



# Sharing Power: The Case for Public Consultations on Trade

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## Abstract

Since the 1960s, public consultation has emerged as an important democratic tool, allowing governments to inform, debate, and learn from the general public. Since the 1980s, international trade agreements have wielded significant influence over domestic law making, as an ever more 'comprehensive' set of topics is regulated via treaty. In Canada, these two trends have yet to meet. Neither the public nor Parliament is involved in trade policy making, raising concerns about the democratic legitimacy of expansive trade agreements. Through the lens of the recent Canada and European Union (EU) Comprehensive Economic and Trade Agreement (CETA), this article examines whether trade law's consultation practices can be aligned with those of other federal government departments. We identify five key values that make consultations successful—diversity, education, commitment, accountability, and transparency—and consider the viability of their inclusion in trade consultations.

**Keywords:** trade, CETA, public consultations, democracy, representation

## Résumé

Depuis les années 1960, les consultations publiques sont devenues un important outil de démocratie, permettant aux gouvernements de débattre d'enjeux, d'informer le public et de s'informer eux-mêmes auprès du public. Depuis les années 1980, les accords commerciaux internationaux ont infléchi les processus législatifs nationaux, alors que les sujets couverts par ces accords deviennent toujours plus nombreux et divers. Au Canada, ces deux tendances n'ont toujours pas convergé. Ni le public ni le Parlement ne participent au façonnement des politiques commerciales, mettant en doute la légitimité démocratique des accords commerciaux pourtant vastes. Par l'entremise du récent accord Canada-Union Européenne (UE) (l'Accord économique et commercial global, ou AECG), l'article examine si les pratiques de consultation adoptées par les ministères peuvent s'appliquer au droit commercial. L'on cerne cinq conditions du succès des consultations – diversité, information, engagement, reddition de comptes, transparence – et l'on étudie leur aptitude à être intégrées aux consultations commerciales.

**Mots clés :** commerce international, consultations publiques, AECG, représentation, démocratie, participation

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## 1. Introduction

In 2002, the Royal Commission on the Future of Health Care in Canada consulted the public about the future of Canada's public healthcare system.<sup>1</sup> Over the course of many months, the Romanow Commission ran public hearings, expert roundtables, and public dialogues on health care strategy. A random sample of 489 Canadians was invited to participate in deliberative activities, ensuring that the commission gathered opinion broadly and deeply. These activities were complemented by an online consultation workbook, televised forums, regional forums, campus policy dialogue sessions, online issue survey papers, and more.<sup>2</sup> The full report is available online and lists all submissions received, including e-mail messages and phone calls, as well as a breakdown of all consultative sessions.<sup>3</sup>

Contrast the preceding process with the following that took place in the domain of trade. In 2014, the Standing Committee on International Trade, a permanent committee established by the House of Commons, released its report on the Comprehensive Economic Trade Agreement (CETA) between Canada and the European Union. The report was submitted pursuant to consultations carried out by the committee in three major cities. Of the roughly seventy individuals and organizations invited to attend the hearings, the largest contingent represented corporate and industrial interests.<sup>4</sup> Further, as the government refused to release any of the draft text of the agreement, witness commentaries were directed toward a government-generated technical summary, forcing witnesses to offer only hopes and predictions.<sup>5</sup> We also note that during the preceding four years of negotiations, industry actors were consulted on their preferred outcomes;<sup>6</sup> other stakeholders such as provinces and municipalities as well as parliamentarians at large were sometimes consulted,<sup>7</sup> but often merely "briefed."<sup>8</sup>

<sup>1</sup> Canada, Royal Commission on the Future of Health Care in Canada. *Building on Values: The Future of Health Care in Canada* [Romanow Commission] (November 2002), <http://www.collectionscanada.gc.ca/webarchives/20071115025623/http://www.hc-sc.gc.ca/english/care/romanow/hcc0086.html>. Unless otherwise stated, all URLs were last accessed 20 August 2014.

<sup>2</sup> Canadian Policy Research Networks and Ascentum Inc., *Trends in Public Consultation in Canada (for the Parliamentary Centre's Canada-China Legislative Cooperative Project, 2005)*, 14–15, [http://www.cprn.org/documents/38835\\_en.pdf](http://www.cprn.org/documents/38835_en.pdf).

<sup>3</sup> *Romanow Commission*, 259–70, 271–99. Forty pages of individual and organizational participants bespeak a successful consultation effort.

<sup>4</sup> See House of Commons, Standing Committee on International Trade, *Canada–European Union Comprehensive Economic and Trade Agreement [CETA report]*, (June 2014), 31–36.

<sup>5</sup> In a recent interview, MP Don Davies revealed that, "when I ask witnesses, it doesn't take me long to burrow into any particular witness and get an answer that they can't really tell because they're waiting for the details. They can't really tell because they need the text." Don Davies (Member of Parliament, Official Opposition Critic for International Trade and Vice-Chair of the Standing Committee on International Trade), in discussion with Delaney Greig, December 18, 2013.

<sup>6</sup> "John Masswohl, Director of Government and International Relations, Canadian Cattlemen's Association, said that his association was 'consulted closely on every one of [the] decisions during the negotiations.'" *CETA report*, 2.

<sup>7</sup> Apparently, BC at least was quite robustly consulted in the latter half of the negotiation process: Andrew MacLeod, "BC Secretly Rolling Over on Euro Trade Pact: Dix," *The Tyee* (Vancouver, BC), 26 October 2011, <http://theyee.ca/News/2011/10/26/BC-Euro-Trade-Pact/>. Since these consultations are not a matter of public record, however, neither civil society nor Parliament knows exactly how extensive the consultations were.

<sup>8</sup> Steve Verheul, Canada's Chief Trade Negotiator, describes "briefing sessions with the provinces before every negotiating session so that they could understand what would be expected and what our strategy was"—a relationship that seems less close than that described by the Cattlemen's Association. *CETA report*, 3.

Both the health and trade policy-making processes involved public consultations, but the differences between them could not be starker. While the most obvious disparities are of scale,<sup>9</sup> we argue that important differences in attitudes toward consultation—ultimately, differences of values—separate the two consultation efforts. The Romanow Commission consulted broadly, educating the public about the issues at stake as well as listening closely to public preferences and concerns. Their activities were part of a reasonably transparent and accountable process. In contrast, CETA's negotiators and the Standing Committee spoke almost exclusively with industry stakeholders, keeping the text and their discussions closed and secretive. Trade consultations thus appear impoverished—even undemocratic—when compared with best practices from several other federal government departments, such as immigration, environmental protection, and Aboriginal affairs.<sup>10</sup>

The best explanation for the lamentable state of public consultations on trade is the government's awareness of the outrage regarding its trade policy. Preferring to ask for forgiveness rather than permission, the government declines to consult before agreements are concluded. This explanation is plausible, but cynical; in this article, we engage a government that wants to make policy consistent with the preferences of Canadians. In this vein, one of our final recommendations is that the government carry out a large-scale consultation—a Commission of Inquiry—in order to teach and learn from Canadians on trade.<sup>11</sup>

Our other major recommendation is that all trade consultations, from major commissions to ad hoc committee hearings, be conducted thoughtfully, in accordance with the values that have made other government consultations successful: these consultations are diverse, seek reciprocal information exchanges, pursue commitment and accountability, and proceed transparently. By focusing on these value-informed actions, with emphasis on their application in exemplary consultative processes, we aim to articulate the ways in which trade lawmakers can improve their practices.

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<sup>9</sup> Commissions of Inquiry enjoy extensive mandates to consult with the public, to conduct and review research, and, in large part, to set the terms of their own investigations: see *Inquiries Act*, RSC 1985, c I-11. In contrast, Parliamentary or Senate committees have neither the mandate nor the resources to engage in consultations and research of similar scope; the committee phase is but one of many in the passage of a bill or the drafting of a regulation or policy instrument. Nevertheless, we argue that consultations of any scale should be guided by the values we set out in Part 3 of this article—though indeed it may be easier for a Royal Commission than for more resource-pressed committees to craft and implement value-driven consultations. We thank one of our anonymous reviewers for prompting us to elaborate on the connection between scale and values.

<sup>10</sup> Examples of consultations in immigration and environmental protection will be discussed in Part 3, below; however, consultations between the government and First Nations, Métis, and Inuit communities fall outside the scope of this article. For a summary of the Crown's duties toward these groups as well as relevant criticisms of one common type of Crown-Aboriginal cooperative body, see Michael McClurg, "The Nunavut Wildlife Management Board and the Duty to Operationalize Consultation," *Indigenous Law Journal* 9 (2010): 77.

<sup>11</sup> The last Royal Commission on trade, the MacDonald commission, was published in 1985: Canada, Royal Commission on the Economic Union and Development Prospects for Canada, Report (Ottawa: Minister of Supply and Services Canada, 1985), <http://epe.lac-bac.gc.ca/100/200/301/pco-bcp/commissions-ef/mcdonald1985-eng/mcdonald1985-eng.htm>. Carried out before NAFTA's negotiations began, the MacDonald commission was the last time all Canadians were invited to participate in trade policy making on a large scale.

The value of a revitalized trade consultative process should not be underestimated. In recent years, we have observed, both in Canada and across Europe, growing public interest in trade deliberations, interest that, in the case of the secretly negotiated Anti-Counterfeiting Trade Agreement (ACTA), morphed into a pan-European opposition movement widely credited with the European Parliament's rejection of the agreement.<sup>12</sup> The nature of the interest also conveys significant public angst. What began as an oppositional morass in response to the formation of the World Trade Organization in the 1990s has sharpened through the interventions of NGOs, academics, whistle-blowers, and government officials. Rising public awareness of the centrality of trade agreements to the domestic and global political economy has also propelled a variety of public initiatives.

Repeat instances of covert trade deliberations have exacerbated public mistrust of government and scepticism toward consultations. A report commissioned by the Canadian Privy Council Office confirms as much, reporting rising incredulity toward consultations: the public no longer believes in the sincerity of the government's consultative efforts.<sup>13</sup> The implications for democracy are far reaching. Robert Post argues that democratic legitimacy suffers when the public is no longer convinced that they "are engaged in the process of governing themselves."<sup>14</sup> Additionally, as a sense of authorship over laws erodes, self-governance and human autonomy deteriorate, both of which are critical to a functioning democracy. Hence the value of reform, particularly in relation to trade agreements: carrying on with one-sided and superficial consultations exacerbates public distrust. A meaningful consultative process, on the other hand, structured around essential democratic values, would contribute to rebuilding public faith in the value of civic engagement.

While indispensable to the functioning of government, neither public confidence nor civic engagement is the primary object of our examination: our use of democracy is instrumental, intended to promote a conception of justice. Building on the third component in Nancy Fraser's tripartite theory of justice—representation<sup>15</sup>—we contend that meaningful pathways for public participation in trade deliberations would contribute to building more just trade processes. Political mobilization around trade issues may have expanded massively in the past decade, but both the Canadian government and the European Commission persevere with executive-driven trade negotiations and elite-centric trade consultations. A partial approach to trade policy-making disenfranchises the public and weakens

<sup>12</sup> Witness, for instance, the mass public movement precipitated by ACTA. When citizens learned of the agreement, they initiated a campaign of civil disobedience, producing petitions, street marches, and electronic attacks against the websites of supportive governments. Academics wrote, and newspapers published, critical editorials while the Rapporteur to the European Parliament on ACTA resigned in protest at the freezing out of the public, actions which combined to produce, for the first time in its history, a European parliamentary vote against a trade agreement endorsed by the European Commission.

<sup>13</sup> Compas for the Privy Council Office, *Public Consultations on Canada's Democratic Institutions and Practices* (2007), <http://www.democraticreform.gc.ca/eng/content/public-consultations-canadas-democratic-institutions-and-practices>.

<sup>14</sup> Robert Post, "Democracy and Equality," *Law, Culture and the Humanities* 1 (2005): 144.

<sup>15</sup> Nancy Fraser, "Reframing Justice in a Globalizing World," *New Left Review* 36 (2005): 69. See Part 4, below, for more on Fraser's misrepresentation.

fair representation in public decision making. We conclude that overcoming injustice in representation, or “misrepresentation,” requires a reframing of trade and of consultations in trade to facilitate meaningful public engagement.

We begin with a brief definition of public consultations in the Canadian context (2.1), before moving on to discuss the criticisms that have been levelled at Canadian trade consultation practices (2.2). Parts 2.3 and 2.4 explain the bases of current trade negotiation procedures. We then make the case for better consultations in trade (2.5), including a strategy for attaining them. To this end, Part 3 outlines key values of successful consultations while Part 4 suggests how the government could put these into practice.

## 2. Consultations in Trade

### 2.1 The Rise of Consultative Processes in Canadian Governance

Public consultation is the process by which the elected government seeks or incorporates input from citizens, including corporations and civil society, on policies and projects.<sup>16</sup> Consultations come in two types: permanent and ad hoc. Permanent consultations are held during certain parliamentary processes, especially the committee phase of lawmaking, when parliamentarians or senators invite stakeholders to comment on proposed legislation, regulations, or amendments.<sup>17</sup> A similar process is observable in the trade arena: successive governments have routinely run hearings and encouraged written submissions to solicit public commentary about proposed trade deals.<sup>18</sup> Many of these permanent forms of consultation—parliamentary committees, government commissions, and industry lobbying—are quite old, dating back to the early days of Confederation.

Large-scale ad hoc consultations, often ones that include new or marginalized voices, are a newer form. Launched in the 1960s and 1970s, this type responded to demands by environmental activists who sought government action—including ongoing consultation—in response to new research on environmental damage and toxicity.<sup>19</sup> So effective were these new processes that the rich history of environmental activism has played a direct role in shaping much of Canada’s environmental legislation; Ontario’s *Environmental Bill of Rights* and

<sup>16</sup> For similar definitions, see Marc Gramberger, *Citizens as Partners: OECD Handbook on Information, Consultation and Public Participation in Policy-Making* (Paris: OECD Publications Service, 2001), 16, <http://www.oecd-ilibrary.org/docserver/download/4201141e.pdf?expires=1384019007&id=id&accname=ocid195496&checksum=FB02538AA7B1E095661050A727CFDC9D>; Gene Rowe and Lynn J. Frewer, “Public Participation Methods: A Framework for Evaluation,” *Science, Technology & Human Values* 25, no. 1 (2000): 6; Gene Rowe and Lynn J. Frewer, “A Typology of Public Engagement Mechanisms,” *Science, Technology & Human Values* 30, no. 2 (2005): 253.

<sup>17</sup> A recent poll shows, however, that a majority of Canadians are uninformed about the nature of committee work: Compas, *Public Consultations*, 5.

<sup>18</sup> An important difference with trade consultations is that the use of an electronic strategy conceals the recipients of the submissions, for no information is provided as to who actually reads them. The consultations on trade are currently housed at DFAIT, <http://international.gc.ca/trade-agreements-accords-commerciaux/consultations/index.aspx?lang=eng>.

<sup>19</sup> See Paul Muldoon et al., *An Introduction to Environmental Law and Policy in Canada* (Toronto: Emond Montgomery, 2009), 12. For a US comparison, see Renée A. Irvin and John Stansbury, “Citizen Participation in Decision Making: Is It Worth the Effort?” *Public Administration Review* 64, no. 1 (2004): 55–57.

the *Canadian Environmental Protection Act*, for example, contain permanent avenues for public participation in environmental regulation.<sup>20</sup>

Public consultations are now fixtures in Canadian governance, with both permanent and ad hoc forms regularly operating across a range of fields. The rapid spread of consultations is due to their dual quality: they are both symptom of and remedy for the increases in scope and scale achieved by government over the course of the twentieth century.<sup>21</sup> As the Canadian population grew and the franchise was extended, the gap between representative and represented widened enormously. In the early twentieth century, each Member of Parliament represented roughly 4,800 voters;<sup>22</sup> today that number is 47,800—a ten-fold increase.<sup>23</sup> A mechanism for countering the dilution of representation was needed to preserve the essence of a democratic state.

Consultations were devised to this end, providing representatives and citizens the opportunity to dialogue on issues of public import. By bringing together diverse actors in a forum for collective deliberation, consultations counter the disenfranchisement endemic to governments of scale, while also enhancing the legitimacy of decision making, or so say the proponents.

## 2.2 Not All Consultations Are Created Equal

Support for consultative processes was articulated in a Privy Council Office report on Canada's democratic institutions and practices;<sup>24</sup> the public is eager to be involved in governmental decision making.<sup>25</sup> Paradoxically, the report also uncovered important levels of public disengagement from political processes, including consultations. One possible explanation of this contradiction is the public's self-confessed scepticism toward the consultative process: "To the extent that they perceived the government consulting the public, participants did not perceive the consultation as genuine."<sup>26</sup> Faux consultations produce scepticism, even cynicism, because of the absence of meaningful government action following many of these exercises. This paradox is especially relevant for trade consultations.

<sup>20</sup> *Environmental Bill of Rights, 1993*, SO 1993, c 28 [OEER]; *Canadian Environmental Protection Act, 1999*, SC 1999, c 33, Part II.

<sup>21</sup> Recently, there have been some important critiques of public participation exercises as symptom of and remedy for neoliberal governance itself: see S. Abram, "Participatory Depoliticisation: The Bleeding Heart of Neo-Liberalism," in *Cultures et pratiques participatives : Perspectives comparatives*, ed. C. Neveu (Paris: L'Harmattan, 2007), 113; John Clarke, "In Search of Ordinary People: The Problematic Politics of Popular Participation" *,Communication, Culture, and Critique* 6 (2013): 208.

<sup>22</sup> For historical statistics on the sizes and borders of Canadian electoral districts, see Parliament of Canada, "Electoral Results by Party," <http://www.parl.gc.ca/parlinfo/compilations/electionsandridings/ResultsParty.aspx>. Some were much larger than others: among the largest were Hamilton, with 20,378, (<http://www.parl.gc.ca/About/Parliament/FederalRidingsHistory/hfer.asp?Language=E&Search=Det&Include=Y&rid=268>) and West Toronto, with 24,471.

<sup>23</sup> And this is just people who vote: the populations of today's ridings are around 100,000, with some as many as 170,000: 2003 Representation Order, <http://www.elections.ca/content.aspx?section=res&dir=cir/list&document=index&lang=e#list>.

<sup>24</sup> Compas, *Public Consultations*.

<sup>25</sup> *Ibid.*, 16.

<sup>26</sup> *Ibid.*



During the early days of Canada's foray into free trade, including the Auto Pact and the Free Trade Agreement, the government implemented public consultation mechanisms alongside trade negotiations. From town hall meetings to commissions, successive governments experimented with different forms of consultation, each of which sought to solicit public opinion on the agreement under consideration. While the variety has been scaled back, a pattern of public involvement continues until today. This past year, for instance, citizens wishing to consult on CETA could participate via online submissions to the Department of Foreign Affairs and Trade and testimony before the Standing Committee on International Trade.

So positive were these efforts that the Standing Committee singled out the Canadian government's trade consultations, describing their mechanisms as "inclusive" and open to a range of opinions.<sup>27</sup> Others, however, call the consultations disingenuous. At the core of this rebuke is the perception that governments only consult with groups that already support their policies. MP Don Davies, Official Opposition Critic for International Trade and the Vice Chair of the Standing Committee, explains:

We did a committee study on CETA a couple of years ago while CETA was being negotiated. On the outside it looks like the parliamentary trade committee is bringing forth a variety of voices [but] the government called exclusively supportive witnesses. ... They call the same witnesses all the time who are ideologically in favour and support their position.<sup>28</sup>

Michael Hart, formerly a negotiator for the Department of Foreign Affairs and Trade, sees logic in the partisanship of consultations: the government is seeking to "elicit information from the people they really want to reach."<sup>29</sup> These people include the Canadian Council of Chief Executives, the Canadian Chamber of Commerce, and other representatives of transnational commerce, who, Hart posits, can aid negotiators in their efforts.<sup>30</sup>

There is nothing presumptively questionable about consulting corporate actors; in fact, failing to consult them would be an important omission. What is at issue here is a perception of governmental bias in the treatment of stakeholders. Testifying before the Standing Committee, Jacques Pomerleau, the president of Canada Pork International, was glowing about CETA consultations: "We really appreciate having been consulted since the very beginning of the negotiations and being kept [apprised] of all the latest developments pertaining to our products."<sup>31</sup> Throughout the negotiation of CETA, many formal and informal sessions were held between corporate actors and the government in which they discussed how best to proceed.<sup>32</sup>

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<sup>27</sup> *CETA report*, 2.

<sup>28</sup> Davies, in discussion with Greig.

<sup>29</sup> Michael Hart (Simon Reisman chair in trade policy at the Norman Paterson School of International Affairs at Carleton University in Ottawa, former official in Canada's Department of Foreign Affairs and International Trade), in discussion with Delaney Greig, November 13, 2013.

<sup>30</sup> *Ibid.*

<sup>31</sup> House of Commons, Standing Committee on International Trade, 41st Parl., 1st Sess., No. 13 (November 22, 2011), 1240 (Ron Cannan).

<sup>32</sup> Davies, in discussion with Greig.

Stuart Trew of the Council of Canadians, an NGO involved in the trade debate, describes a different experience.<sup>33</sup> After some rounds of the CETA negotiations, the Department began consulting with non-business NGOs. During one of these sessions, Trew remarked that the officials were neither taking notes nor logging minutes. When pressed on the matter, officials admitted that the participants' queries and comments would not be forwarded to the negotiators or to the PMO, leading Trew to conclude that rather than being consulted, they were being "briefed." Such a stratified approach toward stakeholders does little to quell scepticism.

Next, the charge of disingenuousness also applies to the consultations' timing: excluding the above-referenced briefings, the government only carries out public consultations once the agreement has been finalized. We return to Davies: "Why would we be asking people what they think now that the agreement has been reached [and] there is pretty much no ability to influence anything at this point?"<sup>34</sup> His concern is warranted, particularly in light of a statement by Canadian Prime Minister Stephen Harper who, shortly after CETA was signed, declared: "The agreement as it now stands is not going to change."<sup>35</sup>

Insincerity is also observable in the materials upon which consultations are based: more and more, consultations are carried out with less and less information. By convention, the texts of agreements are usually final once made public. This catch-22 allows cynical government actors to justify keeping the public in the dark and prevents those actors who would like to share the text from doing so. Accordingly, it has become common to hold consultations without the agreement in hand, forcing participants to rely only on select information voluntarily disclosed by the negotiators.<sup>36</sup> Also worthy of mention is the government's refusal to engage in any form of post-consultation reporting, leaving participants to guess what was taken on board and what was disregarded.

Davies's and Trew's observations suggest that the government lacks faith in the public's ability to contribute. This attitude has been documented in other countries, such as France, where government officials rarely seek informed input from citizens on issues that are considered "technical."<sup>37</sup> Before accepting this as the only explanation for an impoverished trade consultation process, however, we evaluate other potential arguments.

### 2.3 Challenges to Consulting the Public on Trade

Three main arguments are advanced in support of the current model of trade consultations: constitutional, procedural, and technical. To the first, the issue is one of

<sup>33</sup> Trew, in discussion with Lillian Boctor, November 5, 2013.

<sup>34</sup> Davies, in discussion with Greig.

<sup>35</sup> Paul Waldie, "Canada-EU unveil 'historic' free-trade agreement," *The Globe and Mail* (Toronto), 18 October 2013, <http://www.theglobeandmail.com/news/politics/eu-harper/article14924915/>.

<sup>36</sup> Mike Blanchfield and Julian Beltrame, "CETA to give European Exporters Bigger Duty Savings than Canadians," *The Globe and Mail* (Toronto), October 29, 2013, <http://www.theglobeandmail.com/news/politics/ceta-to-give-european-exporters-bigger-duty-savings-than-canadians/article15147441/>.

<sup>37</sup> See John S. Dryzek and Aviezer Tucker, "Deliberative Innovation to Different Effect: Consensus Conferences in Denmark, France, and the United States," *Public Administration Review* 68, no. 5 (2008): 868.



the separation of powers doctrine. By a complex admixture of the Constitution, British statutes, the common law, and historical convention, treaty making in Canada falls within the competencies of the executive branch. Historically a form of diplomacy, the prerogative naturally sat within the ambit of heads of state. With few exceptions, the executive alone negotiates and signs agreements that are binding under international law, including the regulation of international trade and commerce. Parliament need not be involved until the end of the process, when they may be required to vote on the agreement's implementation. Why would the public participate in trade consultations when representatives are denied authority?

The second criticism is an extension of the first: the combined characters of the executive prerogative and the trade narrative produces a climate of secrecy across the entire process that, according to participants, negates much of the value of consultative efforts. In Canada, a parochial view of trade dominates: trade's role is to stimulate economic growth.<sup>38</sup> It is a means–end relationship. Through this lens, secrecy is the preferred strategy, for it aids the swift negotiation and settlement of agreements in two ways. First, parties are more likely to be forthright if not under the looking glass. Second, disclosing trade positions would compromise negotiating power. Negotiating parties see themselves as competitors, vying for the best deal. In a zero-sum game, public consultations simply get in the way.

Finally, the poor quality of trade consultations is also a product of the discipline. As observed by Irvin and Stansbury, trade is a lousy field in which to involve laypeople: it is complicated, interests are diverse and diffuse, and there is little popular motivation to oversee trade agreements.<sup>39</sup> Robert Wolfe, a former negotiator with the Department of Foreign Affairs and International Trade, points to the technicality of the issues under consideration as a disincentive for mass-participation: “[In] relatively technical issues such as trade, having a large, open, public consultation where everyone can come in doesn't actually prove to be useful.”<sup>40</sup>

## **2.4 Anachronism in the Trade Consultation Debate**

The validity of these arguments is undeniable. Both constitutional law and global political economy are powerful considerations. There are implications to their alteration, none of which should be taken lightly. There is also, however, an anachronistic quality to them.

First, the treaty-making prerogative traces its roots back to the establishment of the Canadian Confederation, a temporality used to buttress its supposed inviolability. Yet, over the years, aspects of Canada's constitution have been revisited, formally and otherwise, to account for new circumstances. Consultative mechanisms are an excellent example for there is no constitutional requirement to

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<sup>38</sup> “But the point I was making at the outset, it starts with Canadian productivity, Canadian jobs, the growth of the Canadian economy, what would promote those things?” Robert Wolfe (Professor of Political Studies at Queen's University, Canada), in discussion with Lillian Boctor, 6 February 2014.

<sup>39</sup> Irvin and Stansbury, “Citizen Participation,” 62. More on this in Part 4, below.

<sup>40</sup> Wolfe, in discussion with Boctor.

consult the public at all. These mechanisms have developed to account for increases in the scope and scale of government and are seen as potentially effective measures in reinvigorating public confidence in government and public participation in political processes. Consultations are informed not by legal duty but by political wisdom: concerns about good governance and democratic legitimacy. In short, the constitutionality of the executive prerogative is more red herring than compelling rebuttal.

The second and third arguments are weightier. The pre-Uruguay rounds of the General Agreement on Tariffs and Trade (GATT) were indeed technical arrangements, denoted by sub rosa dealings on tariffs and dumping. Through a technical lens, Wolfe's doubt about the value of public consultations is persuasive:

And about three weeks after the riots in Seattle, there was a poll asking if you had ever heard of the World Trade Organization. Less than half of Canadians had ever heard of it. It's not that they didn't know anything about it, it's they hadn't heard of it. The one time in the WTO's life that it was at the top of every newscast because of these riots ... it's just delusional to think that Canadians would like to be consulted about the intricacies of what the tariff levels should be on dairy products.<sup>41</sup>

Hart concurs, though through a less politically correct frame. To him, public consultations double as a safety valve for the "kooks" and a promotional tool for the government.<sup>42</sup> Since "you can always count on 'kooks' being against [a trade agreement]," the government needs to ensure that they always have a "chorus of supporters."<sup>43</sup> According to Hart, consultations can shore up public support for controversial trade agreements by highlighting sympathetic voices. While the two former colleagues disagree on the precise purpose of consultations, we note that Hart and Wolfe share a common reticence.

While valid, their respective arguments are dated. Since the Uruguay round, trade agreements have become more expansive, developed into instruments for the harmonization of global regulation and, seemingly, global culture. Called "comprehensive," the new generation of trade agreements includes chapters on a wide cross-section of everyday living, ranging from labour rights to food safety standards to access to medicines, topics that reach far beyond tariffs and subsidies. Common to these agreements is the identification of preferred regulatory standards and the imposition of restrictions to this effect upon member states. They also create both a technical and an ideological architecture conducive to neoliberal trappings such as the privatization of public services. Finally, they codify varied forms of investor privilege. Each of these elements provides added gravitas to the authority of private actors—often foreign—over that of elected officials, gravitas that manifests as legislative influence. While the aim appears to be the facilitation

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<sup>41</sup> Wolfe, in discussion with Boctor.

<sup>42</sup> Hart, in discussion with Greig.

<sup>43</sup> Ibid. Compare Hart's rationale with Sherry Arnstein's description of the lowest form of citizen participation—manipulation: "Instead of genuine citizen participation, the bottom rung of the ladder signifies the distortion of participation into a public relations vehicle by powerholders." Sherry Arnstein, "A Ladder of Citizen Participation," *Journal of the American Institute of Planners* 35, no. 4 (1969): 216.

of the cross-border movement of goods, services, and capital, consent to supra-national standards impinges on aspects of a state's governing authority.

A form of substitute legislation,<sup>44</sup> comprehensive agreements are heavier on ideology—neoliberalism and corporate-centrism—than on terms of trade.<sup>45</sup> Proponents of neoliberalism presume the supremacy of proprietary rights over goods, services, and social relations, all of which should be freely exchangeable through legal contract. These same individuals are often also motivated by corporate-centrism: the belief that legal structures should be adapted to support the activities of corporations. Since sending commodities across borders requires adjustments to account for legal and cultural differences, national legal standards produce supplementary costs for transnational business. As harmonizing instruments, comprehensive trade agreements neutralize these costs, treating national standards as obstacles rather than expressions of sovereign preference.

For instance, some of the more familiar culprits—CETA and the Trans Pacific Partnership Agreement (TPPA)—are expected to impact key aspects of Canadian society including how health, education, labour, culture, and municipalities are regulated, yet none are brought before either Parliament or the public. In fact, much effort has gone toward preventing disclosure of the terms of the agreements and, in the case of ACTA and CETA, opposition persisted even after the terms had been finalized. As trade evolves to engulf wider aspects of Canadian society, the contentions that topics are too technical for oversight and that dissent is too emotive to warrant a response acquire an anti-democratic character.

We observe in Wolfe's and Hart's remarks an implicit denial of trade's evolution beyond the tariff levels of dairy products. Investor-state dispute settlement (ISDS) mechanisms provide another salient example. Common to comprehensive agreements are ISDS provisions that permit corporations to pursue compensation for lost profits engendered by existing laws.<sup>46</sup> Claims are brought before an extra-judicial arbitration panel operating outside domestic judicial systems. So extensive is the authority granted to these panels that billions in damages have already been awarded to claimants. Claims also have a chilling effect on regulatory development, as governments seek to avoid liability by altering the controversial laws. Whether a nineteenth century executive prerogative established to support international diplomacy grants the PMO unchecked

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<sup>44</sup> See Joanna Harrington, "Redressing the Democratic Deficit in Treaty Law Making: (Re-) Establishing a Role for Parliament," *McGill Law Journal* 50 (2005): 465.

<sup>45</sup> Davies, in discussion with Greig, provides an elucidative view as to the drive underpinning trade negotiations: "What I've observed is their trade policy is driven first and foremost from an ideological vantage point, not from an evidentiary-based one or from a consultative process. ... This government makes trade policy by deciding that, number one, trade is a key political issue ... then they determine that the way that they want to spin that policy is by signing trade agreements, as many as they can. So they tend to measure the political value by the volume of trade agreements that they can conclude."

<sup>46</sup> ISDS provisions first entered the Canadian structure via an early Foreign Investment Promotion and Protection Agreement, though they came to the public eye—and to public notoriety—with NAFTA, mostly because the expanded provision heightened Canadian economic vulnerability (US ownership of its economy was widespread, increasing the likelihood of challenges). As a result, the first ISDS claims against Canada were made under NAFTA. ISDS provisions were also included in CETA and are under consideration in the TPPA.

powers—including authority to develop a parallel system of dispute resolution without public assent—is debatable.<sup>47</sup>

We further note that public support for ISDS provisions is mixed. The European Commission carried out consultations regarding the inclusion of ISDS provisions in the Transatlantic Trade and Investment Partnership (TTIP), a comprehensive free trade agreement between the European Union and the United States.<sup>48</sup> The site was flooded with submissions leading to a network-wide crash. According to the report, the commission received nearly 150,000 submissions and was forced to extend the consultation period to account for continued interest.<sup>49</sup> Not unlike the testimonials cited in the Privy Council report, the European public seems eager for involvement in trade deliberations, and citizens are not deterred by the technicality of these topics.<sup>50</sup> We can only speculate that Canadians would react similarly. We can conclude, however, that technicism only provides debatable support for a preservation of the status quo in consultations.

Over the past three decades, we have witnessed a modernization of trade agreements to account for the globalization of economic activity. They now operate not as mechanisms for the harmonization of tariff levels but for the harmonization of regulatory standards—some might even say of societies. Yet, the rationales

<sup>47</sup> ISDS provisions were developed in the 1960s in response to the economic imbalances between First and Third World economies. First World states argued that foreign direct investment would flow more freely into the Third World if investors could rely on third party ex-situ dispute resolution mechanisms. Their application between advanced economies emerged during the neoliberal era as investors successfully lobbied governments to accept a form of private justice and elevated state liability toward private actors. See Howard Mann, “How Money Calls the Shots in CETA,” *iPolitics*, December 13, 2013, <http://www.ipolitics.ca/2013/12/13/how-money-calls-the-shots-in-ceta/>; Antonius Rickson Hippolyte, “Third World Perspectives on International Economic Governance: A Theoretical Elucidation of the ‘Regime Bias’ Model in Investor-State Arbitration and its Negative Impact on the Economies of Third World States,” (10 June 2012), <http://ssrn.com/abstract=2080958>.

<sup>48</sup> EU consultations are reputed for being more involved. In preparing their Sustainability Impact Assessments (SIAs) for new agreements, they include meetings with civil society groups. This is commendable but inadequate: we observe from the minutes similar shortcomings to the Canadian process, including over-representation of industry associations. As the minutes and the SIAs are publically available, the public can examine the value awarded to civil society-based interventions. European Commission, “Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP),” [http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=179](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179).

<sup>49</sup> Many submissions conveyed broad concerns about the democratic implications of the TTIP, prompting the commission to dismiss them for going beyond the scope of the consultation. Of those that were on point, concerns can be grouped into four research topics: protecting the right to regulate; exploring the functioning of arbitral tribunals; evaluating the relationship between domestic judicial systems and ISDS; and an appellate mechanism for ISDS. The commission has committed to consulting EU stakeholders on these topics with a view to elaborating an enhanced approach toward ISDS. The report is available online: EC, *Commission Staff Working Document: Report on online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)* (2015), [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153044.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf).

<sup>50</sup> The record number of responses was recorded despite several important flaws in the consultative tool, flaws that curbed its accessibility. First, while available in all official languages, the questions alone spanned twenty-three pages and involved a high number of sophisticated queries. Second, the document was littered with “elite knowledge,” requiring participants to possess advanced understanding of trade law, economics, and international relations to meaningfully answer the questions posed. Third, at no point did the commission provide any details regarding its intentions for the data gathered, simply declaring that it was “consulting the public.” Despite the myriad shortcomings, the commission is still (presumably) sifting through a record number of submissions.

for rejecting improvements to trade consultations are trapped in a bygone era, appearing anachronistic, unconvincing, and undemocratic. Wolfe counters that “[y]ou can’t have 33 million Canadians participating in [trade] negotiations.” Straw man aside, Wolfe’s riposte raises an important question: Is it possible to meaningfully involve Canadians in trade deliberations?

## 2.5 The Place of Public Participation in Trade Consultations

The issue is less of possibility than of responsibility. As per the Privy Council report, the public desires greater involvement in governmental decision making. International trade, with its modern catchall character, is a prime target for public enthusiasm (and opprobrium). The obvious argument in support of meaningful public engagement in trade deliberations has been inferred throughout the article and made elsewhere: democracy would accept nothing less.<sup>51</sup> Few are eager to slow trade negotiations but the nature of democratic governance compels some level of public accountability.

Next, an efficiency argument also supports the proposition. ACTA only came to light following a series of revelations from Wikileaks. These alerted—and alarmed—Internet users about the possible criminalization of many widespread activities, prompting mass civil disobedience. Despite years of negotiations and widespread agreement among the executives of signatory states, the European Parliament ultimately voted against it, nullifying the effort that had gone into its production. A lack of understanding about public sentiment toward trade regulatory issues can have dire consequences.

The same was nearly true of CETA: in July 2014, the German government recorded its opposition to the Canada-EU agreement, placing CETA’s future in peril.<sup>52</sup> It was the German public’s animosity toward ISDS provisions, expressed via a large public mobilization campaign, that prompted Germany’s intervention. Eventually, in November 2014, Germany dropped its official objection, indicating that Germany was not prepared to be the only EU member opting out of the agreement.<sup>53</sup> This close call holds an important lesson for all governments: scuppering public participation may seem expedient but ultimately proves costly.<sup>54</sup>

Comprehensive trade agreements presuppose a connection between all forms of economic activity, precipitating a holistic approach toward their regulation. We concur with this claim but take it a step further. Adopting a comprehensive

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<sup>51</sup> See Mohsen al Attar and Enrique Boone Barrera, “Trade Negotiation and the Constitution of Tiered Citizenship,” *McGill Law Journal* 61 (forthcoming).

<sup>52</sup> See “Canada-EU Free Trade Deal to be Rejected by Germany, Says Report,” *CBC News*, 26 July 2014, <http://www.cbc.ca/news/world/canada-eu-free-trade-deal-to-be-rejected-by-germany-says-report-1.2718981>.

<sup>53</sup> See Barrie McKenna, “Germany Won’t Block Canada-Europe Trade Deal Despite Investor-State Clause,” *The Globe and Mail* (Toronto), 29 November 2014, <http://www.theglobeandmail.com/report-on-business/germany-wont-block-ceta-despite-investor-state-clause/article21835893/>.

<sup>54</sup> MP Peter Julian argues that the lack of consultation in trade lawmaking has also resulted in poor domestic trade policy: “We have a record for trade deficit and it’s in large part due to the fact that trade policy is not done in any sort of thoughtful or comprehensive or profound way. ... [T]he reason why our trade policy is so weak is because there isn’t really any sense of, of checks and balances, perhaps parliamentary input, committee input, it’s really all done from the top on down.” Peter Julian (Member of Parliament), in discussion with Lillian Boctor, 20 December 2013.

outlook requires the location of trade agreements within a nation's wider economic policy. For instance, pharmaceutical patents, a key issue in CETA, can hardly be decided without considering demographics, access, and even long-term citizen wellbeing. By extending the reach of trade agreements beyond tariffs and subsidies, comprehensive agreements provoke important political questions about national priorities, most of which cannot be resolved with a calculator. As agreements have evolved, there is a commensurate need to update the government's consultative efforts. Instead of a 33,000,000-person negotiating table, we propose a restructuring of public consultations.

### 3. Design and Goals of Renewed Consultations

Consultations are successful when they pursue diversity, education, commitment, accountability, and transparency, attitudes best expressed as actions: participants must respect diversity, teach and learn, commit, be accountable and hold others to account, and share.<sup>55</sup> Consultations are indeed a microcosm of democracy, representing both a symptom of and a remedy for democratic deficiencies. In the following section, we outline some of the better practices in consultative mechanisms, several of which have already been implemented in other fields of Canadian governance.

#### 3.1 Diversity

Successful consultations seek out different opinions through varied forums.<sup>56</sup> If the federal government is acting on an issue, then both the scope of the problem and its solution must, logically, be national. It thus behoves the government to speak with Canadians likely to criticize or disagree with their views.

Trew, Davies, and MP Peter Julian have observed that Canada's CETA negotiators were only eager to hear from their industry supporters: "[C]onsultation is a misnomer. ... [T]he idea of consultation is really designed to have some sectors that are politically going to support the agreement, or the agenda. And as far as any meaningful public involvement there is none."<sup>57</sup> Davies puts it more baldly: "Those same [business] groups are consulted on an ongoing basis and are given information, but nobody else. ... [B]asically the entire process is driven ideologically and conducted in secrecy with very limited select input from certain limited stakeholders."<sup>58</sup> In recent years, the government has not so much consulted on trade as permitted itself to be selectively lobbied.

In some areas of policy development, the federal government has done admirable work listening to diverse groups. In the mid-1990s, the National Forum on Health, a special advisory committee established and chaired by the prime minister,

<sup>55</sup> We were inspired by Miriam Wyman, David Shulman, and Laurie Ham, "Learning to Engage: Experiences with Civic Engagement in Canada," <http://www.cprn.org/doc.cfm?doc=86&l=en>; Rowe and Frewer, "Public Participation Methods"; Compas, *Public Consultations*; Arnstein, "Ladder"; John M. Bryson et al., "Designing Public Participation Processes" *Public Administration Review* 73, no. 1 (2012): 23.

<sup>56</sup> Rural and Northern residents are especially vulnerable to exclusion from policy-making circles: see Compas, *Public Consultations*, 13; Bryson et al., "Designing."

<sup>57</sup> Julian, in discussion with Boctor.

<sup>58</sup> Davies, in discussion with Greig.



consulted with over 1,300 Canadians. While this is far from the largest number of citizens consulted by one program, this public consultation exercise is notable for its commitment to diversity:

Between November 1995 and April 1996, study circles (also called discussion groups) were held in thirty-four different communities. The Forum made a sincere commitment to capturing the diversity of Canada's size, demographics, economic activities and ethnicity. The consultation also attempted to engage a variety of communities often not included, such as homeless people, street kids, new Canadians, low-income mothers, senior citizens and First Nations.<sup>59</sup>

Each study circle was organized around a consultation booklet that both informed participants about Canada's health care system and structured their conversations, a design element of consultations about which we will speak further in the coming section on education. The input gathered from these meetings was verified by calling back many of the circle participants as well as 500 randomly selected Canadians<sup>60</sup>; this design choice ensured that the perspectives expressed were genuinely representative of the public.

Diversity can also be fostered in the methods and modes of consultation. As mentioned in our introduction, the 2002 Romanow Commission offered many ways for getting Canadians involved; these avenues for participation also varied in the level of commitment necessary to participate, ranging from a full day of deliberative workshops to a brief online survey.<sup>61</sup> Offering diverse avenues for participation ensured that the commission gathered broad opinions.

### 3.2 Education

Seeking out diverse opinions is a valuable strategy because of the reciprocal educative value. While the government learns from well-structured and well-documented public debate, acquiring a more nuanced understanding of their constituents' views, so too do consultations edify the public in return.<sup>62</sup>

In the mid-1990s, following a series of controversial news articles criticizing immigration policy, public approval of immigration policy—and even of immigrants—dipped dangerously low. This prompted the federal minister of Citizenship and Immigration to instigate a public dialogue aimed at educating Canadians about its immigration strategy. Once consultations began, however, the government learned that they had poorly framed the topic:

[P]articipants suggested situating the discussions within a broader debate that centred on population issues. If the immigration consultation had been framed in terms of population rather than immigration, the consultations would have embraced rural communities that were losing population rather than only urban centres where the majority of new Canadians choose to settle.<sup>63</sup>

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<sup>59</sup> Wyman et al., "Learning to Engage," 20.

<sup>60</sup> *Ibid.*, 22.

<sup>61</sup> CPRN, *Trends*, 14–15.

<sup>62</sup> Wyman et al., "Learning to Engage," 27.

<sup>63</sup> *Ibid.*, 29.

Success was possible because the government learned of an unexpected perspective. According to Wyman and colleagues, the deliberative discussions caused immigration officials to shift their focus from the economic impact of immigration to Immigration Canada's accountability to the public—an outcome that was not evident from earlier, non-educational polls.<sup>64</sup>

We have discussed at length the government's disinterest in learning from citizens during CETA negotiations, where reciprocity is not a priority. Beyond this, however, is another important criticism of trade consultations: the lack of information available to stakeholders. More than just a general denunciation of secrecy in negotiations, what is at issue is the active dissuasion of citizens' engagement with trade. Government officials encourage the public to believe that trade deliberations are beyond their understanding. The consequences are significant: today, "people expect that these deals are good for them and they just assume that ... there's going to be jobs and prosperity at the end of the line."<sup>65</sup> This belief is perpetuated by a lack of trade education.

Contrast this mindset with the attitude common to the early days of free trade agreements, when the public and the media sought debate on trade. One salient example is the Multilateral Agreement on Investment, which collapsed in 1995 when the Canadian public, informed and encouraged by the media, voiced distrust of negotiators and a lack of support for the agreement as a whole. To combat a feeling of inevitability to the negotiations, the Council of Canadians "initiated a cross-country MAI inquiry, A Citizen's Search for Alternatives."<sup>66</sup> The consultations contributed to the disruption of the negotiations, achieved this time not through civil disobedience but by educating participants. Presenting the public with information about the agreement and a forum in which to discuss it empowered participants to implicate themselves further.

Much literature extolls the power of deliberation in enhancing the democratic legitimacy of policy choices.<sup>67</sup> Even literature on traditional consultative mechanisms endorses a reciprocal structure, encouraging processes that facilitate genuine interchanges between citizens and government; information sharing ultimately produces better policy feedback.<sup>68</sup>

### 3.3 *Commitment*

Both government and citizens must commit to consultations. From the government's perspective, an excellent example is in the structure of the *OEBR*

<sup>64</sup> Ibid., 16, 28. Immigration policy was revised again in 1998 and in 2002, but the exact policy outcomes of consultations were difficult to determine.

<sup>65</sup> Trew, in discussion with Boctor.

<sup>66</sup> Wyman et al., "Learning to Engage," 51. Note that British Columbia also conducted legislative committee meetings on the MAI in 1998 and 1999 in which they heard from citizens: See British Columbia, Legislative Assembly, Special Committee on Multilateral Agreement on Investment, Second Report (June 1999) (Chair: Joan Smallwood), <https://www.leg.bc.ca/cmt/36thParl/mai/1999/2report/index.htm>.

<sup>67</sup> See e.g. *ibid.*, 27–29; Dryzek and Tucker, "Deliberative Innovation"; Bryson et al., "Designing."

<sup>68</sup> "Apart from the recurring theme of better, more respectful consultation, another recurring theme was better education." Compas, *Public Consultations*, 16.

(*Ontario Environmental Bill of Rights*).<sup>69</sup> The *OEBR* was born of decades of citizen demands for access, transparency, and participation in decision making on environmental issues.<sup>70</sup> The Ontario government responded by legislating permanent avenues of participation in environmental policy. Enshrining participatory rights marks an important pledge from the government: citizens now enjoy stable pathways via which policy can be scrutinized and officials held to account.

For participatory rights for the citizenry to function effectively, their implementation must be followed by citizen participation. Consultative mechanisms are reciprocal, with participation representing the *quid pro quo* of participatory rights. For example, built on the assumption that citizens are better placed and more motivated to direct government environmental policy, the *OEBR* requires citizen involvement, without which the oversight mechanisms flounder. The Romanow Commission provides another example, listing mutual commitment to the results of the consultations—the preservation of Medicare—as its first recommendation. The commissioner determined that both the government and the public needed to renew their commitment to accessible public health care in order for the subsequent recommendations to work. The commission proposed a Health Covenant to formalize this pledge.<sup>71</sup>

### 3.4 Accountability

Accountability is defined by a commitment to follow up. Likewise, ensuring government accountability requires commitment from citizens. Current trade consultation practices are particularly deficient in this regard. Not only is the government not taking notes during civil society interventions, but it can go back on promises and is never required to explain its actions: “The only people they explain themselves to [are] the business sector. ... [T]hat’s the only accountability that exists.”<sup>72</sup> Even this relationship does not seem sacrosanct; Davies and Trew recount that Canada’s dairy farmers and municipalities experienced losses under CETA that the government had insinuated would not occur.<sup>73</sup>

Moreover, even celebrated consultations have lacked accountability. The Romanow Commission that we applaud throughout this article consulted with thousands of Canadians through varied forums; the government dedicated millions to the consultations and the commission’s findings are readily available to the public.<sup>74</sup> Yet the government failed to establish a follow-up protocol. In an ideal consultation, accountability mechanisms—next steps—are set out beforehand.

<sup>69</sup> The *OEBR* even “sets out minimum levels of public participation that must be met before the Government of Ontario makes decisions on certain kinds of environmentally significant proposals.” *OEBR*, s 3(1).

<sup>70</sup> Muldoon et al., *Introduction to Environmental Law*, 211–2.

<sup>71</sup> *Romanow Commission*, 247.

<sup>72</sup> Trew, in discussion with Boctor.

<sup>73</sup> *Ibid.*, (on municipalities); Davies, in discussion with Greig (on dairy farmers).

<sup>74</sup> “[T]he total amount that was set aside for the Romanow Commission was approximately \$15 million.” House of Commons Debates, 37th Parl., 2nd Sess., No. 101 (13 May 2003), 2050 (Hon. Anne McLellan).

We note, however, that Irvin and Stansbury counsel against tying all consultations to a promise of implementing participant suggestions, for consultations vary in character and aim. For example, some involve brainstorming, which may only require consideration of or response to the ideas presented. Others are beset with potential liabilities: town halls are at risk of poor or unrepresentative turnout. Despite these concerns, they emphasize that, to build trust, consultations must begin with clear expectations.<sup>75</sup>

### 3.5 Transparency

Transparency is a design feature of the most effective consultations and can be prioritized in several ways. Returning to the Romanow Commission, we observe that the full report is available online, listing all submissions received, including e-mail messages and phone calls, as well as a report of all consultative sessions.<sup>76</sup> Anyone could, for instance, determine whether senior citizens' interest groups were overrepresented or aboriginal groups involved. Interestingly, the report itself recommends greater accountability and transparency in health care spending.<sup>77</sup>

Transparency stands for the ideal of governance by communication and agreement rather than by command. Roderick Macdonald captures this ideal when comparing modern administrative governance to a call centre:

[T]he call centre is a good allegory because it reminds us that the purpose of governing institutions is to govern, but that governance cannot be simply a matter of command, *fiat, ukase, diktat*. Accountable public governance is, at bottom, about communication—not just any kind of communication, but interactive, two-way communication. Neither public governance nor law is a one-way projection of power.<sup>78</sup>

Democratic governance requires sharing power, information, and respect. Consultations further those habits—even virtues—of good governance, and, when done well, they also embody those virtues.

## 4. Recommendations, and Some Caveats

The exemplary consultations we single out in this article were carried out on a large scale, often conceived as ends in themselves: a means to inform the public while rebuilding trust in government. The immigration consultations of the early 1990s are a great example, conceived specifically to combat a public relations problem. Resulting changes in policy were almost a secondary benefit. Of course, consultations on this scale can be costly in time and funds and we do not suggest that the government consult Canadians every time it wishes to make a trade decision.

Our suggestions are practical and viable. First, when the government negotiates, it should involve stakeholders in a way that gives thought to the values enumerated

<sup>75</sup> Irvin and Stansbury, "Citizen Participation," 58–60.

<sup>76</sup> *Romanow Commission*, 259–70, 271–99.

<sup>77</sup> *Ibid.*, xix, 311–3.

<sup>78</sup> Roderick A. Macdonald, "Call-Centre Government: For the Rule of Law, Press #," *University of Toronto Law Journal* 55 (2005): 459–60.

above. Second, the government should periodically conduct large-scale consultations both to learn about Canadians' evolving priorities with regard to trade policy and to inform Canadians about how future treaties may affect them.<sup>79</sup>

With regard to our first recommendation, the five values detailed in Part 3 set minimum standards that enhance the effectiveness and legitimacy of consultations. Even if the government chooses to consult with only ten people, let that group be diverse and include dissenting voices; let the discussion offer true exchange of information; let the government set clear guidelines for how they will follow up on what is said; let them in fact follow up adequately; and let the meetings be recorded and open for public scrutiny.<sup>80</sup> While publicizing aspects of the negotiations may hinder their effectiveness, the government must commit to following up on consultations to preserve the integrity of the consultative process. This is good practice at all times and essential where the government is forced into a concession that affects a topic touched upon during a consultation.

With regard to our second recommendation, we recognize that consultations on trade policy are difficult but posit nevertheless that they are necessary. Beginning from the negative, we reiterate our earlier point: trade is a difficult candidate for public consultations. Consultations are easiest when there is already public interest in and knowledge about an issue. Equally important, local issues are preferable to national ones because (1) there is a delimited and socio-economically diverse interest group, and (2) the costs of participation are low.<sup>81</sup> These features ensure good value for money.

The environmental activist groups that first routinized public consultation in federal lawmaking are an ideal example of a "low-cost, high-benefit group," for they coalesce around deeply local issues that require a response from the federal (rather than local) government. Because environmental issues often involve a geographical area, they bring together diverse actors around a common cause. The citizens involved are motivated and proactive, and the cost of attending meetings is low.<sup>82</sup>

Trade has none of these characteristics of ease: it is national, complicated, and little understood. While treaties affect all Canadians, their impact can be hard to gauge and harder to critique. The issue of cost to participants is well taken. It is one thing to extol the virtues of full-day deliberative polling sessions on trade, and quite another to confront the realities of the voices crucial to a successful broad-based consultation: First Nations on distant reserves, rural residents in remote cantons, and part-time workers with unpredictable schedules.

We prefer, however, to regard these features of Canadian society as challenges to confront rather than obstacles to yield to. Large-scale consultations are necessary because, as Nancy Fraser explains, representation has become a

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<sup>79</sup> Rowe and Frewer argue that it is easier to involve the public when values, rather than knowledge, are at stake: "Public Participation," 6.

<sup>80</sup> Arnstein's ladder is informative though not absolute: we do not expect every participatory exercise to fall on the highest rung. The large-scale trade policy consultations that are our second recommendation should aim for one of the top three rungs, where genuine citizen power can be found.

<sup>81</sup> Irvin and Stansbury, "Citizen Participation," 62.

<sup>82</sup> The Sydney Tar Ponds Joint Action Group, for example: Wyman et al., "Learning to Engage," 32–37.

key justice issue of the twenty-first century.<sup>83</sup> Fraser observes that justice claims are increasingly being made over the legal and political boundaries that separate those who have a right to comment—who has legal standing, who is a citizen, etc.—from those who do not.<sup>84</sup> Boundary conflicts are critical sites of justice claims, for the social stratification they engender infringes upon parity of participation: “justice requires social arrangements that permit all to participate as peers in social life.”<sup>85</sup> When these boundaries are poorly drawn—here, manipulated—people affected by a decision can be left out of the process. She calls this kind of injustice “misrepresentation,” for it denies people the possibility of “participating on a par with others, as full partners in social interaction.”<sup>86</sup>

In seeking to explicate the injustice inherent in misrepresentation, Fraser poses two exemplary questions, both of which resonate with this article: “[D]o the boundaries of the political community wrongly exclude some who are actually entitled to representation? Do the community’s decision rules accord equal voice in public deliberations and fair representation in public decision-making to all members?”

The Canadian public is formally represented in trade negotiations—we elect the prime minister as well as members of the cabinet, after all. But the exclusion of parliamentarians, followed by the exclusion (often patronization) of the public, adumbrates artificial political boundaries that deny Canadians the possibility of influencing trade policy.

To be precise, we do not regard popular exclusion from trade deliberations as presumptively unjust. Our analysis turns on whether the public is “wrongly” excluded and, if so, whether public deliberations provide for “fair-representation.” Returning to the first half of our article, the answers to these questions are self-evident. The (over-)inclusion of corporate actors and the exclusion of the public creates a *disparity* of participation in trade deliberations. It would be difficult to contend that this amounts to a *rightful* exclusion, for its basis is arbitrary and preserved despite evidence that the original rationales no longer hold. Equally untenable is the suggestion that this arrangement could produce fairness in representation. Without accountability, transparency, or disclosure, without the participation of parliamentarians, the outcomes are impossible to verify according to independent standards, requiring an application of the executive’s self-generated and self-applied benchmarks.

According to Fraser, in instances of misrepresentation, justice requires the “dismantling [of] institutionalized obstacles” that interfere with parity of participation. The obstacles to meaningful participation in trade deliberations are real, both substantively and procedurally. Tolerance of these obstacles harms democracy and justice, arguably two primary social ideals. Since these obstacles “arise from the political constitution of society,” countering the injustice they produce requires an adjustment to our political structure.<sup>87</sup> Our arguments in this article are in this vein.

<sup>83</sup> Fraser, “Reframing Justice,” 75.

<sup>84</sup> *Ibid.*, 72.

<sup>85</sup> *Ibid.*, 73.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, 77.



## 5. Conclusion

Political mobilization around CETA, the TTIP, and other comprehensive trade agreements has uncovered the extent to which the “misframing” of the debate has produced high levels of disenfranchisement. The current framing of trade and of consultations in trade means that core aspects of Canadian society have been placed beyond the reach of Parliament and public. In response, we have proposed a restructuring of trade consultations predicated on a reframing of the trade narrative. This reframing begins with a dual admission: of the enhanced nature of trade agreements and of the injustice inherent in the continued exclusion of the public from their articulation. We propose a redesign of trade consultations to facilitate more meaningful public involvement through an application of key democratic values.

Our proposal is hardly a panacea. As we readily admit throughout the article, every stage is fraught with obstacles, none of which are easy to overcome. What we hope is that our representation of the significance of the debate will encourage those who wield power in trade policy making to share it. Our hope may be earnest but it is hardly naïve: surrendering power has never been the purview of the powerful. Nevertheless, we also recognize that the public has a finite tolerance for powerlessness.

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