Copyright © 2018 by The American Society of International Law

VALUING WOMEN IN INTERNATIONAL ADJUDICATION

This panel was convened at 9:00 a.m., Saturday, April 15, 2017, by its moderator, Susan Franck of the American University, Washington College of Law, who introduced the panelists: Kate Parlett of 20 Essex Street; Josephine Dawuni of Howard University; Meg Kinnear of the International Centre for Settlement of Investment Disputes; and Liesbeth Lijnzaad of the Netherlands Ministry of Foreign Affairs.*

Introductory Remarks by Susan Franck†

doi:10.1017/amp.2017.82

The American Society of International Law (ASIL) agreed, in 2017, that it was appropriate to have an entire panel at the Annual Meeting dedicated to exploring the value of women in international adjudication. Although the panel occurred at 9:00 a.m. on the Saturday before Easter, we were pleased that the room was sufficiently packed—with men and women—that there was standing room only.

The panel covered a broad variety of perspectives on the role of women in international adjudication—and the speakers demonstrated the breadth and depth of women's excellence in international adjudication. Professor Josephine Dawuni received her legal training in Ghana and has written extensively on gender in the African judiciary. Meg Kinnear is the Secretary-General of the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), and in her previous life, she was also the Director General of the Trade Law Bureau of Canada for trade and investment disputes. Kate Parlett is a barrister at 20 Essex Street with experience before arbitration tribunals and international courts; and the United Kingdom's Attorney General appointed her as a Specialist for public international law. Liesbeth Lijnzaad has been the Legal Advisor of the Netherlands Ministry of Foreign Affairs and Head of the International Law Department; and she has acted as an agent for the Netherlands before the International Court of Justice (ICJ), the Law and Sea Tribunal, and the International Criminal Court (ICC).

As an initial matter, the role of women—and their capacity to serve as counsel and adjudicators—in international courts and tribunals has been the subject of ongoing attention by scholars.[1] In another 9:00 a.m. panel at the University of Pennsylvania discussing women in international arbitration,[2] I asked whether international arbitration wishes to be a leader or a laggard in

* Meg Kinnear and Liesbeth Lijnzaad did not contribute remarks for the *Proceedings*.

† Professor of Law, American University Washington College of Law.

[1] Susan D. Franck, James Freda, Kellen Lavin, Tobias Lehmann & Anne van Aaken, *The Diversity Challenge: Exploring the "Invisible College" of International Arbitration*, 53 Colum. J. Transnt'l L. 429 (2015); Nienke Grossman, *Achieving Sex-Representative International Court Benches*, 110 AJIL 82 (2016); Nienke Grossman, *Shattering the Glass Ceiling in International Adjudication*, 56 Va. J. Int'l L. 339 (2017); Sally J. Kenney, *Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice*, 10 Feminist Legal Stud. 257 (2002); Katerina Linos, *Introduction to Symposium on Nienke Grossman, Achieving Sex-Representative International Court Benches*, 110 AJIL Unbound 84 (Sept. 19, 2016), *at* https://www.asil.org/blogs/introduction-symposium-nienke-grossman-"achieving-sex-representative-international-court.

[2] PennLaw, *Women in International Arbitration*, PennLaw, 23:03-27:53 (Mar. 27, 2017), *at* https://www.youtube.com/watch?v=bac95jZZkAA.

https://doi.org/10.1017/amp.2017.82 Published online by Cambridge University Press

promoting diversity of all kinds, including gender diversity. To paraphrase Meghan Trainor, "it's all about the bas[e]" and to what the community wishes to compare itself.

There are at least two different frames that we might consider in evaluating gender parity in international adjudication.

One potential baseline comes from national courts. In Canada, with women composing roughly 40 percent of practicing lawyers, 33 percent of judges were women.[3] In Latin America, 36 percent of the Venezuelan, 35 percent of the Costa Rican, and 32 percent of the Columbian judiciary were women; and in Kenya, roughly 35 percent of advocates and 30 percent of judges were women.[4] Other countries have not hit the roughly one-third baseline of many states. In Japan, the judiciary had roughly 15 percent women—but this may have reflected that only roughly 16 percent of all attorneys there are women.[5] In Malawi, the judiciary had 17 percent women.[6] In the United Kingdom, data from 2010 reflected that roughly 21 percent of the judiciary were women.[7] Although this has increased somewhat, those numbers are still among the lowest levels of gender balance in European judiciaries.[8] Nevertheless, despite the availability of highly qualified female counsel,[9] Lord Sumption, a justice on the Supreme Court of the United Kingdom, stated that the "push to increase the gender balance at the top of the judiciary could have 'appalling consequences' for justice."[10] As there are vectors of variance, the question remains what these national baselines mean for international adjudication.

A second baseline could come from within international law itself. Nienke Grossman's research reminded us that the historical number of women on the International Law of the Sea Tribunal (ITLOS) was, until recently, zero.[11] As of the day of our panel, there had only been one female judge since the tribunal's 1996 creation, but by the time of publication, Liesbeth Lijnzaad has also been elected to the court.[12] In other international courts and tribunals, roughly 15 to 20 percent of adjudicators are women. For those entities with the best gender equity, four out of five of those courts and tribunals either have language to mandate gender balance or otherwise offer hortatory language to nudge gender balance.[13]

[3] Franck et al., *supra* note 1, at 473–74.

[4] *Id.* at 474.

[5] *Id.* at 475.

[6] *Id.*

[7] Franck et al., *supra* note 1, at 474–57; Mary L. Clark, *Judicial Retirement and Return to Practice*, 60 CATH. U. L. REV. 841, 873–74 n.216 (2011).

[8] 2014 data from the Council of Europe, which uses the Council's self-reporting methodology, demonstrated that: (1) in England and Wales, only 30 percent of the judiciary was female; and (2) in Northern Ireland and Scotland, 23 percent of the judiciary was composed of women. COUNCIL OF EUROPE, EUROPEAN JUDICIAL STUDIES: EFFICIENCY AND QUALITY OF JUSTICE , CEPEJ STUDIES NO. 23 (2014 DATA) 101 (2016 ed.), *at* http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/REV1/2016_1%20-%20CEPEJ%20Study%2023%20-%20General%20report%20-%20EN.pdf. Although, overall, the judges in national courts at all levels through Europe were generally balanced at 51 percent women and 49 percent men, men tended to have more senior and prestigious appointments. COUNCIL OF EUROPE, EUROPEAN JUDICIAL STUDIES: EFFICIENCY AND QUALITY OF JUSTICE—OVERVIEW OF THE REPORT (2014 DATA) 21 (2016 ed.), *at* http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/REV1/2016_1%20-%20CEPEJ%20Study%2023%20-%20Overview%20-%20EN.pdf.

[9] *See infra* Kate Parlett, *Valuing Women as Counsel in International Adjudication*, ASIL PROCEEDINGS (identifying the large number of women practicing as solicitors and barristers—and elite Queen's Counsel—in England and Wales).

[10] Chloe Smith, *Rush for Gender Balance Could 'Destroy' Judiciary, Claims Sumption*, LAWGAZETTE (Sept. 25, 2015), *at* https://www.lawgazette.co.uk/practice/rush-for-gender-balance-could-destroy-judiciary-claims-sumption/5051136.article.

[11] Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 CHI. J. INT'L L. 647 (2012).

[12] In 2011, Elsa Kelly was the first woman appointed. In June 2017, ITLOS elected two more women: Neeru Chadha and Liesbeth Lijnzaad. International Tribunal for the Law of the Sea, *Press Release: Election of Seven Members* (June 14, 2017), *at* https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_260_EN.pdf.

[13] Grossman, *Achieving*, *supra* note 1, at 82–84.

https://doi.org/10.1017/amp.2017.82 Published online by Cambridge University Press

The role of gender balance for counsel in international courts is also problematic. Cecily Rose and Shashank Kumar's empirical research has focused on gender equity at the International Court of Justice. They identified that, for all lawyers involved in contentious cases at the ICJ, female counsel only represented 11.2 percent of all advocates, and spoke for only about 7.4 percent of the time. For the subset of lawyers who are repeat ICJ counsel, women represented 6.3 percent of the pool, and women's speaking time was 2.9 percent.[14]

Another transnational baseline for women in international adjudication comes from international arbitration. The highest proportion of female arbitrators that I have seen came from a snapshot of a study I conducted in 2014, where 17.6 percent of arbitrators sampled were women.[15] Other studies have suggested that those figures are unusual and that a more conservative estimate of women arbitrators is required. Older data analyzed by Lucy Greenwood and others showed that 10 percent, at most, of international arbitrators were women.[16] My research on counsel suggests that there is a strong pipeline to pull from in the future, as women represented 24 percent of counsel; women counsel were, on average, forty-one years old[17] and had worked on an average of fifteen cases. For this roundtable, I conducted a special analysis that identified that male international arbitration counsel reliably worked on more cases than female counsel, although the effect was statistically small.[18] The effect could, however, be a function of age.[19] While one might hope that over time the imbalance may be addressed, structural considerations about the problem of "pipeline leakage" nevertheless persist.[20]

Meg Kinnear explored her experience at ICSID, making observations about the critical role institutions can play in offering opportunities to appoint women arbitrators and promote diversity in the appointment of adjudicators in international disputes. She observed that counsel still have a large role in appointing arbitrators (i.e., 75 percent of appointment is done by parties), meaning ICSID only has the capacity to control 25 percent of the variance. In 2016, for those arbitrators ICSID appointed, 19 percent were women; for the much larger swath of arbitrators appointed by parties, only 13 percent of arbitrators were women.[21] Ms. Kinnear also noted that, for the 153 member

[14] Shashank Kumar & Cecily Rose, *A Study of Lawyers Appearing Before the International Court of Justice 1999–2012*, 25 Eur. J. Int'l L. 893, 904–17 (2014).

[15] Franck et al., *supra* note 1, at 453.

[16] Susan D. Franck, *Empirically Evaluating Claims About Investment Treaty Arbitration*, 86 N.C. L. Rev. 1, 81–82 (2007) (finding roughly 4 percent of treaty arbitrators were women but identifying that women were in roughly 11 percent of the caseload); Lucy Greenwood & C. Mark Baker, *Getting a Better Balance on International Arbitration Tribunals*, 28 Arb. Int'l 653, 656–65 (2012) (suggesting roughly 5 to 7 percent of arbitrators were women); Lucy Greenwood & C. Mark Baker, *Is the Balance Getting Better? An Update on Issues of Gender Diversity in International Arbitration*, 31 Arb. Int'l 413, 471 (2015) ("our 'best estimate' should probably be revised upward, to around 10%").

[17] Franck et al., *supra* note 1, at 453–54.

[18] For those providing information about gender and work experience, the average number of cases as counsel was twenty-four (SD = 46.66; $n = 476$). While men had worked on an average of twenty-six cases (SD = .87), women had worked on an average of fifteen cases (SD = .86). A *t*-test comparing group differences revealed that the gender gap was statistically meaningful, with men reliably having worked on more cases than women ($t(474) = 2.329$; $p = .02$; $r = .11$; $n = 476$). A nonparametric test of medians was marginally significant (U = -1.819; $p = .069$).

[19] There was also a meaningful difference between the age of counsel, with men being reliably older ($t(515) = 6.998$; $p < .001$; $r = .29$; $n = 517$)—with the average female counsel being 42 (SD = .877) and the average male counsel being 50.6 (SD = .549) years old. A partial correlation, which controlled for the effect of age, was unable to detect a reliable relationship between gender and the number of cases as counsel ($r(466) = –.056$; $p = .23$).

[20] Greenwood & Baker, *Getting Better?*, *supra* note 16, at 418–19; Lucy Greenwood, *Unblocking the Pipeline: Achieving Greater Gender Diversity on International Arbitration Tribunals*, 42 Am. Bar Ass'n, Int'l Law News (Spring 2013), *at* https://www.americanbar.org/publications/international_law_news/2013/spring/unblocking_pipeline_achieving_greater_gender_diversity_international_arbitration_tribunals.html; *see also infra* note 27 and corresponding text.

[21] Statistics are on file with ICSID. Additional material will be published in forthcoming editions of *The ICSID Caseload—Statistics*.

https://doi.org/10.1017/amp.2017.82 Published online by Cambridge University Press

states, 120 have named people to the list for annulment panels and there are sixty women on that list, accounting for nearly 15 percent of the potential pool. Ms. Kinnear described ICSID's effort to be proactive in promoting efforts related to diversity. First, ICSID is offering transparent statistics on female arbitrators rather than hiding data behind a paywall, so that these aspects can be evaluated going forward. Second, she has introduced a balloting procedure to make sure to include at least one woman on a list of potential arbitrators. Even if parties do not appoint the arbitrators at the time, the availability heuristic may mean that the names seep into consciousness and may permit a candidate being seen as a viable option for appointment in later cases. Nevertheless, even with counsel recommendations, clients ultimately control the appointment process.

While institutions do a decent job of appointing women, others have likewise reported that, the rate tends to drop when appointment is made by other means.[22] The Stockholm Chamber of Commerce's 2015 data revealed that, overall, women received 14 percent of all SCC appointments.[23] When the SCC controlled appointment, 73 percent of appointees were women; whereas when parties and co-arbitrators controlled appointment, the proportions of female appointment were 6.5 percent and 10 percent respectively. This suggests that, while institutions may be doing a somewhat better job of fostering broader and more diverse appointments, because appointment remains a function of client choice, the impact may be minimal. The International Chamber of Commerce's 2016 data offers a slight counterpoint. Their most recent analysis, referring to a "marked increase" in female appointments, nevertheless found women were only 14.8 percent of all ICC arbitrators. While the ICC worked hard to appoint female arbitrators in 46.5 percent of its appointments, clients did relatively better by appointing women 41.1 percent of the time. Co-arbitrators, however, appointed women in only 12.4 percent of ICC cases.[24]

Kate Parlett and Josephine Dawuni have written separately to highlight their unique contributions to the debates about valuing women in international adjudication. Dr. Parlett's commentary reflected the data and her experience in the role of women as counsel, with of focus on both interstate and investor-state disputes. Professor Dawuni, while reflecting the real possibility of meaningful intragroup differences, explored the role of African women in international courts and tribunals. Liesbeth Lijnzaad's remarks explored the nomination process for core positions in public international law litigation. She identified that, to achieve balanced representation, there is real value in exploring appointment possibilities at both the national and international levels.

During the panel, speakers considered various issues, including whether the numerical disparity in international adjudication is problematic and, to the extent there is a concern, what factors contribute to the challenges. Speakers had a variety of responses. Meg Kinnear, for example, suggested that international adjudication systems should seek to be credible and sustainable, and that they legitimately need to represent the stakeholders. Drawing on literature that reflects that women may gain access to core positions but may nevertheless find themselves in lower-prestige positions and lacking minimal representation in higher-prestige appointments,[25] she highlighted the need to

[22] Caroline Simson, *Change Afoot, But Work Remains for Diversity in Arbitration*, LAW360 (Apr. 5, 2017), *at* https://www.law360.com/articles/909771/changes-afoot-but-work-remains-for-diversity-in-arbitration.

[23] The SCC reported 279 appointments, thirty-nine of which were female. Stockholm Chamber of Commerce, *New SCC Statistics on Appointments of Female Arbitrators* (June 30, 2016), *at* http://www.sccinstitute.com/about-the-scc/news/2016/new-scc-statistics-on-appointments-of-female-arbitrators/.

[24] International Chamber of Commerce, *ICC Court Sees Marked Progress on Gender Diversity* (May 31, 2017), *at* https://iccwbo.org/media-wall/news-speeches/icc-court-sees-marked-progress-gender-diversity/.

[25] *See, e.g.*, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, BARRIERS AND BIAS: THE STATUS OF WOMEN IN LEADERSHIP (2016), *at* http://www.ncgs.org/Pdfs/Resources/barriers-and-bias.pdf (discussing leadership challenges in many economic sectors); Sally J. Kenny, *Which Judicial Selection Systems Generate the Most Women Judges? Lessons from the United States*, *in* GENDER AND JUDGING 461 (Ulrike Schultz & Gisela Shaw eds., 2013); Kate Malleson, *The Position of Women in the Judiciary in England and Wales*, *in* WOMEN IN THE WORLD'S LEGAL PROFESSIONS 175, 177

https://doi.org/10.1017/amp.2017.82 Published online by Cambridge University Press

focus on more than just having women in the "pipeline." Rather, there may be value in focusing on steps that both prevent women from dropping out and permit women to achieve senior and prestigious appointments. Drawing on this theme, Kate Parlett identified the value in women having leadership, rather than junior, roles when acting as advocates.[26] While hoping that imbalances might be redressed over time, she also noted that research from institutions like Stanford has identified the complex matrix of variables that create barriers and blockages to achieving leadership roles.[27] Josephine Dawuni made the point that one way to address challenges is making sure to identify the valuable things that women in international adjudication bring to the table, and she encouraged participants to work to develop their own professional profile.

As a final point, as the panelists noted, one of the most critical aspects of valuing women in international adjudication and creating a sustainable future requires a focus upon mentoring. I offer three pieces of my own advice for posterity and for the *ASIL Proceedings* to reflect practices that one hopes will foster a generation that values diversity—in many forms—to international adjudication. First, bring your perspective and personality to the table while doing excellent work. Second, build a network and find mentors. In my own career, multiple mentors have made a tremendous impact in my evolution. A law school mentor, Professor Laura Cooper—who was the first woman to get tenure at the University of Minnesota Law School—regularly reminded me, "We stand on the shoulders of the women who have gone before us." Third, pay it forward. I have been lucky to mentor amazing colleagues and students, several of whom were present at the panel. By "paying it forward" and making conscious decisions to promote mentoring, we can build a better future to benefit both ourselves and future generations.

Valuing Women as Counsel in International Adjudication

doi:10.1017/amp.2017.83

*By Kate Parlett**

My focus today is on women acting as counsel in international disputes.

(Ulrike Schultz & Gisela Shaw eds., 2003) (observing that "women are disproportionately situated at the lower end of the judicial ranks"); 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, *supra*, at 145 (discussing the relatively small number of women in Germany's most elite courts); Nicole Asmussen, *Female and Minority Judicial Nominees: President's Delight and Senators' Dismay?*, 37 Legis. Stud. Quart. 591 (2011) (observing that female and minority judicial nominations in the United States take longer and are less likely to be confirmed).

[26] *See* Am. Bar Foundation, First Chairs at Trial: More Women Need Seats at the Table—A Research Report on the Participation of Women Lawyers as Lead Counsel and Trial Counsel in Litigation (2015), *at* https://www.americanbar.org/content/dam/aba/marketing/women/first_chairs2015.authcheckdam.pdf (conducting a study related to U.S. district court cases and finding that "[i]n civil cases, men are three times more likely than women to appear as lead counsel and to appear as trial attorneys").

[27] Parlett's presentation and written commentary referred to the student study *Retaining and Advancing Women in Law Firms*. Anna Jaffe, Grace Chediak, Erika Douglas & Mackenzie Tudor, Retaining and Advancing Women in National Law Firms, Stanford Law School Women in Law Policy Lab Practicum (May 2016), *at* https://law.stanford.edu/publications/retaining-and-advancing-women-in-national-law-firms/. Others have identified similar concerns. Joyce S. Sterling & Nancy Reichman, *Overlooked and Undervalued: Women in Private Practice*, 12 Ann. Rev. L. & Soc. Sci. 373 (2016) (providing recent data on women lawyers in private practice, with some data from other countries, and looking at a variety of structural impediments to women's advancement including composition of compensation committees, credit for client business, job segregation, billing, performance evaluation, and implicit bias).

* 20 Essex Street.

https://doi.org/10.1017/amp.2017.82 Published online by Cambridge University Press