

THE UNDER-REPRESENTATION OF WOMEN AND WOMEN'S PERSPECTIVES IN INTERNATIONAL DISPUTE RESOLUTION PROCESSES*

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Introduction

This paper focuses on with the status of women lawyers in the practise of international law. Specifically, it addresses the participation of women lawyers in international dispute resolution (IDR) processes as neutrals, adjudicators, and judges. A cursory compilation of statistics reflects the dearth of women on the lists of members or rosters of international tribunals and IDR service providers.¹ It suffices here to say, that the proliferation of international tribunals and the diversification of international law, which has been exponential and without precedent, warrants representation of women's voice respectively. In 2000, so much was the International Law Commission worried about this growth, that it introduced the topic of "Risks ensuing from the fragmentation of international law" in its work. Six years later, the report on the "Fragmentation of international Law: Difficulties Arising from the Diversification and Expansion of International Law"² was published. Not surprisingly, nowhere in the report is the risk of the continued silence of the voice of women mentioned, nor does this void figure as a difficulty in the context of the expansion of international law, a law which has been getting out of hand.

The first part of the paper addresses the stages that women (and men alike) have to pass in the course of building a successful and fulfilling career in IDR. It then discusses the relevance of women's voices to IDR; follows with women lawyer initiatives to remedy what from their perspective represents an inadequate situation; and concludes with a proposal for future action.

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¹ In 2005, "[w]omen comprise[d] 11 percent of the International Chamber of Commerce International Court of arbitration, 5 percent of the International Council of Commercial Arbitration, 5 percent of the ICSID Panel of Conciliators and arbitrators, 0 percent of the London Maritime Arbitrators Association, and 4 percent of those listed in the Guide to the World's Leading Experts in Commercial Arbitration", Goldhaber, Michael D. "Madame La Présidente", Focus Europe, *The American Lawyer*, Summer 2004, at http://www.americanlawyer.com/focuseurope/arbitration_04.html, retrieved August 16, 2007. Most recently, in October 2007, two women were appointed by Germany to the ICSID arbitration panel. I leave the general status of women in international private practise and in the public service in the capacity of as counsel in IDR processes as a topic for another paper.

² Report of the Study group of the International Law Commission Finalized by Martti Koekenniemi, General Assembly, A/CN.4/L.682, 13 April 2006.

Career stages in IDR

Recruitment

When thinking of any professional occupation at large - whether legal, medical, etc. - ideally, the most important criteria for selection, recruitment, and promotion of human resources is merit: Education and professional experience. In practice, of course, this standard, in its ideal form, does not apply to women. In the legal profession, the standard not only applies differently to men and women. It applies differently at the domestic and international levels of jurisdictions.

Any recruitment and promotion of personnel (in the private or public spheres) requires the accumulation of social capital, which is founded on various bases, e.g. education, work experience, ascriptive characteristics, etc. While access to education has now been opened up to women in many countries,³ notably Western countries, but also many newly industrialising and developing countries, women generally hit a barrier once having graduated from school.⁴ Only a few of those who stay in the legal profession choose international law as a practise. Of those, a few try, and yet a fewer succeed, in making inroads into the lucrative international legal business, and specifically, the dispute resolution one.

At the 2006 annual meeting of the Canadian bar Association (CBA),⁵ Valerie Hughes⁶ observed that while women have succeeded in making some inroads into international legal practise via the public service, the picture is less clear when addressing the status of Canadian (and other) women lawyers in international private practice. Speaking from Canadian experience, she noted that it appeared to be hard for men and women alike to promote their skills as international lawyers in the Canadian private legal sector for several reasons. These largely boil down to the Canadian government's preference to employ the Washington based bar over the domestic one (although there is capable and relevant home-grown expertise available), yet fails to explain, for instance, the low number of women lawyers on the Canadian Chamber of Commerce's Panel of Canadian Arbitrators.⁷

³ In Canada, there are more women law graduates than men.

⁴ Makin, Kirk. "Female Lawyers Hiding Illness to Remain Competitive," *The Globe & Mail*, August 15, 2007, A3.

⁵ Gal-Or, Noemi. "The State of Women Lawyers in International Practice and the Role of Women in the Practice of International Law", *The Common Room*, Canadian Bar Association National Women Lawyers Forum Newsletter, Oct. 2007.

⁶ Who had previously served four and a half years working as Director of the Appellate Body Secretariat of the World Trade Organisation (WTO), and just returned to private practise in Ottawa after a rich career with the Government of Canada.

⁷ Eight out of fifty nine. <http://www.chamber.ca/article.asp?id=4009>, retrieved August 17, 2007. The list appears to be outdated. However, the biographies of the participants reflect that women are less experienced than men in IDR.

Moving on to international institutions, the statistics do not become rosier.⁸ First, it is almost impossible to find publicly posted rosters of IDR alternative dispute resolution neutral practitioners (mediators, arbitrators, etc.). A perusal of a few major institutions and service providers shows, for instance, that the present (2007) and former members of the WTO Appellate Body⁹ represent what appears to be an exclusively male list, the Dispute Settlement Body's Chairperson is a man as well, and a roster of panellists is not available online, at least not easily so... The NAFTA website indicates that "panellists are chosen from rosters of experts established by the Parties in each NAFTA country"¹⁰ but a search of both Canada's Foreign Affairs and International Trade website and the link to the Canadian branch of the NAFTA Secretariat produced no results. The International Centre for Settlement of Investment Disputes (ICSID) provides the names of conciliators and arbitrators after being appointed (following the contracting states' designations), among which women have a more salient representation¹¹. The private International Chamber of Commerce (ICC) does not work with a roster, nor does it maintain a list of arbitrators, neutrals or experts. Pursuant to the ICC Rules for Arbitration, when the ICC Court is called on to appoint an arbitrator (or any other ICC service requiring experts and neutrals), it must request a proposal from the relevant ICC National Committee¹² "or otherwise", and will have to take into account, in accordance with Article 7(8) of the DB Rules, the "DB Member's qualifications relevant to the circumstances, availability, nationality and relevant language skills".¹³ That being said, it should be noted that the ICC has an updated database of possible candidates, which also includes information about the performance of arbitrators, neutrals and experts who have acted in previous cases.

The adversarial judicial bodies reveal a similar picture. The International Court of Justice is currently presided by a woman (Dame Rosalyn Higgins), the second woman to have ever been sitting on this international bench,¹⁴ yet the rest of the judges have been and still are all men.¹⁵ The International Criminal Court is comparatively more "progressive", with seven women out of sixteen judges.¹⁶ The European Court of First Instance lists seven women among its twenty eight judges; the higher instance of the European Court of Justice - six out of thirty six; two out of eight judges on its Civil Service Tribunal are women; while the Hearing Officers' list of the European

⁸ The following examples represent only a cursory, partial, and non-representative sample of the various relevant institutions world wide.

⁹ With one exception. <http://www.org>, retrieved August 16, 2007.

¹⁰ "Frequently Asked Questions", <http://www.nafta-sec-alena.org>, retrieved August 17, 2007.

¹¹ <http://www.worldbank.org/icsid/news/news.htm> retrieved August 17, 2007. The recent German appointments are the first ones made in twelve years by this country.

¹² Please see author's comment above on the Canadian CCC list.

¹³ "Question: How do I become a member of a Dispute Board? Answer:"

http://www.iccwbo.org/court/dispute_boards/id4530/index.html retrieved August 17, 2007. "On September 20, 2006, the Administrative Council of the (ICSID) unanimously elected Ms. Ana Palacio as the Centre's new Secretary-General. Ms. Palacio, a Spanish national, was appointed Senior Vice President and World Bank Group General Counsel in June 2006."

¹⁴ The first was Mme. Bastid acting as an *ad hoc* judge.

¹⁵ <http://www.icj-cij.org/court/index.php>...Retrieved August 16, 2007.

¹⁶ <http://www.icc-cpi.int/chambers/judges/html> retrieved August 16, 2007.

Commission on Competition represents the most balanced roster.¹⁷ Fourteen women out of forty seven serve as judges on the European Court of Human Rights,¹⁸ and the composition of the Inter-American Court of Human Rights shows four women out of nine judges.¹⁹

This quick survey reflects various interesting facts involving other factors that may explain the gender differential but which require further study (e.g. the nationality and age as indicators of a sex-based recruitment).²⁰ For the purpose of this paper however, it suffices to conclude that (a) women are in the minority in the IDR neutral and/or adjudicative positions, and (b) compared with the public international judiciaries, the private sector exhibits a significantly higher level of confidentiality and non-transparency with regards to appointments to these positions. Since financial remuneration tends to be more competitive in the private sector, the difficulty in accessing these lists is suggestive.

Promotion path

The previous section reflects the real situation in numbers namely, that there are significantly less women than men in the lucrative business of IDR. One place to look for explanation is the institutions that serve as feeding channels to promotion or appointment to these positions. As already mentioned, cultivating a career in the public sector (government) is the safer way for women's progression in the ladder of IDR institutions. The particular area of law does also play a role. As observed by Valerie Hughes,²¹ unlike matters human rights in the UN, the top positions at the WTO²² have been almost exclusively held by men. So far, all Directors-General (including the pre-WTO General Agreement on Tariffs and Trade (GATT) have been all men, and out of the WTO four Deputy Directors-General there has so far been only one woman in office (since September 2005). Out of the twenty three Division-Director positions, a total of only four have been occupied by women so far, and currently – only two women. Although the incumbent Director-General, Pascal Lamy, has been encouraging diversity within the organization, there is still little sensitivity to gender issues, and the WTO remains a men's world. Similarly, the bureau of the United Nations (UN) Sixth Committee (Legal) is entirely male dominated, its Secretariat comprising of twelve persons out of which three are women,²³ and a list of experts working on the various projects is not readily available.

¹⁷ <http://curia.europa.eu/> and http://ec.europa.eu/comm/competition/hearing_officers/hearing_officers.html retrieved August 16, 2007. The current Commissioner is a woman - Neelie Kroes.

¹⁸ <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Composition+of+the+Plenary+Court/> retrieved August 17, 2007.

¹⁹ <http://www.corteidh.or.cr> retrieved August 16, 2007.

²⁰ For a more detailed list of factors see, Samuels, David. "Network Effects", *Global Arbitration Review*, 2 (4), Oct. 2007.

²¹ Gal-Or, *ibid.*

²² Working in trade and investment is financially more lucrative than for human rights.

²³ <http://www.un.org/law/cod/sixth/61/sixth61.htm> retrieved August 17, 2007.

In the past several years, a welcome shift has been noticed in the private sector. While in 2003, eight women were listed as counsel for the biggest arbitrations, the number stands now at 24 who are lead or second chair on - even all-women - arbitration teams. Participation on an arbitration team often operates as a “conveyer belt” to the panel.²⁴

An important avenue for exposure and networking within the international legal profession are professional associations. The International Law Association’s (ILA) three committees most relevant and important to this paper, are the International Commercial DR Committee with three women out of fifty five, International Trade Law Committee - seven out of seventy two, and the International Law on Foreign Investment Committee featuring the highest rate - eleven out of fifty.²⁵ Results from personal inquiries show that the ILA does not provide for any standardised committee volunteer recruitment mechanism, nor do many of its national branches. Similar to previous observations, confidentiality and lack of transparency are the rule rather than the exception. Another prestigious group, the international Commission of Jurists’ Eminent Jurists, consists of a balanced mix of male/female members.²⁶ There are many other relevant fora - national, regional, and international - within which women participate, and it appears reasonable to conclude that the numbers reported in the above section suggest that their participation does not translate into a significant numerical weight at the level of legal practice.²⁷

Does it matter whether or not women are fairly represented within the IDR regime?

Three main arguments deserve serious attention when examining whether women’s representation is needed within the IDR regime. First is a basic justice and equality argument. In a world where women have been recognized to be equal to men as human persons, one would expect women who have gained educational and professional merit equal to men’s, to enjoy the same degree and scope of access to participate across the entire spectrum of the IDR regime. Women share with men the *right* to equal opportunity to advance and grow in their profession, to freely choose and gain position along the hierarchy of IDR which means, among other things, access to lucrative remuneration and high prestige. The threshold must be lower than even suggested by Brigitte Stern where “[e]specially now, with state-investor cases presenting important social questions [...] all society should be represented. When it comes to the big questions, there are not enough women”.²⁸ Really, it should not matter what kind the questions

²⁴ Samuels at 9.

²⁵ The numbers may vary slightly because of the gender neutral or unfamiliarity of the author with the names, and due to redundancies on the list. Note that membership in one committee does not exclude membership in any other committee. http://www.ila-hq.org/html/layout_committee.htm retrieved August 17, 2007.

²⁶ http://ejp.icj.org/resource.php3?id_article=21 retrieved August 17, 2007.

²⁷ Women are often “short-changed on speaking opportunities” at conferences, which serve as professional promotion events. Samuels at 12.

²⁸ Goldhaber. Brigitte Stern is one of the only two women who are listed as top arbitrators.

are, and whether they address big or small issues - equality dictates that women be represented equally - and thus encompasses all matters.

The two other arguments flow from the first. One addresses the resolution of disputes, i.e. the outcome to the parties involved; the other - the development of the law. Women, regardless whether they have the same, or a different, voice than their male colleagues will as individual persons contribute their personal "spice" to a decision made or a neutral service rendered. At least from the point of view of the parties' perception, the outcome of an IDR process fairly inclusive of women adjudicators or neutrals promises to produce a socially and culturally fairer result for it will be representative of the composition of the human society. Evidently, a rich literature exists studying the varying *styles*, approaches, and contributions of gender to the law, and it is to be expected that a fair gendered representation in the IDR process will do justice to these nuances, i.e. be truthful to, and authentic of, real life.

To be sure, there is a measure of insincerity when it comes to the role of women in alternative dispute resolution (ADR). "Feminists have been able to describe the possibility of an equally said 'feminine' reasoning based on factors usually considered irrelevant to legal thinking. Alternative, nonlitigious, dispute resolution and nonconfrontational negotiation techniques are sometimes proposed as examples of such an approach."²⁹ Moreover, men lawyers have been slow to adopt these methods when in domestic legal practice where alternative dispute resolution (ADR) corresponds with a perception of softness and femininity, and where women are (in certain traditional feminine areas of the law, e.g. family)³⁰ well represented. Curiously, it is exactly the opposite case when concerning the international practice of law and the areas of international law.³¹

That it would be instrumental to consider women's experiences is important also for the satisfaction of parties' *interests*, particularly where the parties' interests may affect interests of others who have no voice in the IDR process (e.g. investment's impact on women's concerns in developing countries).

The argument concerning the development of the law focuses on the role played by IDR practitioners in crafting the law either through hard or soft law making. Fair representation of

²⁹ Charlesworth, Hilary, Christine, Chinkin, & Shelly, Wright. "Feminist Approaches to International Law," *The American Journal of International Law*, 85 (4), 1991 at 616.

³⁰ See Charlesworth et al. re the public/private divide, as well as the book review by Koskeniemi, Martti. "*Reconceiving Reality: Women and International Law*. (Studies in Transnational Legal policy No. 25). Edited by Dorina G. Dallmeyer. Washington: The American Society of International Law, 1993," Book Reviews and Notes, the American Journal of International Law 89(1) 227-230.

³¹ Some argue that women on arbitration cases tend to save money for clients more than their man colleagues. Samuels at 9-10.

women within law drafting fora as well as in adjudicatory processes which create precedents (yes, also in international law), will doubtlessly affect the substance of the law. This in itself would be a service to the interests and rights of women as human persons equal to men. A necessary condition for ensuring a truly universal international law hinges on the inclusion of women in the *interpretation* and *reformulation* of the law not from the sidelines (e.g. academe, bar associations, etc., which are a valuable source of international law) but also from within the practice and the *adjudication* of cases.

These three arguments are well reflected in various mission statements/mandates of fora concerned with the equal representation of women. For instance, the CBA WLF states that “[t]he Women Lawyers Forum is aimed at promoting the stature and influence of women in the profession, as well as developing assistance programs, networking opportunities and mentoring programs”.³² The American Bar Association (ABA) Standing Committee on Diversity identifies as its first objective to “[i]mprove the employment opportunities for underutilized ADR professionals of color, women and lawyers with disabilities or impairments, by making organizations, corporations and ADR providers aware of barriers that minority ADR professionals encounter”.³³

Women getting organized...

Women have been organizing in various fora in view of advancing their chances of achieving higher stature within the legal profession - specifically so in national organisations and largely in legal matters not pertaining to international law. The Canadian WLF did establish a “desk” for international law, and the international association of ArbitralWomen (since 1993) addresses both municipal and international practice issues.³⁴ Women issues are represented also in various subject matter committees (e.g. diversity, poverty, family, education, etc.) were they may sporadically address also concerns of an international nature. However, even the ILA does not provide a forum for women to discuss their status within the international legal profession (although there is a committee devoted to issues of international law which impact on women’s lives and concerns).

³² CBA WLF *ibid*.

³³ <http://www.abanet.org/dch/committee.cfm?com=DR014700> retrieved August 9, 2007.

³⁴ http://www.cba.org/CBA/conf_women/Women_Lawyers/default.aspx and <http://www.arbitralwomen.org/>, respectively.

Future action

The masculinity of international law has been well documented.³⁵ It still remains valid that “the international legal order is virtually impervious to the voices of women.”³⁶ Charlesworth et al. propose two explanations: “[T]he organizational and normative structures of international law”.³⁷ The first, and at present highest, hurdle to overcome is a bias in *appointments* of women for cases at all, including high-stakes cases.³⁸ There are various explanations for this obstacle, e.g. the male “image of gravitas,” immunity against pressure to appoint women due to the confidentiality and lack of transparency of IDR mechanisms, perceived shortage of suitable women candidates, outright sexism, etc.³⁹ Of course, the handiest argument against the appointment of women is the merit excuse. This appears peculiar especially considering that men, particularly those who “pioneered the field”⁴⁰ and are presently dominating it (but also other non pioneer men) were not required to exhibit any previous experience or relevant ADR credentials.⁴¹

What can and should be done to appoint more women as arbitrators and neutrals across the entire range of IDR?

There are two main, necessary and complementary avenues for future action. One consists in encouraging lawyers, and particularly women lawyers, to act as mutual referees and prefer, for instance, the use of the list of ArbitralWomen when seeking neutrals, arbitrators, but also counsel to represent arbitration and mediation clients. The second avenue consists of insisting on compliance with, and the implementation of, the UN 1980 Convention on the Elimination of All

³⁵ Charlesworth et al.

³⁶ *Ibid.* at 621; see also Goldhaber. And, “[i]n this sense, the silences of international law may be as important as its positive rules and rhetorical structures. [...] By and large, when women enter into focus at all in international law, they are viewed in a very limited way, often as victims, particularly as mothers, or potential mothers, in need of protection”. Charlesworth, Hilary. “Feminist Methods in International Law,” *The American Journal of International Law*, 93(2), 1999, 381. Most recently, Patricia Shaugnessy, a Swedish arbitrator, observed that in her 25 years career “I’m shocked to see such little progress”. Samuels at 9, 24.

³⁷ *Ibid.*

³⁸ Goldhaber.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ In an opening to Andreas Lowenfeld’s visiting lecture at McGill some time ago, William Tetley, Q.C. muses about becoming an arbitrator. When approached with an invitation to arbitrate under the presumption that he was familiar with the ICC rules, he now concedes that “I had enough of the politician still left in me to say ‘Of course.’ [...] got the Rules, read them in the taxi driving back and found them to be brief, concise and the epitome of common sense. The phone rang again. By then I seemed to sufficiently understand the procedure for naming the Chairman to an arbitration and the convening of the first meeting, not to expose my ignorance and my appointment was confirmed. It turned out to be a very large arbitration concerning the construction of airports, air control and air defense systems in seven districts in Saudi Arabia. “How to Become an International Arbitrator without Even Trying” at <http://www.mcgill.ca/maritimelaw/tetley/arbitrator/> retrieved August 20, 2007. Similarly, a mid-career lawyer from Alberta told the CBABC ADR Branch about transparency in his appointment as an arbitrator: “I got up one morning, looked in the mirror and told myself: “I want to be an arbitrator””. (Author’s personal notes).

Forms of Discrimination against Women⁴² (CEDAW) within the international legal profession. "The principal of gender equality must be paramount in all areas of work and at all levels of the United Nations - its agencies and its intergovernmental and expert machineries - and in the States parties to the Convention."⁴³ This requires, among other things, that governments appoint more women to ADR bodies. To insure compliance and entertain complaints, The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (1999),⁴⁴ should be further developed and applied.

In order to coordinate work along these two avenues, it would be advisable to set up a special and separate committee within the IBA, ILA, and at home - through national relevant branches of international organisations and others, e.g. CBA WLF, ILA, CCIL. Members of the committee will be either members of, or serve as representatives within each organisation's relevant sections, divisions, and committees (e.g. international law, ADR, litigation, etc.). The role of the special committee will be to (a) serve as liaison (for instance, in the IBA) among Arbitral Women, CEDAW, the IBA, the national bar association and IBA regional fora, and other international law professional organisations, and (b) develop a program of action - both roles in view of promoting fairer representation of women in IDR.

⁴² <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> retrieved August 20, 2007. Certainly, this past, perhaps already obsolete, practise of arbitrator appointment is no justification for not having merit standards in place today.

⁴³ Šimonović, Dubravka. Chairperson, Committee on the Elimination of Discrimination against Women. Statement at the Commemorative Event: 25th Anniversary of the Work of the CEDAW Committee, July 23, 2007, <http://www.un.org/womenwatch/daw/cedaw/25anniversary.htm> retrieved August 20, 2007. It is worthwhile to remember that many IDR procedures are performed under the auspices, and within, bodies of the UN.

⁴⁴ General Assembly Resolution 54/4 (A/RES/54/4), 6 October 1999, entered into force, 22 December 2000, <http://www.un.org/womenwatch/daw/cedaw/protocol/> retrieved August 20, 2007.