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**Article**

**When Equality Can No Longer Wait: From  
'Formidable Women' to a Gender-Diverse  
Pool of Investment Arbitrators**

**Julia Tétrault-Provencher**

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# When Equality Can No Longer Wait: From ‘Formidable Women’ to a Gender-Diverse Pool of Investment Arbitrators

Julia Tétrault-Provencher\*

At the 2014 ICCA Miami Conference, the late arbitrator V.V. Veeder used a colorful analogy to describe the state of gender diversity in international investment arbitration. He noted that, if a Martian visited Planet Earth and turned their interest to this field, they would conclude that human species tend to discriminate against one another. Similarly, a 2017 empirical study by arbitrator Lucy Greenwood found that, out of the thirteen major international arbitral institutions, the appointments of male arbitrators accounted for at least 75% of the total appointments. Greenwood’s study provides direct evidence of what was already well known in the international arbitration community: the investor-state dispute settlement (ISDS) system has failed, and is still failing, to ensure the gender balance of its decision makers. Since the status quo on this issue has often been contemplated as acceptable, this paper first explains why the ISDS community should be concerned with achieving greater gender diversity. It addresses how democratic values are brushed aside when a homogenous group of arbitrators is repeatedly appointed, detailing the adverse impact that the lack of diversity may have on the perception of the system. The paper then explains that this lack of diversity is likely the result of systemic discrimination and unconscious gender biases, which must be criticized to better overcome them. Finally, the paper discusses the positive impact that a diverse arbitrator pool could have on the quality of arbitral awards (Part I). Turning to solutions, the paper will subsequently present initiatives already undertaken by different actors in the community to enhance the representation of women on the bench. The solutions propose alternative methods for states to enhance gender equality and empower women through the curtailment of party autonomy (Part II).

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En 2014, lors de la conférence de l’ICAA à Miami, le défunt arbitre V.V. Veeder a utilisé une analogie colorée pour décrire l’état de la diversité des genres dans le domaine de l’arbitrage international d’investissements. Il a noté que, si un Martien devait visiter la Terre et observer le domaine de l’arbitrage, il pourrait facilement conclure que l’espèce humaine a des tendances discriminatoires. En effet, une étude réalisée en 2017 par l’arbitre Lucy Greenwood a révélé que, parmi les treize grandes institutions internationales d’arbitrage, la nomination d’arbitres masculins représentait au moins 75 % des nominations totales. L’étude de Greenwood a donc fourni une preuve tangible de ce qui était déjà bien connu dans le domaine : le système de règlement des différends entre investisseurs et États (RDIE) ne réussit toujours pas à assurer l’équilibre entre les sexes parmi ses membres responsables. Étant donné que ce statu quo favorable au genre masculin est maintenant bien établi dans le milieu, cet article cherche à démontrer pourquoi il est dans l’intérêt de la communauté de RDIE de se préoccuper d’atteindre une plus grande diversité de genre au sein du milieu. Cet article cherche à démontrer comment les valeurs démocratiques sont affaiblies lorsqu’un groupe homogène d’arbitres est régulièrement nommé à des postes décisionnels et cherche à exposer les effets néfastes que le manque de représentativité peut avoir sur l’image et la perception du système. Cet article examine ensuite comment ce manque de diversité est probablement le résultat d’une discrimination systémique et de préjugés sexistes inconscients à dénoncer pour pouvoir les combattre. Suivant cela, l’article examine l’impact positif qu’un bassin d’arbitres diversifié peut avoir sur la qualité des décisions arbitrales (Partie I). Quant aux solutions, cet article présentera ensuite des initiatives déjà prises par différents agents de la communauté pour renforcer la représentativité des femmes dans les tribunaux d’arbitrage. Ces solutions offrent des méthodes alternatives aux États pour promouvoir l’égalité des sexes et mettre à valeur le rôle des femmes en limitant l’autonomie des parties (Partie II).

At the 2014 ICCA Miami Conference, the late arbitrator V.V. Veeder used a colorful analogy to describe the state of gender diversity in international investment arbitration. He noted that, if a Martian visited Planet Earth and turned their interest to this field, they would conclude that human species tend to discriminate against one another.<sup>1</sup> Similarly, a 2017 empirical study by arbitrator Lucy Greenwood found that, out of the thirteen major international arbitral institutions, the appointments of male arbitrators accounted for at least 75% of the total appointments.<sup>2</sup> Greenwood’s study provides direct evidence of what was already well known in the international arbitration community: the investor-state dispute settlement (ISDS) system has failed, and is still failing, to ensure the gender balance of its decision makers.

While the issue of gender diversity has been widely discussed in the literature and within the arbitration community, authors have yet to clearly address how this issue relates to the commitment made by UN Member States to achieve the 2015 United Nations Sustainable Development Goals by 2030 (SDGs).<sup>3</sup> Yet, SDG5, which aims to achieve gender equality and enhance the empowerment of women and girls,<sup>4</sup> explicitly encourages states to fight gender discrimination<sup>5</sup> and to adopt policies enhancing gender equality.<sup>6</sup> States should thus be concerned by the lack of gender diversity in investment arbitration.

This paper focuses on ISDS and largely excludes international commercial arbitration for three reasons. First, investment arbitration constitutes part of global administrative law and features several public aspects, which raises

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1 See VV Veeder, “Who Are the Arbitrators?” in Albert Jan Van der Berg, eds, *Legitimacy: Myths, Realities, Challenges*, vol 18 (The Hague: ICCA & Kluwer Law International, 2015) 653.

2 See Lucy Greenwood, “Moving Beyond Diversity Toward Inclusion in International Arbitration” in Axel Calissendorff & Patrik Schöldström, eds, *Stockholm Arbitration Yearbook 2019* (Stockholm: Wolters Kluwer, 2019) 93 at 95 [Greenwood, “Moving Beyond Diversity”].

3 See United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UNGAOR, 70th Sess, UN Doc A/Res/70/1 (2015) [Transforming Our World]. (The author notes however that the International Council for Commercial Arbitration (ICCA) Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings, issued in 2020, has recognized how gender equality in international arbitration could have a positive impact on sustainable development. See International Council for Commercial Arbitration, “Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings” (ICCA Reports No 8, 2020) at 9-11, online (pdf): ICCA <[www.arbitration-icca.org/icca-reports-no-8-report-cross-institutional-task-force-gender-diversity-arbitral-appointments-and](http://www.arbitration-icca.org/icca-reports-no-8-report-cross-institutional-task-force-gender-diversity-arbitral-appointments-and)>. This paper aims at expanding on that issue and answering how the international obligation of States to respect the SDGs can concretely enhance the place of women in international arbitration).

4 See United Nations General Assembly, *Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development*, UNGAOR, 71st Sess, UN Doc A/Res/71/313 (2017) at 9 [Work of Statistical Commission].

5 See *ibid* at Global Indicator 5.1.

6 See *ibid* at Global Indicator 5.c.

greater concerns with respect to the gender diversity of its decision makers.<sup>7</sup> Second, the data regarding arbitral appointments in this field have been more widely collected, making it possible to assess with relative precision the gender of its decision makers.<sup>8</sup> Third, because states are the defendants but also the architects of the system, they have the power, whether through policy-making initiatives or appointments, to make concrete changes to foster gender equality. States also have the primary responsibility of ensuring the achievement of the SDGs through concrete policies and actions.<sup>9</sup>

Since the *status quo* on this issue has often been considered acceptable, this paper first explains why the ISDS community should be concerned with achieving greater gender diversity. It addresses how democratic values are brushed aside when a homogenous group of arbitrators is repeatedly appointed, detailing the adverse impact that the lack of diversity may have on the perception of the system. The paper then explains that this lack of diversity is likely the result of systemic discrimination and unconscious gender biases, which must be criticized to better overcome them. Finally, the paper discusses the positive impact that a diverse arbitrator pool could have on the quality of arbitral awards (**Part I**). Turning to solutions, the paper will subsequently present initiatives already undertaken by different actors in the community to enhance the representation of women on the bench. The solutions propose alternative methods for states to enhance gender equality and empower women through the curtailing of party autonomy (**Part II**).

## 1. Why Does Gender Diversity Matter in Arbitrator Appointments?

While certain participants of the ISDS community are content with the *status quo*, an increasingly large number of stakeholders have brought forward the significance of promoting gender diversity on arbitral panels. This section examines four main reasons to support this position.

### A. *Defending Equal Representation as a Democratic Value*

The pool of investment arbitrators must represent the diversity—including the gender diversity—of the population subject to their decisions to maintain its “democratic legitimacy.”<sup>10</sup> While several states have shown

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7 See Lucy Greenwood & C. Mark Baker, “Getting a Better Balance on International Arbitration Tribunal” (2012) 28:4 *Arbitration International* 653 at 665.

8 See *ibid.*

9 See *Work of the Statistical Commission*, *supra* note 4 at 5.

10 See Lady Brenda Hale, “Lady Hale gives the Fiona Woolf Lecture for the Women Lawyers’ Division of the Law Society” (2015) at 4, online (pdf): *UK Supreme Court* <<https://www.supremecourt.uk/docs/speech-140627.pdf>>; Kathleen Claussen, “Keeping Up Appearances: the Diversity Dilemma” (2015) 12:4 *TDM* 1 at 9.

their engagement to promote gender representation at the national level<sup>11</sup> and in regional and international courts,<sup>12</sup> the same commitment has not yet led to concrete or binding measures in investment arbitration.<sup>13</sup>

When viewed as a private dispute settlement forum, as it once was, investment arbitration was not seen as being subject to the same requirements of representation and to the same heightened public scrutiny as, for example, national courts in democracies.<sup>14</sup> This may be because this means of dispute settlement was established in a piecemeal fashion, using international commercial arbitration processes, rather than as a true system part of public international law. However, ISDS certainly has public law features today. Awards have increasingly impacted governments<sup>15</sup> and national and international law making.<sup>16</sup> These effects, coupled with the *de facto* precedential value of awards,<sup>17</sup> call for the respect of public and democratic values. This includes a fair representation of the general public.<sup>18</sup>

In 2019, these considerations were highlighted in the agreed roster of the European Union and Canada as part of their new Comprehensive Economic and Trade Agreement (CETA).<sup>19</sup> The agreed roster was meant to create a list of arbitrators for dispute settlement in accordance with article 29 of the CETA. However, when the list came out, of the 16 potential arbitrators selected by the Parties, only 4 were women.<sup>20</sup> The strong criticism voiced

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11 See e.g. Republic of Latvia, *Law on Judicial Power* (amended in 2013) at art 44(2); *Constitution of the Republic of South Africa*, Act 108 of 1996 at s 174(2); *Constitution of the Republic of Ecuador* (2008) at art 434; art 259 bis 2 Civil Code (Belgium).

12 See e.g. *Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights* at arts 12(2), 14(3); Council of Europe, PA, *Procedure for the election of judges to the European Court of Human Rights as of 15 April 2019*, SG-AS (2021) 01rev (The ECtHR has a non-binding policy promoting gender diversity); *Rome Statute of the International Criminal Court*, 17 July 1998, UNTS vol 2187 no 38544 at art 36(8)(a)(iii) (entered into force 1 July 2002) [*Rome Statute*].

13 See Susan D Frank et al, “The Diversity Challenge: Exploring the ‘Invisible College’ of International Arbitration” (2015) 53 *Colum J Transnat’l L* 426 at 476–77.

14 See William W Burke-White & Andreas Von Staden, “Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations” (2010) 35:2 *Yale J Intl L* 282 at 288.

15 See UNCITRAL Working Group III, “Possible Reform of Investor-State Dispute Settlement (ISDS)”, UNGAOR, 34th Sess, UN Doc A/CN.9/WG.III/WP.142 (2017) at paras 46–47 (especially “where large or controversial amounts are awarded to foreign investors”).

16 See Catherine A Rogers, “The Vocation of the International Arbitrator” (2005) 20 *Am U Intl L Rev* 957 at 1003.

17 See Rogers, *supra* note 16 at 1005 (even if these precedents are non-binding).

18 See Darius J Khambata, “Tensions Between Party Autonomy and Diversity” in Albert Jan Van der Berg, ed, *Legitimacy: Myths, Realities, Challenges* (The Netherlands: Kluwer Law International, 2015) at 615.

19 See EC, *Council Decision (EU) 2019/2246 of 19 December 2019 on the position to be taken on behalf of the European Union in the CETA Joint Committee as regards the adoption of the List of Arbitrators pursuant to Article 29.8 of the Agreement*, [2019], OJ, L 336 at Annex 1.

20 See *ibid* (the list was divided into three sub-lists: a sub-list for Canadian candidates, a sub-list for EU candidates and a sub-list of Chairpersons who were not nationals of either Parties. Among the arbitrators nominated, women represented 50% of the Canadian’s sub-list, 20% of

against the underrepresentation of women on the list was a striking example of how contemporary society values gender equality and expects democratic states to make arbitrator appointments that correspond to those values.<sup>21</sup> The CETA example also demonstrates the reputational risk that states cause to the entire ISDS system when overlooking qualified female candidates. The selection process has been criticized as being a “step backward,” preserving the rooted systemic gender inequality in this field and negatively impacting efforts to increase diversity in resolution.<sup>22</sup> When this roster was denounced for its lack of gender diversity, the European Commission responded that “reflections” were undertaken to ensure that gender balance in the roster of candidates and on future arbitral panels would be taken into consideration.<sup>23</sup> The prompt reply of the EU confirms that, at least for states supporting democratic institutions and values, there is a desire to please public opinion, or, at least, opinions stemming from practitioners in the field.

In addition to being in accordance with SDG5, the conscious appointment of female arbitrators reflects the significance contemporary society puts on democratic values, including gender equality<sup>24</sup> and representativeness,<sup>25</sup> and its role in maintaining a sense of legitimacy in the system.

### B. *Ensuring the Perceived Legitimacy of ISDS*

Greater gender diversity on the bench should be prioritized to heighten the perception of impartiality and fairness of ISDS.<sup>26</sup> Research has shown people associate gender diversity on the bench with fairness, impartiality and justice.<sup>27</sup> This paper proposes that the homogeneity of the pool of arbitrators could only fuel the current public distrust of investment arbitration.

Enhancing the diversity of arbitrators could contribute to overcoming the perceived illegitimacy of “biased typical arbitrators.”<sup>28</sup> There is a current

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the EU’s sub-list and 0% of the sub-list for Chairpersons).

21 More specifically, the initiative taken by Dr Katherine Simpson will be discussed further in the second part of this paper, see Part II.

22 See Interview of Dr Katherine Simpson by ArbitralWomen, “Interview with Katherine Simpson: CETA List of Arbitrators – Where are the Women?” (2020), online: *ArbitralWomen* <[www.arbitralwomen.org/ceta-list-of-arbitrators-where-are-the-women/](http://www.arbitralwomen.org/ceta-list-of-arbitrators-where-are-the-women/)>.

23 See Letter from Rupert Schlegelmilch to Dr Katherine Simpson (April 2020), online (pdf): *Simpson Dispute Resolution* <[www.simpsonadr.net/files/2020.04.24CETAResponse.pdf](http://www.simpsonadr.net/files/2020.04.24CETAResponse.pdf)>.

24 See *Transforming Our World*, *supra* note 3 at paras 3 and 9; Chiara Giorgetti, “Who Decides Who Decides in International Investment Arbitration” (2013) 35 U Pa J Intl L 433 at 482.

25 See Armin von Bogdandy & Ingo Venzke, “On the Democratic Legitimation of International Judicial Lawmaking” (2011) 12 Get L J 1341 at 1360; Nienke Grossman, “Legitimacy and International Adjudicative Bodies” (2009) 41 Geo Wash Intl L Rev 107 at 153–60.

26 See *Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights* (12 February 2008) ECHR at para 49.

27 See Nienke Grossman, “Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts” (2012) 12:2 Chi J Intl L 647 at 667–68.

28 See Christophe Seraglini, “Who Are the Arbitrators? Myths, Reality and Challenges” in Albert

belief, albeit not necessarily accurate, that arbitrators could be biased and in favor of investors, especially in ICSID cases.<sup>29</sup> In accordance with this perception, since investors usually hold the power to initiate proceedings, arbitrators would be prone to making pro-claimant decisions to encourage investors to appoint them in future proceedings.<sup>30</sup> This negative perception is alive today, as states have called on reforming the appointment of decision makers in ISDS to prevent similar biases.<sup>31</sup> States have also recently expressed concerns about the lack of gender diversity and its impact on the perception of insufficient impartiality and independence in the system.<sup>32</sup> To address these concerns, UNCITRAL’s Working Group III (WGIII) is considering possible reforms to ISDS. The Secretariat has noted the importance of considering the SDGs in the reflections of WGIII, including SDG5 on gender diversity, to ensure greater gender equality amongst decision makers.<sup>33</sup>

Practitioners and arbitrators alike have already explained that the “perception of legitimacy” in the field is significant.<sup>34</sup> Considering the risk that the current homogeneity adversely affects the public perception of ISDS and knowing that panels which better represent the population are perceived as more legitimate and increase the public trust in the institutions,<sup>35</sup> the lack of diversity is a serious matter that must be adequately addressed.

### C. Recognizing the Unconscious Biases and Ending Discrimination

In 2016, a study reported that 23% of the women surveyed believe that they were not appointed as arbitrators because of their gender.<sup>36</sup> In this context,

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Jan Van der Berg, ed, *Legitimacy: Myths, Realities, Challenges*, vol 18 (The Hague: ICCA & Kluwer Law International, 2015) at 598–99.

29 See *ibid* at 597.

30 See Gus van Harten, “Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration”, (2012) 50:1 Osgoode Hall LJ 211 at 219 (this is what was found in a study made in 2012 by Gus van Harten. The study notably concluded that “[t]he asymmetrical claims structure and absence of institutional markers of judicial independence create apparent incentives for arbitrators to favour the class of parties (here, investors) that is able to invoke the use of the system.” However, it is to be noted that the study was limited in scope (only 140 arbitration cases). For that reason, while the belief that arbitrators might be biased exists, empirical studies supporting that belief remain limited.)

31 See UNCITRAL Working Group III, *Arbitrators and decision makers: appointment mechanisms and related issues*, UNGAOR, 36th Sess, UN Doc A/CN.9/WG.III/WP.152 (2018) at paras 39–41 [*Arbitrators and decision makers*]; UNCITRAL, *Ensuring independence and impartiality on the part of arbitrators and decision makers in ISDS*, UNGAOR, 36th Sess, UN Doc A/CN.9/WG.III/WP.151 (2018) at paras 22 and 68–69.

32 See *Arbitrators and decision makers*, *supra* note 31 at paras 20–21.

33 See UNCITRAL Working Group III, *Possible Reform of Investor-State Dispute Settlement (ISDS)*, UNGAOR, 36th Sess, UN Doc A/CN.9/WG.III/WP.149 (2018) at para 21.

34 See Fakhruddin Ali Valika, “Improving the Participation of Minorities in International Arbitration” (10 November 2019), online (blog): *Kluwer Arbitration Blog* <arbitrationblog.kluwerarbitration.com/>; Seragliani, *supra* note 28 at 598–99; Claussen, *supra* note 10 at 9; Sergio Puig, “Social Capital in the Arbitration Market” (2014) 25:2 EJIL 389 at 400.

35 See Sital Kalantry, “Women in Robes”, (2012) 6 Americas Q 82 at 87.

36 See Berwin Leighton Paisner, “International Arbitration Survey: Diversity on Arbitral Tribunal”

Lucy Greenwood proposed blind appointment to overcome the unconscious biases that parties typically have when choosing their arbitrators from a gender-balanced list of suitable candidates.<sup>37</sup> Louise Chappell calls the absence of women's voices the "corollary [impact] of men's traditional dominance international law,"<sup>38</sup> pointing out the "leakage" of discriminatory gender norms into seemingly impartial law and policy.<sup>39</sup> Women wishing to be appointed as arbitrators are stuck in a "vicious circle." As rightfully pointed out by Professor Christophe Seraglini during the International Council for Commercial Arbitration Miami Conference: "parties like to appoint experienced arbitrators, but women lack experience and this strengthens their exclusion from the circle. They suffer from the fact that since they were not appointed as arbitrators during the past decades, they do not benefit from solid experience assuring reappointment."<sup>40</sup> Similar qualifications likely perpetuate institutionalized gender biases that the international arbitration community must address.

Yet, those who believe in the *status quo* have typically argued that members of the arbitral community have few alternatives to improve gender balance in appointments. At the ICCA Miami Conference, the majority of arbitrators contended that appointers would naturally tend to appoint more women as diversity becomes an increasingly important value over time.<sup>41</sup> Other individuals have argued that there was no discrimination in arbitrator selection, but the gender imbalance was instead the result of the historically delayed access to legal education for women.<sup>42</sup>

This attitude, however, denies the fact that the current ISDS system, including the appointment of arbitrators, is gender biased, whether this be conscious or not. Denying the existence of a gender diversity issue is counterproductive and goes against the global goal of reaching gender equality by 2030. Appointing parties and institutions should be aware of these biases so as to find solutions to overcome them.

As Professor Andrea Bjorklund argues, "experience trumps diversity and so long as diversity is not prioritized (voluntarily or not), parties are

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(2016) at 6, online (pdf): *Berwin Leighton Paisner* <[www.bclplaw.com/images/content/1/5/v2/150194/FINAL-Arbitration-Survey-Report.pdf](http://www.bclplaw.com/images/content/1/5/v2/150194/FINAL-Arbitration-Survey-Report.pdf)>.

37 See Lucy Greenwood, "Could 'Blind' Appointments Open Our Eyes to the Lack of Diversity in International Arbitration?" (2015) 12:4 TDM 1 at 8–9.

38 Louise Chappell, "Conflicting Institutions and the Search for Gender Justice at the International Criminal Court" (2014) 67:1 Political Research Q 183 at 185.

39 *Ibid.*

40 Seraglini, *supra* note 28 at 595.

41 See Ricardo Dalmaso Marques, "To Diversify or Not to Diversify? Report on the Session Who Are the Arbitrators" in Albert Jan Van der Berg, ed, *Legitimacy: Myths, Realities, Challenges*, vol 18 (The Hague: ICCA & Kluwer Law International, 2015) 584.

42 See Stéphanie Hennette Vauchez, "Gender Balance in International Adjudicatory Bodies" in *Max Planck Encyclopedia of International Procedural Law* (2019) at para 27.

not likely to select diverse arbitrators who do not have experience.”<sup>43</sup> Since the experience of the candidates is seemingly the most important consideration when appointers choose their arbitrators,<sup>44</sup> it creates systemic discrimination where women, who entered the legal profession later, do not benefit from the same practical experience as their male counterparts, and cannot show the same track records to appointers. Two exceptions to this are Gabrielle Kaufmann-Kohler and Professor Brigitte Stern; both of whom managed to enter the arbitral network at the same time as some of their male counterparts and thus accumulate appointments.<sup>45</sup> Their situation, however, is symptomatic of a larger problem, where the same arbitrators are repeatedly chosen, prohibiting the appointment of new arbitrators and disproportionately affecting women.<sup>46</sup>

Even when some women overcome this ‘systemic discrimination’ and obtain similar accolades as their male colleagues, they still face unconscious (and sometimes conscious) stereotypes related to their gender. These narratives include the idea that they do not have the necessary ‘gravitas’, are not assertive enough, cannot be influential<sup>47</sup> or are simply incapable to “discharge roles of ‘responsibility.’”<sup>48</sup> In addition, appointing authorities have a propensity to “fear the unknown” and, when selecting their arbitrators, they will usually select those with the most experience (usually men) or, in the absence of well-known arbitrators, will choose the “lawyers who project [...] an image gravitas with which they are familiar” – who will likely be a man.<sup>49</sup>

It is thus imperative to address the lack of gender diversity in both the rosters of suitable candidates and on arbitral panels. As stated by the UN Secretary-General in March 2019, women’s empowerment and gender equality are “essential to global progress” and to ensuring sustainable development.<sup>50</sup> These words should also resonate in the international

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43 Andrea K. Bjorklund et al, “The Diversity Deficit in International Investment Arbitration” (2020) 21:2/3 *J World Investment & Trade* 410 at 429.

44 See Michael D. Goldhaber, “Madame La Présidente – A Woman Who Sits as President of a Major Arbitral Tribunal Is a Rare Creature. Why?” (2004) 1:3 *Transnat’l Disp Mgmt J*.

45 See Puig, *supra* note 34 at 415.

46 See Khambata, *supra* note 18 at 633–34.

47 See Greenwood, “Moving Beyond Diversity”, *supra* note 2 at 98.

48 See Khambata, *supra* note 18 at 634; Veeder, *supra* note 1 at 653.

49 Goldhaber, *supra* note 44.

50 See António Guterres, “Remarks on International Women’s Day 2019” (Opening remarks delivered at the UN International Women’s Day commemoration at the ECOSOC chamber, UN headquarters, New York, 8 March 2019), online: *World Health Organization* < [www.who.int/life-course/news/intl-women-day-2019-un-sg-statement/en/](http://www.who.int/life-course/news/intl-women-day-2019-un-sg-statement/en/)>.

arbitration community.

#### D. *Improving the Quality of the Awards*

Greater gender balance would likely contribute to enhancing the quality of awards and ensuring that the most suitable candidates are not left out of the equation for poor reasons. There is, in fact, a pool of talented female professionals who have the necessary skills and expertise to make high-quality decisions but have not yet sat on an arbitral panel.<sup>51</sup>

A limited and homogeneous pool of candidates might have an adverse effect on awards or, at least, give this perception.<sup>52</sup> Even if the concrete impact that more women arbitrators would have on the outcome of investment cases has yet to be quantified empirically,<sup>53</sup> the diverse professional and personal experience that these women bring to arbitral tribunals is certain.<sup>54</sup> As explained by Jacomijn van Haersolte-van Hof, an appointment respecting gender diversity is beneficial even if only for the disputing parties themselves.<sup>55</sup> A tribunal where members do not share the same perspectives is likely to break the current decisional patterns, lead to more nuanced deliberative processes and produce fairer decisions.<sup>56</sup> Empirical judicial studies have demonstrated that enhancing gender diversity on the bench improved the potential of the overall reasoning and decision-making of the entire tribunal.<sup>57</sup> For instance, a study conducted in the United States showed that having one female judge on a three-judge panel (instead of a panel of three male judges) would influence the outcome of the decision. This result was in part explained by the fact that female judges were more likely to cast liberal votes and to influence their colleagues (at least for cases related to civil liberties).<sup>58</sup> More recently, it was found that “[w]orking with people who are different from you may challenge your brain to overcome its stale ways of thinking and sharpen its performance”<sup>59</sup>

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51 See Bjorklund et al, *supra* note 43 at 429.

52 See Seraglini, *supra* note 28 at 595.

53 See Grossman, *supra* note 27.

54 See e.g. Hennette Vauchez, *supra* note 42 at para 20.

55 See Jacomijn J. van Haersolte-van Hof, “Diversity in Diversity” in Albert Jan Van der Berg, ed, *Legitimacy: Myths, Realities, Challenges*, vol 18 (The Hague: ICCA & Kluwer Law International, 2015) 638 at 641.

56 See Lucy Greenwood, “Tipping the Balance — Diversity and Inclusion in International Arbitration” (2017) 33 *Arb Intl* 99 at 101; Puig, *supra* note 34 at 401 [Greenwood, “Tipping the Balance”].

57 See e.g. Won L. Kidane, *The Culture of International Arbitration* (New York: Oxford University Press, 2017) at 145–47; Robert Kovacs & Alex Fawke “An Empirical Analysis of Diversity in Investment Arbitration: The Good, the Bad and the Ugly” (2015) 4 *Transnat'l Disp Mgmt J* at 1, 5, 11.

58 See Donald R Songer & Kelley A Crews-Meyer, “Does Judge Gender Matter? Decision Making in State Supreme Courts” (2000) 81:3 *Soc Science Q* 750 at 759–60.

59 David Rock & Heidi Grant, “Why Diverse Teams are Smarter” (4 November 2016) online (blog): *Harvard Business Review* <[hbr.org/2016/11/why-diverse-teams-are-smarter](http://hbr.org/2016/11/why-diverse-teams-are-smarter)>.

By overlooking the appointment of female practitioners because of their seemingly more limited experience as compared to their male colleagues, appointers are turning their back on an important pool of competent candidates. It is shocking that, while women comprise a third of the participants in the investment arbitration community, they are appointed at a rate of only about 11% in ICSID cases.<sup>60</sup> In addition, consciously promoting gender diversity would allow for a constant renewal of the pool of candidates, ensuring the replacement of busier or retired arbitrators and the exchange of know-how.<sup>61</sup> This is, in short, a “true waste of the enormous human resources available to arbitration.”<sup>62</sup>

Parties believe that the appointment of the most experienced arbitrators is the best option for them, notably due to the predictability of the outcomes. In fact, parties are often reluctant to appoint new arbitrators who do not have a known track-record since they cannot assert whether they will be the “best” or the “right” ones for their cases.<sup>63</sup> Hence, male arbitrators will be preferred mainly because parties will be more familiar with them and will not have to be the first to “take a risk on a new actor.”<sup>64</sup> It seems, therefore, that an arbitrator who will be deemed as the “best” will not be qualified due to their merit or expertise, but rather due to their views and the predictability of their decisions.

However, as shown, choosing predictability over merit might not be so beneficial to parties after all. In addition to promoting democratic values and providing greater legitimacy to the entire field, supporting gender equality is, in fact, a more sustainable choice for the future of investment arbitration, as it will allow for new candidates to replace older and busier ones. This, in turn, could ultimately lead to better drafted awards.

## **2. What Has and Should be Done to Improve the Gender Balance of the Investment Arbitrator Pool?**

As the importance of gender diversity has progressively been recognized in the field, efforts to improve the representation of the arbitrator pool has similarly been deployed—with varying degree of successes. This part presents initiatives already being undertaken and proposes next steps that

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60 See Bjorklund et al, *supra* note 43 at 416, 429 (these numbers are from 2017).

61 See Frank et al, *supra* note 13 at 495.

62 Marques, *supra* note 41 at 585.

63 See Claussen, *supra* note 10 at 2.

64 International Council for Commercial Arbitration, “Report of the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings” (2020), online (pdf): *International Council for Commercial Arbitration* <[https://cdn.arbitration-icca.org/s3fs-public/document/media\\_document/ICCA-Report-8-Gender-Diversity\\_o.pdf](https://cdn.arbitration-icca.org/s3fs-public/document/media_document/ICCA-Report-8-Gender-Diversity_o.pdf)> at 53 [Report on Gender Diversity].

stakeholders should undertake to move forward.

A. *Initiating Lofty but Non-Binding Measures*

Already, the arbitration community has begun considering measures to enhance the representation of women on arbitral tribunals. Most notably, WGIII has been mandated to find possible avenues to reform ISDS, including solutions to overcome the lack of gender diversity.<sup>65</sup> While it is still unclear what forms the proposed changes will take, WGIII has highlighted the importance of a selection method that will “reflect high standards of diversity,” including on gender.<sup>66</sup> For instance, the nomination process should explicitly require that bench composition take into consideration the adequate representation of gender.<sup>67</sup> While these propositions should be celebrated, it remains uncertain whether these non-bidding recommendations will have the concrete impacts on gender diversity the reform aims to achieve.

Certain states have, albeit timidly, also taken actions to include gender considerations in ISDS. For example, the 2019 Dutch Model BIT explicitly provides for the appointing authority to “strive for gender and geographic diversity”<sup>68</sup> and requires a set of clear criteria which, rather than focusing solely on the experience of the arbitrator, prioritizes expertise.<sup>69</sup> Setting a list of objective criteria that the parties expect in candidates is a promising solution to overcoming the risk of systematic biases in arbitrator appointment. Past experiences are a relatively subjective criterion: they often depend on when a professional has managed to enter the field of ISDS and, thus, leave the door open to unconscious biases. In contrast, the Dutch Model BIT turns the focus to expertise, which both men and women equally possess.<sup>70</sup> Treaties, such as the CETA<sup>71</sup> and the United States-Mexico-Canada Agreement,<sup>72</sup> and draft treaties, such as the Comprehensive and Progressive

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65 See UNCITRAL Working Group III, *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session*, UNGAOR, 36th Sess, UN Doc A/CN.9/935 (2018) at para 70.

66 See UNCITRAL, *Selection and appointment of ISDS Tribunal Members*, UNGAOR, 38th Sess, UN Doc A/CN.9/WG.III/WP.169 (2019) at para 15 [*Selection of ISDS Tribunal Members*].

67 See *ibid* at paras 40, 48.

68 *Netherlands Model Investment Agreement*, 22 March 2019 at art 20(2), online (pdf): [www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden](http://www.rijksoverheid.nl/ministeries/ministerie-van-buitenlandse-zaken/documenten/publicaties/2019/03/22/nieuwe-modeltekst-investeringsakkoorden) [Netherlands Model BIT].

69 See *ibid* at art 20(5).

70 See Greenwood, “Moving Beyond Diversity”, *supra* note 2 at 100; Bjorklund et al, *supra* note 43 at 18.

71 See CETA Joint Committee, “Recommendation 002/2018 on 26 September 2018 of the CETA Joint Committee on Trade and Gender”, online (pdf): [European Commission <trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157419.pdf>](http://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157419.pdf).

72 See *United States-Mexico-Canada Agreement*, 10 December 2019 at art 14.17 (entered into force 2 July 2020).

Agreement for Trans-Pacific Partnership,<sup>73</sup> also attempt to promote gender equality in ISDS through non-binding principles. These should encourage the disputing parties to consider gender equality when selecting arbitrators under these instruments.

Yet, the initiative taken by the European Union and Canada did not lead the drafters to propose a gender-balanced roster. In response, Dr Katherine Simpson has proposed a list of 70 women possessing the competence required by CETA for its roster.<sup>74</sup> In addition, initiatives led by ArbitralWomen, Women Way in Arbitration (WWA-LATAM), Women in International Law Interest Group (WILIG-ASIL) and Alliance for Equality in Dispute Resolution have all strengthened the network of women and increased recognition of their work.<sup>75</sup> These efforts contribute to diversifying the arbitral network which, as demonstrated in a study by Professor Sergio Puig, is a dense, tight-knit and homogenous group where the same talented professionals are regularly reappointed.<sup>76</sup> This group internally creates a chain of connections that is almost impossible for outsiders, including female outsiders, to break.

Other private actors have initiated concrete—albeit again non-bidding—efforts to encourage stakeholders to provide equal opportunities to women arbitrators. One significant example is the ‘Equal Representation in Arbitration’ (ERA) Pledge launched in 2016.<sup>77</sup> The Pledge aims at improving the representation of women in the field and promoting an equal opportunity basis for the appointment of arbitrators.<sup>78</sup> This initiative raises awareness and assists parties who wish to appoint female arbitrators. Similarly, the Multi-Criteria Selection Tool of ArbitralWomen allows the disputing parties and arbitral institutions to find women with dispute resolution experience. ArbitralWomen proposes the ‘ArbitralWomen Diversity Toolkit,’ a programme which aims at shedding light on the role played by biases and how to overcome them when appointing arbitrators.<sup>79</sup>

These initiatives are all key in strengthening the network of women in the

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73 See *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 8 March 2018 at preamble (entered into force 30 December 2018).

74 See Katherine M. Simpson, “Annex II: Alphabetical Listing of All Women Referenced”, (last modified 26 January 2020), online (pdf): *Simpson Dispute Resolution* <[www.simpsonadr.net/files/2020.01.26ListUpdates.pdf](http://www.simpsonadr.net/files/2020.01.26ListUpdates.pdf)>.

75 See “Misión” (2021), online: *Women Way in Arbitration LATAM* <[wwarb.org/mision.php](http://wwarb.org/mision.php)> (the mission of WWA LATAM, which includes the promotion of networking and exchange of knowledge between arbitral stakeholders).

76 See Puig, *supra* note 34 at 401–09.

77 See “Time For Change” (last visited 10 May 2020), online: *Equal Representation in Arbitration* <[www.arbitrationpledge.com/](http://www.arbitrationpledge.com/)> (for more information on the ERA pledge).

78 See “About the Pledge” (last visited 10 May 2020), online: *Equal Representation in Arbitration* <[www.arbitrationpledge.com/about-the-pledge](http://www.arbitrationpledge.com/about-the-pledge)>.

79 See “Diversity Toolkit” (last visited 10 May 2020), online: *Arbitral Women* <[www.arbitralwomen.org/diversity-toolkit/](http://www.arbitralwomen.org/diversity-toolkit/)>.

international arbitration community.<sup>80</sup> They also encourage stakeholders to widen their candidate pool and to consider gender equality when appointing arbitrators.

*B. Moving from Experience to Expertise*

Following these initiatives and others, the representation of women in international arbitration has recently increased. For instance, the ERA Pledge has pushed arbitral institutions, such as the Milan Chamber of Arbitration and the Arbitration Institution of the Stockholm Chamber of Commerce, to consciously appoint more women<sup>81</sup> and to make their appointment processes more transparent and gender balanced.<sup>82</sup> Data collected by the Cross-Institutional Task Force on Gender Diversity in Arbitral Appointments and Proceedings have also determined that the proportion of women appointed as arbitrators increased from 12.2% to 21.3% in less than five years.<sup>83</sup> Yet, as shown by the latest updated ICSID Panels,<sup>84</sup> stating that only 15 out of 60 new designations made were women, the efforts surveyed above are still not enough.

Is it time then to restrain the party autonomy in the appointment process? This is what the present author believes. In fact, while party autonomy is one of the most central elements of international arbitration, it is not unlimited.<sup>85</sup> This precept should not be used as a reason to accept the *status quo* and to tolerate gender discrimination. Since all UN Member States have supported the Resolution adopting the 2030 SDG Agenda, which includes achieving gender equality and enhancing women's empowerment,<sup>86</sup> they should be reminded that SDG5 also applies to ISDS. While it remains difficult to impose the criteria of gender diversity on private parties, states have the power to radically improve the situation through a few measures. Three concrete solutions are proposed here.

First, since disputing parties usually select seasoned arbitrators with practical experience, states, and especially those publicly promoting gender equality, should take the lead in reversing the tide. As discussed, the misstep of the CETA roster must be avoided. Instead, states should be

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80 See Mirèze Philippe, "Redressing the Balance: The Path Ahead for Gender and Generational Diversity on Arbitral Tribunals" (31 October 2016), online (blog): *Kluwer Arbitration Blog* <arbitrationblog.kluwerarbitration.com/2016/10/31/redressing-the-balance-the-path-ahead-for-gender-and-generational-diversity-on-arbitral-tribunals/>.

81 See Victoria Pernt, "Women in Arbitration Are on the Rise" (4 June 2017) online (blog): *Kluwer Arbitration Blog* <arbitrationblog.kluwerarbitration.com/2017/06/04/women-arbitration-rise/>.

82 See Greenwood, "Tipping the Balance", *supra* note 56 at 102–04.

83 See Report on Gender Diversity, *supra* note 64 at 16.

84 See Lara Elborn, "Latest Designation to ICSID Panels: A Mixed Bag for Gender Parity" (22 February 2020), online: *ArbitralWomen* <www.arbitralwomen.org/>.

85 See Khambata, *supra* note 18 at 615; Dalmaso Marques, *supra* note 41 at 585.

86 See *Transforming Our World*, *supra* note 3 at 18.

intentional with their commitments to gender equality and consider gender representation when making arbitrator appointments. The ICSID Panels of Arbitrators is an ideal starting point.<sup>87</sup> To ensure that gender diversity is considered, amendments to the current rules and regulations should be proposed by Contracting States. For example, the WTO explicitly reminds parties to select an arbitral panel “with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.”<sup>88</sup> Similarly, gender diversity should be explicitly added to ISDS rules to make it mandatory. As the architects of the system, states should require that such changes to the appointment of arbitrators be added in the Proposals for Amendment of the ICSID Rules.

A second solution is for states to adopt the approach of the 2019 Dutch Model BIT, where the arbitrator’s appointment is put in the hands of an “appointing authority”, either the Secretary-General of ICSID or the Secretary-General of the PCA.<sup>89</sup> Since the data has revealed that private parties and their counsel are less likely to consider gender diversity when appointing arbitrators, in contrast to arbitral institutions,<sup>90</sup> imposing appointments by a neutral third party could overcome this bias. For this solution to be effective, however, appointing authorities must have clear sets of objective criteria to assess the qualifications of suitable candidates to overcome systemic discrimination. These criteria should certainly include traditional ones sought after by disputing parties, including having the required knowledge and expertise, but gender diversity should also be added to the equation.

Finally, if the alternative of creating a standing mechanism, as currently being discussed by WGIII, does emerge, then it would be time for Member States to genuinely show their commitment to SDG5 and ensure equal representation of gender via this standing mechanism. States should ensure that the nomination and selection rules—whether they are for a permanent panel, a predetermined roster or an appointing authority<sup>91</sup> — explicitly include binding obligations to consider gender diversity. This standing mechanism could, for instance, take as inspiration the International Criminal Court (ICC). The ICC requires that “[t]he State Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for [...] a fair representation of female and male judges.”<sup>92</sup> WGIII has already voiced its concerns about ensuring the election of a gender diverse

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<sup>87</sup> See Greenwood & Baker, *supra* note 7 at 665.

<sup>88</sup> WTO, *Marakesh Agreement*, Annex II: Understanding on Rules and Procedures Governing the Settlement of Disputes at art 8(2), online: *WTO* <[www.wto.org/english/docs\\_e/legal\\_e/28-dsu.pdf](http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf)>.

<sup>89</sup> See Netherlands Model BIT, *supra* note 68 at art 20(1).

<sup>90</sup> See Greenwood & Baker, *supra* note 7 at 665.

<sup>91</sup> See *Selection of ISDS Tribunal Members*, *supra* note 66 at paras 9–12.

<sup>92</sup> See *Rome Statute*, *supra* note 12 at art 36(8)(a)(iii).

panel.<sup>93</sup> This alternative, as the others have mentioned, seems in line with the intention of states and shows a certain momentum is building up to implement it.

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This paper argued that gender equality has been, and is still, an important issue in international arbitration. It sought to fill the gap in the literature by addressing this problem through the international obligation of states to respect their commitment and achieve the Sustainable and Development Goals by 2030.

Four main issues have been raised to support this point. First, gender imbalance can give the impression that the ISDS system fails to respect democratic values, including fair representation, as it only encourages the participation of half of the population. Second, a lack of gender equality can have an adverse impact on the perceived legitimacy of the entire field. It gives the false impression to states and other parties that the system lacks fairness and impartiality. Third, the failure to appoint women as arbitrators perpetuates systemic discrimination. While today women will have the required *expertise*, historical and cultural limitations may still prevent them from being chosen by parties since they will not display the required *experience*. Fourth, the absence of women arbitrators on a panel can negatively impact the quality of the decision since greater diversity has the potential to enhance the complexity of the decision-making process. Taken individually, these issues are highly problematic. As a whole, they are a clear failure by states to promote gender equality and uphold their international obligations.

The time of *status quo* is now behind us. Initiatives have already been undertaken by the community in order to increase the visibility of women arbitrators in the field. Pools of female arbitrators have been created and private parties can take a pledge to ensure that they make informed choices. On May 11, 2020, the PCA presented a submission to WGIII addressing the proceedings of an appointment mechanism and explicitly mentioning that, among selection criteria, attention to gender diversity should be given.<sup>94</sup> However, non-binding solutions and good will are not enough. As UNCITRAL WGIII is currently working on a reform of the system, including on the selection and appointment of arbitrators, states must seize this opportunity to implement concrete solutions that will enhance gender equality in ISDS. While some of these reforms may be carried out with party

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<sup>93</sup> See *Selection of ISDS Tribunal Members*, *supra* note 66 at para 48.

<sup>94</sup> See Permanent Court of Arbitration, "Mechanisms for Selection and Appointment of Presiding Arbitrators or Sole Arbitrator" (11 May 2020) at art 21, online (pdf): [UNCITRAL <uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/pca\\_mechanisms\\_for\\_selection\\_and\\_appointment.pdf>](https://www.uncitral.org/sites/uncitral.un.org/files/media-documents/uncitral/en/pca_mechanisms_for_selection_and_appointment.pdf).

autonomy in mind, experience has shown that, to concretely achieve SDG5, restrictive measures must be seriously considered.

As a starting point, the arbitration community, and especially stakeholders involved in initiatives promoting gender diversity, like the ERA pledge, ArbitralWomen or individuals like Dr Katherine Simpson, should continue their advocacy to reinforce the UNCITRAL-led ISDS reform work. They should directly engage with Members States, like France, Belgium and Germany – which have already expressed their support for the establishment of a standing mechanism bound by the obligation to ensure gender diversity<sup>95</sup> – and encourage them to informally create a group of ‘like-minded states’ that could support and promote such reform. Roundtables and seminars to foster dialogues on this specific issue should be organized with State Representatives and members of civil society in parallel to the work conducted by WGIII.

Finally, states should be reminded that they have committed to respect the 2030 Sustainable and Development Goals Agenda,<sup>96</sup> which, albeit beyond the ins and outs of investment arbitration, must be considered when reforming the system. As a UN body, UNCITRAL must show greater leadership in achieving the SDG Agenda. Mandatory training, like the one proposed by ArbitralWomen on gender biases and how to overcome them for the legitimacy of the whole system, could be added to the agenda of the next session of WGIII. UNCITRAL should put a greater emphasis in its reports on the commitment states have made to adopt binding norms to achieve gender equality. Certainly, the time has come for states to be consistent with their engagements made under international law as equality can no longer wait.

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95 See UNCITRAL, *Possible reform of ISDS – Selection and appointment of ISDS tribunal members: Annotated comments from the European Union and its Member States to the UNCITRAL Secretariat*, UN Doc. A/CN.9/WG.III/WP. --- (19 October 2020) at 7.

96 See *Work of Statistical Commission*, *supra* note 4 at 10.