

# Engendering International Trade and Investment Arbitration for Sustainable Development

Ksenia Polonskaya

## Key Points

- Women are currently not well represented in international investment and trade dispute settlement bodies. This is contrary to Goal 5 of the United Nations Sustainable Development Goals (SDGs), which calls on governments to enhance women's participation in public decision making *at all levels*.
- Equal participation of women in leadership is not only fair but also enables women to play integral roles in public life and to positively contribute to public decision making.
- Gender equality and female empowerment have long been buzzwords in domestic and international discourses in both politics and law. However, such rich rhetoric on diversity has not yet materialized in gender parity.

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## Introduction

This policy brief examines the lack of gender diversity in international investment and trade dispute resolution in light of SDG 5.<sup>1</sup> The primary objective of the brief is to link SDG 5 with the imperative of diversifying international adjudication bodies in the fields of trade and investment. The brief demonstrates that women continue to be under-represented as adjudicators in the fields of investment and trade, and proposes steps necessary to address persistent under-representation. In particular, the brief argues that further empirical research in these fields and a targeted gender strategy are necessary to achieve meaningful progress. In its analysis, the brief will focus on the investor-state tribunals under the framework of the International Centre for Settlement of Investment Disputes (ICSID) and the World Trade Organization (WTO) panels.

Investor-state tribunals and the WTO panels seem to be at odds with SDG 5's call for equal gender representation in decision making, as the pool of adjudicators reflects a profound lack of gender parity. Investment tribunals are described as largely "male, pale and stale."<sup>2</sup> Joost Pauwelyn's analysis of the profiles of 396 investment arbitrators under ICSID who served from 1972 to 2014, and 251 WTO panellists

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<sup>1</sup> UN, "Transforming our world: the 2030 Agenda for Sustainable Development", SDG 5, online: <<https://sustainabledevelopment.un.org/post2015/transformingourworld>>.

<sup>2</sup> Chiara Giorgetti, "Who Decides Who Decides in International Investment Arbitration?" (2014) 35:2 U Pa J Intl L 431.

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## About the Author

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who served from 1995 to 2014,<sup>3</sup> reveals huge disparities between male and female appointees. In the pool of WTO panellists, there were only 15.6 percent women, while in the pool of ICSID arbitrators, there were just seven percent women.<sup>4</sup>

These figures appear to support Pauwelyn's findings that participation of women as adjudicators in both ICSID and the WTO is grossly limited.<sup>5</sup> According to the WTO report, *Women and the WTO: Gender Statistics (1995–2016)*, "Of the 276 individuals selected to serve as panelists since 1995, 40 (14%) have been women."<sup>6</sup> The number of women chairs of the WTO panels is even lower. The report showed that "[o]ut of the 268 panels composed, 16 (6%) have been chaired by women."<sup>7</sup> For its part, ICSID reported that in 2017, only "14% of the new appointees were women" and women held 14 percent of the total number of appointments.<sup>8</sup> In its 2019 annual report, ICSID stated that "[t]wenty-four percent of the appointments in FY2019 were women, with a slightly higher percentage of women amongst the cohort of first-time appointees (31%)."<sup>9</sup> This finding showed some progress, as the figure was only 23 percent for first-time appointees in 2016.<sup>10</sup> However, it is important to emphasize that ICSID does not seem to account for the repeated appointments when it provides its overall statistics on gender. The statistics on first-time appointees show a degree of fluctuation.

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3 Joost Pauwelyn, "Who Decides Matters: the Legitimacy Capital of WTO Adjudicators versus ICSID Arbitrators" in Nienke Grossman et al, eds, *Legitimacy and International Courts* (Cambridge, UK: Cambridge University Press, 2018) [Pauwelyn, "Who Decides Matters"] at 222.

4 *Ibid.*

5 *Ibid.*

6 WTO, *Women and the WTO: Gender Statistics (1995–2016)* (Geneva: WTO, 2017) at 15, online: <[www.wto.org/english/news\\_e/news17\\_e/gender\\_stats\\_march2017\\_e.pdf](http://www.wto.org/english/news_e/news17_e/gender_stats_march2017_e.pdf)>.

7 *Ibid.* at 17.

8 ICSID, *Annual Report 2017* [ICSID, *Annual Report 2017*] at 35, online: <<https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20AR%20EN.pdf>>.

9 ICSID, *2019 ICSID Annual Report: Excellence in Investment Dispute Resolution* [ICSID, *2019 Annual Report*] at 25, online: <[https://icsid.worldbank.org/en/Documents/ICSID\\_AR19\\_EN.pdf](https://icsid.worldbank.org/en/Documents/ICSID_AR19_EN.pdf)>.

10 ICSID, *Annual Report 2016* at 35, online: <[https://icsid.worldbank.org/en/Documents/resources/ICSID\\_AR16\\_English\\_CRA\\_bl2\\_spreads.pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID_AR16_English_CRA_bl2_spreads.pdf)>.

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# Determinants of Appointments under ICSID and WTO Dispute Settlement Body

It is important to understand the institutional structures that determine the appointment processes of WTO panellists and investment arbitrators. These structures vary significantly from one dispute settlement mechanism to another and create different dynamics within the appointment procedures. The factors at play include (but are not limited to) who makes the appointments, the structural organization of the dispute settlement bodies and social dynamics that persist in these fields.

In terms of the appointing authority, in the investment law context, states, investors, co-arbitrators and arbitration institutions, through their residual authority, can appoint arbitrators.<sup>11</sup> Most arbitrators, however, are appointed unilaterally by investors or by states. The appointing authority appears to have substantial bearing on the diversity of the pool. For example, ICSID reported that the investors and co-arbitrators did not appoint a single female arbitrator in 2017.<sup>12</sup> Of the female arbitrators appointed in 2017, representing 14 percent of appointees, “ICSID and the Respondent/State each appointed 43.5% of these female appointees.”<sup>13</sup> In 2019, the situation only marginally improved. According to ICSID, “ICSID appointed 29% of female appointees, respondents appointed 31%, and claimants appointed 10%.”<sup>14</sup> ICSID and states are thus more active in promoting gender parity than investors.

In the WTO context, agreement of the parties is required to appoint the panellists.<sup>15</sup> To assist the parties in the selection process, the Secretariat maintains an “indicative list of governmental

and non-governmental individuals.”<sup>16</sup> If the parties cannot agree on the candidates, “either party may request the Director-General of the WTO to determine the composition of the panel. Within ten days after sending this request to the chairperson of the DSB [Dispute Settlement Body], the Director-General appoints the panel members in consultation with the chairperson of the DSB and the chairperson of the relevant Council or Committee, after consulting with the parties.”<sup>17</sup> The appointment system in the WTO is set up in a way that mandates interaction between the parties and the Secretariat. Most importantly, if the parties cannot agree on the composition of the panel, the director-general makes such a determination. As such, the Secretariat exercises a significant degree of control over the appointment process. Arguably, such a structure produces particular incentives for adjudicators who wish to obtain reappointments. According to Mark Wu, “an individual perceived to be biased faces little chance of a re-appointment. After all, the WTO Director-General and Secretariat are concerned first and foremost with the institution’s legitimacy.”<sup>18</sup>

However, the structural organization of the WTO contrasts radically with that of investment arbitration, where most appointments are made unilaterally by the disputing parties, investors and states. One of the most profound criticisms of investment arbitration is that such a party-driven appointment system can result in skewed incentives where the parties pick candidates on the basis of their respective known positions on particular aspects of substantive law and procedure relevant to the particular dispute. In practice, it means that it is more difficult to secure a first-time appointment. For women who have not previously held an appointment, this structural feature could create an additional barrier for securing a seat. Combined with the “men’s-club” social

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11 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 5 ILM 532, 575 UNTS 159, arts 37(2)(b), 38 [ICSID Convention].

12 ICSID, *Annual Report 2017*, *supra* note 8 at 35.

13 *Ibid.*

14 ICSID, *2019 Annual Report*, *supra* note 9 at 25.

15 Pauwelyn, “Who Decides Matters”, *supra* note 3 at 224.

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16 *Agreement Establishing the World Trade Organization* (1994), 15 April 1994, 1867 UNTS 154, 33 ILM 1144, Annex 2, art 8(4) (entered into force 1 January 1995) (“Understanding on Rules and Procedures Governing the Settlement of Disputes”), online: <[www.wto.org/english/docs\\_e/legal\\_e/28-dsu.pdf](http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf)>.

17 WTO, “The process – Stages in a typical WTO dispute settlement case” in WTO, *Dispute Settlement System Training Module*, ch 6, online: <[www.wto.org/english/tratop\\_e/dispu\\_e/disp\\_settlement\\_cbt\\_e/c6s3p2\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s3p2_e.htm)>.

18 Mark Wu, “Trade’s Influence in Shaping the Evolving International Investment Regime” in Zachary Douglas, Joost Pauwelyn & Jorge E Viñuales, eds, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford, UK: Oxford University Press, 2014) at 179.

dynamics (an issue discussed below), these factors can undermine women's progress in acquiring seats.

The second factor in the appointment process is the structural organization of the dispute settlement body itself. While the WTO has a standing appellate mechanism, the investment tribunals are ad hoc by nature. Most importantly, the ICSID Convention includes only limited grounds for annulment of the tribunals' decisions.<sup>19</sup> Arguably, the difference in organizational structure can affect the diversity of the pool. The stakes in the investment arbitration proceedings are usually high. There is no appeal mechanism that can reverse decisions. Users therefore tend to appoint "repeat players" as arbitrators of the investment tribunals.<sup>20</sup> The appointing parties generally prefer candidates whose views, attitudes and approaches are already known rather than new candidates. In such a closed system, repeat appointments can potentially limit gender diversity.

The third factor is the social dynamics that inform appointments to ICSID and the WTO.<sup>21</sup> For newcomers to the pool of adjudicators, their backgrounds and insider/outsider status could determine how easily they can gain access to the respective fields. The pool of investment arbitrators is relatively small, such that its participants could be viewed as a club or tight network of legal professionals.<sup>22</sup> Newcomers could be excluded because parties are pragmatic and would prefer to appoint arbitrators whose views on particular legal issues are already settled. As these dispute settlement mechanisms are already male dominated, the club or network orientation of both means it is less likely for female candidates to enter them.

Thus, even though the institutional structures that determine the dynamics of appointment processes in the context of the WTO and investment arbitration are different, gender diversity is lacking in both regimes. What are the possible reasons for the exclusion of female adjudicators in these fields and, most importantly, what can be done to change the status quo?

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<sup>19</sup> ICSID Convention, *supra* note 11, arts 50–52.

<sup>20</sup> William W Park, "Arbitrator Integrity" in Michael Waibel et al, eds, *The Backlash against Investment Arbitration: Perceptions and Reality* (The Hague: Kluwer Law International, 2010) at 209.

<sup>21</sup> Sergio Puig, "Social Capital in the Arbitration Market" (2014) 25:2 Eur J Intl L 387; Pauwelyn, "Who Decides Matters", *supra* note 3 at 224.

<sup>22</sup> Thomas Hale, *Between Interests and Law* (Cambridge, UK: Cambridge University Press, 2015) at 77.

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## Why Are Women Under-represented in Investment and Trade Adjudication?

Apart from the factors highlighted in the last section, other factors could be at play in the under-representation of women in ICSID and the WTO. It may be that there are not enough women who possess the necessary expertise to become adjudicators in international trade and investment disputes. This factor has been noted in relation to WTO negotiating teams.<sup>23</sup> Gender imbalances in trade negotiations are, in turn, blamed on fewer women being government trade officers.<sup>24</sup> Some governments may also be reluctant to appoint women as adjudicators, arguing that there are no "meritorious" female candidates available for nomination.

In the investment arbitration context, while women continue to serve as lead legal counsel in arbitration disputes, experts in arbitral proceedings, partners at major law firms that specialize in international arbitration and prominent academics in international law,<sup>25</sup> they seem unable to transition from these positions to arbitrators (at least not in great numbers). The parties to the dispute, foreign investors and states do not exactly line up to appoint female arbitrators, especially those who have not previously served as arbitrators. One more relevant factor (in particular in the WTO context) may be the candidate's previous experience in government as a trade negotiator or a judge.<sup>26</sup> The recommendations (by co-panellists, legal counsel or

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<sup>23</sup> Barnali Choudhury, *Public Services and International Trade Liberalization: Human Rights and Gender Implications* (Cambridge, UK: Cambridge University Press, 2012) at 38.

<sup>24</sup> *Ibid.*

<sup>25</sup> Consider, for example, Lucy Reed, who is director of the Centre for International Law at the National University of Singapore and partner and co-head of International Arbitration and Public International Law Groups at law firm Freshfields Bruckhaus Deringer. See Lucy Reed, "Lucy Reed", online: LinkedIn <[www.linkedin.com/in/lucy-reed-8194a243/](https://www.linkedin.com/in/lucy-reed-8194a243/)>.

<sup>26</sup> Joost Pauwelyn, "The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus" (2015) 109:4 Am J Intl L 761 ("Over time, more (not fewer) panelist appointments have a substantial government background...the trend for appointments to the WTO AB [Appellate Body] is in favor of 'trade insiders' (former negotiators, with trade law experience and a government background)" at 801).

previous disputants) through informal networks can also play a role in the appointment process.<sup>27</sup>

Accordingly, it may be difficult even for a candidate who is an “insider” in the field to make the transition from legal counsel (representing an investor or a state), expert in the proceedings, or secretary of the tribunal to arbitrator (i.e., the parties still may not appoint the candidate). To understand the reasons why this is so, it is necessary to conduct further empirical research and interview the female candidates about the obstacles they face in the process.

There is also a possibility that under-representation of women adjudicators in international investment and trade dispute settlement may be seen as simply a temporary problem that will be resolved as more women progress in their professional careers. This is known as the “trickle-up” effect and is well known in domestic legal systems.<sup>28</sup> The trickle-up argument is, however, built on the false assumption that women and men progress in similar ways (i.e., at a comparable pace, and also encounter identical obstacles on their career paths). This is not necessarily so. Previous studies have shown that women lawyers face additional barriers at every stage of their careers, such as a lack of mentorship, which reinforces the impenetrability of the male-dominated social networks.<sup>29</sup> These factors prevent them from entering and progressing in national judicial institutions, let alone international bodies. Debra Steger notes that, at the WTO, women’s representation in its leadership positions has not improved appreciably over the past several years.<sup>30</sup> Women also achieved only limited progress in the context of investment dispute settlement.<sup>31</sup> This indicates

that policy makers should not wait for women to achieve parity in decision-making positions — they should act to address the gaps now.

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## Steps Taken So Far to Improve the Situation

Generally speaking, international dispute settlement mechanisms, including the International Court of Justice, are far from achieving parity in gender representation.<sup>32</sup> What is being done to redress this imbalance in the context of investment and trade dispute settlement mechanisms? Examining existing trends and approaches in this area can be useful for the future reform of international investment and trade dispute settlement mechanisms. The reform seems particularly timely, given the ongoing conversations regarding the WTO and investment arbitration reforms.<sup>33</sup>

In international investment arbitration, some initiatives were launched to shift the dynamics of female appointments. The most notable among them is the Arbitrator Intelligence project, which helps to collect information on arbitrators from investment arbitration users through a specialized questionnaire. The project also helps to familiarize parties with the candidates and personalizes the selection process by making information about the candidates publicly available. A second initiative focuses on a voluntary commitment to gender diversity on the bench by encouraging arbitration users to take the Equal Representation in Arbitration pledge.<sup>34</sup> The pledge has gained in popularity, with 3,740 signatories at the time of writing this policy brief.<sup>35</sup> Both the Arbitrator Intelligence and pledge initiatives, albeit voluntary initiatives, are definitely a step forward. This means they lack any compliance-monitoring processes, which could be an impediment to tangible progress.

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27 Fernando Tupa, “Arbitrator Challenges in Investment Arbitration: Is an Overhaul Needed?” in Ian A Laird et al, eds, *Investment Treaty Arbitration and International Law* (New York: Juris Publishing, 2015) at 51; Thomas W Wälde, “Improving the Mechanisms for Treaty Negotiations and Investment Disputes: Competition and Choice as the Path to Quality and Legitimacy” in Karl P Sauvant, ed, *Yearbook on International Investment Law & Policy 2008–2009* (Oxford, UK: Oxford University Press, 2009) at 573.

28 Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (London, UK: Routledge, 2013) at 35.

29 *Ibid* at 94. Sally J Kenney, *Gender and Justice: Why Women in the Judiciary Really Matter* (London, UK: Routledge, 2013) at 96–97.

30 Debra Steger, “Gender Equality in the WTO: The Need for Women Leaders” CIGI, *Reshaping Trade through Women’s Economic Empowerment Series*, 11 April 2018, online: <[www.cigionline.org/articles/gender-equality-wto-need-women-leaders](http://www.cigionline.org/articles/gender-equality-wto-need-women-leaders)>.

31 ICSID, *Annual Report 2017*, *supra* note 8 at 35–36.

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32 Ruth Mackenzie et al, *Selecting International Judges: Principle, Process, and Politics* (Oxford, UK: Oxford University Press, 2010) at 161.

33 Joost Pauwelyn, “The WTO in Crisis: Five Fundamentals Reconsidered” [2012], online: <[www.wto.org/english/forums\\_e/public\\_forum12\\_e/art\\_pf12\\_e/art9.htm](http://www.wto.org/english/forums_e/public_forum12_e/art_pf12_e/art9.htm)>.

34 Equal Representation in Arbitration, online: <[www.arbitrationpledge.com/](http://www.arbitrationpledge.com/)>.

35 *Ibid*.

Finally, arbitration institutions, such as ICSID, can contribute to gender diversity by proactively appointing female arbitrators, including those with no previous experience in the investment arbitration process.<sup>36</sup> ICSID's *2017 Annual Report*, for example, shows that the centre appointed more women arbitrators than did investors or states.<sup>37</sup> Apart from its diversifying potential, this approach also assists female candidates to establish their reputation in the field and gain social capital by building their track record of appointments. However, because arbitration institutions control only a limited number of appointments, their contribution should be complemented by the parties and co-arbitrators who jointly make the most appointments in the investment arbitration context.

The broader overview of international courts and tribunals points to at least two approaches that could be taken to increase gender diversity on the bench. First, the requirement for equal gender representation can be embedded in the relevant constitutive international treaty. For example, the Rome Statute of the International Criminal Court provides for "a fair representation of female and male judges" on the bench.<sup>38</sup> Second, the requirement of gender parity on the bench could be set up by special regulation. A series of directives issued by the Council of Europe Parliamentary Assembly that requires state parties to submit a list of candidates for nomination, including at least one female candidate, to the European Court of Human Rights could be a relevant model.<sup>39</sup>

It is too soon to evaluate the success of the aforementioned approaches, mainly because they have not yet resulted in absolute gender parity at the specific international courts and tribunals. There are also certain limitations associated with these approaches that emanate from their political and structural attainability. For example, it may be difficult to agree on the gender parity requirement in the constitutive treaty. International investment agreements, in particular, do not generally include gender parity as a requirement of the

panel composition. Even the recently negotiated Comprehensive Economic Trade Agreement between Canada and the European Union failed to set such requirements. The WTO Dispute Settlement Understanding (DSU) also does not contain requirements for gender-balanced panels.

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## Recommendations

Considering this context, governments and other actors that participate in, use and monitor performance of the international dispute settlement bodies should do the following:

- Conduct qualitative empirical research by means of anonymous interviews engaging female professionals in the fields of international trade and investment law. Such research could focus on two groups: female professionals who have already served as adjudicators on trade and investment panels to identify what obstacles they faced before and after they obtained their first appointment; and female professionals who previously or currently serve as legal counsel, government representatives or experts in proceedings to understand what biases or obstacles they faced or are facing. The results of such empirical research could be helpful in developing evidence-based policies that eliminate structural, social and cultural barriers that prevent women from obtaining a greater number of adjudicatory appointments.
- Formulate a strategy across relevant international organizations and arbitration institutions to enable more women to become adjudicators in international investment and trade contexts. The strategy should include a detailed plan for action to address slow progress and could be developed within the relevant international organizations such as, for example, the WTO and the United Nations Commission on International Trade Law. The strategy could also be expanded to include the inputs of other non-state actors where appropriate.

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<sup>36</sup> ICSID, *Annual Report 2017*, *supra* note 8 at 35–36.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, UNTS 2187, art 8(a)(iii) (entered into force 1 July 2002).

<sup>39</sup> Françoise Tulkens, "More Women – But Which Women? A Reply to Stéphanie Hennette Vauchez" (2015) 26 *Eur J Intl L* 223 at 224.

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## Conclusion

The 2030 Agenda for Sustainable Development emphasizes the linkage between gender and sustainable development. Equal participation of women in leadership enables them to influence decision making, including when they serve as adjudicators in international investment and trade law contexts. In addition, women's participation has significant symbolic value. Greater representation of women in these roles demonstrates that women can, in principle, rise to high-paying and prestigious offices that enable them to participate in international governance. The current state of affairs in the fields of international trade and investment demonstrates slow progress. The situation calls for a greater focus on empirical, qualitative research to inform a policy-oriented approach to eliminating existing barriers for women and a targeted strategy across international organizations to achieve the ambitions of SDG 5.

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