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Gender Equality, Disability and Social Inclusion Branch
Department of Foreign Affairs and Trade
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By email to: gender.equality@dfat.gov.au

Monday, 18 September 2023

Dear DFAT,
International Gender Equality Strategy - ICSID Membership

Australia is a member of the 1965 ICSID Convention which established the International Centre for Settlement of Investment Disputes in Washington, D.C. The purpose of ICSID, or the Centre, is to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States.

Among other things, the Centre maintains a Panel of Arbitrators and a Panel of Conciliators. Each Contracting State may designate four suitably-qualified persons to each panel.¹ If every Contracting State designated an equal number of men and women to each panel, there would at least be gender equality on the panels. This is something that Australia could do and should do as part of any international gender equality strategy.

In ICSID disputes, arbitrators and conciliators may be appointed from outside the panels and in reality many are - selections are made mostly by disputing parties outside of the direct control of the Centre. Therefore, the extent to which there is or is not gender equality in ICSID appointments is mainly the result of the individual preferences of the parties to actual disputes.

For example, were Australia to be named as a respondent in an ICSID dispute, it should consider whether its choice of arbitrator or conciliator were consistent with any International Gender Equality Strategy in place at the time. In this regard, any short-list of persons to be considered by Australia for appointment as arbitrator or conciliator in the dispute should contain an equal number of suitable men and women so that the final choice would be significantly influenced by gender equality. (The same is true for other non-ICSID investor-state arbitrations to which Australia is a party.)

¹<https://www.ag.gov.au/about-us/careers/statutory-appointments/international-centre-settlement-investment-disputes-icsid-arbitrator-and-conciliator-panels-member-designation>

In addition and more generally, ICSID publishes annual reports and periodical statistics on the gender diversity of appointments. These show that the majority of appointments in recent disputes have resulted in male-only or male-dominated arbitral tribunals. Statistically, between 20-30% of ICSID arbitrator appointments are female. However, most appointments are to three person tribunals and in the calendar year of 2022, of about 63 ICSID tribunals (or similar committees) constituted, only one of these was a tribunal of three women. By contrast, about 28 of the tribunals constituted were of three men while about 29 were of two men and a woman.

Putting it another way, at least one man shared in the potential arbitrator fees from almost all ICSID disputes in the period whereas at least one woman (and usually only one) shared in the potential arbitrator fees from only about half of the disputes. All of this is fine - as long as you're not a Contracting State in the business of promoting international gender equality.

Every Contracting State is a member of the Administrative Council of the Centre and its meetings take place annually. Any subject may be placed on the agenda of these meetings, including the gender inequality of appointments. The community behaviour that results in this gender inequality is complex and deserves to be discussed openly among ICSID's Contracting States.

If Australia intends to lead the community with an international gender equality strategy, then one thing it could do is raise its voice and take the lead at an annual meeting of the ICSID Administrative Council in this way.

This is my personal opinion. My submission is based on resources, information and data publicly available on ICSID's website, icsid.worldbank.org/cases/case-database.

Thank you for your attention. I am an Australian lawyer residing overseas and working in this field.

Kind regards

James Rowland