

# Submission

To

The House of Commons Standing Committee on  
International Trade

by

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For

**Citizens against CETA**

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First let me thank the Committee for the opportunity to submit this brief.

There are four concerns we would like to express. They relate to the impact of trade agreements like the TPP on our parliamentary democracy, our judicial sovereignty and the Canadian economy. Finally, we would like to address the inherent imbalance of the lobbying process.

### 1. The impact of the TPP and other trade agreements on democratic governance.

It seems to us that there is an invisible elephant on the table in discussions about the merits of trade agreements that the Prime Minister, elected MPs and civil servants, particularly in the Department of International Trade, rarely acknowledge. That elephant is democratic governance.

Trade agreements like the TPP and CETA are a clever back door way of getting around one of our most important democratic principles. It's called the No-Fettering Rule.

“In Canadian law (based on the English common law) there is a democratic principle called the no-fettering rule that bars one elected government from making commitments to bind another.

However, the principle does not exist in international law and an international agreement cannot be trumped by the laws of Canada.”

from *Sold Down the Yangtze* by Gus Van Harten, Osgood Hall Law School <sup>1</sup>

Thus, a government, driven by ideology or corporate interests, can surreptitiously use a trade agreement (which falls under international law) to fetter future governments for decades. That can happen through targeting highly specific policies for elimination (such as Minimum Processing Requirements in our province of Newfoundland or Labrador). But the fettering language can be more general, and therefore open to interpretations that government never intended. We've chosen to focus on just three of the many ways in which this type of fettering can take place.

**Regulatory Fettering:** Under trade agreements like NAFTA, the TPP and CETA, corporations are able to legally challenge the right of future governments to create and amend regulations. They can do this by claiming their “[legitimate expectations under the Fair and Equitable Treatment](#)”<sup>2</sup> clauses have been violated.

The most frequent targets of these legal challenges have been, and probably will continue to be, government attempts to protect the environment and manage our resources. However, the TPP is notable in that it goes beyond NAFTA in also making it [harder to regulate the financial sector](#).<sup>3</sup> The reasons for the 2008 financial collapse have apparently been forgotten.

The most troubling aspect of regulatory fettering is invisible. For example, there is evidence that the mere corporate threat of an ISDS NAFTA lawsuit has caused government to modify or reconsider planned and needed new regulations.<sup>4</sup>

**Fettering Public Services:** Both the TPP (at the federal level) and CETA (in sub-federal jurisdictions as well) use a “[negative list](#)”<sup>5</sup> approach to protect public services. That means that any attempt by future governments to introduce a public service that has not been already protected on the “negative lists” can be legally challenged by TPP or CETA investors. Furthermore, under the [Ratchet](#)<sup>6</sup> mechanism, if government decides to privatize a public service, that privatization becomes locked in. The service cannot be brought back into the public sector

What about Pharmacare? Under both [CETA](#)<sup>7</sup> and the [TPP](#)<sup>8</sup> it will be very difficult for future governments to introduce a national “Pharmacare” program that will not have costly restrictions placed on it by the big pharmaceutical corporations.

**Fettering Government Procurement:** [50 municipalities](#)<sup>9</sup>, including the largest in the country, petitioned their provincial governments asking that public spending at the municipal level be excluded from CETA. Their argument was that the right of governments to use “Buy Local policies” to stimulate local economies should not be tampered with.

Government’s response was, in essence, to side step the core issue of the fettering of government authority by simply raising the threshold beyond which CETA’s procurement restrictions would kick in. We find it significant that, by contrast, TPP countries, chose to protect “[Buy Local](#)”<sup>10</sup> policies in sub-federal jurisdictions.

Are we exaggerating our claim that the TPP and CETA are a long-lasting assault on the traditional power of government? Not according to Nobel Prize winning economist, Joseph Stiglitz. He asserts that the intent of many TPP provisions is “[to make it hard for governments to conduct their basic functions - protecting their citizens’ health and safety, ensuring economic stability, and safeguarding the environment.](#)”<sup>11</sup> We would say Ditto for CETA.

## 2. The impact of the TPP and other trade agreements on Canada’s judicial sovereignty

What happens if a future government rebels and chooses not to be fettered by the TPP or CETA? Under the Investor State Dispute Settlement (ISDS) regime they can be sued by investing corporations in offshore tribunals. These tribunals can demand that governments pay huge (multi-billion dollar) compensation to corporations.

These ISDS tribunals can also override Canadian courts and profoundly fetter future government actions.

A salient example is the [Exxon Mobil Murphy Oil lawsuit](#).<sup>12</sup> Three levels of Canadian courts rejected arguments made by US oil companies that a tribunal in Newfoundland and Labrador could not lawfully tighten requirements related to oil company research and development in the province. When the oil companies took the lawsuit to the NAFTA ISDS tribunal the tribunal chose to ignore the interpretation of the Canadian courts. Not only did the government have to pay generous compensation to the corporations. The tribunal ruled that Canada would continue to be liable as long as the restrictive regulations stayed in place.

Also, of notable significance is the current [Eli Lilly NAFTA lawsuit](#)<sup>13</sup> against Canada. Eli Lilly is challenging decisions by Canada’s federal courts to invalidate the company’s patents for two drugs.

Canadian courts had decided that Eli Lilly had presented insufficient evidence to show the drugs would deliver the promised long-term benefits. According to Ottawa University law professor, Michael Geist, “If the pharmaceutical giant succeeds, it will have effectively found a mechanism to override the Supreme Court of Canada.”<sup>14</sup>

Canada has been sued 39 times under NAFTA. That’s more than any other developed country in the world. Expect an acceleration of ISDS lawsuits if the TPP is ratified. It may even be dramatic. That’s because, at present, disputes over procurement contracts or public-private partnerships are typically resolved in Canadian courts. The TPP would allow multinational corporations who enter into contracts with the federal government (either to supply goods and services or to deliver or operate privatized services and infrastructure) to pursue ISDS lawsuits<sup>15</sup>. This is a very significant extension of the definition of what kind of investor is entitled to use the ISDS mechanism.

The silence of our judiciary on the impact of the TPP and CETA stands in contrast to what’s been happening elsewhere in the world. Even before this latest development was revealed, internationally there has been substantial and growing judicial and legal opposition to the ISDS regime. That includes:

[The European Association of Judges](#)<sup>16</sup> (representing 44 judicial associations across Europe)

[The National Center for State Courts \(US\)](#)<sup>17</sup>

[New Zealand Jurists](#)<sup>18</sup>

[The largest German Magistrates Association](#)<sup>19</sup>

[American Legal Scholars](#)<sup>20</sup>

We applaud their stance. Our position is that Canada should be working to reform the ISDS obligations ceded under NAFTA, rather than signing trade agreements that will further fetter our court system through enlarged concessions to huge international corporations.

### **3. The impact of the TPP and CETA on the Canadian economy**

Did you know that between 2001 and 2015:

- Exports to countries with which Canada does not presently have a free trade agreement (FTA) grew [six times as fast](#) as to those with whom we do have an FTA? <sup>21</sup>
- Our imports from our trade agreement partners grew twice as fast as our exports to them.
- Canada’s export performance since the turn of century has been the 2<sup>nd</sup> worst of any OECD country? <sup>22</sup>

In spite of these sobering statistics, economists and lobbyists from the powerful corporate think tanks continue to enthusiastically push for the ratification of the TPP and CETA. Canada has to participate, we’re told, because so many other countries do. Our poor performance to date is rationalized by the claim that there is always a lag period while countries adjust to a different economic reality. If we are just patient, we are told, the benefits will eventually flow to Canadian businesses and Canadian workers.

In response to the argument that we have no choice but to participate, we would point out that there is [substantial and growing opposition to NAFTA style trade agreements](#)<sup>23</sup> in both the United States and the EU.

As for the claim that the benefits of free trade will come if we are patient, some well-respected research, as well as dissent from Canadian entrepreneurs, suggest exactly the opposite.

**Jobs:** According to a [study out of Tufts University](#)<sup>24</sup>—which used the UN Global Policy Model, the TPP is going to increase inequality and cause job losses in all 12 participating countries. The model predicts highest per capita job losses in [Canada](#).<sup>25</sup> CETA will also provoke job losses, particularly in manufacturing and processing sectors, according to a [2010 CCPA report](#).<sup>26</sup>

**Canadian Businesses:** A United Nations [UNCTAD study](#)<sup>27</sup> (Table 2, pg. 24) predicts a 26% drop in Canada’s value-added exports as a consequence of the TPP. Particularly hard hit will be innovative industries.

“Once ratified, the (TPP) agreement will make our markets less free and less competitive, and it will particularly hurt innovation-based entrepreneurship.”

[Dan Breznitz](#), Monk Chair of Innovative Studies, University of Toronto.<sup>28</sup>

Canadian business leaders who have spoken out against different aspects of the TPP include:

[Former co-CEO of Research in Motion Jim Balsillie](#),<sup>29</sup>

[Shopify CEO Tobi Lutke](#),<sup>30</sup>

[CEO of Ford Canada, Dianne Craig](#)<sup>31</sup>

[Canadian publisher Don LePan of Broadview Press](#),<sup>32</sup>

[The National Farmers Union](#) which represents family farms<sup>33</sup>

As for the CETA agreement, the obligatory opening up of provincial and municipal procurement to corporations based in Europe is a one way concession. Canadian companies will find it very hard to penetrate the European market given both the linguistic and diverse regulatory challenges in place there.

**Foreign Direct Investment (FDI):** It seems to us that the big question with respect to FDI in Canada is not how much money will come into the country, but rather what it will be used for.

Measurement of FDI in Canada in the 16 years after the CUFTA and NAFTA were signed (1985-2001) showed that [96.6% of investments](#)<sup>34</sup> were used for the acquisition of existing businesses. Less than 3% was used for the introduction of new industries.

Does government really believe that FDI under the TPP and CETA is going to be used to start up new industries that will benefit our economy? Isn’t it much more likely that the objective of international corporations is greater access (either through P3s or increased privatization) to that enormous cash

cow, the delivery of public services? How does guaranteeing them that access through trade agreements benefit the Canadian economy?

#### 4. Lobbying: Which voices most influence government?

According to Statistics Canada, international trade was the top lobbying topic<sup>35</sup> for Canada in 2015. While we were unable to find out just how much money is spent on lobbying governments in Canada, we are pretty sure that a miniscule fraction of the total amount spent comes from civil society groups.

Government will, no doubt, argue that civil society is already represented by the MPs we elect. However, it's a very selective representation. MPs do an excellent job at responding to constituency issues but trade is not considered a constituency issue. How many MPs outside of the trade committee have been briefed in a comprehensive and unbiased manner on both the pros and cons of these trade agreements? How many have been encouraged to bring trade issues back to their constituents for discussion?

As for the promised public consultations on the TPP, they were, in our opinion, initially structured to avoid having to talk with the public. For a long time there was no schedule posted on the government website as to where and when public consultations would take place with the result that interested civil society groups either missed the "presentations" or were given less than 24 hours' notice.<sup>36</sup> That's since been corrected but only after civil society groups went public with their disappointment.

With respect to CETA, we would like to remind the Committee that civil society groups had minimal access to government during the excessively secretive CETA negotiations. This stood in stark contrast to the access corporate lobbyists<sup>37</sup> were granted to negotiators. Thus, while presentations were accepted by the International Trade Committee early on in the negotiation process, civil society groups, unlike the corporate sector, were at the considerable disadvantage of having to rely on leaked and outdated material to make their case.

Civil society groups hoped and expected that that bias would be corrected with the election of a new government committed to more openness and reform. The decision not to hold public consultations or revisit CETA through the Parliamentary Committee profoundly surprised us. It's hard not to conclude that government wants the general public to know as little about this trade agreement as possible.

#### Our conclusions

**"The Liberal Party of Canada strongly supports free trade as this is how we open markets to Canadian goods and services, grow Canadian businesses, create good-paying jobs, and provide choice and lower prices to Canadian consumers."**<sup>38</sup>

Could it be that the political enthusiasm of our mainstream parties for free trade is based more on ideology than evidence? Studies analyzing or estimating past and future performance suggest that

the TPP will not open markets for our value added industries. Nor will it grow genuine Canadian businesses. And it will not create good paying jobs.

As for the CETA agreement, restrictions on the procurement of goods and services at the sub-federal level represent an enormous concession to the giant corporations that have lobbied so heavily for this agreement. CETA also includes a “zombie clause” that will allow these corporations to continue suing government for up to 20 years even if a future government chooses to withdraw from the agreement.

We would like to end with three questions for the committee.

1. What possible justification could the Canadian government have for ratifying two trade agreements that will so significantly fetter the legislative and adjudicate power and authority of future governments?
2. Where is the positive economic evidence justifying the ratification of either the TPP or CETA?
3. Is it not time to reassess Canada’s free trade policy?

Our group is aware of all the time and effort Committee members must put into reading briefs like our own. This is a huge responsibility.

We hope that, in diligently examining all the evidence, you will come to the conclusion, as we have, that the ratification of these trade agreements is not in Canada’s best interest.

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for Citizens against CETA

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### **General Information**

Citizens against CETA is a St. John's based civil society group. Although the bulk of our work and energy initially focused on CETA, we have similar concerns about the intent of the TPP and the almost invisible TISA agreement, currently being negotiated. The [CitizenagainstCETA.blogspot.ca](http://CitizenagainstCETA.blogspot.ca) website articulates our position. We are available to talk to our elected representatives, to the public and to the media.