

KEY FACTS: Trans Pacific Partnership Agreement

The lack of transparency of the TPPA has resulted in suspicion that the TPPA is not being negotiated with the interests of US citizens and the common person of eleven other nations in mind. The member nations of the TPPA are: **Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam.**

For six years the TPPA was negotiated in secret. The key facts below have been provided thanks to New Zealand's postings of their findings on the TPPA taken from: [https:// itsourfuture.org.nz/wp-content.../2016/key-issues-in-the-TPPA.pdf](https://itsourfuture.org.nz/wp-content.../2016/key-issues-in-the-TPPA.pdf)

Specific Analysis of the TPPA: Not in our interests!

The final text of the TPPA was released on 5 November 2015 and an amended version on 26 January 2016. Trade Ministers of all twelve countries signed the TPPA on 4 February 2016 in Auckland, amidst a storm of protest. The signing ceremony was largely symbolic.

The TPPA does not come into force until countries with 85% of GNP have ratified the TPPA. It is possible that the US Congress will not pass the TPPA until after the US Presidential election, if ever. Political opposition is building.

Initial analysis of the text shows the NZ government has misled the public through spin, inflated claims and self-serving omissions. The economic benefits have been exaggerated, the economic and social costs understated, and future risks ignored. [Note: In the United States the situation has been different. Information has been difficult to receive. A shroud of mystery surrounds the TPPA. Virtually no information was made available to the American populace from the government or from corporations involved in the negotiation. Citizens have learned about the TPPA in the USA largely through Wikileaks.]

In Vermont we largely have to rely on foreign information to understand the TPPA. In this case information that comes to us from New Zealand. So we

can glean from New Zealand what the effect will be on other nations including the USA.

Right to regulate: The most serious problem is that democratically elected New Zealand governments will lose the right to change laws and policies in ways they (and we) think appropriate - and can face challenges from foreign governments and corporations if they try to do so.

Assurances that governments retain the right to regulate for the public benefit are misleading. In fact, every time the government weakens its regulation, there is a ratchet effect. The lower level of regulation risks getting locked in for the future. This poses particular problems in New Zealand, where risk-tolerant, light-handed regulation has become the norm. Finance company collapses, leaky buildings, workers' deaths in mines and forests all show how vital it is to preserve our sovereignty.

It is impossible to predict the regulations that New Zealand will need in decades to come, especially in responding to the crisis of climate change, the internet of things, disruptive technologies, financial volatility, societal changes and economic transformation. Handcuffing future government regulation through the TPPA is dangerous.

Affordable medicines: One of the most sensitive areas is new generation biologic medicines, which treat diseases like cancer and diabetes effectively with low-side effects. The rules say TPPA parties must provide the pharmaceutical company with a monopoly of 8 years or its equivalent (New Zealand law currently provides 5 years). Every additional year adds tens of millions of dollars to Pharmac's bill for subsidising medicines. New Zealand's negotiators say our processes meet the TPPA's vaguely worded requirement. But the US may not agree and may demand that we provided longer monopolies before it will 'certify' that NZ has complied with our obligations in the TPPA. The rule will also be renegotiated in 10 years, by which time biologics will be a much bigger share of our medicines budget. In addition, there is a transparency annex that affects Pharmac's processes that will increase its administrative burden and provide big pharmaceutical multinationals with more opportunity to challenge Pharmac's decisions.

Investment: Investors from TPPA countries, notably the US and Japan, gain special rights that are not available to New Zealand investors. The agreement limits our right to vet foreign investment and impose conditions to ensure it benefits NZ businesses, technology developers and local communities. It raises the level of investment that requires approval from

\$100 million to \$200 million. At the same time, the TPPA makes it difficult, if not impossible, to stop foreign firms exporting all their profits out of the country.

Investor enforcement: **Foreign investors can enforce their special rights in controversial offshore tribunals, not in our domestic courts.** Investor-state dispute settlement (ISDS) provisions in other agreements have been widely used (especially by US investors) to challenge new regulations that adversely affect their business. The TPPA would allow foreign multinationals to challenge a huge range of decisions in future, such as regulation that adversely affected a contract for oil exploration, a PPP contract for water, sewage or toll roads, a mining or forestry concession with central government or with an SOE exercising a delegated power.

The government says the TPPA has addressed the problems with ISDS, but it has tinkered at the edges. Most arbitrators are still likely to come from a small club of investment lawyers, with no effective conflict of interest rules (although some are promised). There is no guarantee they will apply consistent rules and no way to appeal if they make rogue decisions. There's no cap on damages or compound interest.

Health and environment protections: There is a general exception provision that appears to protect public health or environment measures. But it is weak and has rarely succeeded when governments have relied on it in disputes. It does not even apply to the investment chapter. Instead, there are various provisions that refer to 'legitimate public policy' objectives, but they only apply to some rules or their wording is full of hidden traps. Some so-called protections for environment, health and regulatory objectives just allow the government to do what the chapter allows the government to do anyway. In places, there is less protection than agreements that NZ has with other countries, like China, South Korea and Taiwan – and they will now get the benefit of the TPPA's pro-investor rules.

Tobacco: Malaysia had wanted to carve tobacco control measures out from the entire agreement, but failed to get support. There is a special exception for tobacco, but it applies only to disputes brought by foreign investors under the investment chapter, and a country must opt in if it wants to use it. TPPA governments can still State to State dispute settlement to challenge tobacco control measures under the investment chapter, as well as labelling rules and intellectual property rights under other chapters – similar to those that Australia's plain packaging law faces in the WTO.

Finance: Many of the risk-tolerant rules on financial services that have allowed banks to become too big to fail and fostered shadow banking systems offshore will have to remain, or be weakened. Governments have limited room to move in a financial crisis, including imposing controls on movement of capital into and out of NZ, and major problems taking steps that would prevent a crisis if they contravene the TPPA's rules. The Agreement also allows financial services companies to use ISDS to sue governments for allegedly breaching their special protections.

Services: Most existing regulation of various services and investments will be locked in so governments can't make them more restrictive in the future, including problem areas like construction and services related to forestry. Market models of services like education and broadcasting will have to remain the norm, with governments required to choose the most light-handed approach to regulation, including zoning and quality standards.

State-owned enterprises: State-owned Enterprises are required to operate on a fully commercial basis and not receive advantages that other countries say are unfair, unless the government has protected them from the rules (NZ has listed few protections). It will be really hard to create new SOEs that require support or guarantees – such as proposals for a new state-owned insurance company.

Information, innovation, internet and privacy: Stronger protection for intellectual property rights primarily benefits IP holders (who are mainly in the US). Copyright is extended by 20 years, incurring significant direct costs for the New Zealand economy and inhibiting innovation and creative expression. There are potential problems with data privacy in the e-commerce chapter, as information can be held in offshore countries with weak privacy protections and strong surveillance powers. A new offence for removing digital locks on content, even where there is no copyright infringement, could criminalise members of the public for legitimate activities or tinkering with technology.

Creating and protecting jobs: Approval of foreign purchases of New Zealand assets or other foreign investment can't be linked to creating jobs. The government procurement chapter aims to prevent governments from using government purchasing power to foster local businesses and jobs. There is a built-in review after 3 years to extend these obligations to regional

and local government. The SOE chapter requires SOEs to use only commercial considerations when buying and selling goods and services. New Zealand business is further disadvantaged by allowing foreign investors to challenge laws through ISDS.

Protecting the environment: The government has suggested that one of the areas of gains in the TPPA is in environmental protection, but the useful measures on curbing fisheries subsidies and trade in endangered species are far outweighed by the provisions that undermine environmental laws. These include threats to NZ's restrictions on product labelling for GM content, sugar content and food safety; threats to regulation of mining, fracking and pollution from ISDS challenges; and threats to action on climate change – the TPPA fails to even make a mention of climate change anywhere in its 6147 pages. Instead, proposed references to climate change and the UNFCCC in the environment chapter have disappeared.

The economy: The TPPA has been sold primarily on the basis of its economic benefits to exporters. But the tariff reductions are small and don't necessarily mean additional trade. Even the most obvious costs have been excluded from the modelling. Analysis of the agreement has revealed significant additional costs and serious risks to affordable health care, innovation and creativity, privacy, the environment and government's right to regulate.

The TPPA has been touted as a “21st Century agreement”. It is far from it. Rather, it looks more like a desperate attempt to lock in the failed pro-corporate policies of the last century. It would not be in our interests for New Zealand to sign this agreement.

February 2016

Dr. Jane Kelsey, Professor of Law, Auckland University

Barry Coates, Spokesperson for It's Our Future – Kiwis against the TPPA

See research published at <https://tpplegal.wordpress.com/nzlf-expert-paper-series/>

The Following include more details on the TPPA

KEY FACTS: The Environment

- • The environment is a significant casualty under the TPPA.
- • Adopting the lens of the foreign investor when making broad governance changes through the TPPA has sidelined the opportunity to properly integrate management of the economy with management of other domains – such as the environment. The overall result for environmental governance is window dressing on the upside, and serious threats on the downside.
- • In marked contrast to TPPA chapters that involve core commercial areas such as intellectual property, the environment chapter sets almost no new standards, with each partner country essentially left to set its own.
- • A failed US proposal to have seven UN multilateral environmental agreements made enforceable by the TPPA would have created new problems, especially by opening the way to ‘forum shopping’.
- • Parties are required to implement provisions in the Convention on International Trade in Endangered Species, but this UN treaty does not provide a legally enforceable prohibition on trade in illegally sourced timber, wildlife, and marine resources and the TPPA does not fix this.
- • Two forms of fishing subsidy that contribute to overcapacity and overfishing are eliminated under the TPPA ,but no similar progress has been made on the overarching issue of illegal, unreported and unregulated fishing.
- • The TPPA’s enforcement provisions are very similar to those first developed for the US/Peru FTA, and it is continued violations of Peru’s obligations under that agreement have become the case study in how enforcement of such environmental protections has failed.
- • When challenged on the need for ISDS provisions, ministers promoting the TPPA repeatedly stated that there would be no restraint on a government’s ability to regulate in the public interest. What the TPPA has delivered are provisions that completely fail to protect governments from being sued when taking such action.
- • The risk that a government could be successfully sued means the ISDS provisions would have a ‘chilling effect’ on a government’s willingness to undertake progressive environmental reform. This favours retaining low standards when these need to rise markedly.
- • There is a gross asymmetry in the rights and means accorded organisations that would seek to protect the commons for the public good, and rights and means accorded foreign investors to protect private wealth.
- • The section on climate change contains two impotent paragraphs that do not mention

the words “climate change” nor the relevant global treaty, the UNFCCC. The aspirations contained in the newly minted Paris agreement (made under the UNFCCC) are entirely disconnected from what the parties are willing to sign for in a treaty that carries trade sanctions as a penalty for non-performance.

- The TPPA provides assistance to GMO exporting countries by making it harder for other countries to independently regulate GM foods. A combination of information requirements, the TPPA's dispute procedures, and new working groups, together amount to a significant new level of pressure on TPPA governments to accept GM foods under 'mutual recognition' standards—those of the exporter.

Drawn from the expert, peer-reviewed research paper by Simon Terry at <https://tpplegal.files.wordpress.com/2015/12/tpp-environment.pdf>

KEY FACTS: Intellectual Property and Information Technology

Intellectual Property

- • TPPA provisions on intellectual property are a net cost to New Zealand citizens and businesses. There are significant financial costs, and more significant lost opportunities, with some rules limiting our ability to experiment and innovate.
- • The text has improved over time. Compared with leaked earlier drafts, the final text involves reduced restrictions and lower costs to New Zealand.
- • The final impact of the TPPA depends in part on whether we make full use of allowed exceptions, New Zealand can and should adopt these exceptions.

Copyright

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Increases to copyright term under the TPPA are estimated to cost New Zealanders at least \$55 million a year on average. Official analysis equates this with an up-front cost of \$500 million dollars.

The same analysis notes that these copyright cost estimates are uncertain, and are likely to be underestimates.

Opening "digital locks" on copyright content, including purchased content, will mean risking personal liability.

Medicines and biologics

- • The TPPA requires data exclusivity for biologic medicines either for a term of eight years, or a shorter term with unspecified other measures to ensure a "similar market outcome". New Zealand's current five year term may be challenged by the US. Extended protection for biologics would add to the cost of some treatments, resulting in higher costs for patients or the tax-funded health system.
- • New biologic treatments would be eligible for longer patent terms. This may not happen often, but when applied would delay access to cheaper generic versions.

Software Patents

- New Zealand can continue to exclude patents for pure software under the TPPA. **The Internet and Data Flows**

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New Zealand could retain its existing “graduated response” regime, where ISPs pass on copyright notices to customers for file sharing.

TPPA rules make it easier for business to move information overseas, but limit potential restrictions and protections for user data.

Our .nz domain registry is independent from government. TPPA domain name provisions, though consistent with current practice, are a wrinkle on this independence.

Innovation and Exports

- • Overall, TPPA rules on intellectual property do not assist innovation. Benefits go mainly to established, overseas companies, not new or rapidly growing businesses.
- • New Zealand technology businesses may benefit from opening of TPPA markets.

This briefing sheet is drawn from the expert, peer reviewed research paper “TPPA: Intellectual Property and Information Technology”, authored by James Ting-Edwards, Melanie Johnson, Judge David Harvey, Debbie Monahan, Kate McHaffie and Jo Shaw at <https://tpplegal.files.wordpress.com/2015/12/tpp-ip-it.pdf>

KEY FACTS: The Economics of the TPPA

- • Modelling of the economic benefits of the TPPA for New Zealand, commissioned by the Ministry of Foreign Affairs and Trade (MFAT), predicts an increase in GDP of 0.9% by 2030 or \$2.7 billion.
- • These benefits are modest - extrapolating from current growth rates, GDP would increase by 47% by 2030 without the TPPA or 47.9% with the TPPA.
- • Estimates of the gains from tariff reductions are less than a quarter of the projected benefits according to the modelling, and are exaggerated.
- • Most of the projected benefits result from reducing Non-Tariff Barriers (NTBs) – these rely on inadequate information that neither identifies the NTBs that would be reduced by the TPPA nor distinguishes between protectionist measures and legitimate government regulation.
- • According to recent modelling, the TPPA is projected to result in a reduction in employment and an increase in income inequality for New Zealand.
- • The government has not included the costs that are likely to result from the TPPA in its analysis - these are likely to be significant, and may outweigh the economic benefits.
- • A comprehensive and objective cost-benefit analysis should be undertaken before signing or ratifying the TPPA.

- • Gains for agricultural producers are small compared to fluctuations in commodity prices and exchange rates.
 - • Restrictions on labelling through the TPPA's Sanitary and Phytosanitary Measures may restrict opportunities for New Zealand food exporters to build a high quality, differentiated market position.
 - • Significant tariff barriers remain in the dairy sectors of Japan, Canada and the US - these are likely to be 'locked in' under the TPPA and more difficult to remove in future.
 - • Regional trade agreements such as the TPPA will undermine negotiations on agriculture in the World Trade Organisation, which is only realistic forum to reduce the massive agricultural subsidies that distort agricultural markets.
 - • The TPPA will both help and hinder New Zealand's ambitions to add value to our raw materials and commodities, and climb up value chains – more analysis is required.
 - • The benefits of the TPPA are likely to be asymmetric - the TPPA is favourable to the business model and practices of US multinationals and may exacerbate the disadvantages of New Zealand's size and remoteness.
 - • The potential threat from cases under the TPPA's Investor State Dispute Settlement is likely to create a chilling effect on New Zealand governments' laws and policies.
 - • The delay in implementing plain packaging regulations for cigarettes in New Zealand is a current example of regulatory chill; regulation in sectors such as banking, energy, climate change, transport, environmental protection and mining may be subject to threat from potential ISDS cases.
 - • Potential compensation payments or settlements could far outweigh the limited economic benefits from the TPPA; even if cases are successfully defended, the legal costs are onerous.
- The TPPA's coverage is far from comprehensive and its US-centric rules on intellectual property, services and dispute settlement mean that it is unlikely to be the model adopted by China or the EU.
 - The TPPA would limit governments' ability to innovate and address deeply entrenched inequalities in health, education and income, and exacerbate rapidly escalating problems such as environmental degradation and climate change. The TPPA falls short of being "a trade agreement for the 21st Century" as its proponents claim.

Drawn from the expert, peer-reviewed research paper by Barry Coates, Rod Oram, Geoff Bertram and Tim Hazledine at

<https://tpplegal.files.wordpress.com/2015/12/tpp- economics.pdf>

KEY FACTS: Local Government

As democratically elected bodies, local authorities must be able to influence important decisions, be held accountable by their constituencies and have flexibility to respond to local needs and circumstances, which necessarily change over time.

Local governments internationally have found they have to exercise their mandates within strict policy and regulatory boundaries set by international trade and investment treaties they had no role in negotiating, and that decision-making is removed further from elected bodies who are responsible for the wellbeing of their regions.

The binding and enforceable rules of the TPPA go further than any previous such agreement and will impose new constraints on local governments' authority and autonomy to regulate and make decisions.

Every local authority will have to comply with complex rules across many chapters, and decisions they make that impact adversely on foreign investors will potentially be open to challenge through the investor-state dispute settlement (ISDS) mechanism.

The chapters on investment and cross-border services that apply directly to local government have the greatest potential impact, and the protections for key areas of local authority activity are limited.

Local government is not currently bound by the government procurement chapter and most rules in the state-owned enterprises chapter, but negotiations to include them are built into the Agreement. Extending these rules to local government level requires extensive in-depth study and democratic consultation, which has not occurred to date with the TPPA.

There are piecemeal and contingent exceptions and exclusions in the TPPA, which are complex and will make it very hard for local government to anticipate the legal risks when it exercises its powers.

Municipal activities that have the greatest potential to be affected are: policy making and planning decisions; bylaws and regulations governing permitted activities; technical standards, such as property development, construction, advertising, zoning and environmental quality; activities relating to finance; public procurement contracts, including public private partnerships (PPPs); utilities; and resource management rules and decisions.

Investors from TPPA countries will have the power to challenge local government decisions that damage their commercial interests, including disputed procurement or PPP contracts, planning and consent processes, or blocking price increases for utilities like water or sanitation.

Special rights for foreign investors can be enforced through the controversial ISDS process. Even where the local government believes it is legally correct the uncertainty

and costs of defending a dispute can sap a government's resolve – known as the 'chilling effect'.

An investor from a TPPA country can also enforce an investment contract through ISDS, even they are not claiming a breach of the TPPA's investment chapter.

The text has not addressed the main objections that ISDS lacks the characteristics of a credible and independent legal process and can effectively bypass domestic courts. The recent *Bilcon v Canada* dispute shows the risks of ISDS where a local authority rejects a resource application from a foreign investor because of community concerns. The dissenting arbitrator called the decision a 'significant intrusion' into domestic jurisdiction and a 'remarkable step backwards' in environmental protection. Defending disputes is very costly. In recent Canadian disputes the government has proposed to recover the costs and any compensation from the provincial authority. The contracting out of services, greater use of PPPs, including for water, and asset sales will intensify the exposure of local government to the TPPA and heighten the risks of investor-state disputes over disputed contracts. Regulations, bylaws, administrative decisions, etc that give preferences to local firms, limit the quantity of services or suppliers, or impose special restrictions or performance requirements on foreign firms, cannot be tightened unless the New Zealand government has expressly reserved the right to do so.

Administration of local government measures affecting services from a TPPA supplier can be challenged as not being reasonable, objective or impartial.

The TPPA erodes the flexibility that local authorities need to promote economic development in their communities, and is not a sound basis for a progressive and sustainable 21st century economy that addresses climate change, social inequalities, environmental degradation and other challenges.

Drawn from the expert, peer-reviewed research paper by Tony Holman, Richard Northey and Jane Kelsey at <https://tpplegal.files.wordpress.com/2015/12/tpp-local-govt.pdf>

KEY FACTS: TPPA and the Democratic process

- • The 30 chapter Trans-Pacific Partnership Agreement (TPPA) constrains domestic law and policy at central government level, and in places by local government and SOEs, in diverse areas beyond traditional aspect so of international trade.
- • New Zealand's treaty making process is controlled by the Executive, which will decide whether and when to sign and ratify the TPPA.
- • Parliament's effective input is limited to any amending legislation, which can be passed, if necessary, in a confidence vote.

- • The National Interest Analysis tabled with the TPPA text is prepared by the Ministry of Foreign Affairs and Trade(MFAT) and is not an independent assessment of the costs and benefits of the TPPA.
- • The select committee examination of the TPPA by the Foreign Affairs, Defence and Trade Committee will not provide an independent review that can alter the agreement.
- • Aside from the final text no other negotiating documents have been, or are proposed to be, released to enable proper analysis, democratic participation and government accountability.
- • The US Congressional process is governed by domestic political factors, with a significant chance there will be no vote before a new administration takes office in 2017.
- • The US will withhold certification of compliance by New Zealand until the US is satisfied that all changes it requires to New Zealand's domestic laws, policies and practices have been made.
- • A new US administration may seek to renegotiate the agreement, add new side-letters or with hold certification until further changes are made.
- • The TPPA can only come into force following completion of domestic processes by the US, Japan and several other larger parties.
- • Countries that sign the TPPA but do not ratify immediately may be required to make additional concessions, as will other countries seeking to accede to the TPPA.
- • A TPP Commission of the parties will govern the agreement, including accessions and amendments.
- • Withdrawal is a technical possibility but a political, diplomatic and economic unreality.
- • Where there is inconsistency between provisions of the TPPA and existing agreements between some parties, the terms that are more favourable to commercial interests will prevail.
- • The TPP provides cumulative opportunities for foreign states and corporations to influence domestic decisions which maybe burden some and intrusive.
- • The TPP Commission's powers, chapter-specific committees and inbuilt renegotiations will supervise compliance and could extend the initial TPPA obligations.
- • The TPPA will be enforced through extra-territorial tribunals, backed by sanctions that will, in practice, reflect the asymmetries of power between the various parties.
- • Provision for investor-state dispute settlement lacks the characteristics of a credible

and independent legal process and effectively displaces national judicial processes for a privileged class of foreign investors.

Drawn from the expert, peer-reviewed research paper by Jane Kelsey at <https://tpplegal.files.wordpress.com/2015/12/tpp-treaty-process.pdf>