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CANADIAN CENTRE
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BC Office

# Presentation to the House of Commons Standing Committee on Trade

## ON THE PROPOSED TRANS-PACIFIC PARTNERSHIP AGREEMENT

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Good afternoon,

Let me begin by thanking the Committee for giving me the opportunity to express my views today on the proposed Trans-Pacific Partnership (TPP) trade agreement. This initiative has important public policy and public health implications which I believe merit extensive examination. Let me also note that I am here as an individual and not as a representative of Simon Fraser University where I teach.

I would like to start by making clear that I am not opposed to trade. We all benefit from trade. My focus is on whether the terms of this proposed agreement constitute a reasonable way to ensure that Canadians—and other parties to the TPP—achieve the benefits of trade in a fair, balanced and equitable manner.

This Committee hearing is challenging because the full draft text of the agreement is not available. While secrecy is normal in trade negotiations, there is a powerful democratic argument that the public has a right to know what is being negotiated on their behalf, given the major public policy and health implications of the TPP and given that once ratified, it is almost impossible to reverse. The limited information accessible to Canadians contrasts with the privileged access given to 600 of the world's largest corporations who have been included as US advisors in the negotiating process.[1]

I believe the Canadian Government should engage in a much wider process of consultation to enable Canadians to make an informed choice about whether they support the TPP. Canada should publish the full draft text of the agreement and provide adequate time for full legislative scrutiny and public debate before it considers ratification.[2] It should follow

the lead of the EU which suspended negotiations with the US on a new trade agreement until completion of extensive public consultations on enhanced investor rights proposals.

Trade agreements are very complex, both in terms of obligations in individual agreements and in terms of their interaction with other agreements. This makes it difficult to know, in advance, how particular provisions will be interpreted by dispute panels. Complexity and inter-linkage also opens the door to costly trade challenges, the prospect of which can 'chill' government initiatives. The increasing number of agreements—nearly 3,000 Bilateral Investment Agreements (BITs), globally, and numerous other Free Trade Agreements—also facilitates venue shopping by those who wish to challenge government policies. Dispute adjudication is handled by a small number of trade law experts who may have little background in health, increasing the risk that their decisions may ignore important population health considerations.[3]

The proposed TPP, like other trade agreements, places restrictions on the policy tools available to governments. These restrictions are meant to minimize any policy or regulatory barriers to trade or investment flows, regardless of the actual intent of these policies. Public regulations to protect health or the environment or to achieve socially beneficial purposes can be challenged if they violate trade treaties.

However, there is a long history of public-health-based regulations that have contributed significantly to improving population health. In light of the well documented benefits of public regulatory capacity, it is essential that nothing in the proposed TPP erode or restrict the ability of future governments to protect public health or require governments to adopt measures that subordinate public health considerations to other policy objectives. Governments must continue to have the policy tools needed to protect and advance population health, including the policy flexibility to address future challenges.

The scope of TPP is very broad, with 29 chapters covering matters such as intellectual property, public procurement, state enterprises, market access, investment and so on. In the time available, I can only comment on a limited number of issues and will focus primarily on health implications. A more thorough analysis on the impacts of the TPP on population health is clearly needed. I hope the Committee will do this.

Let me turn to some of the major health and public policy concerns raised by the proposed agreement. As the Committee knows, intellectual property rights—IPRs—cover patents, copyright and trademarks. The US has advocated stronger IPRs than in TRIPS and stronger than what Canada currently provides, or may provide under CETA.[4]

The proposals would extend the duration of pharmaceutical patents (TRIPS +), lock in data exclusivity (further restricting the ability of generics to enter the market) and include, for the first time, medical procedures, something the US did not get in its recent agreement with Korea. They would also provide additional protection for biologics. If implemented, the changes will increase the time-to-market for lower cost generic drugs and increase the range of life-saving measures that may be patented, making it more difficult to provide affordable medicines and implement universal public drug coverage.

Canada's past experience with patent extensions has not been favourable. In the mid-1980s, under compulsory licensing, prescription drug expenditures represented 6.3% of total health spending. In 2012 they were 13.6% or $27.7 billion.[5] Drugs have been the fastest growing component of health expenditures over the past 25 years. A recent analysis of patent extensions in the proposed CETA agreement estimated it would add between $850 million and $1.65 billion, annually, to our drug bill.[6] High drug costs adversely affect many Canadians. Many patients do not fill prescriptions due to cost, or use less than prescribed amounts to make them stretch to fit their budgets, risking their health.

The multinational drug corporations promised to increase research and development (R&D) in return for increased patent protection from Bills C-22 (1987) and C-91 (1993). The R&D target was an extremely modest 10% of revenues. While reached between 1993 and 2002, it has now fallen to 6.6% of sales, despite the huge increase in industry revenues.[7] And much of this R&D is not basic scientific research, but rather applied (clinical trials), marketing and sales research. Almost half of R&D is funded by federal and provincial subsidies and tax credits.[8] Our R&D to sales ratio is a fraction of other OECD countries.

Canada's balance of payments in pharmaceuticals has also deteriorated. In 1987 under compulsory licensing, we had a trade deficit of $334 million. In 2012 our trade deficit had ballooned to $7.6 billion.[9] Once our Patent Act changes were locked in by NAFTA and TRIPS, the multinational drug corporations had little reason—and no obligation—to locate production, employment or R&D in Canada.

In light of the extensive evidence of this policy failure, it is not clear how further extensions of patent protection for pharmaceuticals will benefit Canada.

The US has also proposed banning governments from using their public purchasing power to negotiate lower drug prices. This reflects current US law, preventing its federal government from negotiating bulk prices for the Medicare prescription drug benefit.[10] Canada should not accept any such provision.

What Canada should demand is a clear commitment by all TPP Parties to the *Doha Declaration on the TRIPS agreement and Public Health* (Nov. 14, 2001), including: 'the right of WTO members to make full use of the safeguard provisions of the TRIPS Agreement in order to protect public health and enhance access to medicines for poor countries.'[11]

Canada should also oppose proposals that undermine existing protections for health in TRIPS, such as patenting medical procedures or providing additional data exclusivity for biologic drugs. According to the World Medical Association, 'If medical procedure patents are obtained, then patients' access to necessary medical treatments might diminish and thereby undermine the quality of medical care.'[12]

The TPP proposes additional protection for trademarks, an area that has already witnessed numerous health related trade disputes. The ability to restrict and/or regulate the use of trademarks—and to require warning labels—is a key health policy tool that governments

need to deter consumption of harmful products such as tobacco, alcohol and unhealthy foods.

According to the World Health Organization (WHO), Tobacco kills almost 6 million people, annually.[13] Over 168 countries have signed the 2005 *Framework Convention on Tobacco Control*. Significantly, the US has not ratified this treaty and is not obligated to meet its public health objectives.

The treaty advocates numerous regulatory measures to restrict tobacco marketing and promotion. The multi-national tobacco industry has opposed these measures, launching numerous trade challenges to strike down public health measures designed to reduce tobacco consumption.

We should be particularly concerned about this issue due to our experience. In 1994, Canada drafted new legislation requiring manufacturers to sell cigarettes in plain packaging, based on evidence from the public health community that industry advertising linked logos and images on cigarette packages with attractive, sophisticated lifestyles and thus encouraged smoking.

Despite the health rationale, Canada abandoned plain packaging, fearing it would lose a NAFTA trade challenge from US tobacco interests. These fears were based, in part, on the testimony, submitted by R.J. Reynolds, from the former US trade representative and chief US NAFTA negotiator, Carla Hills to a Parliamentary Committee asserting that the proposed legislation would violate Canada's IPR obligations on trademarks.[14]

Had the legislation passed, many Canadians might not have started smoking. Canada's abandonment of this policy tool provides a clear warning that trade agreements can undermine health policy.

Canada also set a negative international precedent for almost 20 years. In 2011, Australia passed the *Tobacco Plain Packaging Act*. It, too, is being challenged at the WTO by the Ukraine and others on behalf of the transnational tobacco companies, while Philip Morris Asia is challenging it under a BIT between Australia and Hong Kong.[15]

Other labelling requirements are also at risk. Philip Morris initiated arbitration to stop Uruguay from placing graphic images of smoking victims on cigarette packages (a requirement of the Framework Convention on Tobacco Control) under the terms of a Switzerland-Uruguay BIT.[16] Uruguay's legal counter-challenge has only been feasible because part of the costs are being paid by the private charity of former New York City mayor, Michael Bloomberg, a strong anti-tobacco advocate.

Trade agreements may have indirect health consequences through their impacts on key drivers of the global non-communicable disease epidemic, such as tobacco, alcohol, and obesogenic foods. Liberalization increases health risks by streamlining supply chains and making potentially harmful products more accessible physically and financially. Reducing 'technical barriers to trade' (TBTs) to facilitate easier market access, can undermine efforts

to limit the harms of these products by placing an unreasonable onus on governments to prove regulations are the least trade restrictive as possible.[17]

Canada must ensure that any TBT provisions in the TPP be no more extensive than those in the current WTO TBT. To protect public health regulatory capacity, the agreement should explicitly guarantee the right of governments to require health warning labels.[18]

Health measures can be further compromised by investor-state dispute provisions which open the door to financial compensation for corporations affected by such restrictions.[19]

The threat of trade litigation has deterred countries from implementing health measures already enacted, such as tobacco control. The *New York Times* recently noted that Uruguay and Uganda, as two examples, have failed to implement their tougher anti-smoking legislation, fearing expensive tobacco trade challenges.[20]

Alcohol causes numerous health and social problems. The WHO estimates that 2.5 million people die each year from its harmful health impacts. Liberalization of alcohol markets and elimination of restrictions on alcohol promotion have serious health consequences.[21] In 2010, the UN's World Health Assembly (WHA) adopted the *Global Strategy to Reduce the Harmful Use of Alcohol*.[22] However, TPP commitments to regulatory harmonization and easier market access may pose significant barriers to achieving this goal.[23] Canada should ensure that the TPP does not compromise the right of governments to manage alcohol distribution, limit advertising and regulate labelling.

Food safety is a major public health issue. TPP regulatory harmonization could restrict the policy capacity to regulate imports of foodstuffs and to implement evidence-based domestic food safety and labelling regulations.

Trade agreements have facilitated numerous other challenges to health policies. To its shame Canada tried—and failed—to overturn France's ban on the import of asbestos at the WTO in 1996.

A core objective of the TPP is to facilitate market access for services as well as goods. This means opening up markets that are extensively regulated or closed to foreign investors or suppliers.[24] However, expanding market access could lead to significant changes in the financing and delivery of Canada's health care system if the TPP adopts a negative listing approach to reservations protecting existing public programs and if Canada fails to list comprehensively, an almost impossible task.[25]

Turning to investor rights, the TPP expands them beyond Canada's obligations under NAFTA and other BITs. Inclusion of investor-state dispute mechanisms has encouraged corporations to sue governments over regulatory policies they consider 'tantamount to expropriation.' According to a 2012 UNCTAD review:

> *Claimants have challenged a broad range of government measures, including those related to revocations of licences, breaches of investment contracts, irregularities in public tenders,*

*changes to domestic regulatory frameworks, withdrawal of previously granted subsidies, direct expropriations of investments, tax measures and others.*

The TPP will significantly expand the list of countries whose investors can sue governments. Settlements can be enormous, with one recent BIT amounting to $2.4 billion.

Alarmingly, the TPP proposes to include IPRs within the definition of investments. NAFTA does not explicitly do so. This is a contested element of the unresolved $500 million Ely Lily NAFTA investor state claim over Canadian Federal court decisions to invalidate its patents for Strattera and Zyprexa. However the TPP, if ratified, would open the door to a flood of challenges to our drug patent system.[26]

Canada's experience with investor state disputes under NAFTA should be a warning that expanding investor rights under the TPP is extremely risky. The number of NAFTA investor state disputes has risen significantly in recent years, including: Ethyl, S.D. Myers, Dow Chemicals, Abitibi-Bowater, Ely Lily and others.

Being mindful of the time restrictions, I will conclude my comments by noting that I have only been able to touch on some of the major health risks that the TPP may pose to Canadians. I would be pleased to answer questions you may have about the points I have raised today.

## Notes

1 Aside from several of the 'leaked' chapters now in the public domain, the various ministerial statements and US Trade Representative briefings, the provisions in a number of recent US FTAs with central and south American countries and, especially, the most recent agreement with South Korea provide an indication of what the US would like to see included in the TPP.

2 Canada's current procedure for the ratification of treaties seems inadequate to provide the level of legislative scrutiny and public debate necessary for a treaty of such widespread and longstanding implications. The House of Commons has only:

*…21 sitting days to consider the treaty before the executive takes action to bring the treaty into effect through ratification or other preliminary measures, such as introducing legislation. The House has the power to debate the treaty and to pass a motion recommending action, including ratification; however, such a vote has no legal force. Passing treaties through the House of Commons remains a courtesy on the part of the executive, which retains full authority to decide whether to ratify the treaty after the parliamentary review. The policy states clearly that in exceptional cases the executive may have to ratify treaties before they can be tabled in Parliament"* (Parliament of Canada, 2012).

3 According to one study, 15 arbiters have been involved in 55% of all investor state disputes (Eberhardt, & Olivet, 2012).

4 USTR web site.

5 Canadian Institute for Health Information, 2013.

6 Lexchin & Gagnon, 2013.

7 PMPRB 2013; Lexchin; 2003, Gagnon, 2013.

8 Gagnon, 2013.

9 Cansim Table 380-0070.

[10] Pear, NYT April 12, 2007.

[11] The Doha Declaration States that:

*a) Each Member has the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted.*

*b) Each Member has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency*. (http://www.wto.org/english/res_e/booksp_e/analytic_index_e/trips_02_e.htm#article31)

[12] World Medical Association. (2009). "Statement on Patenting Medical Procedures" 60th WMA General Assembly, New Delhi, India, October 2009. http://www.wma.net/en/30publications/10policies/m30/

[13] WHO fact sheet #339, July, 2013.

[14] The claim referenced the Paris Convention on the Protection of Industrial Property, NAFTA chapters 11 (investment) and 17 (intellectual property) and the TRIPS agreement.

[15] Holden and Lee, 2009; Fooks & Gilmore, 2013. Ironically, the Ukraine has not sold any tobacco products to Australia since 2005.

[16] Fooks & Gilmore, 2013.

[17] Canada attempted to use various WTO agreements to strike down the ban on asbestos imports by France in 1996. Fortunately, we lost in one of the very few trade decisions in which occupational and environmental health considerations have taken precedence over trade liberalization. But the very fact that our government thought that it could keep the French asbestos market open through filing a trade challenge underscores the risks to health that a successful clam might have imposed. Arguably, Canada would not have pursued this unless it felt there was a reasonable chance of winning.

[18] Gleeson and O'Brien, 2013.

[19] Kelsey, 2012.

[20] NYT Dec. 15, 2013

[21] BMA, 2009.

[22] WHO, 2013.

[23] Gleeson & O'Brian, 2013; Kelsey 2012.

[24] Another strategy of the tobacco industry has been to use trade challenges to leverage open markets in developing countries by challenging state tobacco monopolies. The result has been to remove a valuable policy tool enabling governments to limit consumption. As the experience in Thailand illustrates, the introduction of competitive tobacco markets encouraged all participants, including its state owned firm, to take measures to maintain, or expand, their market share through various promotional activities, a process which severely compromised government tobacco control initiatives.

[25] Epps. (2003)

[26] According to Public Citizen, Ely Lily's argument is that it its patent application should be approved on the basis of its claims for the benefits of the patent, and not on its 'demonstrated or soundly predicted' utility (the 'promise doctrine'), as assessed by the Canadian patent authorities. This expansive interpretation would fundamentally change the basis on which patents are awarded and provide a new avenue, outside Canada, to challenge Canadian laws by allowing corporations that were denied patents the ability to overturn Canadian patent approval decisions and/or claim investor compensation. Such a provision would also likely lead to a flood of new trade challenges to Canadian law. (Public Citizen, March, 2013)

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