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VIA E-MAIL (AsiaPacificConsultations-ConsultationsAsiePacifique@international.gc.ca)

Canada-Pacific Trade Consultations
Global Affairs Canada
Trade Negotiations Division (TCA)
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario K1A 0G2

To Whom It May Concern:

Re: Asia Pacific Trade Consultations

The Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC) is a legal clinic based at the Centre for Law, Technology & Society at the University of Ottawa's Faculty of Law in Canada. Founded in 2003, CIPPIC's mission is to contribute to public policy debates on technology law issues, ensure balance in policy and law-making processes, and provide legal assistance to under-represented organizations and individuals on matters involving the intersection of law and technology.

CIPPIC welcomes the opportunity to participate in consultations regarding the resumption of discussions regarding the Trans Pacific Partnership Trade Agreement. Our contribution focuses on four areas:

1. Process;
2. Investor State Dispute Mechanism;
3. Digital Trade; and
4. Intellectual Property.

1. Process - Transparency

International trade negotiation processes fundamentally challenge democratic law-making norms. CIPPIC urges the Canadian government to limit the challenges continuing engagement over the TPP continues to pose these norms. CIPPIC calls on the

Canadian government to require, at a minimum:

- public release of text proposals by governments before negotiations, with clear processes established for members of the public to comment on them;
- consolidated versions of negotiating texts published between negotiating rounds;
- locations and times of key meetings announced well ahead of time; and
- the establishment of consultative trade groups that are broadly representative of both business and public interest stakeholders with a commitment to conducting deliberations openly.

2. Investor State Dispute Settlement

CIPPIC has some experience with the NAFTA ISDS. We conclude that these provisions are problematic to the rule of law. We suggest that the TPP not include such provisions, relying instead on state-to-state dispute settlement mechanisms. If ISDS proves a requirement of NAFTA, we support the inclusion of ISDS rules in the Canada-EU Trade Agreement standard.

3. Digital Trade Chapter

CIPPIC has written extensively on the TPP's Digital Trade provisions. We refer you to the comments of CIPPIC Staff Counsel Tamir Israel and Public Citizen's Burcu Kilic, "The Highlights of the Trans-Pacific Partnership E-commerce Chapter", for specific comments. See <https://www.citizen.org/sites/default/files/tpp-e-commerce-chapter-analysis.pdf>.

We note in particular that data localization limitations and protections for cross-border data transmissions have particular implications for Canada's privacy regime. See, for example, CIPPIC's comments before a special committee established by the BC Legislative Assembly on potential implications of TPP commitments for cross-border privacy protections in BC's *Freedom of Information and Protection of Privacy Act*: <https://cippic.ca/uploads/20151118-BCFOICommittee-Testimony.pdf>.

These concerns are all the more important given Canada's continuing focus on maintaining digital ties to Europe in the face of Europe's recent adoption of the *General Data Protection Regulation* and its enhanced requirements of personal data security.

4. Intellectual Property Chapter

The withdrawal of the United States represents an opportunity to return the TPP's IP chapter to a balanced state. CIPPIC's position is that intellectual property laws should not limit Canadians' freedom of expression, right to privacy and due process, or hinder our ability to innovate.

While the TPP includes a provision committing signatories to balanced laws, this provision is quite meagre. A commitment to balanced laws should include a positive mandate to ensure that IP laws include open exceptions, such as fair dealing. This reflects

intellectual property's dual role of promoting creativity and innovation on both the protective and access-oriented sides of the IP equation.

CIPPIC suggests that the TPP should oblige member states to adhere to existing standards articulated in international instruments such as BERNE, the WIPO Copyright Treaty and the WPPT, the Marrakesh Treaty, the PCT and the Madrid Protocol. Trade negotiations are not the place to set substantive laws.

With respect to specific provisions of the TPP, CIPPIC strongly urges the Canadian government to set term of copyright protection at the international standard of Berne: life plus 50. Term extension provides Canada no benefit.

Similarly, Canada should resist efforts to render civil wrongs criminal. Criminal intellectual property provisions should be reserved for those cases involving commercial scale willful infringements. Canada should resist efforts to conscript public resources to enforce private rights.

Damages generally should be predicated on principles of proportionality, remedial flexibility and transparency in calculation. Intellectual property infringements should not provide harmed parties with the windfall of multipliers.

No further ratcheting up of digital lock provision

Finally, CIPIC submits that Canada should resist the criminalization of trade secret law through the Trans Pacific Partnership. These provisions solve no problems that private law systems are unable to address, and again introduce the problem of conscripting state resources to enforce private interests. Criminalization needlessly creates new threats for journalists and whistleblowers.

* * *

We thank you for the opportunity to provide you with these comments. We hope you find them helpful.

Yours truly,

A handwritten signature in black ink that reads "David Fewer". The signature is written in a cursive, flowing style.

David Fewer
Director, CIPPIC