy, democratic legitimacy, and democracy deficits are poignant and arguably resonate strongly.²³⁴ Yet, concerns about diversity also impact the legitimacy of ICA and disputes purely among private parties. Although the New York Convention²³⁵ and the UNCITRAL Model Law²³⁶ require domestic judiciaries to give arbitration awards

231. See generally GROSSMAN, *op. cit.*, fn. 82 (exploring how women's participation on international courts and tribunals affects their legitimacy); see also Leigh SWIGART, "The 'National Judge': Some Reflections on Diversity in International Courts and Tribunals", 42 *McGeorge L. Rev.* (2010) p. 223 at p. 224 ("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."); Sally J. KENNEY, "Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice", 10 *Feminist Legal Studies* (2002) p. 257 at pp. 265-266 (exploring whether the paucity of women on the European Court of Justice's bench affects its legitimacy and why).

232. GROSSMAN, *op. cit.*, fn. 82, p. 652.

233. See Shashank KUMAR and Cecily ROSE, "A Study of Lawyers Appearing before the International Court of Justice, 1999-2012", 25 (*Eur. J. Int'l L.* (2014) p. 893 (calling for empirical research comparing diversity imbalances at the ICJ with international arbitration).

234. See Nienke GROSSMAN, "The Normative Legitimacy of International Courts", 86 *Temp. L. Rev.* (2013) p. 61 (discussing a democratic theory of legitimacy); Nienke GROSSMAN, "Legitimacy and International Adjudicative Bodies", 41 *Geo. Wash. Int'l L. Rev.* (2009) p. 107 (discussing a sociological approach to legitimacy); Daniel BODANSKY, "The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?", 93 *Am. J. Int'l L.* (1999) p. 596 at p. 601 (asserting that popular views about an authority comprise one dimension of that authority's legitimacy); Allen BUCHANAN and Robert O. KEOHANE, "The Legitimacy of Global Governance Institutions", 20 *Ethics & Int'l Affairs* (2006, no. 4) p. 405 at pp. 405-406 (suggesting that a global public standard of legitimacy can help citizens distinguish legitimate institutions from illegitimate ones).

235. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. No. 4739 at p. 3 (henceforth New York Convention).

236. UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006) at <www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> (last accessed 27 June 2014).

a degree of 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 but, instead, 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.²³⁷ States permit and honor arbitration proceedings, in part, because of their perceived utility; and should those actors believe that ICA is illegitimate or problematic, courts retain the capacity to re-absorb those cases into judicial dockets. There have, indeed, been calls to regulate international arbitration more closely regardless of whether a dispute involves a state or state-related entity.²³⁸ Even private dispute resolution, therefore, is dependent on public trust and state regulation.²³⁹ As Salim Moollan observed, there are risks when – rightly or wrongly – international arbitration is viewed as an imposed, an unwanted, foreign process.²⁴⁰

Diversity concerns are not unique to international arbitration.²⁴¹ 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.”²⁴² Some commentators argue that, “diversity should be considered both by policymakers and businesses when making investment and policy decisions as it can affect competitiveness which is key to economic growth and the quality of life of a nation’s citizens”.²⁴³ The first Sub-section therefore first explores the basic demographics of international arbitration and then places those findings within a larger context. The next Sub-section then explores respondents’ perceptions about potential

237. See, e.g., *Sherck v. Alberto-Culver Co.*, 417 U.S. 506 (U.S. Sp. Ct. 1974), at p. 511 (noting “centuries of judicial hostility to arbitration agreements”); BORN, *op cit.*, fn. 138, Sect. 1.01 (providing a brief history of international commercial arbitration).

238. See, e.g., MENON, *op. cit.*, fn. 133, para. 43 (“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.”).

239. 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.

240. See MOOLLAN, *op. cit.*, fn. 91, 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 a 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 progressively to become part and parcel of the legal culture of developing countries”).

241. 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.

242. Oxford Economics, “The Global Diversity Report: An Annual Guide to Measure Global Employee Diversity”, at <<http://bit.ly/1opaTao>> (last accessed 30 June 2014).

243. *Ibid.*, p. 21.

diversity challenges within international arbitration. Finally, it contrasts this with respondents' actual experiences as with the diversity of international arbitrators.

a. Contextualizing the demographics of diversity

Earlier, Sect. II.2 and Tables 2-5 offered key descriptive data related to the diversity of the international arbitration community. Overall, the data suggested the "median" ICCA attendee and arbitration counsel was a male, 50 years of age, with some common law legal training and from a developed state. In slight contrast, the "median" arbitrator at ICCA was a male, 55 years of age, with some training from a common law jurisdiction and was a national of a developed state. For the subset of arbitrators, less than 18% were women,²⁴⁴ 20% (or less) were from 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. Overall, these results suggest that: (1) women's presence in international arbitration was relatively small; and (2) the proportion of developing-world arbitrators was relatively small.

The data must, however, be viewed in context. Obtaining diversity in gender and race has been challenging for domestic dispute resolution; similarly, obtaining diversity in gender and nationality in international law adjudication has been complex. While there are contexts where diversity levels have become relatively more balanced, that is not a universal phenomenon. These premises raise the interesting questions of how the international arbitration community fares comparatively and whether it wishes to become a leader or a laggard in addressing diversity.

244. We would be remiss not to recall from Sect. II.2.c that women arbitrators were statistically younger (48 years old on average) than their male counterparts (56 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. Yet, Greenwood and Baker suggest that female partners make up about 11% of international arbitration teams; and when compared to their data on arbitrators, they infer that less than half of that 11% serve as arbitrators and thereby suffer from "more than the usual 'pipeline leak'". GREENWOOD and BAKER, *op. cit.*, fn. 30, p. 658. This creates three possibilities. First, Greenwood and Baker's extrapolation that women account for 6% of international arbitrators could be wrong, and their derivative inference is incorrect. Second, it means that the 17% proportion of women arbitrators in our sample was over-representative of women arbitrators. This could reflect that either women benefit from ICCA networking opportunities or women who have multiple appointments elect to attend ICCA Congresses. Third, as several studies identified that women accounted for 5-9% 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, *Myths and Realities*, *op. cit.*, fn. 29, ch. 8; see also FRANCK, *Empirically Evaluating*, *op. cit.*, fn. 28, p. 80 (identifying five women (3.5%) 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, forty-five (17.3%) were women.

i. More relative success at gender and racial diversity

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

Several national legislatures exhibited better diversity levels than international arbitration. For instance, as of 2013, the countries with the largest proportion of women serving as elected representatives included Sweden (47%), Iceland (43%), Argentina (43%), the Netherlands (42%), and Finland (42%).²⁴⁵ Similarly, according to Women in National Parliaments' 2014 data, out of the 149 countries surveyed, thirty-five different countries (including Rwanda, Ecuador, Mexico, Serbia and Burundi) had more than 30% of women in their lower houses.²⁴⁶

Likewise, empirical 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. For example, several countries in the European Union have had respectable success in equalizing the representation of women in their domestic judiciaries.²⁴⁷ Some European 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, and Slovenia;²⁴⁸ and Israel has also experienced more than 50% of female judges.²⁴⁹

Not all countries experience perfect balance but exhibit relative success in diversifying their judiciaries. Although women have been nearly 50% of law school classes in the United States since 1992, women currently occupy only approximately 33% of positions within the federal judiciary;²⁵⁰ and only roughly 23% of US federal district court judges

245. *Ibid.*, p. 10.

246. Women in National Parliaments, "World Classification: Situation as of 1st May 2014", at <www.ipu.org/wmn-e/classif.htm> (last accessed 1 July 2014). There were, however, 32 states where women in national legislatures accounted for less than 11%. *Id.* There was also wide variation in women's representation in upper houses.

247. See European Judicial Systems, European Commission for the Efficiency of Justice, available at <<http://bit.ly/OGJ7T>> (last accessed 30 June 2014) (highlighting the achievements of several European Union judiciaries in having proportionate numbers of women in their judiciaries).

248. The percentages break down as follows: Bosnia and Herzegovina: 63.3%; Croatia: 67.4%; Czech Republic: 59.4%; France: 82.4%; Greece: 65.2%; Hungary: 68.8%; Latvia: 75.6%; Montenegro: 55%; Poland: 63.3%; Romania: 73%; Slovakia: 62.5%; Slovenia: 77.6%. See *ibid.* pp. 147-150, 275-281; see also Ulrike SCHULTZ and Gisela SHAW, eds., *Gender and Judging* (Hart Publishing 2013) (henceforth *Gender and Judging*) (exploring the experiences of women judges in nineteen different countries).

249. Eyal KATVAN, "The Entry and Integration of Women into Judicial Positions in Israel" in *Gender and Judging*, *op. cit.*, fn. 248, p. 83.

250. National Women's Law Center, "Women in the Federal Judiciary: Still a Long Way to Go", 30 May 2014, National Women's Law Center, at <<http://bit.ly/1qn2SEv>> (last accessed 30 June 2014); see also Jill D. WEINBERG and Laura B. NIELSEN, "Examining Empathy: Discrimination, Experience and Judicial Decisionmaking", 85 S. Cal. L. Rev. (2012) p. 313 at pp. 347-348. 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

are minorities.²⁵¹ Similarly, within the United States, state courts experienced a range of gender diversity. Likewise, despite increases over time, recent data indicate women hold 29.2% of state judicial positions.²⁵² Similarly, despite increases over time, minorities hold approximately 12.6% of overall state judicial positions.²⁵³ In Germany, in 2012, approximately 40% of national judges were women.²⁵⁴ Likewise, Canada had a core proportion of female judges. 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.²⁵⁵ This suggests that, although these states did not exhibit perfect gender diversity, there were multiple instances where national judiciaries had proportionately better diversity levels 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.

There were other states whose judiciaries did not exhibit gender balance but experienced better success in generating equilibrium than international arbitration. In 2010, for example, women made up approximately 36% of the judiciary in Venezuela, 35% in Costa Rica and 32% in Colombia.²⁵⁶ In Kenya, although women lack representation on the court of appeal, approximately 35.5% of advocates are women and

the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?”, 105 Nw. U. L. Rev. (2011) p. 587 at p. 588.

251. WEINBERG and NIELSEN, *op. cit.*, fn. 250, p. 347; see also Gregory L. ACQUAVIVA and John D. CASTIGLIONE, “Judicial Diversity on State Supreme Courts”, 39 Seton Hall L. Rev. (2009) p. 1203 at pp. 1214, 1223.

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

253. Malia REDDIC, et al., “Racial and Gender Diversity on State Courts: An AJS Study”, 48 Judges J. (2009) p. 31. 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%). *Ibid.* Research exploring women’s variation in representation in US state courts also identified that the size of the court matters, and larger courts are more likely to have more women. Sally J. KENNY, “Choosing Judges: A Bumpy Road to Women’s Quality and a Long Way to Go”, 2012 Mich. St. L. Rev. (2012) p. 1499 at pp. 1520-1521; see also Margaret WILLIAMS, “Women’s Representation on State Trial and Appellate Courts”, 88 Soc. Sci. Quart. (2007) p. 1192 at p. 1193.

254. Bundesamt für Justiz, “Zahl der Richter, Richterinnen, Staatsanwälte, Staatswältinnen und Vertreter, Vertreterinnen des öffentlichen Interesses in der Rechtspflege der Bundesrepublik Deutschland” (31 December 2012) at <<http://bit.ly/1mUKION>> (last accessed 30 June 2014). Scholars have identified, however, that women within the German judiciary “continue to be under-represented in leadership positions”. Ulrike SCHULTZ, “‘I was noticed 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*, *op. cit.*, fn. 248, p. 145.

255. Meredith BACAL, “Diversity and the Judiciary: Who Is the Bench Representing Anyway?”, The Court, 5 July 2012, at <<http://bit.ly/1mltOEs>> (citing Ryerson University Diversity Institute, “Improving Representation in the Judiciary: A Diversity Strategy” (27 June 2012) at <<http://tinyurl.com/oyd5ork>> (last accessed 30 June 2014).

256. Sital KALANTRY, “Women in Robes”, 6 Americas Quart. (Summer 2012) p. 83 at p. 84 available at <<http://tinyurl.com/lax56jv>> (last accessed 30 June 2014).

women made up about 30% of the bench in 2010.²⁵⁷ Even in Indonesia, in 2011, 23.4% of trial judges and 15.4% of appellate judges were women.²⁵⁸

Some countries, however, are laggards in terms of gender diversity.²⁵⁹ In the United Kingdom, the Ministry of Justice reported that, in 2010, the levels of women finally rose to 20.6%, with only 4.8% minorities.²⁶⁰ In Brazil, in 2010, 18% of the judges at its highest court were women but this was an increase from 0% in 1999.²⁶¹ In Malawi, approximately 17% of justices on the Malawi High Court and Supreme Court of Appeal were women.²⁶² In Japan, the percentage of women in the judiciary is relatively low (15%) but proportionate to the ratio of women lawyers (16%) generally.²⁶³

The private sector also exhibited a degree of success in putting women in elite positions and arguably better success than international arbitration. In some countries, there was better representation of women on corporate boards than in international arbitration. In the United States, for example, there is at least one woman on 97% of corporate boards.²⁶⁴ 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”,²⁶⁵ an Oxford Economics Report observed that countries with the “highest female representation on corporate boards [were] Norway (36%), followed by Philippines (23%), Sweden (23%), Latvia (22%) and Slovakia (22%)”.²⁶⁶ Some of the

257. Winifred KAMAU, “Women Judges and Magistrates in Kenya: Challenges, Opportunities and Contributions” in *Gender and Judging*, *op. cit.*, fn. 248, p. 165 at pp. 170, 181.

258. Engy ABDELKADER, “To Judge or Not to Judge: A Comparative Analysis of Islamic Jurisprudential Approaches to Female Judges in the Muslim World”, 37 *Fordham Int’l L.J.* (2014) p. 309 at p. 347.

259. These are, of course, countries that were sufficiently interested in issues of gender diversity that there is publicly available data identifying the scope of gender diversity; and it is possible that there are additional states with worse representation or states with no representation at all. Research on some Islamic law countries suggest this is the case. See ABDELKADER, *ibid.*; *Gender and Judging*, *op. cit.*, fn. 248, pp. 8-9 (observing that countries such as Egypt, Kuwait and the United Arab Emirates have female judges but noting that Saudi Arabia and Iran do not).

260. Mary L. CLARK, “Judicial Retirement and Return to Practice”, 60 *Catholic U. L. Rev.* (2011) p. 841 at pp. 873-874 n. 216. More recent data also demonstrates low levels of women’s representation as, in 2013, 24.3% of judges were women and 4.8% were black or ethnic minorities. Courts and Tribunals Judiciary, “Tribunals Diversity Breakdown 2012-13” (2014) available at <www.judiciary.gov.uk/publications/diversity-statistics-and-general-overview-2013> (last accessed 1 July 2014).

261. KALANTRY, *op. cit.*, fn. 256, p. 83.

262. Siri GLOPPEN and Fedelis E. KANYONGOLO, “Courts and the Poor in Malawi: Economic Marginalization, Vulnerability and the Law”, 5 *Int’l J. Const. L.* (2007) p. 258 at p. 289.

263. David T. JOHNSON, “Japan’s Prosecution System”, 41 *Crime & Just.* (2012) p. 35 at p. 49 fn. 8.

264. 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.* (2013) p. 419 at pp. 453-455; but see *ibid.* (noting that women only make up 16% of the total number of directors and the average number of women on corporate boards is two).

265. Oxford Economics, *op. cit.*, fn. 242, p. 30.

266. *Ibid.*, p. 8; see also Kimberly GLADMAN, “2013 Women on Boards Survey”, Harvard Law School Forum on Corporate Governance and Financial Regulation (20 May 2013) at <<http://blogs.law.harvard.edu/corpgov/2013/05/20/2013-women-on-boards-survey/>> (last

representation on European boards, however, may reflect that some countries enacted legislative mandates requiring women to be on corporate boards.²⁶⁷

ii. Less relative or equal success at gender and racial diversity

Other contexts, however, suggest that international arbitration has low, but not necessarily unusual, levels of diversity and, in any event, diversity itself is a challenging concept. As indicated earlier, some national courts have experienced diversity challenges; and even where courts have been successful in increasing the level of women, they may have experienced challenges on issues of racial diversity or vice versa. Similarly, empirical research suggests, public international law courts and tribunals tend to be primarily populated by men from developed states; but some international tribunals have done comparatively better at promoting some aspect of diversity than others.

In terms of gender diversity, one study estimated women account for only about 5% of appointments in international courts and tribunals.²⁶⁸ Grossman's earliest comprehensive study of international courts and tribunals in 2010 identified slightly higher proportions. Specifically, with only one outlier,²⁶⁹ women have historically comprised less than 20% of international tribunals. Grossman identified that women made up only 19% of the World Trade Organization's Dispute Settlement Body; women comprised 18% 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 on Human and People's Rights had 15% women; the Inter-American Court of Human Rights had 13%; the European Court of Justice had 7%; the International Court of Justice had 3%; and the International Tribunal for the Law of the Sea (ITLOS) had 0% women.²⁷⁰ When surveyed in 2010, on average, women made up only about 21% of the judiciary of those international courts and tribunals (ranging from 0% at the ITLOS to 58% at the International Criminal Court).²⁷¹

accessed 30 June 2014) (noting that "63% [of companies] have at least one female director" and "women make up a higher percentage of directors in developed markets"); European Commission, "Report on Women and Men in Leadership Positions and Gender Equality Strategy Mid-Term Review", MEMO/13/882 (14 October 2013) at <<http://bit.ly/1rYZoaC>> (last accessed 30 June 2014) (identifying within the EU that 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%)).

267. See generally Fredrik ENGLESTAD and Mari TIEGEN, eds., *Firms, Boards and Gender Quotas: Comparative Perspectives* (Emerald Group Publishing 2012).

268. See Chiara GIORGETTI, "Who Decides Who Decides in International Investment Arbitration", 35 U. Penn. J. Int'l L. (2013) p. 431, at p. 459 fn. 99 (citing Lawyers Comm. for Hum. Rts., "LCHR's Chart Showing Gender and Regional Balance in Elections to International Courts and Tribunals", research by Lawyers Committee for Human Rights, at <<http://bit.ly/1xie7QW>> (last accessed 30 June 2014)).

269. The International Criminal Court was the one exception, with 44% women. GROSSMAN, *op. cit.*, fn. 82, pp. 652-654, 679-681.

270. *Ibid.*, pp. 679-680.

271. *Ibid.*, pp. 652-654, 679-681.

Beyond Grossman's research on women adjudicators, the Iran-U.S. Claims Tribunal (IUSCT) at The Hague currently has nine members, and only one is a woman.²⁷² Our historical research has only been able to identify one other woman – Gabrielle McDonald – serving on the IUSCT since its inception in 1981. Likewise, at present, only one of the seven members of the WTO Appellate Body is a woman.²⁷³ Our research identified only one woman ever serving as a commissioner on the United Nations Claims Commission.²⁷⁴

Cecily Rose and Shashank Kumar's research confirms a similar lack of female counsel in public international law. More specifically, they identified that for all lawyers involved in contentious cases at the ICJ, female counsel only represented 11.2% of all advocates ($n=23$), and women only spoke 7.4% of the total time in ICJ proceedings.²⁷⁵ 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% of all oral advocacy.²⁷⁶ One intriguing contrast was that, in advisory proceedings, female advocates accounted for 19% of the population and 18% of total speaking time, but that these women tended to be government officials and state diplomats,²⁷⁷ which suggests that having a healthy proportion of women in key domestic positions could generate a trickle-down effect in international law.

International law courts and tribunals also experience challenges with diverse representation of nationality and obtaining adjudicators from perspectives across a development dimension. One study observed, "the extent of the Western monopoly of international legal practice at the ICJ", and it argued that international law "is not as 'international' as the name implies".²⁷⁸ The authors called into question the legitimacy of the ICJ given the lack of diversity in both 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 his legal education in OECD states.²⁷⁹ Similarly, they discovered a dearth of developing-world advocates.²⁸⁰ Rose and Kumar replicated those findings with recent data. From 1999-2012, the vast majority of the 205 different lawyers appearing before the ICJ were

272. See Iran-United States Claims Tribunal, *Arbitrators*, at <<http://bit.ly/1faG86s>> (identifying Rosemary Barkett as the only female arbitrator currently on the Tribunal). Historically, Gabrielle McDonald was the only other woman and a US appointee.

273. Yuejiao Zhang is the current Chinese appointee. Other women include Merit Janow (US), Jennifer Hillman (US) and Lilia Bautista (Philippines). See World Trade Organization, *Dispute Settlement: Biography Appellate Body Members*, at <<http://bit.ly/15Q2FCr>> (last accessed 30 June 2014).

274. We were only able to identify Professor Dr. Nayla Comair-Obeid as a female Commissioner. See Reports and Recommendations of the Panel of Commissioners, <<http://bit.ly/1koSNal>> (showing several reports signed by "N. Comair-Obeid", including report [S/AC.26/2005/3;] 10 March 2005).

275. KUMAR and ROSE, *op. cit.*, fn. 233, p. 13.

276. *Ibid.*, pp. 13-14.

277. *Ibid.*, p. 25.

278. GAUBATZ and MACARTHUR, *op. cit.*, fn. 70, pp. 240-241.

279. *Ibid.*, pp. 261-263.

280. *Ibid.*, pp. 247, 251-253.

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”; and, for counsel who were repeat players at the ICJ, the balance was skewed towards representation by lawyers from developed states.²⁸¹

The private sector also has its challenges. When power is concentrated into a single position, gender balance is not as prevalent. For example, the *Fortune 500* recently announced that women exhibited their best showing in history by comprising 4.8% of CEO positions in the top 500 corporations in the United States.²⁸² 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 one female member on their board.²⁸³ This latter phenomenon might reflect the tendency for larger diffuse structures to generate greater opportunities for diversity, much like diversity in US state courts where larger courts exhibited larger proportions of women.²⁸⁴ Meanwhile, large law firms also experience diversity struggles. Linklater’s 2012 diversity statistics, for example, reflect that, globally, only 17% of its partners were female, with a high of 26% female partners in Asia and a low of 9% female partners in Europe; and 90% of UK partners were white.²⁸⁵ Yet Linklater’s experience is not unique given the dearth of women partners in US and UK law firms.²⁸⁶ These potentially unrepresentative examples raise the possibility that the diversity data in arbitration reflects an international pipeline problem as not all countries have the same level of

281. KUMAR and ROSE, *op. cit.*, fn. 233, pp. 11-16; but see TERRIS, et al., *op. cit.*, fn. 9, p. 223 (concluding that “[t]here once was a time when the ‘invisible college’ of international judges consisted of a small band of men, principally Europeans, clustered tightly in The Hague” but then stating “[t]oday’s more extensive network has much more diversity in terms of geography, race, and gender”).

282. Caroline FAIRCHILD, “Number of Fortune 500 women CEOs reaches historic high”, *Fortune 500*, 3 June 2014, at <<http://bit.ly/1nLdkqE>> (last accessed 18 June 2014).

283. GLADMAN, *op. cit.*, fn. 266 (“63% [of companies] have at least one female director, and 13% have at least three women”). Even with this historic success, the popular press nevertheless 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”, *The Guardian* (17 May 2014) at <<http://bit.ly/1o32V6x>> (last accessed 30 June 2014); Claire Cain MILLER, “An Elusive Jackpot: Riches Come to Women as C.E.O.s, but Few Get There”, *New York Times* (7 June 2014) at <<http://bit.ly/1o32V6x>> (last accessed 30 June 2014) (observing that women CEOs make \$1.6 million less than male counterparts).

284. See *op. cit.*, fn. 253 and accompanying text.

285. Linklaters, “Diversity Statistics 2012”, p. 1 at pp. 1-2, at <<http://bit.ly/1vtOERM>> (last accessed 1 July 2014).

286. See American Bar Association, “A Current Glance at Women in the Law 2013” (2013) at p. 2, at <<http://bit.ly/1o0m06Q>> (last accessed 1 July 2014) (identifying 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”, *The Lawyer* (5 August 2013) at <<http://bit.ly/1iSQrzE>> (last accessed 1 July 2014) (observing that The Lawyer’s UK 200 indicated women made up 18.6% of all partners).

women or minority lawyers (to say nothing of women and minority lawyers who are interested in international arbitration).²⁸⁷

Nevertheless, it is worth observing that – by comparison to many (but not all) national judiciaries and legislatures – public international law courts and tribunals experience meaningful challenges about whether they are representative and thereby generate concerns about their institutional legitimacy. The question remains as to whether the international arbitration community wishes to find ways to be viewed as a leader in promoting diversity in international law or is content with its current position.

b. Perceived problems of diversity

Irrespective of the comparative baseline, the raw data reflected that there were diversity challenges within ICCA itself and within the ranks of counsel and arbitrators.²⁸⁸ The question is whether, in light of the given demographic data, the international arbitration community considers the current state of diversity to be acceptable or worth addressing.

To explore issues about diversity from a broad perspective, we asked a wide-ranging question. Specifically, we asked respondents to respond to this statement: “International arbitration has diversity challenges related to gender, nationality, or age.” Respondents then ranked their answer using a 1-5 ordinal scale, with 1 being “strongly disagree”, 3 being “neither agree nor disagree” and 5 being “strongly agree”.²⁸⁹

Overall, the responses reflected that ICCA respondents self-identified that international arbitration experiences diversity challenges. For the 513 ICCA respondents answering the question, both the most frequent answer and median answer was 4,²⁹⁰ indicating that respondents somewhat agreed that there are diversity challenges in international arbitration related to gender, nationality or age. See Table 15.²⁹¹

287. See also Sally J. KENNY, “Which Judicial Selection Systems Generate the Most Women Judges? Lessons from the United States”, in *Gender and Judging*, *op. cit.*, fn. 248, p. 461 at pp. 462-469 (identifying various explanations for lack of female representation in judiciaries).

288. Arbitration’s diversity concerns are somewhat reminiscent of commentary about the glass ceiling in transitioning to the judiciary. See KALANTRY, *op. cit.*, fn. 256, p. 85 (“Across the globe, women judges report that an ‘old boys’ club’ mentality surround[s] judicial appointment [and] poses a crucial barrier to entry”).

289. See Annex: Survey Materials, this volume, pp. 121-122.

290. Thirty-five respondents failed to answer this question. The mean response was 3.63 (SD=1.153).

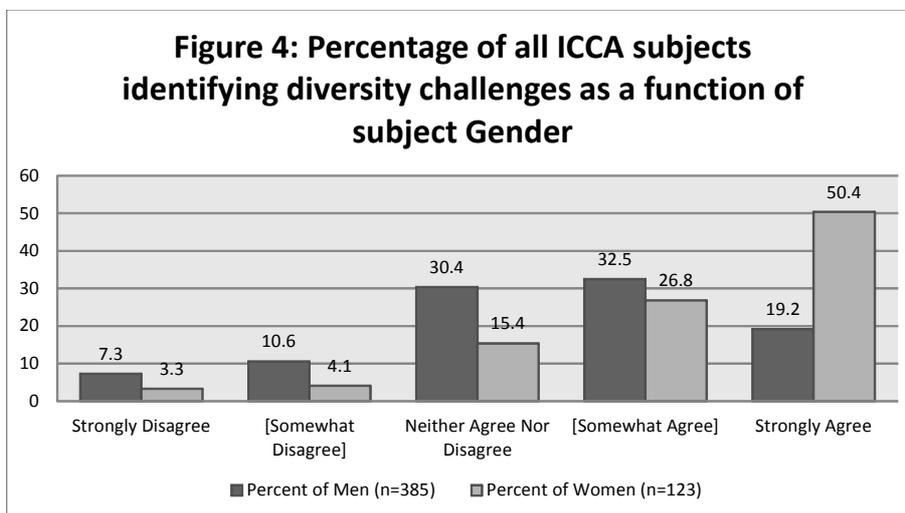
291. For the subset of ICCA respondents who served as counsel or arbitrator, the 445 respondents yielded similar response patterns, with 6.3% strongly disagreeing ($n=28$); 10.3% somewhat disagreeing ($n=46$); 26.5% neither agreeing nor disagreeing ($n=118$); 30.1% somewhat agreeing ($n=134$); and 26.7% strongly agreeing ($n=119$) about international arbitration experiencing diversity concerns.

Table 15: Percentages and Frequency of Responses of All ICCA Respondents in Response to Question About Whether International Arbitration Has Diversity Issues Related to Gender, Nationality or Age

Answer	Response Percentage	Response 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	158
5 – Strongly Agree	26.7	137
Total	100.0	513

There were also reliable gender differences in how respondents perceived diversity issues in international arbitration ($t(506)=6.189$; $p<.001$; $r=.27$; $n=508$).²⁹² For male respondents, the mean score was 3.46 (SD=1.13; $n=385$), indicating that the tendency overall was to neither agree nor disagree about the existence of a diversity problem in international arbitration but still, overall, reflective of a potential concern. In contrast, for female respondents 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 or strongly agreed with the possibility of diversity challenges related to gender, nationality or age. In addition, the r -value suggests that gender differences exhibited a medium-sized effect, suggesting the variation in experience was not trivial. Figure 4 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 50% of all women selecting that response.

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



A correlation coefficient evaluated a possible relationship between age and perceived concerns about diversity and identified a statistically significant relationship ($r(497)=-.17; p<.001$). The reliable link was, as respondent age increased, respondents were *less* likely to identify a diversity problem in international arbitration. In contrast, as respondent age decreased, respondents were *more* likely to identify a diversity problem in international arbitration.

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

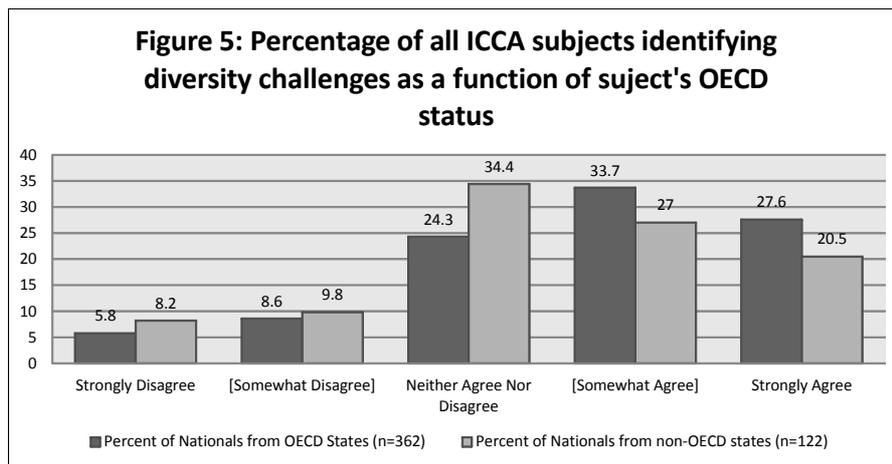
Out of an abundance of caution, we analyzed respondents' primary nationality in three ways, namely: (1) OECD membership, (2) World Bank classification, and (3) HDI classification. The results generated a puzzle. First, using correlation coefficients²⁹³ and ANOVAs,²⁹⁴ it was not possible to identify a meaningful difference in responses to the

293. Using correlation coefficients, there was not a reliable linear relationship with respondents' development status using World Bank ($r(484)=-.05; p=.25$) or HDI status ($r(484)=.07; p=.15$). As any latent effect was less than statistically small, they are technically statistically underpowered and further research is necessary.

294. The ANOVA analyzed variation in the diversity question on the basis of the four-category variable of respondents' World Bank development status. There was no significant main effect for development ($F(3,480)=1.802; p=.15; r=.11; n=484$). Follow-up analyses using a conservative test also failed to identify any significant pairwise comparisons. Using a more liberal test, however, there was only one significant follow-up relationship where nationals of upper-middle income states expressed *lower* levels of concerns about diversity, whereas nationals of high income

diversity question using a respondent's World Bank or HDI classification. Nevertheless, the non-significant facial pattern was that respondents from countries with higher levels of development status were more likely to express concerns related to diversity.

There was, however, a reliable variation in answers to the diversity question based upon whether the respondent was from an OECD or a non-OECD country.²⁹⁵ Yet, the difference was in an unexpected direction. Respondents who were from OECD countries were *more* likely to identify diversity issues; and, in contrast, respondents from non-OECD countries were *less* likely to identify diversity challenges. Nevertheless, even having identified the difference, the effect size was statistically small ($r=.10$), which indicates that the effect while reliably present was not large. Figure 5 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 on diversity challenges. By contrast, OECD nationals were more likely than non-OECD nationals to either "somewhat" or "strongly agree" that international arbitration experiences diversity challenges.



The results may, in part, reflect that in some national courts, there were low levels of diversity, and in public international law courts and tribunals, there were low levels of development status diversity. In these circumstances, it is possible that non-OECD nationals view arbitration as comparatively better at generating opportunities for a

states expressed *higher* level of concerns about diversity.

295. The relationship was significant using a correlation coefficient ($r(484)=.10$; $p=.03$) or a t -test ($t(482)=-2.255$; $p=.03$; $r=.10$; $n=484$). The mean response to the diversity question for OECD nationals was 3.69 (SD=1.14; $n=362$) and 3.42 (SD=1.16; $n=112$) for non-OECD nationals.

diverse range of arbitration specialists and thereby view the status quo as less problematic.

Overall, the general international arbitration community indicated there were concerns on issues of diversity related to gender, nationality or age. Women and younger respondents reliably identified the difference more distinctly. Although the results were mixed as regards a respondent's development status, which served as a proxy for nationality, there was some evidence suggesting that, for those attending the ICCA Miami 2014 Congress, the arbitration community from the developed world may perceive greater concerns than their counterparts. Yet, as demonstrated with respondents' actual experiences with diversity, these perceived concerns may need to be adjusted given the data.²⁹⁶

c. Actual experience with diversity in international arbitration

Perception, however, can differ from reality. Scholarship in cognitive psychology reflects that assessments can be influenced by heuristics that make certain experiences seem more prevalent or generate selective perception.²⁹⁷ For this reason, we tested the demographic data and perceptions against reported experiences in international arbitration.

This Sub-section first analyzes how frequently those acting as arbitrators receive appointments, both as a function of gender and development status. It then explores counsel's and arbitrators' experience with diverse appointments. To minimize response bias, we asked about respondents' 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 exploring – in their experience as arbitrator and counsel – how frequently respondents worked with tribunals comprised of at least one woman and/or tribunals with at least one developing-country arbitrator.²⁹⁸

i. Gender and development: variations in frequency of arbitral appointments

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

296. Sect. IV.4.c.i-iii raises several questions, for example, as the data reflect 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; and we were unable to identify a meaningful difference between the appointment levels of men and women.

297. See, e.g., Christopher CHABRIS and Daniel SIMONS, *The Invisible Gorilla: How Our Intuitions Deceive Us* (Crown Publishing 2010); FRANCK, *Myths and Realities*, *op. cit.*, fn. 29, ch. 2 et seq.

298. If we had additional time and space, we could have explored other diversity aspects of international arbitrators and counsel. Methodological constraints related to timing and formatting, however, prevented us from doing so; and we were only in a position to ask those questions identified in the Annex : Survey Materials, this volume, pp. 121-122. Further research could consider a broader conception of diversity to explore other experiences.

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 failed to reveal a statistically significant difference in the median number of appointments ($U=4564.5$; $p=.39$).²⁹⁹ The median number of appointments for women was 9 (IQR=3-22);³⁰⁰ and the median for men was 10.5 (IQR=3-40). Similarly, an ANOVA failed to reveal any statistically significant difference in mean appointments ($F(1,260)=0.086$; $p=.77$; $r=.01$; $n=262$). The mean number of appointments for women was 32 (SD=79.39; $n=46$), and the mean number of appointments for men was 35 (SD=61; $n=216$). When we analyzed the separate subsets of ICA and ITA appointments, we were also unable to find a reliable gender difference in the number of appointments.³⁰¹

For development status, we conducted a series of tests – using different constructs of development status – to assess whether there were meaningful differences between the appointment levels of developed and developing-world arbitrators.³⁰² First, a Mann-Whitney U-test 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-Wallis test 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 more developed-world colleagues. 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 identified a reliable difference between HDI classification of an arbitrator's home state and number of appointments ($r(250)=.13$; $p=.04$). The more developed the home state, the greater number of

299. Non-parametric tests of medians were necessary to evaluate group differences in appointments, as the mean number of arbitral appointments exhibited unacceptable levels of skewing (4.772; SE=.117).

300. IQR stands for an Inter Quartile Range, which reflects quartile breakdowns. See URDAN, *op. cit.*, fn. 53, pp. 19, 161-163 (describing IQRs, the Mann-Whitney U test, the Kruskal-Wallis test, and Chi-square tests of independence). In this case the 25th quartile is 3; the median was 9; and the 75th percentile was 22. For IQR=3-22, the three reflects the 25th quartile and the 22 reflects the 75th quartile.

301. Using a Mann-Whitney test, for example, we were unable to detect a reliable link between gender and number of arbitration appointments in either ICA ($U=4511.5$; $p=.48$) or ITA ($U=3020.5$; $p=.23$).

302. Different tests were necessary given 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.

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 gain access to the arbitration "club" by having at least one appointment, the frequency of appointments was roughly equivalent to the appointment levels of their male colleagues. By contrast, for developing-world arbitrators, the number of their appointments was statistically lower than their developed-world counterparts.

This generates a rather interesting, and complex, puzzle. For women, it means that they were more likely to perceive diversity challenges, the diversity challenges being apparent in the small number of women acting as arbitrators (particularly when compared to women in positions of authority in national courts and legislatures). Once women joined the arbitrator pool, they obtained roughly equivalent levels of appointments. In other words, for women, the diversity challenge appears to involve 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 also received fewer appointments. Part of the explanation may be the contrast with the lower representation of developing-world adjudicators in international courts and tribunals, which is buttressed by the number of tribunals where developing-world arbitrators sat with other developing-world arbitrators. Nevertheless, in contrast to diversity challenges experienced by women, it suggests that developing-world arbitrators may require a different solution to achieving broader representation.

ii. Experience of arbitrators

We asked respondents whether, in their experience as international arbitrators, they had served on a tribunal with a woman (or another woman). We then invited respondents 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 1-5 times, (3) they had sat on such a tribunal 6-10 times, or (4) they had sat on a tribunal with a woman more than 10 times.³⁰³

First, we adjusted responses to reflect women's self-reported arbitral appointments.³⁰⁴ This made it possible to correct for potential under-reporting and identify the number of times ICCA arbitrators sat on tribunals with at least one woman. The mode and median response was two, reflecting that at least 1-5 arbitrations contained at least one woman. Table 16 provides a frequency breakdown of respondents responses, which indicates that a significant proportion of arbitrators reported they had "never" been on a tribunal with a woman and, overall, more than 75% of arbitrators indicated the absolute maximum number of times they had sat on a tribunal with a female co-arbitrator was five. A primary basis for there ever being a female arbitrator on

303. See Annex: Survey Materials, this volume, pp. 121-122.

304. 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.

a tribunal resulted from ensuring that women's own appointment experience was reflected in the analysis.³⁰⁵

Table 16: Percentages and Frequency of Responses of ICCA Respondents Serving as Arbitrators, Describing the Frequency of Having at Least One Woman on a Tribunal (Including Women's Self-Reported Appointments)

Answer	Response Percentage	Response Frequency
<i>Never had Tribunal with a Woman</i>	32.2	83
<i>1-5 Tribunals with a Woman</i>	43.4	112
<i>6-10 Tribunals with a Woman</i>	8.9	23
<i>10+ Tribunals with a Woman</i>	15.5	40
<i>Total</i>	100.0	258

Second, using the subset of forty-six female arbitrators, we identified how many times those women sat on tribunals with two or more women. The results suggested that, more often than not, these women were the only women arbitrators 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 most tribunals consist of three members, this suggests it was rare for two women to work together as co-arbitrators.

Turning to nationality and development, we asked respondents whether, in their experience as arbitrators, they had served on a tribunal with an arbitrator from a developing country. We then invited respondents to respond by ticking a box indicating that they had: (1) "never" sat on such a tribunal, (2) sat on such a tribunal 1-5 times, (3) sat on such a tribunal 6-10 times, or (4) sat on a tribunal with a developing-world arbitrator more than ten times.³⁰⁶ We cross-checked respondents' own development status to ensure that their responses did not ignore their own experience as arbitrators. We classified arbitrators' development status in three ways as a cross-check using OECD, World Bank and HDI status. Results were nearly identical irrespective of how the respondents' development status was coded.³⁰⁷ Table 17 provides a frequency

305. Without adjusting for a woman's own appointments, there was nearly a dead heat between respondents answering they had "never" or only "1-5 times" sat with a woman. Between those two categories alone, this reflected nearly 84% of all responses. Only 7.8% of respondents indicated they had sat with a woman more than ten times.

306. See Annex: Survey Materials, this volume, pp. 121-122.

307. When respondents were analyzed using the World Bank classification of their home state (and classifying non-High Income arbitrators as a "developing-world" arbitrator): (1) 40.2% ($n=102$) had "never" sat with a developing-world arbitrator; (2) 38.6% ($n=98$) had sat with one

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 in their own experience as an arbitrator.

Table 17: Percentages and Frequency of Responses of ICCA Respondents Serving as Arbitrators, Describing the Frequency of Having at Least One Developing-World Arbitrator on a Tribunal (Including Respondents' Self-Reported Appointments Using Their OECD Status)

Answer	Response Percentage	Response Frequency
<i>Never had Tribunal with a Developing-World Arbitrator</i>	40.2	102
<i>1-5 Tribunals with a Developing-World Arbitrator</i>	38.6	98
<i>6-10 Tribunals with a Developing-World Arbitrator</i>	9.8	25
<i>10+ Tribunals with a Developing-World Arbitrator</i>	11.4	29
<i>Total</i>	100.0	254

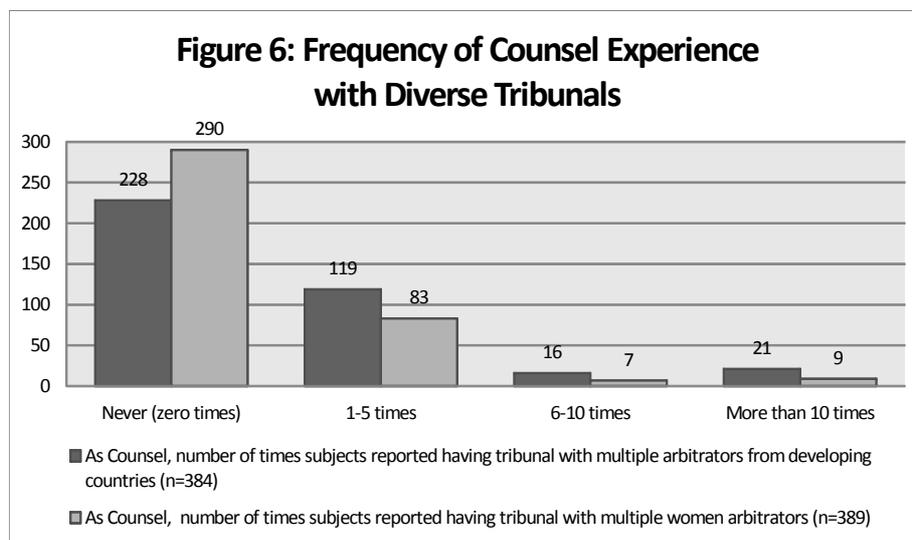
Much like the results for arbitrators experiencing the presence of a single woman, nearly one-half of arbitrators never experienced having a single developing-world arbitrator on a tribunal. Fourteen respondents indicated that they had sat in 100+ arbitrations, but they worked with developing-world arbitrators in less than ten of their cases. At a time when there is a broad pool of talent in international arbitration, and that talent extends across national borders and gender, the concentration of arbitration appointments suggests that there may be untapped value in diversifying the pool of arbitrators.

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 arbitrator 11 or more times. When respondents were analyzed using the HDI ranking of their home state (and classifying arbitrators as “developing” when they were not in the top 30 most developed states under the UNDP’s ranking: (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 arbitrator 11 or more times.

iii. Experience of counsel

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

As regards that first question, the mode and median answers were “never”, and the vast majority of counsel had “never” argued before a tribunal containing two or three women. Specifically, 74.6% ($n=290$) of counsel had never had a tribunal with two or more women; 21.3% ($n=83$) of respondents had only experienced a tribunal with multiple women 1-5 times; 1.8% ($n=7$) of counsel had experienced 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 6 provides a frequency breakdown demonstrating that, when acting as counsel, the overwhelming majority of respondents 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 during the course of their careers. Contrasted with Table 1, where the average counsel worked on 27 cases, the lack of experience with tribunals containing multiple female arbitrators is noteworthy. It also suggests that those perceiving a facial diversity imbalance in international arbitration were justified in their assessment.



On the theory that female counsel might advise the appointment of female arbitrators – or that clients willing to retain female counsel may be more likely to appoint female arbitrators – we tested whether counsel’s gender was reliably linked to the number of tribunals with multiple female arbitrators. Tests were unable to detect a reliable link between those variables.³⁰⁸ A sample of more than 780 subjects would be required to reliably isolate the presence or absence of an effect as the non-significant latent effect was statistically small.³⁰⁹

For the second question of counsel experience with arbitrators’ development status, the results were similar but with a small twist. The mode and median answer were also “never” and the majority of counsel had “never” argued before a tribunal with two or three individuals from developing countries. Yet, counsel had somewhat more experience with tribunals containing multiple developing-country arbitrators. Specifically, 59.4% ($n=228$) of counsel had “never” had a tribunal with two or more developing-world arbitrators; 31.0% ($n=119$) of respondents had only experienced a tribunal with multiple developing-country arbitrators 1-5 times; 4.2% ($n=16$) of counsel had experienced 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 6 demonstrates that when acting as counsel, the overwhelming majority of respondents 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 respondent offered an unsolicited comment in its response, namely: “when you do Brazil work ... every tribunal is Brazilian”.³¹⁰ This raised the question of whether counsel from developing states reliably experienced having tribunals with multiple developing-world arbitrators. Unlike the findings related to gender, a correlation coefficient identified a meaningful link between counsel’s identity and the prevalence of diverse appointments.

Regardless of whether development status was defined using an OECD ($r(367)=-.44$; $p<.001$), World Bank ($r(367)=.42$; $p<.001$) or HDI ($r(367)=-.42$; $p<.001$) definition, there was *always* a reliable and large statistical link between a respondent’s development status and experience with tribunals containing multiple developing-world arbitrators. Where counsel were from less developed states, they were more likely to have had tribunals with multiple developing-country arbitrators; and likewise, the more developed the counsel’s country of origin, the less likely they were to have experienced tribunals from developing states.

These findings perhaps begin to explain why developing-world arbitrators also 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, it seems

308. A correlation coefficient ($r(389)=-.05$; $p=.34$), a t -test ($t(387)=0.957$; $p=.34$; $r=.05$; $n=389$), and a Pearson’s Chi-square Test of Independence were all non-significant ($X^2=.275$; $p=.28$).

309. The r -values were less than .10, which means they were less than statistically small. See COHEN, *op. cit.*, fn. 118. A *post-hoc* power analysis indicates that, in order to reliably detect such a miniscule latent effect related to gender, the minimum sample size would need to be 781 to establish .80 power and 1045 to establish .90 power.

310. This comment came from respondent no. 381.

reasonable to infer that respondents would be less likely to readily 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 rightly identify an imbalance related to nationality or development.

V. LIMITATIONS

It is necessary to identify research limitations to prevent consumers of research from drawing unwarranted inferences and permitting assessment of the utility of the research. Throughout this Paper, we have included cautions about the limitations of survey questions generally and our questions specifically, limitations of statistical tests, and limitations related to the analyzed sample. For example, we identified concerns related to the representativeness of the sample and the risk of selection bias that derive from the potential over-inclusion of North American respondents, the under-inclusion of other respondents, the use of English language in an international dispute settlement conference, and fiscal cost of attendance. In addition to the traditional caveats that must be appreciated when drawing inferences from scientific research,³¹¹ we also believe it is appropriate to highlight other key issues.

First, there is a risk of external validity. The data from ICCA are now a historical snapshot. It is possible that, as international arbitration continues to expand, several of the findings will change. One might imagine, for instance, certain findings related to diversity changing over time as the group of arbitrators expands; and one day there may be broader variation in age, gender and nationality. Future research should therefore reassess these aspects periodically – and in different contexts – with more sophisticated measures and models. In this way, we can reconsider what we know now and add to our knowledge over time.³¹²

Second, as ICCA respondents had the option both to not attend the initial Plenary and also not complete the survey, there is a risk of a self-selection bias that may limit the inferences. Only 55% 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 or able to attend.³¹³

Third, 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 respondents, certain tests were statistically underpowered with an unacceptable risk of a Type II error; and it is possible

311. FRANCK, et al., *op. cit.*, fn. 74, pp. 885-899.

312. *Ibid.*, pp. 888-889, 900-902 (discussing external validity issues and opportunities for future research).

313. See CHENG, *op. cit.*, fn. 33, p. 1279 (identifying similar concerns in distributing surveys to judges at judicial conferences).

that a meaningful – but latent – difference is lurking within the data. Future research with an expanded sample size is therefore required before reaching definitive conclusions about the lack of a statistically reliable effect. In any event, 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. One might therefore hope that a well-attended future ICCA Congress would be an appropriate venue for such an undertaking.

As a result of these cautionary considerations, 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. Nevertheless, those challenges do not diminish the possibility of future research providing useful replication that confirms – and expands – upon existing research.

VI. CONCLUSION

The data in this Paper reflect that the modern reality of international arbitration is complex and not subject to an easy unitary narrative. As ICCA may realize this given its willingness to engage in self-reflection, a full appreciation of the complexity offers a powerful opportunity. This data – and other research in the future – will permit the international arbitration community to explore evidence-based solutions to identifiable challenges without reliance on stylized facts or anecdotes. Recognizing that this research is novel in several key aspects, we respect that the initial findings will require re-evaluation. We now explore the complexities of international arbitration by focusing on the most crucial findings related to demographics, issues involving precision and concerns related to justice.

There were both bright spots along with areas for improvement in the basic demographics. The good news reflected that ICCA has moved past historical east/west and market/non-market economy divides. The data demonstrated that arbitrators and counsel reflected a broad spectrum of nationalities, continents and languages. Nevertheless, as old challenges have been conquered, new ones have arisen. The data reflected arguably disproportionate levels of representation by men from states in North America and Europe, which have high levels of economic development. Specifically, only 24% of counsel and 17.6% of arbitrators were women. Meanwhile, 68.6% of counsel and 76% of arbitrators were from Europe and North America; and given those nationalities, it should be unsurprising that 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. Ultimately, the data supported, rather than disproved, claims that international arbitration is a “white male game”.³¹⁴

314. Peter F. PHILLIPS, “ADR Continental Drift: It Remains a White, Male Game”, *National L.J.* (27 Nov. 2006); 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 *Ford. Urban L.J.* (2008) p. 119.

Precision is key to the legitimacy of rule of law institutions. In this respect, with the limited number of questions we asked, the data revealed precision-related strengths and weaknesses. The core factor supporting a high level of precision involved arbitrator preparation. Despite poignant narratives about well-paid arbitrators who are nevertheless unprepared for hearings, over half of the ICCA respondents revealed that all members of tribunals were fully prepared either “frequently” or “always”. High levels of diligence, in turn, stand to generate greater precision and accuracy in the arbitration process. Nevertheless, there were areas requiring attention by the arbitration community or redress by parties. Specifically, there was a disjunction whereby respondents viewed burden of proof as outcome determinative, yet were unable to obtain advance notice of those outcome determinative rules. Likewise, over 66% of arbitrators and counsel said that tribunals either “never” (or only “occasionally”) offered advance notice of how tribunals would exercise their costs discretion. As both proof and cost issues exhibited a common/ civil law divide in responses, appropriate remedies in these areas likely require tailoring to reflect jurisdictional differences. Luckily, arbitration offers that flexibility and parties can make targeted adjustments. As a final matter, nearly 75% of arbitrators and counsel identified that parties “sometimes”, “frequently” or “always” withheld responsive documents; and less than 2% indicated that such procedural impropriety never occurred in their cases. Given the importance of procedural integrity and generating precise results based upon verifiable facts, document production is an area ripe for targeted reform. Moreover, given that reforms in areas of precision – like burden of proof and document production – relate primarily to procedural matters, generating systemic mechanical reforms will add immediate value for all parties.

Justice – both substantive and procedural – is a core fulcrum of rule of law. Appreciating the preliminary nature of the enquiry, data suggested both positive aspects related to legitimacy and areas in which the arbitration community can make strategic choices about its future. The constructive news was that although respondents viewed arbitration as prestigious (particularly ITA), neither ICA nor ITA arbitrators believed they were motivated by concerns related to reappointment or establishing themselves as collegial players during contemporaneous decisionmaking. For both ICA and ITA, more than 75% of arbitrators indicated that they either disagreed (or simply did not care) about future reappointments. Those findings cut against the theory that arbitrators are self-motivated partisans in adjudication or otherwise actively game adjudication to obtain future appointments. Yet further research is necessary to remove elements of potential self-serving bias that potentially affected the results.

Justice concerns related to fraud and diversity were observable. Respondents identified challenges related to fraud in international arbitration. Nearly 11% of respondents indicated that fraud “frequently” or “always” occurred in arbitration, raising a degree of concern. While others thought fraud was less frequent, over 85% of respondents stated that fraud occurred either “occasionally” or “sometimes”. Arbitration insiders should carefully explore how to decrease the incentives to engage in fraud; but particularly as counsel and arbitrators identified lower levels of fraud than other ICCA respondents, education of the public and de-sensitization of the arbitration bar may also be warranted.

Diversity challenges within international arbitration are, however, potentially the most challenging – but also possibly the most rewarding – as they generate a historical

opportunity to be a leader within the broader community of international courts and tribunals. At a minimum, there is an important normative question about what is the appropriate baseline against which diversity in international arbitration should be measured. On one hand, one might intuitively look to baselines established by national legislatures and judiciaries. Yet, on the other hand, given the transnational nature of international arbitration, which draws on the “invisible college” of lawyers from many states, perhaps the baseline offered by public international law is the more appropriate baseline. Nonetheless, using either baseline, the small size of the pool of women and developing-world arbitrators was noteworthy.

Perhaps intuitively recognizing demographic imbalance, more than 75% of ICCA respondents identified that they agreed (either somewhat or strongly) with the proposition that international arbitration experiences diversity challenges. Yet, not everyone perceived the same level of challenges. Women and younger respondents were *more* likely to identify diversity challenges than men or older respondents. However, respondents from developing countries (no matter how that term was defined) were *less* likely than their developed-world counterparts to identify diversity challenges. These perceived experiences, however, are juxtaposed with actual experiences related to gender and development status.

Data reflected that entering the “club” of international arbitration was challenging, and the proportion of women arbitrators was only 17.6%. Yet, once women entered the “club” of arbitrators, statistical tests could not identify a meaningful difference in the number of appointments that women had as compared to men. Even counting women’s own arbitration appointments, approximately one-third of arbitrators had never sat on a tribunal with a woman. More than 75% of counsel reported they had never had a tribunal with more than two female arbitrators.

Analyzing diversity according to development status was equally challenging with both bright spots and challenges. Recognizing that developing-world arbitrators were *less* likely to identify diversity problems in international arbitration, two aspects are 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 that, irrespective of how development status was defined, developing-world arbitrators experienced statistically lower numbers of appointments than their developed-world colleagues. Meanwhile, 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. Nevertheless, those descriptive findings must be contextualized against tests demonstrating that counsel from developing countries were much more likely to experience high portions of tribunals comprised of developing-world arbitrators. As one respondent volunteered, “when you do Brazil work . . . every tribunal is Brazilian”. While there are other possibilities, localized experiences may account for the divergences of perception and reality for developing-world arbitrators.

Ultimately, diversity challenges in international arbitration are and will continue to generate complex dynamics. As suggested by Sundaresh Menon at the ICCA Congress in Singapore in 2012³¹⁵ and Salim Moollan at the ICCA Congress in Miami in 2014,³¹⁶ we believe they are a challenge worth undertaking and could serve to 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 and encompasses all genders, there is likely untapped value in diversifying the pool of arbitrators.

Considering how best to diversify the “invisible college” of arbitrators may contribute in several ways to the long-term sustainability of international arbitration as a means for solving international disputes. First, as international business activity becomes more complex and international arbitration expands, it is critical to have a pool of arbitrators who are immediately 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 up”, 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.

We must also acknowledge, however, that there are inevitable limitations to this research in terms of the population sampled, questions asked, data identified, and derivative inferences. Empirical research, like all quests for human knowledge, can never be perfect. While we were constrained in our capacity to analyze every latent question suggested by the data due to time and space constraints, we hope the initial data and preliminary analyses will offer a useful baseline. We welcome the process of identifying how the results might change over time as international arbitration evolves.

The results provided in this Paper are both designed to elucidate the “invisible college” of international arbitrators and identify the tip of a larger empirical iceberg.³¹⁷ We applaud ICCA for taking the first step in generating transparent information about the “invisible college” of international arbitration. In light of the data, we offer two suggestions. First, we encourage ICCA and other 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, we encourage ICCA and the international arbitration community to think seriously and strategically

315. MENON, *op. cit.*, fn. 133, paras. 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).

316. See MOOLLAN, *op. cit.*, fn. 240 and accompanying text.

317. Further explorations of the implications of research related to diversity is available at FRANCK, et al., fn. 35.

about how to generate areas for improvement, whether structural or incremental.³¹⁸ Recognizing that normative debates about the evolution of arbitration matter – but the reality of human behavior is also vital – we hope that evidence-driven approaches will enhance both justice and precision and thereby promote the legitimacy of international arbitration as a strong and viable dispute settlement option.

318. That discussion is already beginning. See Lucy REED and James FREDA, “Maxwell Lecture – After ICCA Singapore, After ICCA Miami: The Next Questions”, *ICSID Rev.* (forthcoming 2015).

Annex

Survey Materials

Demographic Questions

1. Your Sex (Male or Female):
2. Your Nationality (or Nationalities):
3. Your Current Age:
4. Your Mother Tongue:
5. Please identify other languages that you speak and/or write proficiently:
6. Please indicate jurisdiction(s) where you received your legal education:
 Common Law Civil Law Both
7. Please indicate the number of cases where you have acted as:
 - a. *Counsel* in international arbitration:
 - b. *Expert* in international arbitration:
 - c. *Arbitrator* in an international *commercial arbitration*:
 - d. *Arbitrator* in an international *investment treaty arbitration*:
 - e. *Adjudicator* in a *public international law dispute* (International Court of Justice, World Trade Organization proceedings, etc.):
 - f. *Judge* in a *national court proceeding*:

ICCA Questions

- (a) How prestigious is it to have an appointment in international commercial arbitration? [1 (Not Prestigious) to 5 (Very Prestigious)]
- (b) How prestigious is it to have an appointment in investment treaty arbitration? [1 (Not Prestigious) to 5 (Very Prestigious)]
- (c) In your experience as arbitrator or counsel, how often do tribunals articulate in advance what burden of proof they will require parties to meet? [1 (Never), 2 (Occasionally), 3 (Sometimes), 4 (Frequently), 5 (Always)]
- (d) In your experience as arbitrator or counsel, how often has the burden of proof been outcome determinative? [1 (Never), 2 (Occasionally), 3 (Sometimes), 4 (Frequently), 5 (Always)]
- (e) In your experience as arbitrator or counsel, how often do tribunals indicate in advance how they will exercise their discretion to shift arbitration costs? [1 (Never), 2 (Occasionally), 3 (Sometimes), 4 (Frequently), 5 (Always)]

- (f) In your experience as arbitrator or counsel, how often are all members of the tribunal fully prepared for the hearing? [1 (Never), 2 (Occasionally), 3 (Sometimes), 4 (Frequently), 5 (Always)]
- (g) In your experience as arbitrator or counsel, how often have you believed one or both parties have withheld responsive documents? [1 (Never), 2 (Occasionally), 3 (Sometimes), 4 (Frequently), 5 (Always)]
- (h) How often do you believe issues of fraud—in the underlying dispute or the arbitration itself—are involved in international arbitration? [1 (Never), 2 (Occasionally), 3 (Sometimes), 4 (Frequently), 5 (Always)]
- (i) International arbitration has diversity challenges related to gender, nationality, or age. [1 (Strongly Disagree) to 5 (Strongly Agree)]
- (j) When acting as an arbitrator, I consider how I will interact with my co-arbitrators in future cases. [1 (Strongly Disagree) to 5 (Strongly Agree)]
- (k) I believe there is value in having default rules permitting institutions to appoint all the arbitrators in a dispute. [1 (Strongly Disagree) to 5 (Strongly Agree)]
- (l) When I am sitting as an *international commercial arbitrator*, I consider whether I will be appointed in the future. [1 (Strongly Disagree) to 5 (Strongly Agree)]
- (m) When I am sitting as an *investment treaty arbitrator*, I consider whether I will be appointed in the future. [1 (Strongly Disagree) to 5 (Strongly Agree)]
- i. In my experience as arbitrator, I have sat with a/another woman: (More than 10 times; 6-10 times; 1-5 times; Never)
- ii. 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)
- iii. 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)
- iv. 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)
- v. 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)