

Women and CETA

Chairpersons for CETA state to state disputes: Where are the women, Canada?

By **Barry Leon**



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(March 10, 2020, 9:28 AM EDT) -- The roster of arbitrators for state to state dispute settlement under the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union (EU) and its member states has no women on its list of chairpersons.

The Article 29 CETA roster — a backup that will be utilized if the disputing parties are unable to agree on an arbitrator — consists of three lists. To Canada's credit, 50 per cent of the nominees to the Canadian list are women. It came as a surprise that — even being reminded of gender equality by Canada's list — the EU list of nominees to its list for the CETA roster has only 20 per cent women members.

But even more troubling, the third list — the "chairpersons" list — for which Canada and the EU are jointly responsible, contains only men.

This dearth of women on these two lists is even more surprising because the CETA parties had convened a conference and a workshop dedicated to ensuring that women would benefit from the opportunities created by the CETA and international trade. Officially, gender equality has been a priority for the European Commission and Canada, who jointly issued an official agreement in 2018 recommending "that the [CETA] Parties cooperate to improve the capacity and conditions for women ... to access and fully benefit from the opportunities created by the CETA."

Overall, these two CETA lists appear to many as a step backward; they preserve the gender imbalance that Canada and the EU have publicly sought to eliminate.

Canada and the EU have made wonderful public statements and have had programs in favour of gender equality. But public statements and programs are not the end game. Canada and the EU need to "walk the talk," as the expression goes.

To be clear, no one has doubted or questioned the credentials of those currently nominated. But why the overall gender imbalance when both Canada and the EU have publicly committed to greater gender equality?

Given Canada's commitment to gender equality and its shared responsibility for the chairpersons list, Canada had — and still has — an opportunity to walk the talk by insisting on the appointment of qualified women to the chairpersons list until gender parity is achieved.

Parity is entirely within reach. There are dozens of comparably highly qualified women. Independent research has established that it is simply not the case that there are no women around the world with qualifications comparable to the qualifications of the men on the chairpersons list. Likewise, the sole woman on the EU list is not the only woman comparably qualified to the people on the EU list. There are literally dozens of women who could have been considered for this important list.

The fact that the chairpersons list includes no women, despite the commitment of Canada and the EU to equalize opportunities, may have sent a sharp — and incorrect — message that no qualified women exist.

Katherine Simpson, a legal scholar based in the U.S. and international arbitrator and mediator with London's Arbitrators@33BedfordRow (where I am an arbitrator and mediator), responded to the absence of women on the CETA lists by investigating whether there were qualified women who could have been appointed.

Simpson conducted global research to locate comparably qualified women who could be eligible to add to the CETA lists. In January 2020 — just weeks after publication of the CETA lists — Simpson provided to the CETA parties the professional credentials of 70 women with the requisite specialized knowledge and whose skills and qualifications are comparable to at least one person on the CETA lists. Thirty-four of these women were comparably qualified to at least one person on the chairpersons list. (An additional eight women had comparable substantive qualifications but would not have been eligible to be on the chairpersons list due to their nationality.)

Her comprehensive research demonstrated what many already knew to be true: there is no shortage of qualified women in international trade law, or in international dispute resolution, generally.

Simpson called on the CETA parties to remedy the serious under-representation of women by appointing additional female roster members until gender parity is achieved. There are no legal barriers preventing the parties from expanding the lists to remedy the gender imbalance. The CETA's Article 29, sets 15 as a minimum number of roster members.

To date, they have not done so.

Broader importance of treaty rosters

On a practical level, treaty rosters are important beyond their immediate treaty purpose.

Treaty-based rosters of arbitrators serve as public verification of the roster members' credentials, backed by public accountability. The credence given to these rosters is significant.

In international dispute resolution, many parties that are appointing arbitrators pay particular attention to people who appear on these rosters. It is a valuable accolade, but comparatively few women have it. Achieving gender parity in treaty-based rosters of arbitrators can be a powerful step toward achieving gender parity in international dispute resolution generally.

Further, it turns out that these rosters are often self-perpetuating. Neither women nor men who were not already on an EU roster or the radar screen of a member state had an opportunity to be considered for the listing. The European Commission acknowledged to Simpson it had relied only on prior rosters and member state recommendations.

Simpson's research disclosed that in 66 per cent of EU trade treaty rosters, no women have been appointed — women account for only 12.9 per cent of all EU arbitrator roster appointments since 2011 and only 10.6 per cent of appointees since 2015. In two-thirds of the EU's trade agreement dispute settlement rosters since 2011, the EU proposed no women at all.

Only one person on the EU and chairpersons list for the Article 29 CETA roster was listed for the first time on such a roster.

Simpson's work is important not just for calling out the significant under-representation of women on the CETA lists, but also for securing an acknowledgement and commitment from the European Commission that it is "fully conscious of the need to ensure a better balance in terms of gender, and will be looking at ways to addressing [sic] this issue in the future."

Through her groundbreaking research and analysis, Simpson identified a fixable systemic cause of the preservation of the "same names" for governmental appointments to lists for arbitral and other tribunals — in effect, those governments just look at their historic appointees and lists of potential appointees rather than, as she did, conducting a wide search for well-qualified candidates.

Her work is particularly important because over the medium and longer term it should lead to the appointment of more well-qualified women — and men — who may not be household names to

treaty rosters and panels. In turn, this should enhance their profile for appointments to tribunals for international investment, commercial and other disputes.

Meanwhile, those committed to diversity and gender equality in international dispute resolution await explanations from Canada and await action by Canada and the EU to appoint more women to the CETA lists. The matter is still pending before the Council of the EU.

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