The Trans-Pacific Partnership agreement and public health: Why we should be concerned

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➢ In October 2012, Canada became a negotiating member of the Trans-Pacific Partnership (TPP) agreement along with 11 other Pacific Rim countries. Widely touted as "a model for 21st-century trade agreements,"[1] it extends well beyond traditional trade issues into domestic policy, creating a number of concerns about its implications for public health. These concerns include potential increases in pharmaceutical costs, the undermining of Canadian patent law, and strengthened investor rights over public health regulations to limit the consumption of products harmful to health.

The Comprehensive Economic and Trade Agreement (CETA) currently being negotiated between Canada and the European Union has already been forecast to increase Canadian drug costs by between $850 million and $1.6 billion annually by extending patent protection; leaked text of the TPP suggests that its provisions would increase these costs further.[2] (See also Box 1.) The TPP's draft chapter on intellectual property rights goes beyond CETA, allowing the patenting of new forms and uses of old drugs regardless of efficacy, and introducing the patenting of diagnostic, therapeutic, and surgical methods. Although the rationale for extending patents is that it will lead to increased research and development spending in Canada, brand-name pharmaceutical companies have failed to comply with similar commitments in the past.[2]

A second concern is the inclusion of investor–state dispute settlement (ISDS) mechanisms in the TPP. Unlike most trade treaties, in which only governments can dispute perceived violations, ISDS treaties permit private foreign investors to launch arbitration against a state if they believe a government action has devalued their investment. Using these provisions, investors have challenged everything from environmental laws to financial regulations to public health and safety. ISDS awards involving US investors alone (often corporations) have already cost the taxpayers of losing countries as much as $3 billion, and claims worth an additional $15 billion are still pending.[3–5] The cases themselves cost governments $8 million on average to defend, although the legal costs of single cases have exceeded $50 million, and the overlapping roles of arbitrators as board members of corporations, corporate lobbyists, and even counsel in cases they are not arbitrating raise questions about their capacity for impartiality.[5]

Canada has already shown its vulnerability under ISDS as a result of the first-ever intellectual property rights challenge by a patent-holding pharmaceutical company.[3] Brought by Eli Lilly in 2012 under NAFTA (which has an ISDS chapter), the company is claiming $500 million in damages for court decisions that revoked Canadian patents on two drugs for failing to satisfy the "promise of the patent" utility requirement,[6] a provision unique to Canadian patent law that requires patentees to "demonstrate or soundly predict" any promised benefit of the pharmaceutical product by the filing date.[7] Leaked text of the TPP's draft

Box 1
Other resources on the Trans-Pacific Partnership agreement

➢ Council of Canadians	www.canadians.org/tpp
➢ infojustice.org	http://infojustice.org/resource-library/tpp
➢ Knowledge Ecology International	http://keionline.org/tpp
➢ Public Knowledge	http://tppinfo.org/resources/leaked-texts-country-info/

intellectual property chapter would allow for "theoretical and speculative utility" instead, resulting in a watered-down requirement and precisely what Canada is attempting to defend against in the Eli Lilly NAFTA challenge. Because of the leaked IP chapter, pharmaceuticals are one area where the health implications of the TPP are easier to project. The treaty and its probable ISDS provisions, however, also have the potential to open up foreign investor litigation on a broad range of public health issues, including efforts to reduce noncommunicable diseases through regulatory policies related to tobacco, alcohol, and food products.

Many countries are currently reconsidering both the value of including ISDS mechanisms in trade and investment agreements and the threat these mechanisms may present to public health and national sovereignty.[8] The EU has recently frozen the negotiation of a free trade agreement with the US to seek public consultation on investor protections.[9] Canada has postponed signing off on CETA, in large part because of concerns about intellectual property rights and the implications for future litigation similar to the Eli Lilly case.[10]

A well-publicized and transparent process for public scrutiny over controversial matters within the TPP is urgently needed in Canada and has been called for by legislators from most of the negotiating countries (see www.tppmpsfortransparency.org/). Such a call warrants the support of every Canadian concerned about health and the health care system.

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