# *Public Health Care vs. The Trans-Pacific Partnership Agreement*

***A PSI-North America Strategic Briefing***
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The Trans-Pacific Partnership (TPP) negotiations are set to erect the largest, most comprehensive free trade agreement (FTA) in the world today. The negotiations include 12 nation-states of the Asia-Pacific region, including Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam-with South Korea still considering its incorporation. The TPP represents a systematic threat to quality public services and is poised to accelerate the privatization of public health care and insurance by degrading public health care delivery systems through foreign investor privilege clauses and a direct challenge to state ownership of public health care assets and national development in general.

According to Public Citizen,

*"A major goal of U.S. multinational corporations for the TPP is to impose on more countries a set of extreme foreign investor privileges and rights and their private enforcement through the notorious "investor-state" system. This system allows foreign corporations to challenge before international tribunals national health, consumer safety, environmental, and other laws and regulations that apply to domestic and foreign firms alike. Outrageously, this regime elevates individual corporations and investors to equal standing with each TPP signatory country's government – and above all of us citizens."*

This strategic briefing identifies and examines the primary threats associated with the TPP as they relate to public health care and the essential workers who deliver this vital public service. The first section treats the core negotiating issue of trade in services with a focused discussion of its consequences for public health, such as contracting out health care services and government procurement of medical devices and pharmaceuticals. The second section examines the key issue of the "negative list" through which participating national governments identify a list of services to be exempt from the Trade in Services provisions of the TPP. The third section treats the cross cutting issues of competition rules and state owned enterprises (SOEs) as they may impact public health care institutions. All of these concerns are exacerbated by the expected inclusion of investor-state dispute settlement provisions that allow foreign investors to directly attack important government policies aimed at protecting public health. Lastly, the briefing outlines several recommendations for PSI affiliates to consider. In addition, *Appendix 1: TPP Member Country Ratification of Core Labor Conventions* offers a review of TPP country ratification of core labor conventions.

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# The Investor-State System At A Glance

According to Public Citizen, "Among the most dangerous but least known parts of today's "trade" agreements are extraordinary new rights and privileges granted to foreign corporations and investors that formally prioritize corporate rights over the right of governments to regulate and the sovereign right of nations to govern their own affairs. These terms empower individual foreign corporations to skirt domestic courts and directly challenge any policy or action of a sovereign government before World Bank and UN tribunals.

Comprised of three private attorneys, the extrajudicial tribunals are authorized to order unlimited sums of taxpayer compensation for health, environmental, financial and other public interest policies seen as undermining the corporations' "expected future profits." There is no outside appeal. Many of these attorneys rotate between acting as tribunal "judges" and as the lawyers launching cases against the government on behalf of the corporations. Under this system, foreign corporations are provided greater rights than domestic firms.

This extreme "investor-state" system already has been included in a series of U.S. "trade" deals,forcing taxpayers to hand more than $400 million to corporations for toxics bans, land-use rules, regulatory permits, water and timber policies and more. Under a similar pact, a tribunal recently ordered payment of more than $2 billion to a multinational oil firm. Just under U.S. "trade" deals, more than $14 billion remains pending in corporate claims against medicine patent policies, pollution cleanup requirements, climate and energy laws, and other public interest polices.

In the past few years, the number of such investor-state attacks has surged. From the 1950s – when this system was first established – until 2000, only 50 cases were initiated. Today, more than 500 cases have been launched. A whole industry of third-party financing and specialized law firms has sprung up to extract our taxpayer dollars and roll back key public interest policies using the investor-state system.

Deals like the Trans-Pacific Partnership (TPP) and the Trans-Atlantic Free Trade Agreement (TAFTA) would vastly expand the investor-state threat, newly empowering thousands of foreign corporations to demand compensation for the policies on which we rely. But some countries are now beginning to challenge this outrageous system.

## 1. Trade in Services

At the 2011 Asia-Pacific Economic Cooperation (APEC) meeting the participating national governments agreed to a broad outline for the TPP-known as the Honolulu Declaration, including an effort to draft a comprehensive market access agreement that would remove both tariff and non-tariff barriers across a full spectrum of goods and services. The intent is aimed at phasing out all tariffs to establish duty-free trade across more than 11,000 commodity categories along with a full spectrum of services, many of which are currently delivered by public authorities in the member countries.[3] The United States government is aggressively advocating a breakthrough in trade in services to facilitate market access for private sector providers, in particular financial services such as banking and insurance among many others.[4] For the U.S. government, the TPP should become the 21st century model for FTAs, which includes broadening market access rules for private sector cross-border service providers. **This model represents a strategic threat to quality public services and the wages and working conditions of those workers who provide them.**

## 1.1 Cross Border Contracting Out

The U.S. government and several other participating governments are negotiating the TPP to expand cross border trade in services and have tabled provisions aimed at: 1) eliminating requirements that a partner-based service provider maintain a commercial presence in the country of the buyer; and 2) requiring the unrestricted flow of payments and transfers of capital flows in the provision of services. Thus, under the TPP, public health delivery systems would be forced to consider contracting out services across borders to foreign, private sector providers, and those foreign companies could directly challenge laws intended to protect these public services through the TPP's foreign investor privileges regime. TPP negotiations have focused on liberalizing postal services so that foreign transnational companies such as FedEx can pry open national government run postal systems and compete for the most profitable elements of such systems. Such provisions, coupled with competition and non-discrimination clauses, could also be applied to compel public healthcare institutions, including clinics, hospitals, and laboratories to engage in cross-border contracting out for lab work and medical procedures thereby complicating public accountability and undermining the wages and working conditions of health sector workers in general. In this sense, **the TPP would favor those foreign private sector enterprises capable of distributing contracted public health care services to the "lowest" bidder and thereby jeopardize quality public health care and those responsible for providing it.**

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[3] Congressional Research Service. "The Trans-Pacific Partnership Negotiations and Issues for Congress. August 21, 2013:21 and accessible at: http://www.fas.org/sgp/crs/row/R42694.pdf

[4] Congressional Research Service. "The Trans-Pacific Partnership Negotiations and Issues for Congress. August 21, 2013:22 and accessible at: http://www.fas.org/sgp/crs/row/R42694.pdf

## 1.2 Public Health Care Insurance

It is possible that proposed TPP provisions could allow for foreign, private sector health insurance providers to dispute national laws designed to restrict the private insurance marketplace and provide universal access to publically provided health insurance coverage; including such encompassing programs as Medicare in the United States or the public insurance options in Australia, New Zealand and those found at the provincial level in Canada. Under the KORUS FTA (South Korea-U.S.), cross border trade in marine, aviation, transit, reinsurance, and related services such as consultancy, risk assessment, and actuarial and claim settlement services are expressly permitted.[5] Already, U.S. headquartered private health insurance companies, such as Cigna and United Healthcare, operate in many other countries including Mexico and the Philippines.[6] Currently, many of these functions, aside from public health care insurance programs, are carried out by public sector employees within the public health care delivery system. **The TPP proposes so many cross cutting measures, from competition policies, non-discrimination and national treatment, as well as competitive neutrality for State Owned Enterprises; which would then be privately enforceable through investor-state dispute settlement by foreign investors, that taken as a whole, could lead to the degradation and eventual elimination of government health insurance programs.**

## 1.3 Drugs and Medical Devices

It is increasingly clear that negotiators of the TPP are contemplating the increasing privatization and liberalization of public health related services while strengthening the monopolistic practices of multinational pharmaceutical companies. Such outcomes could serve to stifle true competition in government procurement and limit the development of cheaper, more effective treatments at the national level.

The TPP negotiations contemplate several provisions that would deepen patent protections and liberalize government procurement; thereby increasing the prices paid for critical medicines and medical devices. For example, the TPP could lead to the "evergreening" of patents based on newer forms or novel uses of patented drugs or devices and thereby prohibit their generic production and use--a current practice that has made important medicines, including HIV treatment, affordable for both government public health care systems and poor consumers around the world.[7]

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[5] Congressional Research Service. "The Trans-Pacific Partnership Negotiations and Issues for Congress. August 21, 2013:23 and accessible at: http://www.fas.org/sgp/crs/row/R42694.pdf

[6] Hall, David and the Public Services International Research Unit. "Globalisation, privatisation and healthcare – a preliminary report." January 2001:13 and accessed at: http://www.psiru.org/reports/globalisation-privatisation-and-healthcare-–-preliminary-report .

[7] Doctors Without Borders. Briefing Note Trading Away Health: the Trans-Pacific Partnership Agreement. 2013 and accessible at: http://www.doctorswithoutborders.org/publications/reports/2013/Access_Briefing_TPP_ENG_2013.pdf.

The TPP would also facilitate patent extention, deepen intellectual property enforcement mechanisms to slow down the process of patent expiration and generic drug manufacturing, and establish data-exclusivity provisions to delay or prevent the production of generic drugs. In contemplating these provisions, the TPP would become a "budget buster" for many government public health services that currently rely on generic drugs and affordable medical devices to treat citizens in a fiscally prudent manner. **Moreover, the TPP may include "transparency" and "due process" provisions in health care technology and pharmaceuticals to insure that foreign suppliers can effectively dispute national and local laws that serve to protect citizens and preserve fiscal policies against the budget busting strategies of multinational drug and device companies.**

## 2. The Negative List Approach

Currently the TPP is framed to cover trade in services in several, overlapping chapters. The section on cross-border trade in services--in which buyer and seller are located in different, participating countries--contemplates the incorporation of lists of exempted services, reflecting the "negative list approach."[8] According to the Congressional Research Service, the United States government favors a trade in services approach developed and ratified through the South Korea-U.S. Free Trade Agreement (known as KORUS FTA) which emphasizes non-discrimination and the elimination of national and subnational legal market access restrictions.

If the KORUS FTA serves as a model for the TPP, then the Trade in Services provision may distinguish between financial services (and presumably all public services) traded across borders and those provided by a foreign firm with a commercial presence in the home country.[9] In the case of firms engaging in cross-border trade in services, the KORUS FTA applies the "negative list" approach exempting certain services from the TPP non-discrimination clauses. For those foreign firms already operating in home countries with a commercial presence, the KORUS-FTA specifies which banking and insurance services apply and which are exempt or "non-conforming" from the FTA provisions. For example, under Article 13:1 the KORUS FTA explicitly exempts *"activities or services forming part of a public retirement plan or statutory system of social security"* from the market access rules. However, a fair interpretation of both the KORUS FTA and what is known about the TPP leads to a conclusion that very few public services would be exempted. According to Public Citizen and the AFL-CIO,

*"the KORUS FTA does not contain a broad, explicit carve-out for these essential public services. Rather, public services provided on a commercial basis or in competition with private providers are generally subject to the rules on trade in services, unless specifically exempted… There are, for example, no U.S. exceptions for energy services (except*

[8] For a fuller, but concise explanation offered by the Australian Services Roundtable and accessible at: servicesaustralia.co/file_download/72/fta-services-concepts.pdf

[9] Ibid, page 23.

*atomic), water services, sanitation services, public transportation, education or health care."*

The negative list approach assumes that all services can be traded across borders without restrictions unless listed in an annex of "Non Conforming Measures."[10] According to the Australian Services Roundtable,

*"This requires a very detailed understanding of the domestic services economy and all the myriad of policy measures which impact on it. Many developing economies find this process exceedingly difficult. It is easy to 'forget' to list a measure and to then discover it is politically difficult to implement removal of that measure."*[11]

In addition, a second annex would allow for the listing of protective policies and measures to retain flexibility over the governmental regulation of services. Taken together, the negative list of services and the list of protective policies, stipulate those non-conforming items that then become the focus for negotiations; as is the case with the public health care systems' list of approved medicines for prescription. Thus, the negative list, once tabled, is held in high scrutiny by participating member national government negotiators bent on reducing the list. To make matters worse, the TPP may include a "ratchet clause" which means that once a member country liberalizes a service once identified on the negative list annex, it then becomes automatically and permanently bound within the Market Access rules of the TPP thereafter.

Following this proposed provision, the pro-business American Chamber of Commerce-Vietnam advocated in its open letter (presumably to U.S. government officials), *The Trans-Pacific Partnership ("TPP"): Key Issues In Promoting Trade, Growth & U.S. Competitiveness in Vietnam*,

*"AmCham Vietnam applauds TPP members for undertaking a negative list approach to services. We hope that the U.S. Government will involve U.S. companies in the formulation of the negative list to ensure accurate accounting of regulatory barriers.*

Thus, **the negative list approach is an incomplete and frail method at best for protecting public health care services** (as well as other public services including education, social welfare services, water, and energy utilities-such as state owned enterprises- among many others) from the Market Access rules of the TPP, but once they are identified-largely as "regulatory barriers" as indicated by AmCham Vietnam, then they become a point of contention and negotiation to reduce the number of services on such lists and force future liberalization by other means, including the "ratchet clause" and restrictions on State Owned Enterprises.

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[10] Australian Services Roundtable. "Cross – Border Trade in Services – Concepts used in FTAs." Accessible at: www.servicesaustralia.org.au

[11] Ibid.

## 3. State Owned Enterprises

State Owned Enterprises or SOEs are organizations directly or indirectly owned or controlled by a government authority. They are often related to natural resource extraction, including water and energy production and distribution, but not exclusively. The TPP, at least those provisions advocated by the U.S. government and others, contemplates provisions to restrict the types and numbers of "advantages-such as subsidies, low cost credit, preferential access to government procurement, and trade protection-not enjoyed by private counterparts…" in order to achieve "competitive neutrality."[12] The TPP would include a number of "cross-cutting" provisions and rules, including non-discrimination and competition policies, to force the liberalization of national economic sectors currently dominated by SOEs. Currently, most FTAs, including NAFTA and the U.S. bilateral FTAs with Australia, Chile, Colombia, Peru and South Korea include provisions that promote national treatment, non-discrimination, and transparency; but proponents of a "21st century" TPP seek to include stronger provisions to insure future liberalization. According to the Congressional Research Service,

*"Such measures may include provisions that seek to ensure that SOEs operate on a commercial basis, and to address potential trade and investment barriers. SOE disciplines may be enforced based on a harm test similar to that used in the WTO subsidies agreement. Broadly, these provisions will likely seek to achieve competitive neutrality with regard to SOEs."*[13]

The TPP's "competitive neutrality" provisions could threaten public health care institutions, such as publically owned or subsidized clinics, hospitals, and laboratories considered to be SOEs and subject to such liberalizing rules as the reduction of government grants, subsidies, and tax credits, public financing-including favorable capital financing, and regulations to restrict private sector participation in the delivery of public health care services. Indeed, **the combination of restrictions placed on SOEs in the public health sector coupled with provisions to liberalize cross-border trade in services provides sufficient points of dispute for any private sector enterprise to challenge public health care delivery systems under the envisioned TPP.**

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[12] "Competitive neutrality" refers to an economic environment in which SOEs receive no competitive advantages beyond those enjoyed by private sector companies. Congressional Research Service. "The Trans-Pacific Partnership Negotiations and Issues for Congress. August 21, 2013:47 and accessible at: http://www.fas.org/sgp/crs/row/R42694.pdf

[13] Ibid.

## 4. Recommendations

More than a decade ago the World Trade Organization facilitated the negotiations leading up to the General Agreement on Trade in Services (GATS). Pollack and Price (2003) examined the GATS and concluded,

*"There is compelling evidence to show that GATS [General Agreement on Trade in Services] and the WTO involve national governments in trading some of their sovereignty for the putative economic gains of liberalisation. In the process, governments lose rights to regulate and to protect non-economic values and the principles that shape provision of public services…. The trade-off between policy autonomy and economic growth raises urgent public health and public policy questions."*[14]

These authors asked fundamental questions about the relationship between public health and international trade; a decade later most TPP negotiators refuse to provide any answers.

- *How can governments achieve public health standards and policy outcomes separate from trade law?*
- *Where will public health standards be set if national and local governments cannot establish and institutionalize them because of enforceable obligations codified through FTAs like the TPP?*
- *Under the TPP, who will be responsible for the public health outcomes directly associated with trade liberalization, including the privatization and cross-border delivery of essential services and their impact on questions of equity in health and human rights?*
- *Under the TPP, why should private sector enterprises enjoy more rights under the Investor-State relations system than citizens?*

We do not have all the answers to these questions; but we do know that the privatization of public health care is not the answer to meeting basic needs and improving the health of citizens in both developed and developing countries such as those involved in the TPP negotiations. Indeed, the case of Colombia is emblematic to the extent that the privatization of public health care created,

*"a system without sufficient qualified staff to administer the system, with appointments influenced by political patronage, and with weak or no community representation. Rich areas ended up with a concentration of private hospitals, poor areas had to rely on under-resourced public sector services. Preventive programmes suffered, and contracting-out of services led to fragmentation, requiring patients to visit different*

[14] Allyson M. Pollack and David Price. "The public health implications of world trade negotiations on the general agreement on trade in services and public services." The Lancet. 2003:362: 1072-75.

*places for different elements in their treatment. One-third of the population has no insurance at all, the government has failed to provide sufficient funding for the fallback system, and hospitals have refused treatment to patients due to lack of payments."*[15]

International trade in public health care services, including privatization and cross-border service delivery, extending drug and device patents to increase profits, and challenging public health institutions through provisions restricting SOEs undermines public health outcomes. No wonder the TPP has largely been negotiated in secret because its fundamental principles and provisions cannot hold up under transparency and democratic scrutiny.[16] Therefore, we recommend that Public Services International and its impacted affiliates:

**4.1 Demand that the TPP negotiating texts be made public prior to the conclusion of the negotiations to allow a robust public debate about its effects on provision of public services and public health outcomes.**

**4.2 Monitor participating national governments' "negative lists" and engage negotiators to advocate for a broad, comprehensive "carve out" for essential public services-including public health care services and institutions among other key public services and utilities.**

**4.3 Oppose the TPP unless it includes a true, comprehensive "carve out" provision that protects public services and the national and sub-national government authority to finance and regulate them in the public interest and to achieve improved public health outcomes.**

**4.4 Oppose the TPP unless extreme foreign investor rights and investor-state dispute settlement are eliminated. Such proposals protect and privilege foreign private sector interests while denying citizens' rights to a fair and transparent dispute settlement system consistent with both national and international law.**

**4.5 Oppose "fast-track" trade negotiation authority now under consideration by the U.S. Congress unless the Obama administration commits to transparent negotiations, broad consultations with all stakeholders, elimination of the extreme and special investor rights, and full protection of public services and public health care institutions.**

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[15] Hall, David and Public Services International Research Unit (PSIRU). "Colombia – Health - Impact of health liberalisation and under-funding." June, 2010 and accessible at: http://www.psiru.org/node/15293.

[16] Wallach, Lori and Ben Beachy. "Obama's Covert Trade Deal." New York Times. June 2, 2013 and accessible at: http://www.nytimes.com/2013/06/03/opinion/obamas-covert-trade-deal.html?_r=0.

## Appendix 1: TPP Member Country Ratification of Core Labor Conventions

According to the Congressional Research Service,

*One of the more controversial issues that the TPP partner countries are addressing pertains to the scope and depth of provisions on worker rights. Supporters of strong worker rights, such as labor unions and certain non-government organizations (NGOs), are concerned that failure to promote and implement these rights, including collective bargaining, could lead to the imposition of low wages and poor conditions for workers by firms in those countries.*

Indeed, the TPP member countries demonstrate an unequal recognition of the International Labor Organization's Declaration on Fundamental Principles and Rights at Work (see table below), including the core conventions that guarantee or advance:

- **The freedom of association and the effective recognition of the right to collective bargaining;**
- **The elimination of all forms of forced or compulsory labor;**
- **The effective abolition of child labor; and**
- **The elimination of discrimination in respect of employment and occupation.**

| Core Labor Conventions | Australia | Brunei | Chile | Canada | Japan | Malaysia | Mexico | New-Zealand | Peru | Singapore | USA | Vietnam |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Forced Labour Convention, 1930 (No. 29) | X | | X | X | X | X | X | X | X | X | | |
| Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) | X | | X | X | X | X | X | | X | | | |
| Right to Organise and Collective Bargaining Convention, 1949 (No. 98) | X | | X | | X | | | X | X | X | | |
| Equal Remuneration Convention, 1951 (No. 100) | X | | X | X | X | X | X | X | X | X | | X |
| Abolition of Forced Labour Convention, 1957 (No. 105) | X | | X | X | | X | | X | X | X | X | |
| Discrimination (Employment and Occupation) Convention, 1958 (No. 111) | X | | X | X | | | X | X | X | | | X |
| Minimum Age Convention, 1973 (No. 138) | | X | X | | X | X | | | X | X | | X |