

LOCATING WOMEN IN INDIAN INVESTMENT AGREEMENTS

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The cognisance of gender concerns is vital when contemplating policies to improve the socio-economic climate and stimulate growth. The primary purpose of this study is to locate women in structural and normative frameworks of the Indian Investment Agreements (IIA). It enables us to identify gender issues persisting in IIA due to the lack of any study and propose relevant reforms. The position of women in IIA due to the lack of extensive study and a considerable gap in the literature has been mostly unknown. Women are an important driver of socio-economic development. Creating greater socio-economic opportunities for women has compelling reasons, and inequalities impose development costs on societies. Hence, this study shall be significant as it will be the first detailed study to map women and examine Indian laws and policies from a gender neutrality perspective. This inquiry will pave the roadmap for a more gender-inclusive and responsive IIA.

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I. INTRODUCTION

This article studies Indian Investment Agreements (IIAs) and how women are positioned in the structural and normative frameworks of such agreements. The scope of IIAs in this article is limited to studying the Indian Parliament, Bureaucracy, and Judiciary for an inquiry into the structural framework of IIAs. The article studies the normative content of IIAs concerning their gender neutrality (language), gender blindness, etc. This study will enable us to evaluate the tenets of IIA concerning gender issues and, if required, pave the roadmap for a more gender-inclusive Indian legal system. As Brooks writes “[w]e need to map the silences and fill them”.¹ To borrow the words of Charlesworth and Chinkin, an “archaeological digging” shall be done into different layers of IIA.² In the absence of any study, the question of whether IIA requires gender reforms and to what degree cannot be answered. The general trend is that international law side-lines women;³ it would be hard to believe that IIA acts any differently. Investigation of the structural and normative content of IIA on gender issues will enable us to identify problems and provide possible venues for gender reforms. In this regard, the employment of feminist analysis and methods like asking women questions, raising consciousness etc., shall help present the experiences of women as participants and stakeholders in IIA. This, in turn, shall be another step towards greater gender inclusiveness. Women as decision-makers and policymakers and the representation of women in IIAs are different matters but profoundly intertwined. Women in decision-making positions at the IIA law-making level can bring more gender-inclusive law and policy frameworks which, in turn, would help the women who are subject to these laws and policies.

Before any inquiry into IIA is made, let us take the privilege to provide the reader with a glimpse of the international legal sphere. Despite being addressed as quite progressive and women’s rights-oriented⁴, the situation at the international level is no better.

¹ Rosa Ehrenreich Brooks, *Feminism and International Law: An Opportunity for Transformation*, 14 YALE J.L. & FEMINISM 345, 352 (2002).

² HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 349 (2000).

³ *Id.* at 173.

⁴ Some instances of progressive attitudes could be found in global commitments made by states, like World Conference on Human Rights, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/24 (Part I), chap. III (1995); Report of the Fourth World Conference on Women, *Beijing Declaration and Program in Action*, U.N. Doc. A/CONF.177/20/Rev.1, chap. I, Res. I, annexes I and II; U.N. Conference on Sustainable Development Rio 20; Millennium Development Goals, etc.

Women's first interaction with international law is generally associated with the meeting of the International Congress of Women in 1915 in The Hague and its call for the peaceful settlement of disputes.⁵ Since then, much has been said and written about the role and status of women and why their active participation in all spheres of the international legal system is relevant and important. However, the study of women as participants in international law-making offers a completely different picture. As of December 2015, women's representation at the high management level (D-2 and above)⁶ in the United Nations (UN) system ranges from a dismal ~27% to ~30%.⁷ From its establishment in 1945 to date, there has not been a woman Secretary-General of the UN.⁸ This pattern of underrepresentation of women at the senior management level can be observed across all UN agencies barring a few.⁹

Even in International Tribunals and Courts, women are underrepresented. For example, as of May 2020, the International Court of Justice (ICJ) has three women judges making their overall percentage on the bench to 20%.¹⁰ International Law Commission (ILC) had its first woman member in 2001 after almost more than fifty years of its establishment.¹¹ As of September 2019, ILC has four female members in the body of a total of thirty-four members which is around 12% of the total strength. In the ILC's history of seventy years, only seven female members have ever been part of the ILC.¹² This quick analysis of international bodies reveals a highly skewed

⁵ B. S. CHIMNI, *Feminist Approaches to International Law: The Work of Hilary Charlesworth and Christine Chinkin*, in INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 358 (2d ed. 2017).

⁶ D-2 refers to senior level professionals. There are senior appointments like Secretary General, Director General, etc. which constitute some of the top positions at UN.

⁷ For date of contract of one year or more, see U.N. Women, Status of Women in the United Nations System, (2016), <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2016/Status-of-women-in-the-United-Nations-system-2016-en.pdf>.

⁸ Department of Economic and Social Affairs, The World's Women 2015 Trends and Statistics, 130 (2015), https://unstats.un.org/unsd/gender/downloads/WorldsWomen2015_report.pdf.

⁹ *Id.*

¹⁰ *Current Members*, INTERNATIONAL COURT OF JUSTICE, <https://www.icj-cij.org/en/current-members>.

¹¹ U.N. Office of Legal Affairs, Opening Remarks by Mr. Miguel de Serpa Soares (May 24, 2018), https://legal.un.org/ola/media/info_from_lc/mss/speeches/MSS_ILC70_gender_side_event-24-May-2018.pdf.

¹² Christiane Ahlborn & Bart Smit Duijzentkunst, *70 Years of the International Law Commission: Drawing a Balance for the Future*, OPINIO JURIS (May 3, 2018), <http://opiniojuris.org/2018/05/03/70-years-of-the-international-law-commission-drawing-a-balance-for-the-future/>.

gender ratio in favour of men. This leads to perpetuation of an androcentric worldview and decision-making. This bias does not only manifest itself in terms of relegating female issues to a lesser degree of importance but also side-lining the normative female experiences.¹³ The paternalistic attitude adopted in gender-focused policies is a form of benevolent sexism, which is found to be harmful to the cause of women's empowerment.¹⁴ Therefore, there is a need to have more women at the decision-making table.¹⁵ Despite its apparently progressive nature, international legal structures and norms have failed women. The normative content of international law is no less worrisome vis-à-vis the status and position of women. Despite having a rich body of international human rights instruments which aim to protect the rights of women, discrimination against women persists in all spheres of their lives. Against this background, due to inadequate studies, the status and position of women under the structural and normative content of IIAs is unknown.

Therefore, the examination of the position of women in the structural and normative framework of IIAs and how IIAs may render gender-blind, if not gender-biased, norms, and policies in the absence of participation of women is necessary.

For this article, the study of IIAs shall be divided into structural and normative parts. The structural part shall include mapping of women in law-making bodies like the Parliament of India, the executive branch, the Judiciary, and Academia. The normative part shall include an analysis of IIAs followed by suggestions for reforms which cater to the concerns of women through IIAs.

II. ANALYSIS OF STRUCTURAL CONTENT OF IIA

Women's movement and their struggle for equal rights and status are centuries old. According to Fraser, it is a struggle for gender equality and inclusion in social, political, and economic spheres mostly dominated by men.¹⁶ According to Deborah Rhode, it challenges existing ideological and institutional structures and distributions

¹³ The conformity bias often leads to the minority, primarily consisting of women, agreeing with the majority, dominated by men. Therefore, to enable women to voice their concerns, their representation in the aforesaid bodies matters.

¹⁴ Peter Glick & Susan T. Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications for Gender Inequality*, 56(2) AM. PSYCHOLOGIST 109, 112 (2001).

¹⁵ Tam O'Neil & Pilar Domingo, *The Power to Decide: Women, Decision-Making and Gender Equality*, <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9848.pdf>. Decision making here refers to ability to influence decisions in all spheres of public and private activities; for example, law making, policy making, or judicial activities etc. It includes formal access to positions of authority and to decision making processes. It is a combination of capabilities, access and actions that influence law and policy making.

¹⁶ Arvonne S. Fraser, *Becoming Human: The Origins and Development of Women's Human Rights*, 21(4) HUM. RTS. Q. 853, 859 (1999).

of power.¹⁷ A more responsive legal system for bringing social change to gender-related power issues is one of the important goals of the women's movement.¹⁸

In India, equal opportunities for women still look like a far-flung dream. The invisibility of women from law/policy-making bodies, unequal pay, poor literacy rate and struggle to have property rights are some examples of these struggles.¹⁹ As explained above, feminism demands such opportunities through its various schools; however, there is another very convincing argument that calls for equal opportunities for women. This results from the demand for diversity. But, why is diversity important? Some of the arguments entail that it helps in avoiding cognitive biases and decision-making fairer.²⁰ Diversity brings sociological legitimacy to decision-making which, in the absence of diversity, may be seen as a biased decision.²¹ Although, most of these arguments are made in the context of adjudicatory processes, they are also true in any other field of decision-making. The article shall discuss this aspect while studying various public structures.

A. Parliament

The Parliament of India passes laws which apply to every subject of the Indian Republic. Debates and discussions on such laws take place in the two houses of the Parliament, the Upper House and the Lower House, apart from a few external consultations if desired or necessary. This means even the laws which directly affect the interest of women in India are made by the Parliament. The question that arises here is whether women are sufficiently represented in the Parliament, enabling them to participate in discussions and play an active role in lawmaking or, whether the majority consists of men who end up making laws for women in India.

A study on the gender-wise representation in both houses of the Parliament shows that the 17th Lower House (Lok Sabha) consisting of 539 seats has only eighty-one

¹⁷ Deborah L. Rhode, *Feminist Critical Theories*, 42(3) STAN. L. REV. 617, 619 (1990).

¹⁸ Dianne Otto, *Feminist Approaches to International Law*, in THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 8 (Anne Orford & Florian Hoffman eds., 2016).

¹⁹ Kishor Parashramji Brahmapurkar, *Gender Inequality in India Hit by Illiteracy, Child Marriages and Violence, A Hurdle for Sustainable Development*, 28 PAN AFR. MED. J. 178 (2017); Nilanjana Chakraborty, *What Is Gender Pay Gap and Why Is It So Wide in India?*, MINT (Dec. 3, 2019), <https://www.livemint.com/money/personal-finance/what-is-gender-pay-gap-and-why-is-it-so-wide-in-india-11575356633900.html>; *Win for Daughters: But More Needed to Ensure Women's Property Rights*, TIMES OF INDIA (Jan. 21, 2022), <https://timesofindia.indiatimes.com/blogs/toi-editorials/win-for-daughters-but-more-needed-to-ensure-womens-property-rights/>.

²⁰ WON KIDANE, THE CULTURE OF INTERNATIONAL ARBITRATION 145 (2017).

²¹ Andrea K. Bjorklund et al., *The Diversity Deficit in International Investment Arbitration*, J. WORLD INVEST. TRADE 410, 413 (2020) [hereinafter Bjorklund et al.].

seats represented by women which translates into around 15% of the total strength of the House.²² The Upper House (Rajya Sabha), until August 2020, had twenty-five women representatives out of 245 total seats making it around 10% of the total strength.²³ This situation reflects that women-related laws are mainly made by men in India, and women do not have the number to overturn the decisions made by men. Efforts have been made to introduce the Women's Reservation Bill which ensures a certain number of seats for women in the Parliament. However, it has been pending for the last twenty-seven years.

This analysis presents a grave picture of inequalities persisting in the law-making processes. The absence of women, who constitute around half of the population in India, perpetuates and nurtures prejudices and creates an unequal distribution of sources prompting social injustices and more. Not only in terms of women-related laws but in also cases of international importance including participation in debates on international matters, a meagre number of women in debates and discussions may render their small presence invisible or lost to the overwhelming number of their male counterparts. In such situations, male biases and prejudices can hardly be balanced. Various studies have shown that the political inclusion of women is good for democracy.²⁴ Participation of all in a democracy is desired to question unfair and unequal power dynamics.²⁵ UN Commission on Women has argued that the “[a]bsence of women from leadership positions undermines democracy and decision making”.²⁶

It is suggested that more and more women should be encouraged to participate in political processes. It is incumbent upon the state machinery to ensure that the aforementioned barriers are removed or diluted considerably allowing women to be a part of political processes.

B. Bureaucracy

²² GENDER-WISE REPRESENTATION OF MEMBERS, <https://sansad.in/lm/members>.

²³ Tara Krishnaswamy, *Female Parliamentarians at a Historic High, but Parties Must Do More*, THE WIRE (Aug. 11, 2020), <https://thewire.in/women/women-parliament-lok-sabha-rajya-sabha-political-parties>.

²⁴ Elizabeth Asiedu et al., *The Effect of Women's Representation in Parliament and the Passing of Gender Sensitive Policies*, 2 (2018), <https://www.aeaweb.org/conference/2018/preliminary/paper/an5yEb5h>.

²⁵ *Id.*

²⁶ Press Release, Economic and Social Council, Absence of Women from Leadership Positions Undermines Democracy, Commission on Status of Women Told, U.N. Press Release WOM/1541 (Feb. 28, 2006).

The uppermost law-making body in India, as explained above, presents a disappointing picture of women's equality. The Parliament makes the law and the bureaucracy implements it. In India, government services are divided into three main services namely, All India services, central group services and state (provincial) services.²⁷ All India services include the Indian Administrative Service (IAS), Indian Forest Service (IFoS) and Indian Police Service (IPS).²⁸ The struggle for women to be a part of these coveted services was not easy. Married women were not allowed to join the IAS in the initial years of Indian independence and in the event of their marriage during service, they were to resign from the office.²⁹ Married women were only allowed to join the services after 1971 with the rule of maternity leave.³⁰ Women, whether married or not, were barred from recruitment in IPS till 1971.³¹ It was only in 1972 that a woman entered the IPS service. Entry of women into IFoS was also very late; it was in 1980 that the first woman entered this service.³² Although the rule relating to married women not allowed being IAS officers was removed, the mindset of the organisation remained the same that certain jobs are not for women.³³

Till 2019, out of 5205 IAS officers, only 935 were women IAS officers.³⁴ This makes the total strength of women officers just around eighteen per cent of the total IAS cadre. Till January 2022, out of ninety-two Secretaries, only thirteen have been women.³⁵ As of December 2021, counting all the states and UTs, there were only two women chief secretaries. As of January 01, 2020, there were only four women officers in the Legal and Treaty Division of the Ministry of External Affairs.³⁶ As per the analysis done by Surabhi Bhatia and Akshi Chawla, out of 11569 IAS officers only 1527 have been women between 1951 and 2020.³⁷

²⁷ Jayasheela George, *Women in Administration in India*, 12(1) J. WOMEN'S STUD. 151–156 (2011).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Surbhi Bhatia & Akshi Chawla, *Why There Have Been So Few Women in India's Administrative Services*, INDIA SPEND (Jan. 5, 2022), <https://www.indiaspend.com/gendercheck/why-there-have-been-so-few-women-in-indias-administrative-services-795991> [hereinafter Bhatia & Chawla].

³⁴ On file with the author.

³⁵ Bhatia & Chawla, *supra* note 33.

³⁶ On file with author received through RTI.

³⁷ Bhatia & Chawla, *supra* note 33.

At present, there is no reservation for women in All India Services.³⁸ The entry is only based on merit, despite all the challenges and social obstructions for women in Indian society. Implementation of policies and laws which affect women's interests and under-representation of women in decision-making are intertwined. The Beijing Declaration³⁹ and Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁴⁰, both called for equal participation of women in public life, administration and decision-making.⁴¹

Notably, in the context of IIAs, where most of the negotiating teams from India mainly consist of men due to their sheer number, it is less likely that women will be able to negotiate terms of IIAs which are women-friendly and resonates with them well in terms of gender parity.

C. Judiciary

The Parliament makes the law; the bureaucracy implements it, and the judiciary enforces it. Most of the women-related matters in courts are heard by men. It is simply because women do not occupy such positions in equal numbers. A study has concluded that gender stereotyping is the reason for the lower representation of women in the judiciary.⁴² Equal representation of women in the judiciary has many benefits. The legitimacy of adjudication and inspiration for the next generation of female judges are some of the benefits to mention.

As of April 2022, the Supreme Court of India had thirty-two judges out of which only four were women judges. There are 25 High Courts in India each having complete jurisdiction over a province or more. Data portrays a sad state of affairs in terms of gender diversity in our constitutional courts. Of the total seats occupied in the Supreme Court and various High Courts, both known as constitutional courts, only around 12% is occupied by women.

³⁸ Santosh Goyal, *Social Background of Officers in the Indian Administrative Service* (1989), <http://103.82.220.134/pdf/santosh1.PDF>.

³⁹ *Report of the Fourth World Conference on Women, Beijing*, ¶¶ 165(k)-343, UN Doc. A/CONF.177/20/Rev. 1, Annex II (1996).

⁴⁰ See Convention on the Elimination of All Forms of Discrimination against Women, Preamble, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981.

⁴¹ U.N. Development Programme, *Global Report on Gender Equality in Public Administration* (Jul. 8, 2021).

⁴² INT'L COMM'N OF JURISTS, *WOMEN AND THE JUDICIARY* 3 (2013), <https://www.icj.org/wp-content/uploads/2014/10/Universal-Women-and-Judiciary-Gva-For-1-Publications-Conference-Report-2014-ENG.pdf>.

The overall analysis of the Indian judicial system presents how it has dealt with the issue of gender diversity immaturely, and this utterly problematic picture must be rectified as soon as possible. Andrea Bjorklund writes that diversity is important because it ensures that at least one adjudicator can understand the dispute's cultural or social context.⁴³ As mentioned earlier, diversity ensures avoiding cognitive biases and group thinking at the bench.⁴⁴ Diversity may also improve the quality of decision-making and increase the normative legitimacy of the decisions.⁴⁵ Also, feminist scholars have argued that female judges interpret laws from a different perspective and may seek a different outcome from their male counterparts.⁴⁶ They argue that women, due to their experience, contextualise matters in a legal dispute, unlike their male judges, who decide cases on abstract reasoning.⁴⁷

Any dispute relating to foreign investment in India, where matters relating to human rights or women's rights are involved, will fare better if female judges, who can contextualise the experiences of women, preside to decide the case. Unfortunately, the few women judges lack training in such matters. This makes the case harder for the local population. They suffer due to the negative impact of foreign investments in India like deprivation of land rights, displacement from ancestral lands or exploitation of various forms etc.

The overall analysis of this chapter disillusiones the author and readers alike. Public legal institutions in India are a mockery in the face of gender equality. Women are mostly invisible from the structural framework of IIA. This absence would mean most of the positions at senior or decision-making levels are occupied by men. The men at the highest levels of decision-making act in self-interest; therefore, more men would mean lesser women-related or gender-sensitive policies or norms, etc. shall be formulated.⁴⁸ Therefore, the absence of women from the structural framework of IIA is probably the main reason for the gender-biased decision-making processes or lack of gender-sensitive policies or norms in IIAs. This analysis calls for a strong

⁴³ Andrea Kay Bjorklund, *The Diversity Deficit in Investment Arbitration*, EUR. J. INT. L. (April 4, 2019), <https://www.ejiltalk.org/the-diversity-deficit-in-investment-arbitration/> [hereinafter Bjorklund 2].

⁴⁴ *Id.*

⁴⁵ Bjorklund et al., *supra* note 21, at 413.

⁴⁶ Coontz P., *Gender and Judicial Decisions: Do Female Judges Decide Cases Differently Than Male Judges?*, 18 GENDER ISSUES 59, 71 (2000).

⁴⁷ *Id.*

⁴⁸ James M. Buchanan, *Public Choice: Politics without Romance*, (2013), <https://www.cis.org.au/app/uploads/2015/04/images/stories/policy-magazine/2003-spring/2003-19-3-james-m-buchanan.pdf>; William N. Eskridge, Jr, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VIRGINIA L. REV. 275 (1988). The inspiration has been taken to analysis how people at decision-making work in self-interest.

case of gender parity in structural frameworks of IIA, particularly at senior management or decision-making levels.

III. GENDER NEUTRALITY UNDER NORMATIVE CONTENT OF IIA

This study argues, in the subpart above, that number matters. It concludes that equality in terms of number will be hopeful for gender justice. However, as of today, when numbers are nowhere near the halfway mark, analysis of gender neutrality and gender blindness of investment agreements in India will enable us to understand gender awareness and the sensitivity of IIAs. It must be reminded to the readers that this is in no way a critique of the content of IIAs but only an analysis of gender neutrality or blindness of laws. Gender neutrality here refers to “not being associated with men or women . . . in the style of language”.⁴⁹ The term gender-blind has been used to identify the laws that are silent on issues concerning women. Most of the IIAs do not utilise gender-non-neutral language. However, it is important to remember that these bilateral investment treaties (BITs) are from an earlier age.⁵⁰ The BITs and free trade agreements (FTAs) that India has signed since 2015 are gender-neutral and include some significant provisions for women.⁵¹ This is a step in the right direction toward developing more gender-sensitive and balanced BITs.

India-Brazil BIT (2020) in its Article 4.1 provides for the following provision:

Based on the applicable rules and customs of international law as recognized by each of the Parties and their respective national law, no Party shall subject investments made by investors of the other Party to measures which constitute: a) denial of justice in any judicial or administrative proceedings; b) fundamental breach of due process; c) targeted discrimination, such as **gender**, race or religious belief . . .⁵² (emphasis supplied)

A similar provision has been provided under Articles 3 of India-Belarus BIT and India-Kyrgyzstan BIT. In the global context, the BITs between Brazil and UAE,⁵³

⁴⁹ Department of Economic and Social Affairs, Integrating a Gender Perspective into Statistics 192 (2016), <https://unstats.un.org/unsd/genderstatmanual/Glossary.ashx>.

⁵⁰ E.g., India-UK BIT.

⁵¹ See, e.g., Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, Braz.-India, Jan. 25, 2020 [hereinafter India – Brazil BIT]; Bilateral Investment Treaty between the Government of Kyrgyz Republic and the Government of Republic of, Kyrg.-India, June 14, 2019; Treaty between the Republic of Belarus and the Republic of India on Investments, Belr.-India, Sep. 24, 2018.

⁵² India – Brazil BIT, *supra* note 53, art. 4.1.

⁵³ Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the United Arab Emirates, Braz.-U.A.E., art. 4.2 (iii), Nov. 12, 2018.

Brazil and Guyana⁵⁴, and Serbia and Turkey⁵⁵ also contain similar provisions for investor protection on the ground of gender discrimination.

According to a UNCTAD report, the increased representation of women at senior policy-making levels, advocacy campaigns about the benefits of gender equality, increased gender awareness research carried out by international organisations and academia, and the widely held belief that inclusive development that equally distributes its benefits will last for a long time are the reasons for these positive developments.⁵⁶

The addition of safeguards against discrimination other than based on nationality is another crucial consideration, as is seen in the current generation of BITs. For instance, the BIT between India and Brazil prohibits discrimination based on gender, ethnicity or religion.⁵⁷ Investors will be safeguarded in this way not just against nationality-based discrimination but also against other types of prejudice such as gender, religion, etc.

Nonetheless, in contrast to some new-generation trade agreements,⁵⁸ with a few notable exceptions, new-generation Indian BITs or investment agreements do not include extensive sections addressing gender or women's problems. The author was unable to locate any BITs that provided for the protection of gender in IIAs or the appointment of a diverse group of arbitrators in Investor State Dispute Settlement (ISDS) procedures.

However, there have recently been a few encouraging developments. India's future BITs can be written using a better model such as the one provided by the 2019

⁵⁴ Cooperation and Investment Facilitation Agreement between the Federative Republic of Brazil and the Co-operative Republic of Guyana, Braz.-Guy., art. 4.1 (iii), Dec. 13, 2018.

⁵⁵ Agreement between the Government of Republic of Serbia and the Government of the Republic of Turkey on Mutual Promotion and Investment Protection, Serb.-Turk., art. 3.3 (g), Jan. 30, 2018.

⁵⁶ U.N. Conference on Trade and Development, *The New Way of Addressing Gender Equality Issues in Trade Agreements: Is it a True Revolution?*, Policy Brief No. 53 (Oct. 2017), https://unctad.org/en/PublicationsLibrary/presspb2017d2_en.pdf.

⁵⁷ Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India, India-Braz., art. 4.1, Jan. 25, 2020.

⁵⁸ Chile-Uruguay Free Trade Agreement, ch. 14, arts. 14.1, 14.2, Oct. 4, 2016; African, Caribbean and Pacific Group of States-European Union Partnership Agreement, Preamble and arts. 1, 9, 11, 20, 25, 31 and 31a, June 23, 2000; Caribbean Forum States-European Union Economic Partnership Agreement, ch. 5, art. 191, Oct. 2008.

Netherland Model BIT (NMB).⁵⁹ The NMB's Article 6 addresses sustainable development.⁶⁰ The contracting parties are required by Clause 3 of this Article to recognise the contribution of women to economic growth as well as the inclusion of a gender perspective for inclusive economic growth.⁶¹ Additionally, it states that parties to contracts must take down obstacles to women's economic involvement and the crucial part that gender-responsive policies may play in achieving sustainable development.⁶² To ensure women's involvement in the economy, it also stipulates that contractual parties must work together and support one another.⁶³ Any discrimination against an investor based on their gender is prohibited by the BIT's fair and equitable treatment (FET) clause, according to Article 9(2).⁶⁴ According to Article 20(2), the appointing authority must take gender and regional diversity into account when choosing arbitrators for the tribunal.⁶⁵

There is a need to have more gender-inclusive investment agreements. Most of these agreements often ignore the concerns of half the population while framing issues and policies. Even when some token provisions are made part of these agreements, women are mostly kept out of the decision-making processes. The overall gender analysis of the structural and normative framework of the IIA regime is disappointing. Women are mostly underrepresented in the structural framework of the IIA and issues concerning women in investment agreements are barely addressed.

IV. SUGGESTIONS AND REFORMS

A. Performance Requirement and Procurement Policy

Even though foreign direct investment (FDI) has advantages for host countries, it may not necessarily support such countries' developmental objectives.⁶⁶ In these circumstances, performance requirements (PR) may be able to assist the state in balancing some of its interests with those of foreign investment. PRs are instruments

⁵⁹ U.N. Conference on Trade and Development, *Netherlands Model Investment Agreement* (March 22, 2019), <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>.

⁶⁰ *Id.*, art. 6.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*, art. 9(2).

⁶⁵ *Id.*, art. 20(2).

⁶⁶ Suzy H. Nikiéma, *Performance Requirements in Investment Treaties*, INT'L INSTITUTE FOR SUSTAINABLE DEV. (2014), <https://www.iisd.org/system/files/publications/best-practices-performance-requirements-investment-treaties-en.pdf>. [hereinafter Nikiéma].

in the form of demands placed on foreign investors to fulfil certain objectives while conducting business in the host nation.⁶⁷ However, using PRs might occasionally be considered ineffective.⁶⁸ The Washington Consensus concluded that the employment of PRs was harmful to investment and commerce.⁶⁹ Consequently, several of the agreements that the United States and Canada have signed forbid PRs.⁷⁰ The predominant strategy is for states to employ PRs to promote their legitimate non-economic interests, despite such a restrictive practice. The WTO's Agreement on Trade-Related Investment Measures (TRIMs), which forbids some PRs under its provisions 2.1, also adopts this strategy.⁷¹

Resultantly, governments may make good use of PRs to achieve gender parity and safeguard the legitimate interests of women. For instance, nations can impose PRs on foreign investors that include preferences for hiring women, local content requirements up to a particular percentage from women-owned businesses, training programs for women, and technology transfer to women-owned industries, among other things. However, it is equally essential that governments employ such a tool sensibly and without undermining the goal of their IIA duties.

B. *Dispute Settlement*

Despite the fact that investments and investors are protected by investment agreements (IAs), investors are nevertheless obligated to uphold human rights duties under the relevant host state legislation.⁷² Consequently, the ISDS tribunal may need to consider claims that the investor violated the relevant laws of the host nations with regard to human rights notwithstanding its restricted authority.⁷³ The tribunal may only grant the host state's counterclaim over human rights if the IA's dispute

⁶⁷ *Id.*

⁶⁸ See World Bank Guidelines on the Treatment of Foreign Direct Investment, Guideline II (3), 31 ILM 1363, (1992); UNCTAD, World Investment Report, 112 (2014), https://unctad.org/system/files/official-document/wir2014_en.pdf; C. Fontheim & M. Gadbow, *Trade Related Performance Requirements Under the GATT-MTN System and US Law*, 14 L. & POL'Y INT'L BUS. 129, 139 (1982); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 114 (2017).

⁶⁹ Nikièma, *supra* note 66, at 1.

⁷⁰ See Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments, Can.-China, art. 9, Sep. 9, 2012; U.S.-Ukraine BIT, art. 2.6, March 4, 1994; North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289, art. 1106 (1993).

⁷¹ Nikièma, *supra* note 66, at 7.

⁷² Eric De Brabandere, *Human Rights and International Investment Law*, in RESEARCH HANDBOOK ON FOREIGN DIRECT INVESTMENT 619 (Markus Krajewski et al. eds., 2019) [hereinafter Brabandere].

⁷³ *Id.* at 620.

resolution provision is sufficiently inclusive to include all investment-related problems without restriction.⁷⁴ However, the tribunal may not permit the transformation of investment issues into human rights problems.⁷⁵ Additionally, the balancing requirements may be met by including particular clauses in IIAs that correspond to the responsibility of investors with regard to human rights on the territory of the host state. Such wording is present in a number of model investment agreements and free trade agreements, and it also puts human rights duties on investors.⁷⁶ The problem of regulatory chill is another crucial element that cannot be disregarded.⁷⁷ Due to a lack of regulatory space offered by IAs or concern over foreign investors bringing ISDS suits in circumstances of state involvement, it is a situation where states choose not to take action against the investor while being aware of the investor's violation of human rights. Therefore, it is crucial that states have sufficient room for regulation through general exception provisions or any other IIA rules.⁷⁸

In order to balance economic and non-economic interests, Petersmann has passionately campaigned for the adoption of "balancing principles" by regional tribunals like the European Court of Human Rights (ECHR).⁷⁹ The goal of the balancing principle is to balance out the competing norms by weighing one against

⁷⁴ Patrick Dumberry & Gabrielle Dumas-Aubin, *When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration*, 13(3) J. WORLD INVEST. & TRADE 349, 360 (2012).

⁷⁵ Brabandere, *supra* note 72, at 629.

⁷⁶ See Trade and Gender in Free Trade Agreements: The Canadian Approach, GOV. OF CANADA, https://www.international.gc.ca/trade-commerce/gender_equality-egalite_genres/trade_gender_fta-ale-commerce_genre.aspx?lang=eng; Netherlands model Investment Agreement, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>.

⁷⁷ For more literature on regulatory chill, see Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, 7 TRANSNAT'L ENVIRON. L. 229 (2018); K. Tienhaara, *Regulatory Chill and the Threat of Arbitration: A View from Political Science*, in EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 606, 615 (C. Brown et al. eds., 2011); K. Cooper et al., *Seeking a Regulatory Chill in Canada: The Dow Agrosciences NAFTA Chapter 11 Challenge to the Quebec Pesticides Management Code*, 7(1) GOLDEN GATE UNIV. ENVIRON. L. J. 5 (2014); L. Gruszczynski, *Australian Plain Packaging Law, International Litigations and Regulatory Chilling Effect*, 5(2) EURO. J. RISK REGULATION 242, 244 (2014); C. Côté, *A Chilling Effect? The Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment*, LONDON SCHOOL OF ECON. (2014).

⁷⁸ Amit Kumar Sinha, *Non-Precluded Measures Provisions in Bilateral Investment Treaties of South Asian Countries*, 7(2) ASIAN J. INT'L L. 227, 228 (2017).

⁷⁹ Ernst-Ulrich Petersmann, *Human Rights, Constitutionalism and the World Trade Organization: Challenges for World Trade Organization Jurisprudence and Civil Society*, 19(3) LEIDEN J. INT'L L. 633 (2006).

the other.⁸⁰ As a result, it is necessary to investigate the balancing principle and the extent to which the ECHR-developed version of the concept can be useful. How the ECHR applies human rights principles to its interpretation of European Economic Community Law (EEC law) may be instructive in the context of the current study.⁸¹ The assertion that fundamental rights are part of EEC law appeared first in the *Stauder* case.⁸² In this case, by resorting to the middle path, the court decided that the recipient of subsidised butter did not need to disclose their name without questioning EEC law's validity.⁸³ This balancing approach, although, was criticised by Habermas as reducing relationships between rights to policy arguments;⁸⁴ nonetheless, it may be proved to help decide cases involving trade-gender linkages. It is essential to note that human rights concerns, including gender issues, are understood to be embedded in economic regulation rather than being considered an external factor.⁸⁵ This subtlety resonates with Ruggie's "embedded liberalism", which proposes that the ultimate goal of international economic order is the welfare of people.⁸⁶ While weighing economic rights against non-economic rights, like gender, the ISDS courts must pay close attention to the preservation of individual rights. Therefore, a host state must be permitted to vary from its responsibilities under International Economic Law (IEL), and such deviation must be weighed against the economic measure in issue by the international courts. This is because if a host state has a reasonable concern that an economic measure may harm women in its country in any way, it must be allowed to do so.

In addition, gender diversity on the bench is another important issue that must be addressed. In ISDS disputes, the adjudicators on tribunals are often men.⁸⁷ Diversity

⁸⁰ Bart Van der Sloot, *The Practical and Theoretical Problems with Balancing: Delfi, Coty and the Redundancy of the Human Rights Framework*, 23(3) MAASTRICHT J. EURO. & COMP. L. 439 (2016).

⁸¹ Bruno De Witte, *Balancing of Economic Law and Human Rights by the European Court of Justice*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 198 (Pierre-Marie Dupuy et al. eds., 2009).

⁸² Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419.

⁸³ *Id.*

⁸⁴ Steven Greer, "Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate, 63, 414 CAMBRIDGE L. J. (2004).

⁸⁵ Bruno De Witte, *Balancing of Economic Law and Human Rights by the European Court of Justice*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 202 (Pierre-Marie Dupuy et al. eds., 2009).

⁸⁶ John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36(2) INT'L ORG'N 379 (1982).

⁸⁷ Cosette D Creamer et al., *Diversity and Legitimacy of the World Trade Organization's Bench*, in IDENTITY AND DIVERSITY ON THE INTERNATIONAL BENCH: WHO IS THE JUDGE? 427 (Freya Baetens ed., 2020); Bjorklund et al., *supra* note 21, at 410; Taylor St. John et al., *Glass Ceilings and Arbitral Dealings: Gender and Investment Arbitration* 6 (PluriCourts, Working Paper, 2018); *Intersectionality Must Be a Part of the Conversation*, 19(1) MELBOURNE J. INT'L L. 259 (2018); Mariama Williams, *Gender Issues, and the Reform of Investment Liberalization, IAs and BITs*,

on the bench is necessary for gender-responsive decision-making as well as for reasons of legitimacy.⁸⁸ Unfortunately, the nomination of women in ISDS tribunals mostly rests on the preferences of the parties to the dispute.⁸⁹ While WTO dispute adjudication processes have some influence over the appointment of adjudicators, which may be utilised to make the panel or appellate body benches gender diverse, the selection of women as adjudicators in ISDS cases is made much more challenging and almost impossible by the limited percentage of women who can meet the experience criteria, as required by most parties.⁹⁰ In this regard, the role of the organisations, like ICSID or ICC, that allow such conflict settlement becomes increasingly crucial as they may play an important role in encouraging parties to get a diverse bench.⁹¹

V. CONCLUSION

As per World Bank, until 2019, women constituted around 48% of the total population of India.⁹² This means that around half of the population in India belongs to a different gender. However, the question remains the same. Does this number reflect in law/policy-making bodies or enforcing bodies? After analysing the structural and normative framework of IIA, it can be concluded that the answer is no. The public institutions in India present an abysmal picture of gender equality. The obstacle women face in India is exclusion. They have been excluded from all spheres of public life as they are dominated by men.

The analysis of structural content suggests that women are absent from decision-making positions in all the important sectors related to foreign investments. The analysis of normative content which deals specifically with IIAs is also quite disappointing. The existing international investment law regime is androcentric and silent on issues affecting women, as discussed in the introduction to this article. Women are notably underrepresented in the highest levels of IIAs' organisational structure. Issues about women hardly have a place in the IIA standards or policy.

in INVESTMENT TREATIES-VIEWS AND EXPERIENCES FROM DEVELOPING COUNTRIES 8 (Kinda Mohamadich et al. eds., 2015); Constance A. Anastopoulou & Daniel J. Crooks III, *Race and Gender on the Bench: How Best to Achieve Diversity in Judicial Selection*, 8 NW. J. L. & SOC. POL'Y. 174 (2013).

⁸⁸ Amit Kumar Sinha & Pushkar Anand, *Feminist Overview of International Investment Law: A Preliminary Inquiry*, 24(1) J. INT'L ECON. L. 99, 118 (2021).

⁸⁹ Bjorklund et al., *supra* note 21, at 410; *see also*, Sergio Puig, *Social Capital in the Arbitration Market*, 25 EUR. J. INT'L L. 387 (2014).

⁹⁰ Bjorklund 2, *supra* note 43, at 413.

⁹¹ Meg Kinnear, *Advancing Diversity in International Dispute Settlement*, WORLD BANK (Mar. 2019), <https://blogs.worldbank.org/voices/advancing-diversity-international-dispute-settlement>.

⁹² The World Bank, *Population, female (% of total population) – India*, (Rev. 2022), <https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS?locations=IN>.

No positive or negative requirements are placed on governments by international legal instruments to guarantee gender parity in any area of IIAs. Overall, the IIA regime is gender-neutral. International law, according to Bianchi, is not only created by men but also for men.⁹³ IIAs are not any different.

Positive steps have been achieved through recent model IIAs, inclusive new-generation IIAs, and reform measures at select international organisations. These adjustments, like new model IIAs or ISDS reforms, are rare and only at the proposal stage, which implies that they are still up for discussion and implementation. It is recommended, in this regard, to take into account gender diversity when selecting arbitrators for ISDS proceedings, and focus on obligations on states to ensure gender parity at municipal levels, equal representation of women at senior management levels of the structural framework of IIA, the inclusion of gender-related provisions into treaty norms and policies, increased participation of women in economic activities in host states, and more.

Indeed, the present scenario is not encouraging. Nonetheless, effective measures may be put in place to ameliorate the situation. What is encouraging is that more and more feminists and women academicians are working to fill the void created by the absence of women in public institutions. Let us hope our institutions and treaty-making take more gender-sensitive and appropriate steps in the coming years.

⁹³ ANDREA BIANCHI, *INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING* 186 (2016).