Opening Remarks on Canada and the Trans-Pacific Partnership (TPP)

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TODAY'S TRADE AND investment treaty negotiations no longer deal exclusively, or even primarily, with trade matters. Increasingly, they are about putting new types of restrictions on how governments and societies are able to regulate themselves democratically.

This is especially true in the case of the Trans-Pacific Partnership (TPP) negotiations with the U.S. and ten other Pacific Rim nations, which Canada joined last year.

It has been consciously styled as a next-generation, 21st century trade and investment agreement that will delve into many behind-the-border regulatory matters.

The TPP agreement is designed to tie governments' hands in many areas only peripherally related to trade, including patent protection for drugs, foreign investor rights, state-owned enterprises, local government purchasing, agricultural orderly marketing, cultural expression and public interest regulation.

Canada already has trade and investment treaties with four other TPP members (U.S., Chile, Peru and Mexico). It is in separate bilateral negotiations with Japan.

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Combined, the other six countries (Australia, New Zealand, Malaysia, Singapore, Brunei, and Vietnam) account for less than one per cent of Canada's exports.[1]

With the exception of the Japanese market, there is limited trade expansion upside, yet there are very significant policy risks for Canada in this negotiation.

The TPP is primarily a U.S.-driven and dominated project. From their perspective, it is a geo-political exercise with a dual purpose: to construct a trade and investment bloc which reflects U.S. commercial interests and regulatory norms, and to counter the growing dominance of China in the Asia-Pacific region.

The U.S. expects the TPP to curb China's influence by providing an advantage to U.S. commercial interests over Chinese competitors within the TPP bloc. Ultimately, the goal is to convince China to join the TPP on terms that compel Chinese reform in areas such as state-owned enterprises and currency manipulation. It is far from clear that the TPP will have the desired results on China, but it will certainly enable the U.S. to apply intense pressure on other TPP members, including Canada, to accede to their ambitious regulatory demands.

Excessive Secrecy

A key problem with the TPP is that despite its potential to have serious implications on governments at all levels and the citizenry, the negotiations are excessively secretive.

There are no opportunities for public scrutiny and debate of negotiating proposals and texts. The 29 draft chapters and other negotiating documents are stamped classified for "four years from entry into force of the TPP agreement or, if no agreement enters into force, four years from the close of the negotiations."

Officials and private sector advisors must sign strict non-disclosure agreements.

This extreme level of secrecy is unacceptable — especially when one considers that the TPP deals with regulatory matters that go to the heart of democratic decision-making in the public interest and any agreement would restrict the policy options of future governments for generations.

There are precedents for greater transparency. The draft text of the Free Trade Area of the Americas was publicly released in 2001 and the WTO regularly publishes negotiating proposals and draft texts.

It is critical that the TPP terms be subject to greater scrutiny by the public, outside experts and legislators before they are agreed to and essentially set in stone by negotiators.

Intellectual Property Rights, "Transparency" Proposals and Drug Costs

The rest of my remarks will focus on two important areas where some information has been leaked from within the negotiations: first, the impact of TPP proposals on drug costs and, secondly, the investment protection chapter and investor-state arbitration.

The U.S. proposal for intellectual property and drugs has been leaked and it incorporates demands from the brand-name drug industry for WTO-plus patent protection, including:

- Longer periods of data exclusivity, locking up clinical data needed to develop and approve generic drugs.
- Stronger patent linkage, allowing brand-name drug companies to delay health regulators' authorizations of generic drugs on the basis that they infringe existing patents.
- And, significantly for Canada, patent term extensions, which would add the time it takes for health regulators' to give regulatory approval to a drug to the term of the patent, up to a maximum of 5 years.

The U.S. has made these proposals for longer periods of patent protection conditional on a so-called "access window". This would give brand-name drug companies access to stronger IP protections only if they sought marketing approval for a drug in another TPP country within a certain (unspecified) period of time after first obtaining marketing approval in an initial TPP country.

But the access window is little more than window-dressing. The proposed changes would invariably reduce the availability of cheaper, generic medicines and drive up costs to governments and consumers.

Currently, Canada does not have a system of patent term extension, although it is widely expected that the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) will include Canadian concessions on patent term extension. Whatever form of patent term extension Canada agrees to in the CETA will become the floor for further negotiations and likely concessions in the TPP. The estimated cost of implementing a full system of patent term extension is up to $2 billion annually, a price that would be borne by provincial drug plans, employer-sponsored insurance plans and individuals.[2]

Containing rising drug costs is essential and these U.S. demands could deal a further blow to the sustainability of Canada's universal health care system.

The U.S. has also proposed new rules that would undermine important drug cost containment policies, including price regulation and reimbursement levels.

A proposed annex to the TPP Transparency chapter, which would deal specifically with pharmaceutical and medical technologies, includes substantive pricing provisions that seek to limit government cost-containment programs through obligations to set reimbursements according to either market-based prices or to the value of a patent.

It also includes procedural rights for drug companies to participate in the decision-making process for reimbursement of prescription drugs and to challenge and appeal reimbursement decisions.

These new substantive hurdles and procedural rights are designed to permit drug companies to frustrate the capability of these programs to curb drug costs. In Canada, there could be implications at the federal level for the Patent Medicines Prices Review Board.

The U.S. proposal is currently worded to apply only to central governments. But any effort to expand its scope to sub-central governments would have serious implications for provincial cost containment measures. It also sets a dangerous precedent that could later be applied at the provincial level.

The potential impact of these transparency proposals, including cost impacts, should be studied fully and debated widely.

Law professor Sean Flynn has argued that, "This is a radical proposal that would move trade agreements completely beyond any pretense to regulate trade and instead directly regulate domestic regulation itself. If such an agreement is desired by countries, it should be negotiated in an open forum where public health experts and advocates are well represented, e.g. the World Health Organization. This is a completely inappropriate subject for closed door trade negotiations."[3]

Investor-State Arbitration

A draft text of the TPP investment chapter was leaked in 2012. It reveals a U.S.-style investment protection agreement, modelled on NAFTA Chapter 11 and U.S. bilateral investment treaties (BITs).

Significantly, the chapter includes an investor-state arbitration mechanism.

Foreign investors have already used Chapter 11 and BITs to challenge a wide range of government measures that allegedly diminish the value of their investments. The UN Conference on Trade and Development reports that in 2012 there were a record number of investor-state claims globally.[4]

Since most government regulations or policies affect property interests, NAFTA's investor-state rules and similar mechanisms in other international investment treaties have been strongly criticized for giving multinational corporations far too much

power, while constraining the fundamental role of democratic governments to safeguard their citizens and the environment.

Investors do not need to seek consent from their home governments and are not obliged to try to resolve a complaint through the domestic court system before launching an investor-state claim.

There has been a steady rise in the number of actions against Canada, particularly in the area of natural resources and environmental protection. We are also witnessing the use of more aggressive arguments, such as in Eli Lilly's investor-state challenge to a Canadian court decision to deny patent protection to one of its drugs.

Agreeing to investor-state arbitration in the TPP will greatly expand the pool of foreign investors who have the right to invoke this severely flawed mechanism. Inevitably, it would increase the number of challenges to Canadian regulatory measures and deepen regulatory chill. It will also result in millions of dollars in legal fees, and, potentially, in damage awards, that must be borne by Canadian taxpayers.

The leaked investment text notes that Australia is refusing to be bound by an investor-state arbitration mechanism. Australia adopted this position in 2011 after a thorough, independent review of the costs and benefits of investor-state arbitration.[5] Such a review is long overdue in Canada and until one is completed Canada would be wise to follow Australia's example in the TPP talks.

There is also a growing problem of incoherence in the various investment protection treaties Canada is agreeing to. For example, in the Canada-EU CETA, Canada is under pressure to agree to stronger investment protection rights in certain areas such as minimum standards of treatment. The NAFTA's most-favoured-nation provisions require that all protections given to the Europeans be extended to investors from the U.S. and Mexico. As a result, these investors will be able to mix and match investor rights from NAFTA Chapter 11 and the CETA to construct the most favourable challenge. This problem of "treaty shopping" will likely worsen under the TPP.

Concluding Remarks

The astonishing range of matters being negotiated in the TPP underlines how far this process has strayed from bread-and-butter trade issues.

- New disciplines on state-owned enterprises, ostensibly aimed at China, could adversely affect the CBC and Canada Post.
- Both the U.S. and NZ are insisting on significant access to Canada's dairy market, threatening the viability of supply management.

- TPP treaty commitments to the free flow of commercial information may undermine domestic privacy policies by exporting data to countries with weaker privacy safeguards.
- The U.S. has never accepted the legitimacy of Canada's cultural exemption in trade treaties, and this will be once again up for grabs.

The list goes on, and may well include new issues and matters that are not yet public knowledge.

The role of Parliament in examining this treaty and how it may affect Canadian interests is critical. There needs to be critical discussion of the full range of potential costs and benefits. But meaningful discussion and debate are hampered by the unprecedented level of secrecy and the difficulty in obtaining proposals and negotiating texts.

Notes

1 Stanford, Jim. (June 19, 2012). "Trans-Pacific Partnership: A Few Questions," *Progressive Economics Forum*, http://www.progressive-economics.ca/2012/06/19/trans-pacific-partnership-a-few-questions/ and United Steelworkers, "Submission to the Government of Canada on the Trans-Pacific Partnership", Feb. 12, 2012. http://www.progressive-economics.ca/wp-content/uploads/2012/02/TPP.pdf.

2 Heather Scoffield, "EU drug demands would cost Canadians up to $2B a year: federal research," Winnipeg Free Press, October 1, 2012, http://www.winnipegfreepress.com/canada/eu-drug-demands-would-cost-canadians-up-to-2b-a-year-federal-research--174100881.html?device=mobile.

3 Sean Flynn, American University: Washington College of Law, "Statement on the U.S. Proposal for Transparency in Medical Technologies and Pharmaceuticals", October 22, 2011.

4 UNCTAD. "Recent Developments in Investor-State Dispute Settlement (ISDS)", May 2013. http://www.unctad.org/diae" www.unctad.org/diae.

5 Australian Government Productivity Commission, "Bilateral and Regional Trade Agreements, November 2010. http://www.pc.gov.au/__data/assets/pdf_file/0010/104203/trade-agreements-report.pdf.

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