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AMERICAN DIVERSITY IN INTERNATIONAL ARBITRATION 2003-2013

*Benjamin G. Davis**

I. INTRODUCTION

When I was approached to return to issues of diversity in international arbitration, I decided to expand on the methodology I had used in the 2003-2004 period in two earlier articles on American minorities in international arbitration.[1]

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* Associate Professor of Law, University of Toledo College of Law.

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[1] Benjamin G. Davis, *The Color Line in International Commercial Arbitration: An American Perspective*, 14 AM. REV. INT'L ARB. 461 (2004) and Benjamin G. Davis, *International Commercial Online and Offline Dispute Resolution: Addressing Primacism and Universalism*, 4 J. AM. ARB. 79 (2005). For a pioneering work on diversity of women, see Louise Barrington*, Arbitral Women: A Study of Women in International Commercial Arbitration*, *in* THE COMMERCIAL WAY TO JUSTICE: THE 1996 INTERNATIONAL CONFERENCE OF THE CHARTERED INSTITUTE OF ARBITRATORS 229-41 (Geoffrey M. Beresford Hartwell ed., 1996) (describing the lack of women in international arbitration but their increasing presence in international commercial arbitration), *cited in* Susan D. Franck, *The Role of the International Arbitrator*, 12 ILSA J. INT'L & COMP. L. 499 (2006). For excellent work on women in investment arbitration, see Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N. C. L. REV. 1, 75-83 (2007). For excellent historical work on women in arbitration, see Mireze Philippe, *Evolution of Women's Involvement in Dispute Resolution in the last Thirty Years; The Institutional Experience & ArbitralWomen Experience*, ARBITRALWOMEN NEWSLETTER, April 2013 at 7, *available at* http://www.arbitralwomen.com/index.aspx?sectionlinks_id=140&language=0&pageName=Newsletters; Mireze Philippe, History of the ICC Counsel, The Secretariat and the ICC International Court of Arbitration…What a Story (International Chamber of Commerce 2013) (on file with the author). For the most recent comprehensive discussion of gender in international arbitration, see Lucy Greenwood & C. Mark Baker, *Getting a Better Balance on International Arbitration Tribunals*, 28 ARB. INT'L 653 (2012) and the literature discussed therein, as well as Lucy Greenwood, *Unblocking the Pipeline: Achieving Greater Gender Diversity on International Arbitration Tribunals*, AMERICAN BAR ASSOCIATION INT'L LAW NEWS, Spring 2013, *available at* http://www.americanbar.org/publications/international_law_news/2013/spring/unblocking_pipeline_achieving_greater_gender_diversity_international_arbitration_tribunals.html. For guidelines on diversity, see Sasha A. Carbone & Jeffrey T. Zaino, *Increasing Diversity Among Arbitrators*, 33 NYSBA JOURNAL, Jan. 2012; V. V. Veeder, *Who Are the Arbitrators?*, presented at the 22d ICCA Congress in Miami, April 6-9, 2014 (forthcoming). For excellent work on diversity of nationality, see Ilhyung Lee, *Practice and Predicament: The Nationality of the International Arbitrator (With Survey Results)*, 31 FORDHAM INT'L L.J. 603 (2008); A literature search has not found other work focused on American minorities, American women, American lawyers with disabilities, or

In the current assessment, I examined American diversity in international arbitration across the broader target population for the American Bar Association's Goal III diversity efforts: American women, American minorities,[2] American lawyers with disabilities, and American LGBTQ (Lesbian, Gay, Bisexual, Transgender, Queer or Questioning) lawyers. These four groups are the target population described in the American Bar Association's Goal III: To eliminate bias and enhance diversity. Its two objectives are: 1. "To promote full and equal participation in the Association, our profession, and the justice system by all persons," and 2. "To eliminate bias in the legal profession and the Justice System."[3] In addition to sending a survey to 413 international arbitration practitioners of whom I was aware or to whom I was referred, I forwarded it to the ICC Counsel Alumni members of which I am a member, as well as to The International Law Discussion Space listserv, the Society of American Law Teachers listserv, and the Contracts, Dispute Resolution and Minority Groups listservs of the American Association of Law Schools. Further, I greatly appreciate that the Oil-Gas-Energy-Mining-Infrastructure Dispute Management network ("OGEMID") and ArbitralWomen were kind enough to share the survey in their online spaces. Thus, an attempt was made to reach as broad a group of international arbitration practitioners as possible on all five continents. Finally, based on anecdotal evidence that women may get their first appointment as an arbitrator through the appointment of an arbitral institution, I contacted a diverse

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American LGBTQ lawyers in international arbitration, let alone all of them at once as a target population.

[2] Race is, of course, a social construct. The vast literature on this subject and its discussion are excellently presented in Meera E. Deo, *Empirically-Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 HASTINGS L. J. 661 (2014). For a concrete example, I have been socially constructed as an African-American in the United States. I have a Hispanic (from Cuba) grandmother, at least one Irish great-grandfather, a Native-American (Cherokee) great-grandmother, and Chinese and Native-American (Blackfoot) ancestors according to my family lore, in addition to my ancestors of African origin whose presence in the United States dates back to at least 1800. Coming to recognize and feel ownership of that diverse history as part of living the social construct and self-identification as an African-American has been one of the most interesting aspects of this life. Coming to understand these and other diverse cultures through working with people in international arbitration is one of the pleasures of that work. I am certain that several Americans (and other Nationals) in international arbitration are similarly socially constructed as being of one race or another as they are perceived on the international plane. Experiencing these social constructs in countries with different cultures and histories can be both a liberating and constraining experience as one comes to understand opportunities and limitations in the expectations across borders. The key appears to be related to both the positive and negative impacts of explicit bias, implicit bias, and stereotype threat discussed later.

[3] American Bar Association Goal III, *available at* http://www.americanbar.org/about_the_aba/aba-mission-goals.html#GoalIII; Diversity and Inclusion ABA Member Survey, Executive Summary, 2013, *available at* http://www.americanbar.org/content/dam/aba/administrative/diversity/ABA_DI_MemberSurveyFinal.authcheckdam.pdf.

group of international arbitral institutions around the world to see if they would be willing to share data on their appointments of members of the target population.

Thirty-four individuals ultimately filled out the survey and three of the international arbitral institutions provided data which will be discussed below.

II. BACKGROUND – A CELEBRATION OF DIVERSITY AND INCLUSION IN INTERNATIONAL ARBITRATION

From my personal experience and research, I am certain that diverse American lawyers – including American women, U.S. minority lawyers, lawyers with disabilities, and LGBTQ lawyers – have been involved in some capacity in international arbitration over the past 35 or more years. It is true that, for most of that period, these persons may not have been seen in the classic roles of arbitrator, lead counsel, or leader of an international arbitral institution, but they have still been present in some aspect of arbitration working with an arbitrator, on the team of a party counsel, or within an international arbitral institution.

Some of the most significant early developments for women were the appointment of Tila Maria de Hancock in 1982 to be the Director of the ICC International Court of Arbitration. Gender diversity in the ICC Court assistant role increased when Sami Houerbi became the first man so named in the early 1990s. A further development was the change of the title of assistants to Deputy Counsel in the early 1990s and the promotion of Anne Cambournac (as she then was) from Deputy Counsel to be the first counsel who was a woman. Anne-Marie Whitesell's promotion from counsel to Deputy Secretary General came in 1999 and to Secretary General in 2001, a second generation appointment nearly twenty years after that of Tila Maria de Hancock. Another development was the promotion of Jennifer Kirby from counsel to Deputy Secretary General in 2005, as was the appointment of Mireze Philippe as Special Counsel in 2000. Mireze Philippe and Louise Barrington crystallized ArbitralWomen from an informal group in 1993 to a formal creation in 2005, a further milestone on the path. Certain American women pioneers such as Sally Harpole in Hong Kong and Karen Mills in Indonesia were working in Asia long before so many others. Gabrielle Kaufmann-Kohler, Eva Horvath, Teresa Giovannini, Antonias Dimolitsa, Delissa Ridgway, Lorraine Brennan, Jane Willems, Vera Van Houtte, Nancy Turck, Nayla Comeir-Obeid, Dana Freyer, Caroline Malinvaud, Loretta Malintoppi, Sarah Francois-Poncet, and Judith Gill, are among others who started working in the vineyards of international arbitration in the 1980s and 1990s.

Fast forward to the present and certainly the most significant developments for women – including American women – are the appointment of Meg Kinnear as the Secretary General of the International Centre for the Settlement of Investment Disputes; India Johnson as the President and Chief Executive Officer of the American Arbitration Association; Annette Magnusson as the Secretary General of the Arbitration Institute of the Stockholm Chamber of Commerce; Kathy Bryan as the President and Chief Executive Officer and Beth Trent as Senior Vice President of CPR; Teresa Cheng as the Chairman and Chiann Bao as

the Secretary General of the Hong Kong International Arbitration Centre; Julie Sager, Executive Vice President and Senior Financial Officer and Kimberley Taylor Senior Vice President and Chief Operating Officer at JAMS; Nadia Darwazeh as Secretary General of the Jerusalem Arbitration Center; Sarah Lancaster as the Registrar of the London Court of International Arbitration; and Lim Seok Hui as Chief Executive Officer and Tan Ai Leen as Registrar at the Singapore International Arbitration Centre. I have been pleased also to learn recently that Megha Joshi was named in 2012 as the Executive Secretary/Chief Executive Officer of the newly minted Lagos Court of Arbitration, another addition to the Arbitral Women. I have also recently met Bernadette Uwicyeza, Secretary General of the Kigali International Arbitration Center in Rwanda. We can think of extraordinary international arbitration practitioners such as Carolyn Lamm, Abby Cohen Smutny, and Lucy Reed who have come to the fore in the 2000s. In the space of intersectionality, we can honor Gabrielle McDonald, first African-American woman appointed a judge at the Iran-United States Claims Tribunal. We can highlight Nancy Thevenin, Effie Silva, and Deborah Enix-Ross (the first African-American woman counsel at WIPO) for their pioneering roles as American minority women in international arbitration.

III. THE SURVEY

With regard to appointments as arbitrators or in roles as counsel, the evidence from the survey suggest that there are persons of all four groups (though not necessarily Americans) present in these roles.

A. *Diversity of Appointments in International Arbitration by International Arbitral Institutions*

I contacted the American Arbitration Association, the Court of Arbitration for Sport/Tribunal Arbitral du Sport, the Chinese International Economic and Trade Arbitration Commission, CPR, the Hong Kong International Arbitration Centre, the Iran-United States Claims Tribunal, the International Centre for the Settlement of Investment Disputes of the World Bank, the International Chamber of Commerce International Court of Arbitration, JAMS, the Korean Commercial Arbitration Board, the London Court of International Arbitration, the Permanent Court of Arbitration, the Singapore International Arbitration Centre, and the World Intellectual Property Organization Arbitration and Mediation Center and asked if they could provide data for the number of U.S. nationals appointed in international arbitrations for 2012 with a breakdown by gender and if possible by American minorities, American lawyers with disabilities and American LGBTQ lawyers. The Hong Kong International Arbitration Centre, the International Centre for the Settlement of Investment Disputes of the World Bank and the International Chamber of Commerce International Court of Arbitration responded with numbers or a means to calculate the numbers by gender, with information on American minorities, American lawyers with disabilities and American LGBTQ lawyers not being available. The results from these three institutions are below:

Hong Kong International Arbitration Centre – U.S. National Appointments by Gender in 2012

U.S. Nationals (Appointed/Confirmed)
Men: 2 / 2
Women: Nil / 1
Total: 5

International Centre for the Settlement of Investment Disputes of the World Bank – Appointments by gender for cases started in 2012[4]

U.S. Nationals	Other Nationals
Men: 11	Men: 106
Women: 0	Women: 11

International Chamber of Commerce International Court of Arbitration – Appointments by Gender 2012

	U.S. Nationals	Other Nationals
Appointments of Men by the ICC Court	19	536
Confirmations of Men by the Secretary General of the ICC Court	59	555
Appointments of Women by the ICC Court	3	76
Confirmations of Women by the Secretary General of the ICC Court	6	47
Total	87	1214

[4] Due to the inability to determine exactly in what year a given arbitrator was named – as opposed to the constitution of an arbitral tribunal – I include as a proxy for 2012 alone all the cases that started in 2012 knowing full well that some of the individual appointments may have happened in 2013.

For American women, if these numbers can be the most favorable proxies for all the international arbitral institutions,[5] the numbers speak for themselves: When they are seeking an American arbitrator, or for that matter, when Other Nationals are being considered, parties and international arbitral institutions need to appoint more women. While at least the ICC (10.3%) and HKIAC's numbers (20%, admittedly on a smaller base) for Americans, and ICC (10.1%) and ICSID numbers (10%) for Other Nationals are significantly better than they were in earlier periods, the process of arbitrator selection has to be opened up somehow by the gatekeepers/door-openers for these decisions. For Americans in international arbitration to reflect the American population, far more women need to be named, which means that more women need to be brought on the path up to the highest levels of the profession.

Based on the survey results below and extrapolating from this information on American women, for American minority lawyers, American lawyers with disabilities, and American LGBTQ lawyers, the situation is probably even worse – though again, better than it was in international arbitration in the 1980s and 1990s. The gatekeepers/door-openers on these decisions need to find their path to the appointment of more American minorities, Americans with disabilities, and American LGBTQ lawyers.

B. *Diversity as Expressed in the Survey Results from Thirty-Four Persons*

Twenty-two out of the 34 persons responding to the survey were or had been in private practice, while 23 out of the 34 persons had acted as arbitrators. The rest were a mix of other categories (employee in an arbitral institution, in-house

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[5] This view is comforted by earlier work on appointments by gender at least. *See* Greenwood & Baker, *supra* note 1, at 654 n.9 for 2011 reports on appointments by gender (but not by gender of Americans):

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

counsel, or judge) with the principal other category (nine) being professors (more than one category could apply to a given person). Fully 25 of the respondents had greater than 20 years of experience in international arbitration. The range of arbitrator, counsel or arbitral institution experience ranged from one to hundreds of cases with these persons having served in over 2500 cases in these roles over the past ten years (though it is possible some were including pre-2003 cases).

Years in International Arbitration

1-5 years	6-10 years	11-15 years	16-20 years	Greater than 20
1	2	4	2	25

1. *American Minorities*

Turning to American minorities, fourteen of the 34 respondents had experience with American minorities in international arbitration in the following numbers:

Number of Experiences with American Minorities in International Arbitration

African-American	Middle-East or Arab-American	Asian-American	Hispanic-American	Native-American
9	14	25 to 31	21 to 36	0

In terms of their experience with American minorities as arbitrators, one Hispanic-American Chairman, two African-American co-arbitrators, two Middle-Eastern or Arab-American co-arbitrators, four Asian-American co-arbitrators, two Hispanic-American co-arbitrators, and one Asian-American Sole Arbitrator were noted. As to how these American minorities were appointed, those who responded noted that four were party appointments and one was a joint nomination by the parties and co-arbitrators or the parties alone, and no information was provided for the others.

As to American minorities as counsel in arbitration cases, 27 African-Americans, 22 to 24 Middle-Eastern or Arab Americans, 18 to 20 Asian-Americans, and 22 Hispanic-Americans were noted. As to their roles as counsel, whether Lead Counsel, Member of the Arbitration Team of the Claimant(s) or Respondent(s), Trainee/Intern, or Other, three were Lead Counsel, seven were members of the Arbitration Team of the Claimant(s) or Respondent(s), and two were in other roles (such as Administrative Secretary to the Tribunal).

As to American minorities as experts, three African-Americans, three Middle-Eastern or Arab-Americans, and two Asian-Americans were noted.[6] These experts were essentially all party-appointed experts with a very few being named by the arbitral tribunal or sole arbitrator, and none by an institution.

[6] There may be more American minority experts based on a number indicated by one respondent, but it appears he/she was referring to him/herself.

2. *American Women*

Twenty-six out of the 34 arbitration practitioners responding had experience with American women in international arbitration. At least 47 to 51 of these experiences were with American women as arbitrators. About six of these were as chairman and at least 30 were as co-arbitrators. As to the manner of appointment (please note the numbers do not total correctly but are as indicated), at least 51 to 61 were party appointments as co-arbitrator, jointly as chair, or jointly as sole arbitrator. Six appointments were by arbitral institutions. As counsel, well over 204 to 217 American women were counsel (with some respondents indicating they had seen "numerous" and "dozens" of American women counsel beyond the ones indicated by those that could number them). At least 21 to 24 of these American women were Lead Counsel and at least 117 to 118 were members of the Arbitration Team of the Claimant(s) or Respondent(s). Some respondents spoke of many in these categories and an uncountable number of trainees. Turning to experts, 21 or 22 American women were named experts with (of those reporting experts) 17 of them being party-appointed experts and one being an expert in a court case.

3. *American Lawyers with Disabilities*

Only one respondent had experience with an American with disabilities in an international arbitration. A few commented that they had not seen Americans with disabilities much in the profession and others referred to non-Americans with disabilities as having been arbitrators at the "top of their game." One person noted that "disability" might include the case of a lawyer who had retired being permitted to unretire for purposes of addressing a case – a new way of thinking of the term disability for me.

4. *American LGBTQ Lawyers*

Five respondents had experience with LGBTQ American lawyers in international arbitration, with the rest either indicating that they had no such experience or that they did not know. Three LGBTQ American lawyers were noted as having been arbitrators though roles were only identified for two – one as chair and one other as co-arbitrator. Those who responded indicated that one was jointly nominated by the co-arbitrators and the parties and one by an arbitral institution. As to counsel, four LGBTQ American lawyers were noted as having been counsel, with one as Lead Counsel and the other three noted as members of the Arbitration Team of the Claimant(s) or Respondent(s). One was noted as an interpreter and one other was noted as a party-appointed expert in an international arbitration case.

IV. COMMENTS

A. *General*

While recognizing that these samples are far from perfect and are essentially only slightly more than anecdotal information, a few thoughts do come to mind. Although there may be double-counting, it appears safe to conclude that as of today a significant number of American women (most likely white) in international arbitration participate in all phases as counsel but few as arbitrators. To a much lesser extent than American women, there are a few American minorities active in international arbitration in all phases as counsel but even fewer as arbitrators. To an even lesser extent than American women and minorities, there are an infinitesimal number of American lawyers with disabilities or American LGBTQ lawyers in international arbitration. For me, the bright aspect in this picture as compared to when I worked in the field in the 1980s and 1990s is best captured in the paraphrase of a line in an old Negro spiritual: "There are not as many as there ought to be, but there are slightly more than there was."

B. *What Can Be Done?*

1. *What Does One Need To Do To Build an International Commercial Arbitration Practice?*

In an earlier article, I noted seven particular currents that an American minority needs to navigate in order to make a successful career in international arbitration. These are:

a. Domestic U.S. Current – one rises in the profession through prestigious international law firm practice

b. Foreign-Based Current – little or no data on this example – foreign office of a U.S. law firm or foreign law firms

c. Human-Capital Current – law degrees (prestige and from different countries), languages, bar memberships, nationalities, family ties, mentors, participation in the Willem Vis Moot, Office of Legal Advisor State Department, internships at International Arbitral Institutions

d. Cooptation Current (how is one absorbed into and recognized in the field as an Expert) – articles placed in key journals, speeches, advisory boards, power to choose articles, etc.

e. Changing International Commercial Arbitration Current – openness to new areas in arbitration where hierarchies are not set such as (back in 2004) domain name dispute resolution, investment, or online dispute resolution and arbitration

f. Lifestyle Current – what price you are willing to pay (family, travel, etc.)

g. Cultural Diversity Current – To what extent is there essentially only one subgroup of persons from whom international arbitration practitioners are selected? Is there a diversity of types of persons recognized in the particular arena of international commercial arbitration in which one works? Put another way, how wide open do the doors seem for people like oneself?[7]

It appears that these seven currents remain valid and their management is a key task for any member of the four groups in the target population.

2. *A Little Help for all my Friends from Neuroscience?*

a. *Explicit bias, implicit bias, and stereotype threat*[8]

Related to these tasks for the prospective member of the target population is a second aspect of how one gets chosen for the path to rise to the highest levels of an international arbitration career. For this, I might suggest that what is being learned from neuroscience and validated cross-culturally can help inform the thinking of individual members of the target populations, as well as gatekeepers and door-openers in the legal profession and international arbitral institutions.

An emerging area in neuroscience is the study of implicit bias and stereotype threat. The subject is of concern to the legal community generally. The American Bar Association Section of Litigation has partnered with the National Center for State Courts to address the issue in the judicial system. The American Bar Association Council for Racial and Ethnic Diversity in the Educational Pipeline has deepened its efforts to understand how this affects achievement in the pipeline from K-12, college and law schools. The concepts are derived from neuroscience and psychology and refer to the process by which schemas (what might be called "mental shortcuts" or "templates of knowledge") develop in the brain that become implicit cognitions (things we do without thinking) and may become implicit social cognitions (things that guide our thinking about social traits). These implicit social cognitions are derived from stereotypes in the sense of traits we associate with a category and attitudes (overall evaluative feelings that are positive or negative). Through the process of the schemas with these implicit social cognitions, implicit forms of bias have been seen to emerge.

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[7] Descriptions in more detail of these concepts are available in Davis, *The Color Line*, *supra* note 1.

[8] This description of explicit bias, implicit bias and stereotype threat borrows substantially from these excellent sources: Samuel R. Bagentsos, *Implicit Bias, 'Science', and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477 (2007); Jerry Kang, Implicit Bias: A Primer for Courts, prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts, Aug. 2009; Project Implicit, *available at* https://implicit.harvard.edu/implicit; Jeffrey J. Rachlinski & Gregory S. Parks, *Implicit Bias, Election '08 and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659 (2010); Reducing Stereotype Threat, *available at* www.reducingstereotypethreat.org as *presented in* Benjamin G. Davis, Implicit Bias and Stereotype Threat CLE, Toledo Bar Association, April 12, 2013 (powerpoint available from the author); *see also* the discussion of implicit bias in Greenwood & Baker, *supra* note 1.

A personal example of this is with regard to my name: Benjamin G. Davis. On a sufficient number of occasions to make me conclude it is possible that this is an ambient implicit bias about me, I have been mistaken for the grandson of the famous American World War II General Benjamin O. Davis, Jr., who led the Tuskegee Airmen. I am no relation, but on occasion I have heard comments along the lines of, "Your grandfather would agree with that!" from people who could not possibly have known my maternal grandfather or paternal grandfather (who died in 1939). One theory I have had about my own life is that what success I have had may be attributable to a significant degree to persons thinking that I am the grandson of this famous general and having a favorable disposition (or implicit bias) toward me because of their belief. That favorable disposition might work even more for me simply because I never make reference to him (I have no reason to). That lack of flaunting him might be construed as modesty ("not flaunting his anointed heritage") which could be perceived as endearing. Notice that in all of this, what I am doing is happening in ignorance of these implicit social cognitions that are occurring in the people around me. It is as if one is swimming in a sea of implicit social cognitions while living one's life.

Explicit bias is described as stereotypes and attitudes that we expressly self-report on surveys, recognize, and embrace. Implicit bias is dissociated from explicit biases and not self-reported on surveys. Both forms of biases are related but in fact have been found to be different mental constructs. The manner of measuring implicit bias has been through the Implicit Association Test ("IAT") which measures reaction times when sorting categories of pictures and words. The IAT measures the strength of associations between concepts (e.g. black people, gay people) and evaluations (e.g. good, bad) or stereotypes (e.g. athletic, clumsy). The main idea is that making a response is easier (therefore quicker) when closely related items share the same response key. Pervasive reaction time differences were found in every country tested and they were consistent with the general social hierarchies. In addition, social category may influence what sort of biases one is likely to have.

Consequences of these implicit biases have been seen in terms of frequency of callback interviews in Sweden, awkward body language in the presence of someone, friendliness of facial expressions, negative evaluations of ambiguous actions by an African-American, negative evaluations of confident, aggressive, ambitious women in certain hiring conditions, shooter bias – black vs. white in video games, and on and on.

The key feature of implicit bias is that the IAT scores appear to better predict behavior than explicit self-reports. In a sense this suggests that how one presents oneself in self-reporting and how one seems to act in terms of implicit social cognitions are different mental constructs and that the implicit biases are more salient to predicting one's behavior than what one says.

Implicit bias is, however, malleable and can be changed. Depending on a person's motivation to be fair, social contact across social groups, counter-typical exemplars of a group (de-biasing agents) or introduction of procedural changes

(such as listening to musicians behind a screen) are examples in which implicit bias has been made malleable.

Stereotype threat refers to one being at risk of confirming, as a self-characteristic, a negative stereotype about one's group. The research has shown that performance in academic contexts can be harmed by the awareness that one's behaviors might be viewed by others through the lenses of race, gender, or sexual orientation as well as in a number of domains beyond academics. Stereotype threat has been seen to lead to self-handicapping strategies, such as reduced practice time for a task and to a reduced sense of belonging to the stereotyped domain. Consistent exposure to stereotype threat can reduce the degree that individuals value the domain in question. Students may choose not to pursue the domain of study and, consequently, limit the range of professions that they can pursue. Research has shown that stereotype threat can harm the academic performance of any individual for whom the situation invokes a stereotype-based expectation of poor performance. In addition, within a stereotyped group, some members may be more vulnerable to its negative consequences than others; factors such as the strength of one's group identification or domain identification have been shown to be related to one's subsequent vulnerability to stereotype threat. Stereotype threat might interfere with performance by increasing hyper vigilance in self-policing, diverting attention, increasing self-focus, engendering over-cautiousness, prompting low expectations, or reducing effort. Many different means have been used to induce and to attenuate stereotype threat.

b. *Cultural bias as explicit bias, implicit bias, or stereotype threat – the comments*

In the comments, some of the international practitioners have been willing to highlight some of the positive and negative cultural attitudes that different members of the target population may face. These comments were passed along on a no-names basis or were comments I heard in my years in international arbitration (I indicate the ones I heard).

General:

"As per your request, I return herewith the questionnaire. I am afraid that I am not much of assistance. I don't keep track of the arbitrators with whom I sit, nor counsel or experts appearing before me. They are all equal to me."

"Arbitrations often had no American nexus."

"For the younger practitioners who are interested in arbitration, I tend to take the old-fashioned approach of basic legal training in a broad scope of commercial matters, laying a strong foundation for career development. If that meat and potatoes approach is too boring, then I won't be offended if you find other sources. In all cases, I'm enthusiastic about arbitration as a career area. It never ceases to be fascinating."

Men

"Pale, Male and Stale" (I heard often.)

Women

"I have seen certain cultures where women are less respected than men in business circles. One client called men by their names during a meeting, but the woman as only "the lady" or "senorita."

"I have heard clients make sexual remarks about female colleagues of mine, as if that is acceptable or the norm. Or comments about women that are derogatory."

"Foreign travel is a huge part of the work, often for more than a week or two. For women with children, this is not easy. The most challenging is travelling while the child is still breast feeding, in terms of leaving an adequate supply of breast milk behind, care for that child during that period, being able to pump while travelling etc. Law firms do not do enough to support women at this stage of their personal/professional life in my opinion."

"Male colleagues have often seen foreign travel as a time to party/let off steam. Female colleagues are sometimes seen as more conservative or prudent and a hindrance to that lifestyle. For that reason, they may not be selected for a particular trip on account of their gender."

"[In France], women are pressured to return to work after having kids. My wife, who decided to spend a bit of time with our kids, faced some very negative comments from her French female friends."

"They are on the team. So they participate as members of the team. I am unaware of any special status or treatment."

"[In 2007], I saw the first [ICC] case (for me) decided by an arbitral tribunal composed of three women. As I was having lunch with one very experienced (and old) French arbitrator right thereafter, I told him how pleased I was about this. His reaction was to ask me, very seriously: "What? Three women? And how was it?..."

"I neglected to mention that there are quite a number of Nigerian women in the arbitration field, and I believe some men, but there seem to be more women. Of course they are not American. Why do you restrict your study to Americans? There are probably fewer American arbitrators than UK, European, Australian or Asian."

"Women constitute a very high percentage of the associates in law firm arbitration groups, and there are increasing numbers of women partners, including several who lead their groups."

"There are enough female names in America that it isn't a stretch for a lazy party to appoint."

"Most women get their first appointment through an arbitration institution. This is true for 99% of them…"

"I believe that the reasons are gender neutral and linked to the expertise of the individual."

"There are very few women in international arbitration. At one point, a few years ago, at a reception at the Hong Kong Vis Moot, I asked a fairly well-known international arbitrator how many women he thought there were who regularly served as international arbitrators. I suggested that there were perhaps four or five. He said, "Oh no! There are at least 10 or 12."

Minorities

"Either not nominated by a party or not nominated by the institution. This assumes that there are American minority groups arbitrators or other related functions. I confess I have not met any in France or the UK (other than you of course)."

"In the Middle East, Far East and Latin America, I have witnessed overt racism towards "blacks" as opposed to those who are "brown" or "white" (and not to African-Americans, but usually black people from that country or working in that country). I remember one law firm in Brazil where all the lawyers were 'white – i.e. European origin' and all the staff were black (i.e. Brazilian, Black or Indian). Some even had to wear maid uniforms to serve tea and coffee. Whether in terms of jokes, stereotypes or otherwise, whether clients or simply getting around a city, it can be challenging due to how the local black population might be treated in that already, or what the majority of people of that country have viewed and perceived from the television of the media. Combine that with a career where you have to deal with people from different nations – and not just professionals but witnesses who may be uneducated or not used to seeing a black person – it becomes all the more challenging. I would love to recruit more African-Americans into the field, but I just do not get the resumes or interest from that particular minority. Hispanic, Russian/CIS or Arab-Americans are plentiful in the field and I see many resumes from these minorities. I have often wondered whether African-Americans know the challenges they may face outside of the U.S. in advance and do not choose this field as a result? Or is it something else?"

"I have found that American minorities do not gravitate toward international arbitration. In our firm's summer associate program, for example, we always have minorities, but they are ordinarily not the ones who express interest in international arbitration."

"Probably [lack thereof] due to lack of experience. A vicious circle!"

"They are generally present in cases where U.S. law firms are involved in representing one or other of the parties."

"There are a few ethnic Korean Americans at the major Korean law firms, including [law firm A], [law firm B] and [law firm C]…. Not many, but a few. At [law firm B], several of the associates are female. At [law firm A], the deputy chair of the practice is Korean American. They are all playing the role of counsel. … Very few non-Korean Americans speak Korean well enough to actually conduct business or hearings in Korean. Maybe two or three people, just because it is such a hard language to learn for foreigners."

"They were not offered as part of the candidate pool."

"I think there are not a lot of minorities in the law firms that typically handle international arbitration. Also, as to the lack of minority arbitrators, this is affected by the old boy network which largely rules the appointment of arbitrators. It has a paucity of minority members."

Lawyers with disabilities

"No doubt there currently is an underrepresentation of disabled persons. This may be due to the particularities of our activity which often times requires intensive travelling."

"One arbitrator has an arm withered by polio, so might be seen as disabled. Nevertheless, he can beat most people at tennis and is one of the most successful arbitrators I know. So I cannot consider him in any way 'disabled' by his 'disfigurement.'"

"Another is totally deaf in one ear. He is the busiest arbitrator and most prolific author I know, so he too is not in the least "disabled" by his physical limitation."

"I am not sure what is meant by disabled, but I have encountered very few disabled persons in law practice generally."

"Lack of individuals who have disability."

"I do not think very many disabled persons practice in the kinds of firms that typically handle international arbitration."

LGBTQ

"There is less acceptance of LGBTQ, let alone tolerance, in certain cultures."

"I have heard jokes about LGBTQ people from clients, as if it is acceptable or the norm."

"There is no reason in San Francisco and I believe LGBTQ are fairly represented."

"Foreign travel – it is possible that a lawyer may feel uncomfortable travelling with a gay colleague. While he/she may profess to be "okay" with the sexual preference when in the office, that may become different on the road (though unsaid of course). He/she would just choose someone else for the trip if more senior, or profess an excuse not to travel if junior."

"Not apparent that candidates fit into this category even after meeting appointed persons."

c. *From cultural bias to cultural gymnastics*

Recognizing from the neuroscience discussion that implicit social cognitions abound around the world and the nature of these implicit social cognitions is to reflect a more positive attitude toward persons who are considered in the more elite positions in a given society, one might ask what could address the types of implicit bias that may be present as members of the target population (especially from non-elite groups within a country) make their way in the field.

We focus first on the preparation of those of the target population who want to work on the international plane in order to get in the field of arbitration. Karen Mills of Indonesia has said it best as to the kinds of preparation an American woman (and I would extend this to all Americans particularly in the target population):

> It is not that easy for a woman to break in to the arbitration field, at least not as arbitrator. The first thing she should do is join ArbitralWomen, which supports women in arbitration. But you really need to be involved in actual arbitrations which means you need to work in a firm that does them and get on the team so you can assist and observe before you have anything to sell yourself on. The Vis and other moots are very useful and any student considering entering the field should become involved in the moots as a necessity. It is the best training a student can have.

While there may be difficulties, membership in the target population is not an inherent block to getting on that path. To rise on that path requires what we have all come to know in the profession: hard work, pluck, luck and mentorship/ sponsorship. What may be a bit different on the international plane is that those four things may come together in different ways and may occur anywhere in the

world. The key moment, that I have seen repeated for so many people in this field is the moment – usually fairly early in a career for those with high-level international arbitration careers – when someone asks them something like, "Can you be in Bratislava next week?" The person may have little or no experience with Bratislava but has to have the confidence to say, "Yes." Those moments come around in cycles over one's life and I describe them as the "international plane calling" moments. The key is to recognize the earliest career moments and have the pluck to take the leap of faith to go toward the international plane. The first experience becomes a second and on and on as one becomes the "go-to" person for the international work. Beyond just sharing the experience with friends, to become the "go-to" person, form the habit of providing written trip reports to the powers that be upon one's return to one's base – wherever in the world. It helps those with the power over your career to identify you for even further work on the international plane. Make it easy for someone to see you on the international plane through preparation and a willingness to take on the gamble.

On cross-racial, cross-gender, cross-cultural or cross-whatever mentoring, as noted from my own experience described above, there are no rational reasons why more of this cannot be done. It is a question of commitment and enthusiasm of gatekeepers/door-openers. The impact of those kinds of supportive efforts in my own life, as described above, has been tremendous. And, as one rises, the impact one can have on those around him/her can lead to opening paths for still others. One example of even modest serendipitous cross-racial and cross-cultural encouragement (let alone mentoring/sponsoring) that can open someone to this path is this note I received from a European lawyer:

> On a more personal level, your mail reminded me that you were the very person who prompted me to develop my arbitration activities and introduced me to ICC arbitration, during a conversation we had on a TGV in the mid-nineties, when we fortuitously met en route to our respective family ski holidays and engaged in a casual conversation between train neighbors…. At the time, I could not have imagined that our accidental conversation would have so important consequences on my life, as I am now spending the most part of my professional activities as international arbitrator.

From the gatekeeper/door-opener perspective, a person's motivation to be fair, social contact across social groups, counter-typical exemplars of a group (de-biasing agents) or introduction of procedural changes in nomination processes for counsel and/or arbitrators would seem to be approaches through which implicit bias can be made malleable. These types of efforts at malleability might take the form of reaching out to members of the target population to help them gain initial experience in the field as summer associates or interns to help whet their appetite for this path. Along their path, recognizing the presence of implicit social cognitions and finding ways to address them may be ways to provide an environment that is inclusive and encourages the target population. Institutional structures to recognize implicit bias and overcome it can be found in having employees of many cultures – so that one particular set of implicit social

cognitions connected to one social hierarchy does not predominate and the work space has a more fluid set of implicit social cognitions present.

For the individual in the target population, the principal lesson would be that implicit bias is malleable and can be changed – with varying degrees of difficulty in that process that may call on one's perseverance. For this individual, the second principal lesson is to not succumb to stereotype threat when one feels at risk of confirming, as a self-characteristic, a negative stereotype about one's group. This would include not succumbing to self-handicapping strategies, such as reduced practice time for a task and to a reduced sense of belonging to the stereotyped domain. Experience is the key and good experience is a buffer for the bad experiences. One should remind oneself of the good experiences in which one has done well to create a counter to negative images or attitudes that encourage a sense of stereotype threat. Negative experiences discourage individuals and may lead them to undervalue the domain in which they are struggling and to exit that kind of work. Some people are simply made to work in the international plane while some come to it as an acquired taste: whatever one's path, allow oneself to go on it.

As stereotype threat might interfere with performance by encouraging over vigilance in self-policing, diverting attention, increasing self-focus, engendering over-cautiousness, prompting low expectations, or reducing effort, the individual must consciously work to recognize and attenuate stereotype threat that he/she feels about him/herself even when others are consciously or unconsciously inducing it in them. One particular moment for this can be in an interview. I have mentioned to students the "(X+1) game" in which one presents a resume and the person evaluating for the position asks for something that is not on the resume. That experience or background that is not found on the resume is of course made to be seen as the crucial characteristic for the work. One should be prepared to counter such approaches – whether sincere or gamesmanship on the other person's part. No one has a perfect resume or experience, but one's experience can aid one in accomplishing more.

Finally, those rising to the international plane should be sufficiently self-aware to try to be sensitive when their own implicit social cognitions are influencing their view of others, whether domestically or internationally. Each of us has places where we are very comfortable performing and places which stretch our abilities to cope and accomplish. Growing the space where one is comfortable is part of the path. This ability to navigate a sea of schemas is what I have come to call the ability to do cultural gymnastics whether domestically, regionally, or transnationally.

There are limits, no doubt. In the face of brutal negative stereotypes of others and one's internal sense of self-worth, the contradictions between what one thinks of oneself and what the ambient social environment is saying may be experienced as too much of a contradiction. For those times, it might help to think of such moments as not so much moments of impasse, but rather moments of breakthrough to another level of deeper meaning and to arrive at a new cognitive

state – sometimes called a nascent state.[9] Others may react favorably or unfavorably to that new self – grown through the fiery cauldron of these kinds of contradictions. Finding one's way to where one's approaches will be both recognized and valued remains the path to tread. I just hope that path is in international arbitration for more of the target population.

V. CONCLUSION

While preparing this article, I was asked to provide legal training for the Secretariat of the ICC International Court of Arbitration in Paris. It was in Room 12 at ICC Headquarters at 38 Cours Albert 1er, the room where so many plenary and special court sessions, PIDA's, Arbitrator Colloquia, Advanced Arbitrator Trainings and other events of memory had occurred. A few short weeks later, the ICC was moving to its new locale, so this was both a return to a very familiar place and an opportunity to say goodbye in the last training held in that room full of memories. As I walked around the room and shook hands with the counsel, deputy counsel, secretaries, and interns in a room where women held up half or more of the sky, in my mind's eye I saw the ghosts of sessions in the 1980s when women would have been barely present. As now the stale male, though not so pale, fellow in the room full of such *jeunesse*, I was overjoyed to see the progress that had been made, which gave me hope for the progress that can still be made in enhancing diversity (and especially American diversity) in international arbitration.

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[9] *See generally* the remarkable analysis of the nascent state in FRANCESCO ALBERONI, MOVEMENT and INSTITUTION (1977).