

**SUMMARY OF KEY ISSUES IN THE TRANS-PACIFIC PARTNERSHIP (TPP) AGREEMENT**  
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***LACK OF TRANSPARENCY & ACCOUNTABILITY***

Negotiated in complete secrecy over a period of six years, the 12-country TPP is now in final form and cannot be changed. Congress can only vote to accept or reject it. *Nonetheless, this agreement is a “living agreement” that additional countries can join in the future, and will put into place roughly 20 committees to manage trade in agriculture, government procurement, the Internet, food safety, financial regulation, and other topics covered in the deal.* Some committees have narrow authority, but others are open-ended in scope. Like the negotiation process that created TPP, many of these ongoing committees, even those dealing with public health and food safety, will be subject to confidentiality provisions that will hamper scientific peer review of their activities and limit public and consumer oversight of their activities. And, unlike a state or federal law that can be repealed when new information comes to light or conditions change, trade agreements require the agreement of all parties to commence negotiations to make changes, which as a practical matter will not occur.

***JOBS***

Will exports exceed imports, when the imported goods are produced with substandard wages and in some cases, slave labor? For example, will Maine’s sustainably sourced seafood be able to compete with tariff-free Asian seafood that’s been demonstrated to rely on forced labor? How will all the provisions of TPP work together, including provisions that open up procurement and turn “Buy American” provisions into “buy TPP”, discourage border checks of imports, and encourage food safety standards to be deemed equivalent between the U.S. and other TPP countries? Although the U.S. Department of Commerce has issued “fact sheets” extrapolating data based on current exports, these calculations fail to include the effect of imports, which will also see tariffs reduced. A careful and complete analysis of TPP’s economic impacts must critically examine imports as well as exports, and job losses as well as gains, in order to understand the economic impact of the trade agreement.

***ENVIRONMENT & NATURAL RESOURCES***

There are two ways that the TPP will impact natural resources and environmental protections. *First*, through Chapter 20, “Environment,” which lays out *pro-environment* standards that TPP signatory countries should comply with. *Second*, through the 29 other chapters, which are mostly intended to speed up and reduce costs and regulatory barriers to trade. These include Market Access, Procurement, Technical Barriers to Trade, and Investment, and could have significant *negative environmental consequences*, so only looking at the provisions of the Environment chapter to a large degree misses the point.

*The major U.S. environmental organizations have completed their analysis of the TPP, and their conclusion is that the pro-environment chapter is weak, and that the other chapters include many provisions that could weaken environmental protections, open the door to trade challenges of pollution control and environmental standards, and accelerate climate change.*

- ***The Environment Chapter does not live up to the Obama Administration’s hype, and is in many ways weaker than prior trade agreements negotiated by the Bush Administration.***

While the range of conservation issues mentioned in the TPP may be wide, the obligations – what countries are actually required to do – are generally vague and combined with weak enforcement. *The chapter does not meet even the basic requirement set forth in the 2015 Congressional fast-track legislation that the TPP meet commitments agreed to by Congress and the Bush Administration in 2007, that seven core international Multilateral Environmental Agreements (MEAs) be included.* Only one of the MEAs is fully enforceable in the TPP - the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)- even though all TPP parties are signatories to three of the agreements and the U.S. and at least one other TPP party has signed the remaining four. Among other MEAs, TPP fails to include enforceable provisions for the longstanding Montreal Protocol on ozone depletion, MARPOL on pollution from ships, and the International Convention for the Regulation on Whaling – even though TPP signatory Japan is a major commercial whaling nation.

- ***Climate protections are missing.*** The Environment chapter fails to even mention “climate change,” even though other provisions of TPP will increase climate-disrupting emissions through more shipping and consumption, and increased fossil fuel exports. Of particular concern, there is no protection from rules that would allow foreign investors and governments to challenge climate and clean energy policies in unaccountable ISDS trade tribunals.
- ***TPP locks in natural gas exports and encourages fracking.*** TPP will require the U.S. Department of Energy to automatically approve all exports of liquefied natural gas to all TPP countries. This will facilitate climate- and natural resource-destructive fracking, and increase reliance on fossil fuels infrastructure including wells, storage facilities, pipelines and train transport at a time when we should be shifting to renewable energy.
- ***Other TPP chapters will harm the environment.*** The investment chapter (discussed below) does not include adequate protections to insure that environmental and public health measures, which are overwhelmingly the subject of ISDS challenges under other trade pacts, will not be undermined. TPP also lacks safeguards for green jobs programs that could run afoul of its procurement rules.

## **HEALTHCARE & PHARMACEUTICAL COSTS**

- ***Monopoly rights.*** Chapter 18, Intellectual Property, includes new monopoly rights for pharmaceutical companies that will keep prices high for especially pricey biological drugs and delay generic equivalents.
- ***Legal challenges.*** Chapter 9, Investment, has new provisions enabling drug companies to challenge measures that reduce their profits, even when those measures are non-discriminatory and designed to promote public health or other public interest goals.
- ***Procedural roadblocks to affordability.*** Annex 26-A includes “transparency” provisions for pharmaceutical and medical devices in could increase healthcare costs in the Medicare Part A and B programs, which cover drugs administered in a hospital or a physician’s office and durable medical equipment. Under this annex, Center for Medicaid and Medicare (CMS) determinations would be subject to a series of principles and procedures, including new appeal rights, which will make it more difficult to negotiate prices. These

provisions may also constrain future policy reforms aimed at curbing rising and unsustainable drug prices in the Medicare Part D program. Pharmaceutical costs are an increasing share of state budgets, and even though Medicare is a “federal” program, states are legally obligated to share in paying for most “dual eligibles” (Medicare beneficiaries who are also eligible for some level of Medicaid assistance). Maine is among a number of states that provide wraparound programs to assist the elderly, including Medicare enrollees, in paying for medicines. A recent AARP Public Policy Institute report found the *average annual cost per person* of specialty medication used to treat chronic diseases and conditions rose to more than \$53,000 -- more than the U.S. median income and more than twice the \$23,500 median income of people on Medicare. Specialty drugs that treat complex, chronic conditions are commonly used by older people and often require special administration - exactly the programs within Medicare that would be subject to the new disciplines of this Annex 26-A.

### ***PROCUREMENT***

TPP undermines one of the most important job-creation tools, using government purchasing to invest in jobs. Under TPP, the federal government must treat TPP countries as if they were U.S. bidders – taking America out of “Buy American.”

- In several TPP countries – Mexico, Vietnam, Malaysia, and Brunei - workers face ongoing and systemic abuse with either the complicity or direct involvement of the state, with significant issues including child labor, human trafficking, and forced labor.
- Chapter 15, Government Procurement, isn’t sufficiently clear about whether responsible bidding criteria, such as a requirement that a bidder not have outstanding environmental cleanup obligations, can’t be challenged as a barrier to trade.
- Although state government procurement is not covered at this time, the agreement *requires* all TPP countries to commence negotiations within 3 years to include “sub-federal” coverage, which would include U.S. states.

### ***FOOD SAFETY***

TPP could reduce food safety and disadvantage responsibly sourced local products. Contrary to claims the TPP is a “high standards” agreement, safeguards intended to protect the food supply have in effect been lowered and oversight given over to the very industries that the standards are meant to regulate.

- New language on border inspection allows exporters to challenge border inspection procedures, which must be “limited to what is reasonable and necessary” and “rationally related to available science,” allowing challenges to the manner inspections and laboratory tests are conducted.
- New language encourages the use of private certifications of food safety assurances — either third party certifications or potentially even self-certification. Third party or self-certified food safety claims are considerably worse than independent government oversight because there is a financial incentive to certify the food as safe. Several U.S. food safety outbreaks have occurred at facilities that received private certifications that attested to their food safety (the companies behind the 2009 peanut butter salmonella outbreak, 2010 egg salmonella outbreak and the 2011 cantaloupe listeria outbreak all received outstanding ratings from their third-party certifier).
- Existing weaknesses in U.S. regulatory agencies’ oversight of food safety will be exacerbated by the expanded confidentiality requirements in the SPS chapter.

- Provisions relating to “trade in products of modern biotechnology,” are located in in the chapter on market access and not in the food safety chapter, so controversies over GMOs or synthetic biology will be judged based on market access criteria (encouraging access to markets) rather than risk assessments of safety for human health or the environment. This provision encourages authorization of these products and will be overseen by a committee that lacks expertise in risk assessment and science.

### ***FOOD LABELING & CONSUMER PRODUCTS SAFETY***

Chapter 8, Technical Barriers to Trade (TBT), could limit effective labeling of consumer products and packaging and interfere with U.S. states’ actions to go beyond federal environmental protections even where the U.S. Constitution and federal statutes authorize such regulation.

- A first-time Annex 8-F “Proprietary Formulas for Prepackaged Foods and Food Additives,” imposes the burdensome “necessity test” and additional confidentiality protections on government regulators seeking information to regulate food ingredients, and could hinder the timely development of stronger federal standards relating to junk food warnings, GMO labeling and detailed information about “proprietary” food additive formulas.
- Annex 8-D on cosmetics includes language downplaying the risk to human health or safety from cosmetics, limiting required reassessments of the product’s safety in future, and encouraging voluntary oversight.
- U.S. trade officials must inform other countries of state regulations with a “significant impact” on trade, and engage in “technical exchanges” concerning state regulations with the goal of harmonizing U.S. and other TPP countries’ standards – with no role for state regulators nor language supporting state laws that go beyond weak or missing federal standards on food, chemicals, and consumer product safety.

### ***A PRIVATE LEGAL SYSTEM JUST FOR CORPORATIONS***

The Investor-State Dispute Settlement (ISDS) procedures in TPP are of particular concern. ISDS allows foreign investors the right to sue governments for lost profits caused by regulations in offshore private investment tribunals, bypassing the courts or allowing a “second bite” if the investors do not like the results of domestic court decisions. Policies can be challenged under ISDS even if they apply to both foreign and domestic firms – in other words, even if they do not discriminate against trading partners. ISDS clauses in other trade agreements including NAFTA have been used repeatedly to attack environmental and public health measures. Even unsuccessful challenges take years to resolve, cost millions to defend, and have a chilling effect on the development of new legislation. The cost just for defending a challenged policy in an ISDS forum is \$8 million *on average*; Phillip Morris’s ISDS challenge to Australia’s tobacco regulations has already racked up litigation costs of over \$50 million for the Australian government, and the case is still in preliminary stages.

- TPP would double the number of corporations that could use ISDS. More than 1,000 additional corporations in TPP nations, which own more than 9,200 subsidiaries in the U.S., could newly launch ISDS cases against the U.S. government.
- The “reforms” to ISDS touted by the Obama Administration are largely cosmetic. ISDS tribunals would not meet standards of transparency, consistency or due process common to TPP countries’ domestic legal systems or provide fair, independent or balanced venues for resolving disputes. There is still no appeals mechanism; the arbitration panels would still be staffed by private sector lawyers paid by the hour and allowed to rotate between

judging and advocating for investors; and problematic “minimum standard of treatment” and “indirect expropriation” language from past trade agreements is largely replicated.

- The TPP investment chapter actually *expands* ISDS liability by widening the scope of domestic policies and government actions that could be challenged:
  - Financial regulations for the first time could be subject to “minimum standard of treatment” claims under the investment chapter.
  - Pharmaceutical firms could demand cash compensation under the investment chapter for claimed violations of World Trade Organization rules on creation, limitation or revocation of intellectual property rights.

## **TOBACCO**

There is one significant improvement in TPP’s investment chapter compared to NAFTA and other trade pacts – countries can opt out of having their tobacco control regulations challenged in ISDS cases. While this is an important safeguard, it highlights the major deficiencies and unfairness of the ISDS system, which has been successfully used to challenge legitimate, reasonable, non-discriminatory health and environmental laws and regulations. This one exclusion from ISDS in no way rebalances TPP so that the continued use of ISDS to challenge virtually any other domestic policy is acceptable.

## **SELECTED SOURCES**

*“Initial Analyses - Secret TPP Text Unveiled: It’s Worse than We Thought,”* November 2015, contributors: Celeste Drake, AFL-CIO; Owen Herrstadt, Machinists Union; Ben Beachy and Ilana Solomon, Sierra Club; Patrick Woodall and Tony Corbo, Food and Water Watch; Maira Sutton and Jeremy Malcolm, EFF; Lori Wallach and Robijn van Giesen, Public Citizen’s Global Trade Watch; Peter Maybarduk, and Burcu Kilic, Public Citizen’s Access to Medicines Program, <http://www.citizen.org/documents/analysis-tpp-text-november-2015.pdf>

*The TPP’s Investment Chapter: Entrenching, rather than reforming, a flawed system,* By Lise Johnson & Lisa Sachs, Columbia Center on Sustainable Investment, Columbia law School (November 2015), <http://ccsi.columbia.edu/files/2015/11/TPP-entrenching-flaws-18-Nov-FINAL.pdf>

*Rx Price Watch Report: Trends in Retail Prices of Specialty Drugs,* by Leigh Purvis, and Dr. Stephen Schondelmeyer (PRIME Institute, University of Minnesota), Public Policy Institute, November 20, 2015, <http://www.aarp.org/ppi/info-2015/trends-in-retail-prices-of-specialty-drugs.html>

*AFL-CIO’s 10 Critical Problems with the TPP,* [http://www.aflcio.org/content/download/164998/4022583/15202\\_TPP-10Problems\\_rf.pdf](http://www.aflcio.org/content/download/164998/4022583/15202_TPP-10Problems_rf.pdf)

*“The Trans-Pacific Partnership: Four Countries That Don’t Comply With U.S. Trade Law,”* AFL-CIO, <http://www.aflcio.org/content/download/150491/3811471/file/TPPReport-NO+BUG.pdf>

*“The Trans-Pacific Partnership and the Environment: An Assessment of Commitments and Trade Agreement Enforcement,”* Center for International Environmental Law, November 2015, <http://www.ciel.org/wp-content/uploads/2015/11/TPP-Enforcement-Analysis-Nov2015.pdf>

*"TPP Text Analysis: Environment Chapter Fails to Protect the Environment,"* November 2015, Sierra Club, <https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/tpp-analysis-updated.pdf>

*"The TPP SPS chapter: not a "model for the rest of the world,"* 11/12/15, Dr. Steve Suppan, Institute for Agriculture and Trade Policy, <http://www.iatp.org/documents/the-tpp-sps-chapter-not-a-model-for-the-rest-of-the-world>

*"States' Leadership on Health Food and Farming at Risk Under Proposed Trade Deals,"* (November 2015) by Sharon Anglin Treat, Institute for Agriculture and Trade Policy, <http://www.iatp.org/documents/states'-leadership-on-healthy-food-and-farming-at-risk-under-proposed-trade-deals>

*"Is TPP a Living Agreement?"* Huffington Post, 11/14/15, by Stan Sorscher, Labor Representative, Society for Professional Engineering Employees in Aerospace, [http://www.huffingtonpost.com/stan-sorscher/is-tpp-a-living-document\\_b\\_8549482.html](http://www.huffingtonpost.com/stan-sorscher/is-tpp-a-living-document_b_8549482.html)

*"Sea Slaves: The Human Misery that Feeds Pets and Livestock,"* (part of several-part series *The Outlaw Ocean*), New York Times, 7/27/15, <http://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html>