The Trans-Pacific Partnership Agreement: Trading away our health?

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ABSTRACT

There is long-standing interest by the public health community in the potential implications of trade and investment agreements for public health. Our commentary highlights the main pathways by which the Trans-Pacific Partnerships (TPP), a comprehensive trade and investment agreement currently under negotiation, might undermine population health (based on analysis of and commentary about leaked chapters of the TPP), and calls for a more transparent and health-sensitive TPP negotiation process. We argue that use of comprehensive health impact assessments could be helpful in identifying how the potentially serious health consequences of the TPP and similar future international trade and investment agreements can be avoided, minimized or mitigated.

KEY WORDS: Public health; trade; socio-economic factors; social determinants of health

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Can J Public Health 2015;106(4):e249–e251
doi: 10.17269/CJPH.106.4896

There is long-standing interest by the public health community in the potential implications of trade and investment agreements for public health. Canada is currently in the midst of finalizing negotiations for a far-reaching trade and investment agreement, the Trans-Pacific Partnership (TPP), with 11 other Pacific Rim countries. Given the lack of progress in multilateral trade negotiations inside the World Trade Organization (WTO), bilateral and regional trade treaties have become the main vehicles for managing and expanding trade and investment liberalization, with the TPP widely seen as “a model for 21st century trade agreements”.¹ The key implications of the TPP for public health are not so much how changes to trade flows and associated income gains (or losses) will impact population health, the traditional purview of impact analysis of trade. Rather, based on analysis of and commentaries on leaked chapters of the TPP, we argue that the TPP will restrict domestic policy decisions relevant to population health because of expanded investor protections, increased intellectual property rights and a requirement to involve companies in developing regulations that affect them. Finally, we call for a more transparent and health-sensitive TPP negotiation process, including use of comprehensive health impact assessments (HIAs) to identify how the potentially serious health consequences of the TPP and other future bilateral and regional trade and investment agreements can be avoided, minimized or mitigated.²

Arguably one of the most controversial aspects of the TPP is the power that it will grant transnational corporations to sue governments that ratify the treaty over public policy decisions that are perceived as damaging to their investments.³ This power is enshrined in Investor-State Dispute Settlement (ISDS) mechanisms, which are widely expected to be included in the TPP and to extend beyond simply compensating for the direct expropriation of an investor's goods or properties. State-State Dispute Settlement procedures encompassed within the WTO limit the power to initiate arbitration for perceived trade and

investment violations to governments alone, while ISDS mechanisms, first inscribed in the 1994 North American Free Trade Agreement (NAFTA), have extended these rights to private foreign investors. The latter have made extensive use of these rights; 2012 and 2013 show the highest documented number of new ISDS cases filed, and the largest award ever rendered.^{4,5} Investor rights allow corporations to potentially challenge any new public policy or regulation, even when in the public interest, including public health and safety regulation. Under ISDS rulings in favour of foreign investors, governments have the option to either withdraw contested policies and regulations or pay compensation determined by an external arbitration panel. The ISDS provisions in the TPP are widely expected to be more investor-friendly than under previous Free Trade Agreements (FTAs) and, with 12 countries involved, will open up potential lawsuits to a larger number of corporations than Canada has faced under NAFTA. In Canada, there have already been 35 ISDS challenges under NAFTA, with a total of more than \$US 10 billion in claims. While many such claims have been dismissed or dropped, in five cases companies have already been paid around US\$ 215 million in compensation by the Canadian government, and pending claims remain in the billions of dollars.⁶ In a case directly relevant to public health, Canada was sued by Ethyl Corporation for banning its fuel additive MMT (methylcyclopentadienyl manganese tricarbonyl) over its potential neurotoxic effects.³ The failure of the Canadian ban to specify the health risks in its legislation resulted in the Canadian

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Funding: The research leading to this commentary was made possible through financial support provided by the Canadian Institutes of Health Research (Operating Grant Nr. 133483).

Conflict of Interest: None to declare.

government settling before the issue went to a NAFTA tribunal, paying Ethyl US\$ 13 million in damages and rescinding the ban. Another example with salience for public health in Canada is the ongoing case with Eli Lilly. The US pharmaceutical company is claiming \$500 million in damages for court decisions that revoked Canadian patents on two drugs when it was revealed that the short-term study the company had conducted, which was not disclosed in the patent application, was insufficient to demonstrate or soundly predict the promised benefits of the drugs. This meant that the drugs had failed to satisfy Canada's 'promise doctrine' of the patent condition.

Other areas where the potential impact of ISDS clauses is already apparent is in tobacco consumption, with Phillip Morris Asia using ISDS mechanisms enshrined in a bilateral trade and investment agreement in an attempt to reverse, or seek compensation for, Australia's plain packaging of tobacco laws.⁷ Thus, ISDS provisions are being used to challenge public health regulations that comply with 'best practice' recommendations of the Framework Convention on Tobacco Control (FCTC). Similar concerns have been raised in relation to the food and alcohol industries which will have access to new legal channels to sue governments over unfavourable policy decisions.^{2,3} Yet, while the TPP agreement and its probable ISDS provisions have the potential to open up foreign investor litigation on a broad range of public health issues, including efforts to reduce non-communicable diseases through regulations, it is not simply the litigation costs that concern public health advocates. Rather, they fear that the inclusion of ISDS might lead to regulatory chill, wherein governments might weaken, delay or abandon innovative health policy because they are unwilling or unable to risk expensive litigation in response, even if such decisions are clearly in the public health interest and they are likely to win in court.⁷

Because of the leaked TPP chapter in intellectual property rights (IPRs), pharmaceuticals are one area where the health implications of the TPP are relatively easy to project. The TPP would weaken the requirements for patentability in comparison to other FTAs (including NAFTA), and increase Canada's vulnerability to future cases like Eli Lilly's, challenging its 'promise doctrine' requirement. Proposed changes to patent law in the IP chapter would also make it more difficult for generic medications to enter the market, delaying the availability of cheaper generic medicines.⁸ 'Evergreening' of patents, i.e., the granting of patents for minor variations to existing products and lengthening the term of patents to compensate for delays in issuing patents or in obtaining marketing approval could further increase drug costs; while proposals for patents on surgical procedure are so extreme that the full range of outcomes remains incomprehensible. Given that many Canadians are paying out of pocket for prescription medications due to lack of a national prescription drug program, a further increase in the cost of drugs could directly undermine population health goals and risk pushing some Canadians into 'medical poverty'.

So what are public health advocates to do about protecting health within trade and investment agreements? First, there is a need for public health researchers to more strongly engage with those areas of public policy making that have traditionally been studied by other academic disciplines, especially economics. It is

crucial that public health advocates understand the subtleties of trade and investment policy in order to ensure better health protection during new treaty negotiations, and to make full use of flexibilities in existing trade treaties through thoughtfully crafted domestic public health regulations.⁹ The 'Health in All Policies' (HiAP) approach can function as a conceptual framework in this endeavour through its emphasis on the interrelationality of health considerations in policy making with a range of non-health sectors (such as trade) that have health implications. There already are existing frameworks for HIAs that researchers can draw on in assessing trade policy, even though comprehensive HIAs of trade and investment treaties have neither been conducted globally nor in Canada. Ideally, to protect health within trade negotiations, health experts should be given a seat at the negotiation table in order to allow for HIAs which would highlight and address potential health implications of new trade and investment rules. However, where this is not possible, given the secret nature of the TPP and many other trade negotiations, HIAs can be undertaken to the extent that the provisions are leaked publicly and available for analysis, which is what the three authors of this commentary are currently doing. However, this remains less than ideal, particularly in light of Canadian legislation that does not give parliament any final decision-making powers over treaties negotiated by the federal government.

Defensively, public health advocates could urge government trade negotiators to include "in all new treaties ... a requirement that dispute panels incorporate specific reference to all international public health 'soft law' (such as the FCTC and the International Health Regulations) and normative agreements (such as World Health Assembly-approved global action plans on various health issues) in their decision-making."⁹ More powerful yet would be treaty language that 'carved out' or excluded from dispute any non-discriminatory public health regulations compliant with such health 'soft law' and normative agreements. Whether any of these are being given attention in the TPP negotiations is unknown, given the secrecy surrounding the negotiations. Such a carve out may require identifying and strengthening what policy flexibilities remain within a final TPP agreement.

To be clear: the new trade and investment treaties now being negotiated bilaterally or regionally are not primarily about liberalizing the trans-border flows of goods (the traditional remit of trade treaties). They concern strengthening investor and intellectual property rights, and creating global market rules that bind the future policy options governments might pursue. To scrutinize comprehensively such trade policies from a health perspective implies adequate funding for research in areas not traditionally seen as central to public health, and better interdisciplinary collaboration between health researchers and others from a variety of disciplines (including political science and political economy, economics, and law and legal studies).

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Received: November 11, 2014

Accepted: February 25, 2015

RÉSUMÉ

Le milieu de la santé publique s'intéresse depuis longtemps aux répercussions possibles des accords commerciaux et d'investissement sur la santé publique. Notre commentaire souligne les principales voies par lesquelles le Partenariat transpacifique (PTP), un accord commercial et d'investissement complet en voie de négociation, pourrait miner la santé de la population (selon l'analyse et les commentaires sur les chapitres divulgués du PTP) et exige un processus de négociation plus transparent et sensible sur le plan de la santé. Nous affirmons que le recours à une évaluation complète des répercussions sur la santé pourrait être utile pour cerner comment les conséquences sur la santé, peut-être graves, du PTP et de tout accord commercial et d'investissement semblable à venir pourraient être évitées, minimisées ou atténuées.

MOTS CLÉS : santé publique; commerce; facteurs socioéconomiques; déterminants sociaux de la santé