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Beware, secret trade deals can seriously damage your health

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If I asked you to name some of the current threats to your health, “international trade law” probably wouldn’t be on the tip of your tongue. Yet trade agreements, and the way we negotiate them, can affect how countries regulate private interests in order to protect our health. And often, even a small change in the wording of an agreement can have huge consequences for our health.

WikiLeaks recently published confidential text from the Trans Pacific Partnership (TPP), a new trade agreement being negotiated among 12 countries who represent 800m people and 40% of the world’s GDP. The TPP is seen by its supporters as an important part of promoting trade to support economic growth and job creation.

But the leaked text has very little to do with trade. Instead it proposes higher levels of protection for corporations at the expense of the public’s health. Among these are the patenting of medical procedures and wording that could give tobacco companies the upper hand when it comes to introducing plain cigarette packaging.

WikiLeaks revealed just one section of the full agreement, the part that lays out rules for the protection of intellectual property. It is a draft for negotiation and not a final product, full of brackets and footnotes that explain the negotiating positions of each state. To interpret it fully and accurately really requires access to the whole text – but requests from public interest groups have been denied.

Supporters of intellectual property rights argue that through copyright, trademarks, and patents, these rights protect creative industries, prevent piracy, and encourage innovation. Critics point out that too much protection can prevent creativity and innovation.

Good news or bad news?
The good news for public health advocates is that the US, the most aggressive proponent of intellectual property protections, has toned down some of its most controversial requests, such as a requirement to make patents available for “new forms” of known substances.

The bad news is that very damaging ideas still remain. Among these is the patenting of medical procedures. We all know that patented products and processes are likely to be more expensive and more restrictive. The US, contrary to its own laws and the World Trade Organisation’s international agreement on intellectual property (TRIPS), proposes in the TPP that US states should make patents available for medical procedures. It’s so controversial that ten states have opposed it.

Then there’s plain packaging. Policies like the one adopted by Australia are designed to reduce the appeal of cigarettes, especially to young people, by replacing slick branded packaging with an unattractive, uniform design.

But trade deals can be used to provide the legal grounds on which companies can challenge the policy. In several places, the TPP text interprets existing trade law in ways that could cause legal problems for countries that adopt plain packaging policies. References to the Doha Declaration on TRIPS and public health, for example, narrows down a broad recognition that countries can act to protect public health without breaking trade commitments to one dealing only with access to medicines.

As tobacco firms often use trade law to challenge tobacco control policies, this narrow interpretation could leave countries with less protection to defend their tobacco regulations.

Evergreen patents are also an issue. “Evergreening” involves making small changes to a drug or finding new uses for it in order to apply for a new patent once the old one has expired. Pharmaceutical firms can use this to continue to monopolise markets after patents run out. The US has proposed text in the TPP that allows patents for new uses or methods of using products. It has also proposed, though the wording is unclear, that patent protections be automatically lengthened if regulating agencies take too long to grant patents to pharmaceutical manufacturers. This seems to suggest that a longer patent would be granted to make up for time wasted during the application process.

Patenting a medicine is one way for a pharmaceutical company to prevent others from copying their drug. Imposing data exclusivity is another. Data exclusivity prevents data that has been collected to justify the introduction of a new drug from being used as evidence for the introduction of future, identical drugs. This both delays the introduction of cheaper generic drugs onto the market and has implications for the ability to use the data to support medical research and treatment. The issue has caused division between countries negotiating the TPP.

Foreign investors can sue

Other parts of the TPP are disturbing, too. Like many other trade agreements, the TPP contains an investor/country dispute settlement mechanism – a procedure that foreign investors can use to challenge countries that have allegedly broken trade and investment commitments. These procedures are worrying because they allow multinational companies to sue governments through a largely private and undemocratic process.
Tobacco firms lobbied for the inclusion of strong investor/state provisions in the TPP, and are currently using similar mechanisms in other agreements to challenge public health regulations in Australia and Uruguay.

The leak indicates that there are fundamental flaws in the procedures used by countries to make trade policy. The TPP negotiations have been described as secretive even by the standards established by previous trade deals.

In the US, for example, elected representatives have complained about getting access to the text of the TPP. Corporate actors – companies considered as intellectual property stakeholders – are able to access and influence the text through the US’ trade consultation process, unlike their public interest group counterparts. Freedom of Information requests to disclose TPP texts have failed on the grounds that they are a matter of “national security”.

The world should pay close attention to these negotiations, as the TPP is likely to be a model for other emerging deals, including the Transatlantic Trade and Investment Partnership being negotiated between the US and the European Union.

The ideas contained in this draft can and will change. And the leaked text shows that US is clearly being challenged by other states, at least in private. Nevertheless, the ideas contained in the draft, and the undemocratic way it has been negotiated, should ring alarm bells for us all.