

The Trans-Pacific Partnership is back: experts respond

Written by The Conversation

The [latest incarnation](#) of the Trans-Pacific Partnership (TPP) is said to have “[fewer bad bits](#)”. But as our experts point out below, there’s still a great deal wrong with, or missing from, the regional free trade agreement.

The new TPP is informally known as the TPP11, after the United States pulled out of the original 12-country bloc earlier this year.

While the agreement has not yet been finalised, the 11 trade ministers have [released a statement](#) saying that the “core elements” have been agreed.

Twenty provisions from the original TPP [have been suspended](#) , but there are still a few areas to be worked out, including those relating to state-owned enterprises.

The Conversation’s experts respond:

Peter Robertson, Dean and Professor, University of Western Australia Business School:

Trade deals such as the TPP11 that include some countries and exclude others are inherently flawed mechanisms for extracting the most benefit from trade (also known as “[gains from trade](#)”).

All trade deals are about “swings and roundabouts”. That is, a redistribution of income from producers to consumers and governments. For example, when we remove tariffs on automobiles, then consumers gain but producers and their employees lose. When we impose a tariff on agriculture, consumers lose by paying higher prices at the grocery store and producers gain.

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Under reasonable circumstances there is reason to believe that the sum of the gains exceeds the losses. But when you add up all the potential winners and losers from the TPP11, from an Australian perspective you end up with pretty much zero. Or, to be more precise, [an 0.5% increase](#) in GDP by 2030.

The gains are so small because the TPP11 diverts attention away from big trade issues like agricultural protectionism in Europe and the US, and focuses on smaller issues among a few countries who have [mostly](#) already liberalised every sector that is possible given the current political willpower.

From a global perspective the TPP11 could even have negative effects because it encourages us to buy from member countries, and not from outsider countries who may in fact have better and cheaper products.

The biggest winners in the world from current protectionist arrangements are the agricultural producers in Japan, the US and Europe where agricultural protection remains extreme and untouchable politically. We need trade agreements that focus on the big issues, not the small ones.

Pat Ranald, Research Associate, University of Sydney:

The TPP11 retains all provisions on Investor-State Dispute Settlement (ISDS) from the previous TPP, except for two narrow improvements which only apply if investors have specific contracts or authorisations with governments.

Despite claimed “[safeguards](#)”, ISDS enables all other foreign investors to bypass national courts and sue governments for compensation in international tribunals if they can argue that changes in domestic laws or policies harm their investment. The cases are tried by tribunals composed of investment lawyers who can continue to represent clients. There is no independent judiciary, and no precedents or appeals to ensure consistency of decisions.

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Many of the [817 known cases](#) involve public interest laws. Swiss Pharmaceutical company [Novartis](#) is suing the Colombian government over the plans to reduce prices on a patented treatment for leukaemia. The US firm [Bilcon](#) won its claim against the Canadian government for US\$101 million after a provincial government refused to approve a quarry in an ecologically sensitive area. The French company [Veolia](#) is claiming compensation from the Egyptian government for a rise in the minimum wage.

Even if a government wins a case, defending it can take years and cost millions. The US tobacco firm Philip Morris shifted some assets to Hong Kong and used ISDS in an Australia-Hong Kong investment agreement to claim billions in compensation for Australia's plain packaging law. It took more than four years and [reportedly](#) cost A\$50 million in legal fees for the [tribunal](#) to decide that Philip Morris was not a Hong Kong company.

ISDS gives additional legal rights to global corporations to sue governments in unfair international tribunals, undermining democratic regulation in the public interest. Trade agreements should not increase corporate power at the expense of communities.

Kimberlee Weatherall, Professor and Associate Dean (Research), The University of Sydney Law School

The TPP11 suspends the most controversial copyright provisions. But not everything controversial is out.

The TPP11 will no longer extend the term of copyright to 70 years after the author's death - a big deal for [Canada](#) and [New Zealand](#) where copyright lasts 50 years after death.

It also suspends the anti-circumvention provisions, which means the TPP11 won't make avoiding access measures (for example, technology that locks your ebooks or movies to a

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particular device) a crime. Although there's a sting in the tail for Australia here - the TPP text on anti-circumvention is less restrictive than [our free trade agreement with the US](#) , and so we lose the benefit of that extra flexibility.

The incredibly complex [safe harbours](#) provisions are also suspended – this leaves members with more flexibility to adjust copyright in the digital environment (but also potentially means no protection for online service providers for the acts of their infringing customers).

Also suspended is a funny little footnote that might have given TPP11 authors a claim on payments from some cultural funds (such as Canada's). However, a provision that encourages copyright to be balanced is not suspended, so that's good news.

But there is still a cornucopia of enforcement procedures and remedies, and very broad criminal liability for infringing copyright – including liability for “aiding and abetting” others' infringement. There are broad provisions that allow right holders to claim any equipment used to infringe copyright.

And, beyond copyright, the ministers haven't suspended a controversial provision (a first of its kind internationally) on the theft of [trade secrets](#) , and they've retained some key provisions on geographical indications and trade marks that are going to complicate efforts by countries in the region to use geographical indications (such as “[Manuka honey](#)”) to develop local artisan and agricultural communities.

So while I'm happy to celebrate some realisation that the intellectual property chapter of the original TPP had serious problems, there is still quite a lot to dislike about what remains.

Deborah Gleeson, Senior Lecturer in Public Health, La Trobe University, Belinda Townsend, Research Fellow, Australian National University:

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The [list of 20 items ministers have agreed will be suspended](#) in the re-branded TPP includes several of the intellectual property rules for pharmaceuticals that were demanded by the US but deeply unpopular amongst the other TPP countries. These rules would have [made medicines less affordable](#) in the Asia-Pacific region.

Importantly for Australia, the provisions specifically targeting biologic medicines were on the list of suspended items. [Our recent study](#) found that this expensive class of drugs cost Australian taxpayers more than A\$2.2 billion in 2015-16. Suspending the biologics rules means fewer barriers to making lower-cost treatments for conditions like cancer and rheumatoid arthritis available – at least for now.

Also suspended were rules requiring countries to provide patents for new uses, methods and processes of using existing products; extensions to patent terms; and what is known as “data exclusivity” – monopolies on clinical trial data submitted to regulatory agencies like the Therapeutic Goods Administration. These provisions would have [primarily impacted developing countries](#), delaying access to generic medicines. They would also have cemented existing monopolies on new medicines in developed countries, including Australia – making it more difficult to reform our patent laws in future.

There is no doubt that suspension of these rules is a positive development. But simply putting them on ice for later implementation if the US re-joins the accord could just mean delaying their effects until a later time.

Despite the suspension of these specific items, there remain other provisions in the intellectual property chapter that could reduce access to medicines in the region. A better option than freezing a limited list of selected provisions would be to remove, or at least suspend, the whole intellectual property chapter.

There are many other parts of the TPP that could affect health, which have not been suspended or renegotiated. One example is the TPP’s alcohol labelling rules, which remain unchanged. These may [create difficulties for countries wanting to mandate effective health warnings](#) or other types of health information on alcohol containers.

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Worse, there only seems to be some minor tinkering around the edges of the investment chapter being considered. The changes don't appear to affect the chances that claims could be brought by corporations against governments over health and medicines policies. It's a shame the TPP11's negotiators haven't taken the opportunity to exempt all health policies from potential investor-state disputes - tobacco control measures remain [the only health policies that countries can elect to explicitly exclude](#)

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There is still time for a more comprehensive reassessment of the TPP, including its likely impact on health and human rights: the agreement has not yet been finalised.

Suspending a small number of the worst provisions doesn't mean an agreement that is good for health.

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Deborah Gleeson has received research funding in the past from the Australian Research Council. She has received funding from various national and international non-government (not-for-profit) organisations to attend speaking engagements related to trade agreements and health, including the TPP. She has represented the Public Health Association of Australia on matters related to trade agreements and public health.

Belinda Townsend is a member of the People's Health Movement and the Public Health Association of Australia. She has been involved in the Public Health Association of Australia's advocacy on matters relating to trade agreements.

Kimberlee Weatherall receives funding from the Australian Research Council, DP150104175, Process Matters: The new global law of intellectual property enforcement. She is an unpaid member of the board of the Australian Digital Alliance.

Pat Ranald is the voluntary convener of the Australian Fair Trade and Investment Network, which advocates for fair trade based on human rights, labour rights and environmental sustainability.

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Peter Robertson receives funding from the Australian Research Council and The Department of Foreign Affairs.

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