TPP-11: deregulation of essential services

The TPP-11 Trade-in-Services Chapter is unchanged from the TPP-12. Its aim is to increase international trade in services and treat them on a commercial basis, open them to international investment, and to minimise barriers to such trade. Considerations about the ability of governments to regulate access to essential services in the public interest are secondary to this aim.

All services are included unless specifically excluded

The TPP-11 services chapter and specific chapters on financial services, telecommunications and state-owned enterprises set rules affecting all service including education, healthcare, transport, water, telecommunications, postal services, aged care, child care, energy and financial services, unless they are specifically excluded. These are services which many of us use each day. New services which may be developed in future will be covered, automatically reducing government's ability to regulate them.

It's claimed that "public services" are not included but the definition of public services is very ambiguous. The TPP-11 defines a public service as "a service supplied in the exercise of governmental authority … which means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers," (TPP-11, Article 10.1). In Australia, as in many other countries, many public and private services are provided side-by-side, meaning very few public services are excluded by the definition.

De-regulation is the aim

The TPP-11 treats regulation of services as if it were a tariff, to be frozen at existing levels or reduced over time, but not to be increased in future, known as the "ratchet" structure. These rules are enforced by the government to government disputes process. Individual foreign investors can also bypass national courts and sue governments for compensation if they can argue that a change in law or policy has harmed their investment (Investor-State Dispute Settlement or ISDS).

Many services require regulation or public provision to ensure that they are delivered safely and equitably. For example, in Australia we expect government to ensure that everyone has access to public services like healthcare and education. Likewise, electricity generation, water, postal telecommunications and transport services require regulation to ensure access and protect consumers.

The "ratchet" structure to prevent new regulation ignores the need for democratic governments to respond to changed circumstances. For example, most governments including the Australian government had to introduce new financial regulation following the Global Financial Crisis, which a United Nations study has shown would have been difficult if TPP-like services rules had been in place.

Governments are also responding to the need for new forms of regulation of energy markets and of carbon emission levels to respond to climate change. The debate about the National Energy Guarantee is just one example, and future governments will need to have the flexibility to adjust such policies. This flexibility should not be reduced by restrictions on new regulation.

Re-regulation not an option

The TPP-11 would stop governments from putting stronger regulations in place in the future, limiting their ability to respond to future crises or changed circumstances.

The TPP-11 could also prevent governments from responding to failures of deregulation and privatisation. The recent failure of deregulation and privatisation of Australian vocational education services resulted in fraudulent advertising, failure to provide courses to students and misuse of government funds. The current government reregulated those services late in 2016. If the TPP had already been implemented without very specific exclusions for private vocational education services, the ratchet structure could have prevented such reregulation. A future government might want further changes, like providing more services through the public TAFE system. The TPP-11 could make this difficult. Such changes could also result in ISDS cases from service providers from TPP countries (See exclusions do not prevent ISDS cases below).

Hidden privatisation agenda

The TPP-11 does not force privatisation but promotes the privatisation of public services in many ways: through its ambiguous definition of what constitutes a "public" service, by allowing greater accesses to services markets for global corporations and through rules which will make reversing a decision to privatise almost impossible.

Privatisation is a politically sensitive issue in Australia where, according to the chair of the Australian Competition and Consumer Commission, it has often failed to deliver promised outcomes, led to price rises for consumers and damaged the economy. Any decision to privatise or to reverse a privatisation should be made through an open democratic process and should not be bound by rules made in secret trade negotiations.

Services exclusions do not exclude ISDS cases

Annex I of the TPP-11 services chapter lists current non-conforming laws and policies that can be maintained, but they cannot be changed in ways which would make them more "trade restrictive" in future, and new restrictions cannot be introduced. Annex II lists non-conforming laws and policies that can be both maintained and changed in future. However, the aim is to reduce over time the measures listed in both Annexes.

The exclusions for public interest legislation in the Annexes of non-conforming measures do **not** prevent foreign corporations from suing governments over these forms of regulation under the separate ISDS provisions in the Investment Chapter for measures introduced at national, state or local government level.

Even if a service were excluded from state-to-state disputes, this would not prevent the possibility of an ISDS dispute. For example, a future government might make further changes to regulation of vocational education services. If the TPP-11 were in force, and there were a private vocational education service provider from a TPP-11 country that could argue that the value of its investment had been reduced, it could launch an ISDS case by alleging indirect expropriation and/or lack of fair and equitable treatment.

Impacts on particular services

State and Local government

All existing nonconforming measures in state and local government are exempted in Annex l, which means that they can be retained, but not increased in future. This means that state and local governments are restricted from introducing changed or new regulation in the future that could be regarded as barriers to trade. This could include many areas of state government regulation and changed or new local government regulation for local purchasing policies, local land use, environmental or health regulation. All these areas of new or changed regulation could also face ISDS cases from foreign investors in TPP countries.

Community services like child care and aged care

Market access provisions to provide national treatment and non-discrimination to international investors in services (Article 10.5a, pp10.4-10.5), mean governments cannot regulate on numbers of service suppliers, numbers of operations and numbers employed in particular services or operations. This may limit planning for the distribution of services and staffing levels in services like child care and aged care.

There are detailed obligations for governments on domestic regulation of services to ensure that regulations for licensing, qualifications and technical standards are “reasonable” and do not constitute “unnecessary barriers to trade” (Articles 10.8-9, pp. 10.6- 10.8). This could have an impact on future governments that regulate to lift qualifications in areas like childcare and aged care. All of these areas of new or changed regulation could also face ISDS cases from foreign investors in TPP countries.

Regulation of carbon emissions and energy services

Governments are also responding to the need for new forms of regulation of energy markets and of carbon emission levels to respond to climate change. The debate about the National Energy Guarantee is just one example, and future governments will need to have the flexibility to adjust such policies. TPP-11 rules could restrict such flexibility. These areas of new or changed regulation could also face ISDS cases from foreign investors in TPP countries.