

SUMMARY OF KEY ISSUES IN THE TRANS-PACIFIC PARTNERSHIP (TPP) AGREEMENT
Sharon Anglin Treat, Attorney and Policy Consultant
December 1, 2015

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 And, unlike a state or federal law that can be repealed when new information comes to light or conditions change, trade agreements require the agreement of all parties to commence negotiations to make changes, which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.

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AFL-CIO's 10 CRITICAL PROBLEMS WITH THE TPP

These critical flaws make the TPP a bad deal for America's working people.

- 1. The TPP allows currency-manipulating countries to kill U.S. jobs.** The current TPP text doesn't contain enforceable currency manipulation rules. Countries that intentionally devalue their currency cheat U.S. manufacturers and undermine any benefits from tariff reductions. Enforcing currency manipulation rules is probably the single most effective thing the United States could do to create jobs; in fact, doing so could add as many as 5.8 million jobs.¹
- 2. The TPP lets foreign corporations bypass U.S. law.** The current TPP text allows multinational companies to challenge U.S. laws, regulations and safeguards through a provision called investor-to-state dispute settlement (ISDS), a private justice system that undermines our democracy. Through ISDS, foreign investors can seek compensation from the United States for enforcing regulations and safeguards designed to protect America's working families. In fact, multinational companies currently are using ISDS to attack democratic policies and laws in Australia, Canada, Egypt, Peru and Uruguay, among many others.
- 3. The TPP allows climate change to go unchecked.** The current TPP text doesn't contain any enforceable climate change commitments or "border fees" to offset the cost of environment-damaging imports. This undermines our efforts to address climate change and jeopardizes the important U.S.-China bilateral agreement on climate change and clean energy.² It does *nothing* to discourage U.S. manufacturers from moving their factories to TPP countries with weak climate regulations. This damages both U.S. jobs and our efforts to address climate change.
- 4. The TPP doesn't strengthen international labor rights protections.** There are extensive, well-documented labor problems in at least four TPP countries (Mexico, Vietnam, Brunei and Malaysia),³ but the administration has not committed to requiring all countries to be in full compliance with international labor standards before they get benefits under the agreement. Worker rights obligations have never been fully enforced under existing free trade agreements, which have provided too much discretion for worker complaints to be delayed for years or indefinitely (e.g., Honduras, Guatemala). A progressive TPP would eliminate this shortcoming, not repeat it. Given that no administration has ever self-initiated labor enforcement under a free trade agreement, any promise to "strongly enforce" the TPP should be met with skepticism.
- 5. The TPP could allow public services to be permanently outsourced.** Public services such as sanitation, transit and utilities should be carved out of trade deals—but the TPP puts them at risk. The current TPP text does not ensure that governments can pull out of wasteful and failing public service privatization efforts without shelling out taxpayer dollars or otherwise compensating foreign firms or trading partners.⁴

6. The TPP allows foreign state-owned enterprises to continue to undermine small business. The current TPP text doesn't adequately protect small businesses from the predatory tactics of foreign state-owned and state-subsidized companies. Often, these enterprises benefit from government support and drive their American competitors out of business or put pressure on our companies to ship American jobs overseas. While the TPP contains some limited provisions to address state-owned enterprises, it's not clear it would level the playing field and provide the fast action small firms need to stay in business when faced with unfair competition.

7. The TPP's weak rules of origin benefit China and other non-TPP countries. The rules of origin in the current TPP text are weak and allow China and other nonparticipating countries to reap the agreement's benefits without having to follow its rules. In fact, the TPP's auto content requirement allows the majority of the auto content to be Chinese and manufactured outside the trade agreement's rules. This has the effect of promoting jobs in China while destroying U.S. auto supply-chain jobs.

8. The TPP takes America out of "Buy American." The current TPP text will require the U.S. government to treat Vietnamese, Malaysian and other TPP firms exactly the same as U.S. firms for many purchasing decisions—even when "Buy American" rules apply. This will send U.S. taxpayer dollars overseas and undermine U.S. job creation efforts. The TPP also could mean government purchasing contracts might not be able to include low carbon, "clean hands," living wage or other responsibility requirements in their bids.

9. The TPP gives global banks even more power. The current TPP text could make it even harder for countries facing an economic crisis to stabilize their economies. Not only can large international banks still sue countries in crisis using the "prudential exception," the TPP expands the rights of international banks to use ISDS to challenge bank regulations in front of private tribunals. Giving global banks more power makes another global financial meltdown more likely, not less.

10. The TPP makes affordable medicines harder to find. Quality, affordable and accessible health care is a human right and trade policy should not interfere with public health care choices, nor should it threaten public health. Unfortunately, the current TPP text threatens access to affordable medicines by including new monopoly rights for pharmaceutical companies—delaying competition by affordable generics—and allowing companies more opportunities to interfere with government cost-saving efforts.

We need a trade agreement that works for America's working families. Help us stop the TPP!

- Call your representative and tell him or her to reject TPP unless it's drastically reformed.
- Work with your community to pass a local resolution opposing bad trade deals that threaten jobs and democracy.
- Text TPP to 235246.

1. Robert E. Scott, "Stop Currency Manipulation and Create Millions of Jobs," Economic Policy Institute, Feb. 26, 2014.

2. "FACT SHEET: U.S.-China Joint Announcement on Climate Change and Clean Energy Cooperation," Executive Office of the President, Office of the Press Secretary.

3. "The Trans-Pacific Partnership: Four Countries that Don't Comply with U.S. Trade Law," AFL-CIO.

4. In 2011, the Project on Government Oversight (POGO) compared the costs of federal employees and contractors in a seminal study titled *Bad Business: Billions of Taxpayer Dollars Wasted on Hiring Contractors*, the first to compare service contractor billing rates with the salaries and benefits of federal employees. POGO determined that "on average, contractors charge the government almost twice as much as the annual compensation of comparable federal employees. Of the 35 types of jobs that POGO looked at in its new report, it was cheaper to hire federal workers in all but just 2 cases."

AFL-CIO

Chamber Policy Panel Recommends TPP Support, But Hints At Need For Changes

Inside US Trade

Posted: December 01, 2015

The U.S. Chamber of Commerce on Monday (Nov. 30) moved one step closer to coming out in support of the Trans-Pacific Partnership (TPP) agreement when its international policy committee agreed in principle to send a policy recommendation to the board of directors that will generally endorse the deal but include language hinting at the need for changes, according to industry sources.

These sources provided differing characterizations of this additional language, which is still being drafted by Chamber staff. One source described it as laying forth "qualifications" to the Chamber's support for TPP, while another signaled it would not go that far.

This source said the language would likely state that the Chamber will continue to work with the Obama administration, Congress and other TPP governments to get the most commercially meaningful deal possible.

The international policy committee agreed in principle on its recommendation despite divisions within the Chamber's membership on the TPP deal reached on Oct. 5.

Tobacco companies, brand-name pharmaceutical manufacturers, financial services firms and the Ford Motor Company made clear during the meeting that they are unable to support the TPP deal in its current form, while other companies such as Cargill conveyed their enthusiastic support, according to industry sources. Still other Chamber members fall in between those two extremes.

Chamber Executive Vice President and Head of International Affairs Myron Brilliant made reference to these divisions during the meeting, saying he did not remember the Chamber's members ever having been this divided over a free trade agreement, sources said.

Some members who do not support the agreement as negotiated believe that if the Chamber comes out in support of the TPP too early, it would give up its leverage with the administration to secure changes to the provisions of the agreement that they oppose, according to industry sources.

But other Chamber members are pressing for an early statement of support because they believe coming out in favor of the deal may buy the business group more leverage to push for changes, as the administration may be more likely to listen to an ally than an adversary, one industry source said.

Even some of the biggest business cheerleaders for the TPP agreement say that the deal in its current form would be unlikely to garner sufficient votes to secure congressional passage, given the objections voiced by Senate Finance Committee Chairman Orrin Hatch (R-UT) and other lawmakers historically supportive of trade deals.

Sources differed on whether the final language of the Chamber's policy recommendation would need to be approved by the international policy committee before being presented to the board. It is also unclear when the Chamber's board might consider the recommendation and make a decision on it, although that is considered to be a pro-forma step.

The administration has already begun engaging with U.S. financial services firms about their objections to two aspects of the TPP.

The first is that fact that language in the TPP prohibiting governments from requiring data be stored on local servers does not apply to the financial services sector. The second is a provision that allows Malaysia to maintain a screening mechanism under which it can block foreign investments in financial services on the broad grounds that they are not in the best interest of Malaysia.

Officials from the Treasury Department and the Office of the U.S. Trade Representative met with financial services industry representatives on Nov. 20 for a discussion that focused on the server localization ban, but did not provide any indication whether the administration was willing to change its opposition to the ban in TPP or future trade agreements, sources said.

Treasury has opposed the inclusion of language in trade agreements that would ban server localization requirements for the financial services sector, under the argument that it wanted to preserve space to impose such requirements in the future.

The meeting consisted largely of industry representatives rehashing their objections to the U.S. approach, and U.S. officials offering an explanation of why they believed they had been addressed, according to these sources.

Industry representatives offered a mixed reaction to the meeting, with some expressing frustration that the case of the industry had already been laid out multiple times, while others viewing it as a positive development that the administration is engaging on the issue, sources said.

USTR has historically been more sympathetic to the industry's position than Treasury, although sources said the administration officials delivered a common position at the Nov. 20 meeting, sources said.



UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, DC 20436

December 2, 2015

Dear Sir or Madam,

The purpose of this letter is to invite and encourage you to participate in a public hearing of the United States International Trade Commission (Commission) associated with its ongoing fact-finding investigation (No. TPA-105-001), "Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors." The hearing will be held in our main hearing room at 500 E Street SW, Washington, DC, beginning at 9:30 a.m. on Wednesday, January 13, 2016.

The Commission's investigation is required under the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA). Section 105 (c)(2)-(3) of TPA requires the Commission to submit its report to the President and the Congress no later than May 18, 2016. The report assesses the likely impact of the Trans-Pacific Partnership (TPP) Agreement on the U.S. economy as a whole, on specific industry sectors, and the interests of U.S. consumers. Other parties to the Agreement include Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

The Commission welcomes your views at the hearing. The deadline for submitting a request to appear at the hearing is December 22, 2015. Further, in order to appear at the hearing, pre-hearing briefs and statements summarizing the testimony must be filed no later than December 29, 2015. Information on how to file documents for this investigation is set out in the enclosed Federal Register notice. If you have questions regarding the hearing procedures, please contact the Office of the Secretary at 202-205-2000.

The Commission invites interested parties to file a written submission in lieu of participating in the hearing. All written submissions for investigation No. TPA-105-001 should be addressed to the Secretary and should be received no later than 5:15 p.m. on February 15, 2016. Please see the Federal Register notice for complete instructions on how to file a written submission.

If you have further questions about the investigation or the hearing, please feel free to contact Project Leaders Jose Signoret at 202-205-3125 or jose.signoret@usitc.gov and Laura Bloodgood at 202-708-4726 or laura.bloodgood@usitc.gov.

We appreciate your consideration of this invitation.

Sincerely

A handwritten signature in black ink, appearing to read 'Catherine DeFilippo', with a long horizontal flourish extending to the right.

Catherine DeFilippo

Director of Operations

Enclosures

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC

Investigation No. TPA-105-001

Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors

AGENCY: United States International Trade Commission.

ACTION: Institution of investigation and scheduling of public hearing.

SUMMARY: Following receipt on November 5, 2015 of a request from the U.S. Trade Representative (USTR), the Commission has instituted investigation No. TPA-105-001, *Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors*, under section 105(c) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (19 U.S.C. 4204(c)), for the purpose of assessing the likely impact of the Agreement on the U.S. economy as a whole and on specific industry sectors and the interests of U.S. consumers. In addition to the United States, the Agreement includes Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

DATES:

December 22, 2015: Deadline for filing requests to appear at the public hearing.

December 29, 2015: Deadline for filing pre-hearing briefs and statements.

January 13, 2016: Public hearing.

January 22, 2016: Deadline for filing post-hearing briefs and statements.

February 15, 2016: Deadline for filing all other written submissions.

May 18, 2016: Anticipated date for transmitting Commission report to the President and Congress.

ADDRESSES: All Commission offices, including the Commission's hearing rooms, are located in the United States International Trade Commission Building, 500 E Street SW, Washington, DC. All written submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street SW, Washington, DC 20436. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>.

FOR FURTHER INFORMATION CONTACT: Project Leader Jose Signoret (202-205-3125 or jose.signoret@usitc.gov) or Deputy Project Leader Laura Bloodgood (202-708-4726 or laura.bloodgood@usitc.gov) for information specific to this investigation. For information on the legal aspects of this investigation, contact William Gearhart of the Commission's Office of the General Counsel (202-205-3091 or william.gearhart@usitc.gov). The media should contact Margaret O'Laughlin, Office of External Relations (202-205-1819 or margaret.oloughlin@usitc.gov). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202-205-1810. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000.

BACKGROUND: On November 5, 2015, the Commission received a letter from the USTR stating that the President notified Congress, also on November 5, 2015, of his intent to enter into the Trans-Pacific Partnership Agreement with the countries of Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. As requested by the USTR and as required by section 105(c) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (2015 Act), the Commission will submit to the President and Congress a report assessing the likely impact of the Trans-Pacific Partnership (TPP) Agreement on the U.S. economy as a whole and on specific industry sectors and the interests of U.S. consumers. In assessing the likely impact, the Commission will include the impact the agreement will have on the U.S. gross domestic product; exports and imports; aggregate employment and employment opportunities; and the production, employment, and competitive position of industries likely to be significantly affected by the agreement. In preparing its assessment, the Commission will also review available economic assessments regarding the Agreement, including literature concerning any substantially equivalent proposed agreement. The Commission will provide a description of the analytical methods used and conclusions drawn in such literature, and a discussion of areas of consensus and divergence between the Commission's analyses and conclusions and other economic assessments reviewed.

Section 105(c)(2) of the 2015 Act requires that the Commission submit its report to the President and the Congress not later than 105 days after the President enters into the agreement. The USTR requested that the Commission provide the report as soon as possible. Section 105(c)(4) of the 2015 Act requires the President to make the Commission's assessment under section 105(c)(2) available to the public.

PUBLIC HEARING: The Commission will hold a public hearing in connection with this investigation at the U.S. International Trade Commission Building, 500 E Street SW, Washington, DC, beginning at 9:30 a.m. on January 13, 2016, and continuing on additional days, if necessary. Requests to appear at the public hearing should be filed with the Secretary no later than 5:15 p.m., December 22, 2015. All pre-hearing briefs and statements must be filed not later than 5:15 p.m., December 29, 2015; and all post-hearing briefs and statements, which should focus on matters raised at the hearing, must be filed not later than 5:15 p.m., January 22, 2016. In order to appear at the hearing, all interested parties and other persons appearing must file a pre-hearing brief or statement that sets forth the information and arguments they intend to present at the hearing. An extension of time for filing requests to appear, pre-hearing and post-hearing statements, and all other written submissions will not be granted unless the Chairman determines that the condition for granting an extension of time in section 201.14(b)(2) of the *Commission Rules of Practice and Procedure* (19 C.F.R. 201.14(b)(2)) is met. All requests to appear and all pre-hearing and post-hearing briefs and statements should otherwise be filed in accordance with the requirements in the "Written Submissions" section below. In the event that, as of the close of business on December 22, 2015, no witnesses are scheduled to appear at the hearing, the hearing will be canceled. Any person interested in attending the hearing as an observer or nonparticipant should contact the Office of the Secretary at 202-205-2000 after December 22, 2015, for information concerning whether the hearing will be held.

WRITTEN SUBMISSIONS: In lieu of or in addition to participating in the hearing, interested parties are invited to file written submissions concerning this investigation. All written submissions should be addressed to the Secretary. Except in the case of requests to appear at the hearing and pre-hearing and post-hearing briefs and statements, all written submissions should be received not later than 5:15 p.m., February 15, 2016. All written submissions must conform with the provisions of section 201.8 of the *Commission Rules of Practice and Procedure* (19 C.F.R. 201.8). Section 201.8 and the Commission's Handbook on Filing Procedures requires that interested parties file documents electronically on or before the filing deadline and submit eight (8) true paper copies by 12:00 p.m. eastern time on the next

business day. In the event that confidential treatment of a document is requested, interested parties must file, at the same time as the eight paper copies, at least four (4) additional true paper copies in which the confidential information must be deleted (see the following paragraph for further information regarding confidential business information). Persons with questions regarding electronic filing should contact the Secretary (202-205-2000).

Any submissions that contain confidential business information (CBI) must also conform with the requirements of section 201.6 of the *Commission Rules of Practice and Procedure* (19 C.F.R. 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the "confidential" or "non-confidential" version, and that the confidential business information be clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available for inspection by interested parties.

Any confidential business information received by the Commission in this investigation and used in preparing this report will not be published in a manner that would reveal the operations of the firm supplying the information.

SUMMARIES OF WRITTEN SUBMISSIONS: The Commission intends to publish summaries of the positions of interested persons in an appendix to its report. Persons wishing to have a summary of their position included in the appendix should include a summary with either their pre-hearing or post-hearing brief or another written submission, or as a separate written submission, and the summary must be clearly marked on its front page as being their "summary of position for inclusion in the appendix to the Commission's report." The summary may not exceed 500 words, should be in MSWord format or a format that can be easily converted to MSWord, and should not include any confidential business information. The summary will be published as provided if it meets these requirements and is germane to the subject matter of the investigation. In the appendix the Commission will identify the name of the organization furnishing the summary, and will include a link to the Commission's Electronic Document Information System (EDIS) where the full written submission can be found.

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: November 17, 2015

For Immediate Release:

Contact:

Dec. 7, 2015

Nicholas Florko, nflorko@citizen.org, (202) 454-5108

WTO Authorizes Over \$1 Billion in Sanctions Unless U.S. Guts Popular Country-of-Origin Meat Labels,

Disproving Obama Claim That Trade Pacts Can't Undermine Public Interest Policies

Ruling Further Complicates Prospect for Controversial Trans-Pacific Partnership

WASHINGTON, D.C. — Today's World Trade Organization (WTO) ruling against the U.S. country-of-origin meat labels (COOL) that consumers rely on to make informed choices about their food provides a glaring example of how trade agreements can undermine U.S. public interest policies, Public Citizen said today. How the Obama administration responds to the WTO ruling will have a significant impact on its efforts to build congressional and public support for the controversial Trans-Pacific Partnership (TPP).

In his May 2015 speech at Nike headquarters, President Barack Obama said that critics' warnings that the TPP could "undermine American regulation – food safety, worker safety, even financial regulations" was "just not true." He said: "They're making this stuff up. No trade agreement is going to force us to change our laws."

"Today's ruling makes clear that trade agreements can – and do – threaten even the most favored U.S. consumer protections," said Lori Wallach, director of Public Citizen's Global Trade Watch. "We hope that President Obama stands by his claim that 'no trade agreement is going to force us to change our laws,' but in fact rolling back U.S. consumer and environmental safeguards has been exactly what past presidents have done after previous retrograde trade pact rulings."

In response to previous WTO rulings, the United States has rolled back U.S. Clean Air Act regulations on gasoline cleanliness rules successfully challenged by Venezuela and Mexico and Endangered Species Act rules relating to shrimp harvesting techniques that kill sea turtles after a successful challenge by Malaysia and other nations. The U.S. also altered auto fuel efficiency (Corporate Average Fuel Economy) standards that were successfully challenged by the European Union. After the final WTO ruling against the policy in May, Obama's Agriculture Secretary

Tom Vilsack also contradicted Obama's claim, announcing: "Congress has got to fix this problem. They either have to repeal or modify and amend it."

COOL requires meat sold in the United States to be labeled to inform consumers about the country in which animals were born, raised and slaughtered. COOL is supported by 92 percent of Americans, according to a recent poll, but has been under attack by Mexican and Canadian livestock producers and the U.S. meat processing industry.

The Canadian and Mexican governments challenged the policy and in 2011 won an initial WTO ruling. In 2013, the Obama administration altered COOL to remedy the WTO violations. The new rules provided consumers more information. Mexico and Canada had sought to weaken COOL and obtained a WTO ruling against the new policy. Today, the WTO authorized those nations to impose over \$1 billion in trade sanctions annually against the United States until it weakens or ends COOL.

Past administrations have repealed or weakened U.S. policies to comply with trade agreements. Today's ruling comes two weeks after the WTO ruled that U.S. "dolphin-safe" tuna labeling, which allows consumers to choose tuna caught without dolphin-killing fishing practices, was a "technical barrier to trade" that must be eliminated or weakened.

The WTO's ruling comes at an inopportune time for the Obama administration, as it attempts to sell the recently completed TPP. The recent release of the final TPP text reveals that it would impose limits on food safety that extend beyond the WTO rules. This includes requirements that the United States permit food imports from exporting countries that claim their safety regimes are "equivalent" to our own, even if doing so violates key principles of U.S. food safety policy. These rules effectively would outsource the inspection of food consumed by Americans to other countries. The TPP also would allow new challenges of food safety border inspections.

Background: Congress enacted mandatory country-of-origin labeling for meat in the 2008 farm bill. This occurred after 50 years of U.S. government experimentation with voluntary labeling and efforts by U.S. consumer groups to institute a mandatory program.

Canada and Mexico claimed that the program violated WTO limits on what sorts of product-related "technical regulations" WTO signatory countries are permitted to enact. In November 2011, the WTO issued an initial ruling against COOL. Canada and Mexico demanded that the

United States drop its mandatory labels and return to a voluntary program that would not provide U.S. consumers the same level of information as the current labels. The United States appealed.

In June 2012, the WTO Appellate Body affirmed that COOL violated WTO rules. In response, the U.S. government altered the policy. However, instead of watering down the popular program as Mexico and Canada sought, the U.S. Department of Agriculture's new May 2013 rule strengthened the labeling regime. By providing more information to consumers, the new rule remedied the violations cited in the WTO ruling. Mexico and Canada then challenged the new U.S. policy. In May 2015, the WTO ruled that the new U.S. policy still violated WTO rules. Mexico and Canada initiated a WTO process to determine the level of trade sanctions that they could impose on the United States until it eliminated or weakened COOL.

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Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

CCSI Policy Paper

Lise Johnson, Lisa Sachs*
November 2015

The TPP's Investment Chapter: Entrenching, rather than reforming, a flawed system

Introduction

During and following the negotiations of the Trans-Pacific Partnership (TPP), the USTR assured stakeholders that novel features in the TPP's investment chapter would respond to legitimate concerns about the investor-state dispute settlement mechanism (ISDS). Indeed, in our analysis on *Investor-State Dispute Settlement, Public Interest, and US Domestic Law*, we highlighted a number of serious shortcomings of investment treaties and their ISDS protections, including the impact that ISDS has on the development, interpretation, and application of domestic law. Now that the TPP has been publicly released, we can see that unfortunately none of these shortcomings has been resolved. In fact, in some areas, we even see a further evisceration of the role of domestic policy, institutions, and constituents. In their current form, the TPP's substantive investment protections and ISDS pose significant potential costs to the domestic legal frameworks of the US and the other TPP parties without providing corresponding benefits.

In "Upgrading & Improving Investor-State Dispute Settlement," the USTR highlights how the "TPP upgrades and improves ISDS" and "closes loopholes and raises standards higher than any past agreements." Below, we respond to the USTR's claims, showing that ISDS in TPP has not been improved as USTR suggests. There are a number of problems from previous trade agreements that have been carried over into the TPP, and new provisions added to the TPP that do not appear in other US FTAs and that raise additional concerns. A forthcoming brief will discuss those issues in more depth; this note focuses specifically on the particular improvements that the USTR claims to have made to ISDS.

*Lise Johnson is the head of investment law and policy at CCSI, and Lisa Sachs is the Director.

Claims and Responses

USTR Claim: “Right to regulate. New TPP language underscores that countries retain the right to regulate in the public interest, including on health, safety, the financial sector, and the environment.” (Point 1).

Unfortunately, while the TPP might “underscore” that countries retain the right to regulate in the public interest, the agreement does not actually protect that right.

In article 9.15, the TPP states, “Nothing in [the Investment Chapter] shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure *otherwise consistent with this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.” (emphasis added)

That article provides no real protection. Rather, it simply notes that the government can regulate in the public interest as long as, when doing so, the government complies with the Investment Chapter’s requirements regarding treatment of foreign investors and investments. The words, “otherwise consistent with this Chapter,” thus negate any protections otherwise purported to be given under that article. Consequently, and as under other investment treaties with ISDS, good faith measures taken in the public interest can still be successfully challenged under the agreement as violating the TPP’s investor protections. That means a continued risk of claims that we’ve seen, such as claims seeking damages for:

- efforts to strengthen and enforce environmental obligations;
- efforts to restrict imports of adulterated drug products;
- efforts to regulate and restrict smoking;
- zoning measures relating to investment in or near protected areas;
- measures regarding location and design of hazardous waste facilities, and transport of hazardous waste;
- efforts to restrict profits of pharmaceutical companies;
- application of bankruptcy law;
- judicial decisions interpreting domestic intellectual property law and policy; and
- government efforts to regulate tariffs and terms of service for essential public utilities.

Notably, the provision here can be contrasted with the TPP’s treatment of other specific measures and policy issues. In the article on exceptions, for example, the TPP parties agreed to prevent investors from arguing that taxation measures violate the infamously vague and problematic fair and equitable treatment (“FET”) obligation (discussed further below). That decision to carve out taxation from the FET obligation evidences the state parties’ unwillingness to trust ISDS tribunals with the broad powers such tribunals otherwise have to interpret that potentially expansive FET obligation. Environmental,

health, and safety measures – while similarly complex and important of matters of law and policy – are not similarly safeguarded from the uncertainties of ISDS decisions.

Likewise, when investors challenge certain measures relating to financial services regulation, officials of the state parties to the treaty have the right to decide whether a “prudential measures” exception applies. Any determination the government officials make is binding on the tribunal. Again, this evidences the states’ unwillingness to permit ISDS tribunals to decide complex issues with significant policy implications. In contrast, there is no such filter mechanism in the TPP for other areas of public interest regulation, such as environmental protection and public health, which would help to preserve the policy space of the state parties.

A third narrow issue that the TPP protects against ISDS challenges is liability for “tobacco control measures”. This provision, adopted in response to the particularly controversial cases Philip Morris and its affiliates have filed against Australia¹ and Uruguay² to challenge those countries’ anti-tobacco regulations, aims to protect government action in one important area of health policy; in so doing, it implicitly recognizes that the TPP’s investment protections and ISDS mechanism can be used to challenge good faith, non-discriminatory measures taken to address undeniably serious issues of public concern, despite the language in article 9.15. While “tobacco control measures” are indeed deserved of protection from investor claims, so, too, are other measures to address environmental, health, and safety concerns, which necessarily remain vulnerable to challenge.

With the TPP, we thus see governments taking some steps to protect their ability to take action in certain discrete areas. Given the specific exclusions and filter mechanisms for taxation, financial services, and tobacco-related measures, the omission of other public-interest related measures from those explicit carve outs means that other measures remain exposed to claims. So despite the claim that the TPP preserves the right of states to regulate in the public interest, many crucial areas of law such as environmental and health-related measures, which been targets of a number of ISDS cases filed to date, are not similarly safeguarded from investors’ challenges.

USTR Claim: “Burden of proof. TPP explicitly clarifies that an investor bears the burden to prove all elements of its claims, including claims on the minimum standard of treatment (MST).” (Point 2).

USTR Claim: “Expectations of an investor. TPP explicitly clarifies that the mere fact that a government measure frustrates an investor’s ‘expectations’ does not itself give rise to an MST claim.”(Point 4).

¹ Philip Morris Asia Limited v. Australia, UNCITRAL, PCA Case No. 2012-12. More information about this case is available at <http://www.italaw.com/cases/851>.

² Philip Morris Brands Sàrl v. Uruguay, ICSID Case No. ARB/10/7. More information about this case is available at <http://www.italaw.com/cases/460>.

These two changes ostensibly try to narrow tribunals' interpretations of the "fair and equitable treatment" or "FET" obligation.³ The FET obligation has morphed over roughly the last 15 years from a relatively unknown and unused protection into the most common standard on which investors initiate and succeed on challenges to conduct by all branches (executive, legislative, and judicial) and levels (local, state, and federal) of government.

Many of the concerns about how investment treaty protections and ISDS favor foreign investors' rights and expectations over broader public interest aims are based on the increasing use of the FET standard, so improvements to this provision are essential. Unfortunately, the language added to the TPP text fails to address these concerns.

As the text of the TPP itself recognizes, the first "change" is language that merely confirms the standard rule in ISDS disputes: the investor bears the burden of establishing its claims. This is nothing new. It simply reiterates what is generally understood, so as hopefully to limit disputes on this point.

Importantly, however, expansive interpretations of the FET provision are not due to a failure by tribunals to impose a burden of proof *on the claimant*, but are due to the common practices of tribunals to treat that burden as being satisfied with only minimal evidence.⁴ In light of the ease with which arbitrators have determined that they can identify the elements of an FET claim, merely reiterating the standard rule that the claimant has the burden to establish those elements will likely have little effect on reducing tribunal overreach.

The second change regarding the FET obligation not only fails to constitute an improvement but actually represents a step backward from previous US positions. In previous cases, the US has clearly asserted that investors' "legitimate expectations" are not elements of the FET obligation⁵ and "impose no obligations on the State" under that provision.⁶ In contrast, the new language, which states that a breach of an investor's "expectations" does not *alone* give rise to an MST claim, implicitly recognizes that "expectations" may in fact be relevant to establishing a violation of the FET standard.

³ Because the treaty states that the "FET" obligation incorporates and does not require conduct beyond that mandated under the "minimum standard of treatment", this note uses the terms "FET" and "MST" interchangeably.

⁴ This can be seen in recent cases decided under US treaties in which the tribunals determined that the FET obligation prohibits "arbitrary" conduct, vaguely defined. *See, e.g.,* *Teco v. Guatemala*, ICSID Case No. ARB/10/23, Award, December 19, 2013, para. 454; *Bilcon v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, paras. 442-444. This can also be seen in cases in which tribunals have determined that the FET obligation protects investors' "expectations". *See, e.g.,* *Bilcon*, paras. 427-454. *See also, Mesa v. Canada*, PCA Case No. 2012-17, Second Submission of the United States, June 12, 2015, paras. 14-19 (stating that the tribunal erred in determining the contents of the FET obligation based on reference to other tribunal decisions rather than state practice and *opinio juris*).

⁵ *Spence Int'l Inv. LLC v. Costa Rica*, ICSID Case No. UNCT/13/2, Submission of the United States of America, April 17, 2015, para. 17.

⁶ *Id.* para. 18. *See also Mesa v. Canada*, PCA Case No. 2012-17, Second Submission of the United States, June 12, 2015, para. 18.

This new language codifies – rather than corrects – problematic decisions such as the March 2015 NAFTA award in *Bilcon v. Canada*.⁷ In that case, the majority of the tribunal⁸ indicated that interference with investors’ economic “expectations”, standing alone, would not violate the FET obligation but was a factor to take into account in determining whether there had been a breach of that treaty provision.⁹ Applying that approach, the tribunal gave disproportionate legal significance to the allegedly “reasonable expectations” of the investors that had been generated by non-binding statements of certain Canadian officials and general promotional materials designed to help the region attract new mining investments. Those “reasonable expectations”, the tribunal determined, were later frustrated by federal and provincial environmental approvals processes, which ultimately resulted in decisions by federal and provincial officials to deny the investors their requested environmental permits. That the governments’ actions frustrated the investors’ “legitimate expectations” led the tribunal to conclude that Canada violated the NAFTA’s FET obligation.

This case is instructive for assessing the TPP’s “improvement”: while the TPP states that the interference with an investor’s “expectations” will not, *on its own*, constitute a violation of the FET obligation, it leaves the door wide open for future application of the *Bilcon* approach. Under that approach, a tribunal identifies what it considers to be reasonable or legitimate expectations – which may have been generated by a wide range of even non-binding government conduct and need not rise to the level of actual “rights” – and then strictly scrutinizes government actions or inactions to determine whether the investors’ expectations were wrongly frustrated.¹⁰ Frustration of investor “expectations” thus remains a key factor that can be used by tribunals to distinguish between government conduct that does, and does not, violate the FET obligation.

In summary, while there are two minor changes to the text of the FET obligation in the TPP, those changes are far from being adequate to ease – much less resolve – valid

⁷ *Bilcon v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015

⁸ One arbitrator in this case dissented, critiquing the majority’s review of the facts and its application of the FET obligation. According to the dissenting arbitrator, the majority’s approach is a “significant intrusion into domestic jurisdiction,” “will create a chill on the operation of environmental review panels,” and will result in investors being able to “import[] a damages remedy that is not available under Canadian law.” (para. 49). Even more problematically, the dissenting arbitrator stated, the majority’s decision was an “intrusion into the environmental public policy of the state.” (*Id.*) *Bilcon v. Canada*, Dissenting Opinion of Professor Donald McRae, March 10, 2015.

⁹ *Id.*

¹⁰ See also *Bilcon*, para. 572. In *Bilcon*, the tribunal added that when investor “expectations” are frustrated, that is considered to be a “special circumstance[]” in which changes in or application of government law and policy are more likely to be successfully challenged. The tribunal noted that some tribunals “express a cautious approach about using investor expectations to stifle legislative or policy changes by state entities that have the authority to revise law or policy.” It added, however, that such authority is “not absolute; breaches of the [FET obligation] might arise in some special circumstances” such as when they are “contrary to earlier specific assurances by state authorities that the regulatory framework would not be altered to the detriment of the investor.” Tribunals’ protection of *expectations* (as opposed to *rights*) generated by “specific assurances” provides investors greater protection against regulatory change than they are provided under US domestic law. See Lise Johnson and Oleksandr Volkov, *Investor-State Contracts, Host-State “Commitments” and the Myth of Stability in International Law*, 24 AM. REV. INT’L ARB. 361 (2013)

concerns about the risk that investors will continue to be able to use this provision to expand the strength of their economic “expectations” at the expense of broader public interests.

The FET obligation has only figured in ISDS jurisprudence for 15 years, but has inspired disproportionate ire, uncertainty, litigation, and liability in that time. With the TPP, it is crucial to avoid entrenching and exacerbating well-recognized existing problems, and to seize the opportunity to make real improvements.

One such improvement would be to exclude the FET obligation altogether, or to exclude it from ISDS and leave it only subject to state-to-state dispute resolution. Alternatively, the TPP could clearly rein in the standard so that it is expressly limited to a protection against denial of justice after exhaustion of local remedies – a much narrower, but still significant protection.¹¹

USTR Claim: “Dismissal of frivolous claims. TPP includes a new standard permitting governments to seek expedited review and dismissal of claims that are manifestly without legal merit.” (Point 3).

USTR Claim: “Expedited review and dismissal of claims. As in U.S. courts, TPP allows panels to review and dismiss certain unmeritorious claims on an expedited basis.” (Point 12).

USTR Claim: “Attorney’s fees for frivolous claims. A panel may award attorney’s fees and costs in cases of frivolous claims.” (Point 13).

These three provisions attempt to address the same problem: how to prevent, or ensure relatively prompt dismissal of, frivolous or meritless investor claims. While it is better to

¹¹ Indeed, this narrower view of the FET obligation would be consistent with positions taken by the United States in ISDS disputes, in which US attorneys have stated that the FET obligation does not reach far, if at all, beyond the obligation not to deny justice to foreign investors. In *Spence v. Costa Rica*, for example, the United States explained:

Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, which is expressly addressed in Article 10.5, concerns the obligation to provide “fair and equitable treatment,” which includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.

Spence, Submission of the United States of America, April 17, 2015, para. 13. *See also* *Apotex Holdings Inc. v. United States*, ICSID Case No. ARB(AF)/12/1, Counter-memorial on Merits and Objections to Jurisdiction of Respondent United States of America, December 14, 2012, para. 353. (“Sufficiently broad State practice and opinio juris thus far have coincided to establish minimum standards of State conduct in only a few areas, such as the requirements to provide compensation for expropriation; to provide full protection and security (or a minimum level of internal security and law); and to refrain from denials of justice. In the absence of an international law rule governing State conduct in a particular area, a State is free to conduct its affairs as it deems appropriate.”).

Experience with ISDS disputes to date illustrates that unless the treaty itself clearly limits the scope of the FET obligation, arbitrators are willing to interpret it expansively.

have such provisions than not, these provisions, as drafted, will not have an appreciable effect on limiting such claims.

First, some other agreements, including the US-DR-CAFTA¹² and US-Peru FTA,¹³ already have very similar provisions regarding dismissal of meritless claims, as do ICSID's Arbitration Rules, which govern many ISDS cases.¹⁴ The US-DR-CAFTA and US-Peru FTA, for example, state:

... a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26 [Awards].¹⁵

In the TPP, the text adds the words in bold:

... a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 9.28 [Awards] or **that a claim is manifestly without legal merit.**¹⁶

The minor change in wording in the TPP does not represent a significant improvement over previous treaties.

Second, although the USTR states that the TPP's mechanisms for early dismissal of frivolous claims are based on the US Federal Rules of Civil Procedure, the TPP's protections for governments are actually significantly narrower than those provided under the Federal Rules.¹⁷

Third, even without the language in the TPP expressly stating that tribunals may award attorneys' fees and costs against investors that file frivolous claims (and respondent states that assert frivolous defenses), tribunals already had this power.¹⁸ As data show, however, tribunals have been reluctant to use this authority.¹⁹ Typically, tribunals order each side – the investor and the state – to bear its own costs (which on average amount to roughly \$4.5 million for each side),²⁰ irrespective of who wins or loses. In some cases, such as when a claim or defense is obviously frivolous, the tribunals have ordered the losing

¹² Art. 10.20(4)-(6).

¹³ Art. 10.20(4)-(6).

¹⁵ US-DR-CAFTA, art. 10.20(4); US-Peru FTA, art. 10.20(4).

¹⁶ Art. 9.22(4) (emphasis added).

¹⁷ See discussion in LISE JOHNSON, *NEW WEAKNESSES: DESPITE A MAJOR WIN, ARBITRATION DECISIONS IN 2014 INCREASE THE US'S FUTURE EXPOSURE TO LITIGATION AND LIABILITY 10-12* (CCSI January 2015), <http://ccsi.columbia.edu/files/2014/03/Brief-on-US-cases-Jan-14.pdf>.

¹⁸ See, e.g., ICSID Convention, art. 61(2); 2010 UNCITRAL Arbitration Rules, art. 42. Other US treaties pre-dating the TPP have also included this provision. See US-DR-CAFTA, art. 10.20(6).

¹⁹ Matthew Hodgson, *Counting the Costs of Investment Treaty Arbitration*, 9 GLOBAL ARB. REV., March 24, 2014, <http://globalarbitrationreview.com/news/article/32513/>.

²⁰ See *id.* (finding that average costs for respondent states were US\$ 4,437,000 and US\$ 4,559,000 for claimants).

party to pay the legal fees and costs of the winning party. Tribunals, however, have been more likely to require losing states to cover the costs of winning investors, than to require losing investors to cover the costs of winning states.²¹ Simply reiterating the power of tribunals to award costs in favor of states is not likely to change these trends.

USTR Claim: “Arbitrator ethics. TPP countries will provide detailed additional guidance on arbitrator ethics and issues of arbitrator independence and impartiality.” (Point 5).

This is a very important potential development. Private arbitrators are not bound by the same rules of independence, impartiality, and public integrity that domestic systems require of judges. And despite the fact that very serious concerns have been raised about arbitrator ethics in ISDS disputes for years,²² there has been no serious effort among the arbitration community to commit to any meaningful self-regulation. As the TPP does not actually resolve this issue but punts it back to the parties to address in the future, it remains to be seen whether this provision will actually help to resolve these concerns about arbitrators.

USTR Claim: “Clarifying rules on non-discrimination. TPP explicitly clarifies that tribunals evaluating discrimination claims should analyze whether the challenged treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.” (Point 6).

Recent NAFTA decisions such as *Bilcon v. Canada* and *Apotex II v. United States*²³ illustrate the very real need to prevent continued abuse of treaties’ non-discrimination standards (i.e., the national treatment obligation and the most-favored nation treatment obligation). The TPP, however, does not provide an adequate solution.

The non-discrimination obligations in investment treaties aim to prevent states from discriminating against covered foreign investors/investments, whether that discrimination is in favor of domestic investors/investments (the national treatment obligation) or in favor of other foreign investors/investments (the most-favored nation treatment obligation). However, rather than using those non-discrimination obligations to protect against and recover for *nationality-based discrimination*, foreign investors and investments are using those treaty provisions to challenge *any* disparate government treatment.

In *Bilcon v. Canada*, for example, the investors successfully argued to the tribunal that Canada had violated the national treatment obligation because officials had denied their environmental permit for a controversial mining project, while other mining projects had been allowed to proceed. As Canada highlighted, those other environmental approvals

²¹ *Id.*

²² NATHALIE BERNASCONI-OSTERWALDER ET AL., ARBITRATOR INDEPENDENCE AND IMPARTIALITY: EXAMINING THE DUAL ROLE OF ARBITRATOR AND COUNSEL (IISD 2010).

²³ *Apotex Holdings and Apotex Inc. v. United States*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014 [hereinafter “*Apotex II*”]. This case is discussed *infra*, n.26.

had involved proposals for projects of different scope, in different locations, and raising different concerns. Those differences, Canada, argued, meant that the Bilcon project was not in “like circumstances” with other mining projects, and that the government was justified in treating the Bilcon project differently than other mining projects.

The tribunal, however, disagreed with Canada. The tribunal determined that the “adverse treatment” accorded to the Bilcon investment as compared to other “similar” extractive industry projects was not “a rational government policy,” and was inconsistent “with the investment liberalizing objectives of the NAFTA.”²⁴ The tribunal therefore found that Canada had violated the national treatment obligation. Notably, the tribunal reached this conclusion even though it declined to conclude that Canada’s decisions denying the Bilcon project’s environmental permits were motivated by any intent to discriminate against the investors based on their nationality.²⁵

This case evidences how non-discrimination obligations can be used by investors and tribunals to second-guess regulatory decisions and prevent strengthening of environmental and other standards over time.²⁶ Even in cases where there is no evidence of nationality-based discrimination, states can be held liable.

The risk of claims is particularly high in the context of administrative enforcement actions that often and, in some cases, necessarily result in disparate treatment of different actors. As Judge Richard Posner has explained, public agencies must use their resources efficiently.²⁷ Depending on the context, this may mean that an agency will prioritize

²⁴ *Bilcon*, para. 724.

²⁵ *Bilcon*, paras. 685-731.

²⁶ Another dispute raising these issues was *Apotex II v. United States*, ICSID Case No. ARB(AF)/12/1. In *Apotex II*, the Canadian claimant alleged that the US Government violated the most-favored nation treatment obligation when the Food and Drug Administration (FDA) restricted imports of its pharmaceutical products due to sub-standard manufacturing practices. The Canadian company did not dispute that it had in fact violated relevant manufacturing standards; rather, it argued that the US violated the NAFTA’s non-discrimination obligation by restricting its imports but not similarly restricting imports from other overseas drug manufacturers that had similarly violated required manufacturing standards.

Reviewing Apotex’s claims, the ISDS tribunal agreed that US regulators did treat foreign drug manufacturers differently when taking enforcement actions against various problem companies located in different parts of the world. Based on that finding of disparate treatment, and despite the lack of any evidence of government intent to discriminate on account of nationality, the tribunal stated it *would find* the US Government liable for breaching its non-discrimination obligations unless the Government could establish that the various companies were not in “like circumstances” and that the Government therefore could legitimately accord them different treatment.

Ultimately, the tribunal agreed with the US Government that the companies were not in “like circumstances”; nevertheless, the tribunal’s willingness to second guess the Government’s action absent any allegation that the FDA’s enforcement decisions were erroneous, and absent any evidence that they were motivated by the investor’s nationality, highlights how vulnerable states are to litigation and potential liability arising out of enforcement actions taken against foreign-owned companies. Given the reality that governments lack the resources to investigate and prosecute all violations of the law, and must exercise their discretion regarding when, how, and against which company or companies to take action, these types of claims may become common strategies for companies trying to frustrate enforcement decisions.

²⁷ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 662-665 (5th ed 1998).

taking action based on such factors as how easy or cost-effective the case will be to prove (which may also depend on the resources the defendant is willing to expend to defend the case), how important the case is for setting precedent, the severity of the violation, and/or the gains to the agency that will be generated through enforcement. Allowing a foreign investor to challenge any instance of disparate treatment on the ground that other projects were allowed to proceed or were not sanctioned (or not sanctioned as severely) for violations of the law, and allowing tribunals to scrutinize enforcement decisions based on their (unreviewable) conceptions of what is “rational” or “legitimate”, undermines the very nature and means of administrative enforcement.

In order to prevent future similar cases, one approach for the TPP could have been to clearly specify that a foreign investor seeking to recover on a non-discrimination claim must establish that the government *discriminated against it on account of its nationality*. Yet the language in the TPP contains no such requirement.

Rather, the TPP’s language is similar to that in previous US treaties. The national treatment obligation, for example, states:

Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.²⁸

In order to purportedly clarify interpretation and application of the Investment Chapter’s non-discrimination obligations, the TPP text adds a footnote stating that, when determining whether different groups of investors or investments are in “like circumstances” and are, therefore, entitled to equal treatment, the tribunal is to look at the “totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.”²⁹

This new language will not be effective in preventing future *Bilcon-* and *Apotex II*-³⁰ type cases. Instead of requiring investors to establish nationality-based discrimination, this language invites foreign investors to pressure governments by bringing speculative claims through ISDS and asking tribunals for a second opinion on whether they agree that government actions or policies differentiating between investors (on grounds other than nationality) were “legitimate”.

²⁸ Ch. 9, art. 9.4(2).

²⁹ Ch. 9, n.14. There is also a “Drafter’s Note on Interpretation of ‘In Like Circumstances’ under Article II.4 (National Treatment) and Article II.5 (Most-Favoured-Nation Treatment).” That note, however, similarly fails to clearly indicate that discrimination on account of nationality is a required element to establish a breach. Moreover, the legal force of this “Drafter’s Note” is unclear. Unlike, for example, Annex 9-A, which clarifies the TPP parties’ “shared understanding” on the meaning of “customary international law,” and Annex 9-B, which confirms the parties’ “shared understanding” on the meaning of an expropriation, the “Drafter’s Note” is not made part of the TPP’s text.

³⁰ See *supra* n.26.

Notably, this standard under the TPP differs markedly from the standard for establishing discrimination on account of race or nationality in violation of the Equal Protection Clause of the US Constitution. To establish that a facially neutral law that has disparate impacts on different individuals or entities violates Constitutional protections against race- and nationality-based discrimination, a plaintiff must prove an intent or motive to discriminate on those grounds.³¹ The US Supreme Court has also explained that discriminatory intent or motive is more than an “awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”³²

Under these standards, if there were a US environmental law that, on its face, equally applied to all foreign- and domestic-owned firms, but that resulted in more domestic-owned firms being granted environmental permits than foreign-owned firms, the foreign firms could argue that the government’s disparate treatment of their applications violated the Equal Protection Clause. To succeed on their claim, they would need to establish that the disparate treatment was motivated by the government’s intent to discriminate against the firms based on their nationality. Under the TPP, in contrast, no such showing would need to be made. In contrast to the claim by USTR that the protections in investment treaties “are designed to provide no greater substantive rights to foreign investors than are afforded under the Constitution and U.S. law,”³³ the rights given to foreign investors to challenge any law, regulation, or action that affects it differently from other investors are substantially greater than the rights provided all investors under US domestic law.

USTR Claim: “Scope of available damages. TPP explicitly limits damages that an investor can recover to damages that an investor has actually incurred in its capacity as an investor, to address concerns about claimants seeking ISDS damages arising from cross-border trade activity.” (Point 7).

This is a useful clarification. The United States, Mexico, and Canada had already made this argument before NAFTA tribunals; but, despite agreement by all three NAFTA parties on this point, at least one tribunal has rejected their position.³⁴

Through this clarification, the TPP states prevent future tribunals from similarly adopting their own idiosyncratic interpretations and disregarding states’ intent.

USTR Claim: “TPP also includes a range of important additional ISDS safeguards. Many of these safeguards go beyond what was included in past trade deals like NAFTA. These key ISDS safeguards include:

³¹ *Washington v. Davis*, 426 U.S. 229, 243-245 (1976).

³² *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (internal citations omitted).

³³ USTR, “Fact Sheet: Investor-State Dispute Settlement” (March 2015), <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>.

³⁴ *See Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, pp. 125-160; *see also Mexico v. Cargill*, Court File No. C52737, Factum of the Intervenor of the United States of America, December 31, 2011 (Ont. Ct. App.), pp. 12-14.

Transparency. TPP requires ISDS panels to ‘conduct hearings open to the public’ and to make public all notices of arbitration, pleadings, submissions, and awards. (Point 8).

Public participation. Members of the public and public interest groups—for example, labor unions, environmental groups, or public health advocates— can make *amicus curiae* submissions to ISDS panels ‘regarding a matter of fact or law within the scope of the dispute.’” (Point 9).

Since the NAFTA was concluded over ten years ago, there have been significant improvements in a number of treaties to increase transparency of ISDS. Nevertheless, the language on transparency in the TPP represents a step backward as compared to other recent US trade agreements. Moreover, the fact remains that ISDS is a process that excludes a range of interested and affected stakeholders.

First, the TPP adds language not contained in other US trade agreements which states that each government “should endeavor to apply [its laws on freedom of information] in a manner sensitive to protecting from disclosure information that has been designated as protected information” in ISDS proceedings. This provision can potentially be used to prevent information submitted or issued in the ISDS proceedings from being disclosed to the public even if such information could otherwise be released to the public under the US Freedom of Information Act.

Second, in the US (as in many other countries), agreeing to ISDS in the first place represents a significant shift of power to the federal executive branch (the “Government”) to decide how to litigate and resolve investor-state disputes. This shift of power comes at the expense of a wide variety of other stakeholders both within and outside of that branch, including state and local governments, and citizens impacted by investments.

Given the myriad effects any given ISDS dispute can have on a wide range of government agencies, private sector industries, and various non-governmental organizations, there is a legitimate concern about whether the Government is actually willing and able to represent adequately all of those stakeholders’ interests.³⁵ Indeed, as US courts have stated, when an individual’s or entity’s “concern is not a matter of ‘sovereign interest,’ there is no reason to think the government will represent it.”³⁶

Under domestic law, to ensure that such diverse concerns are in fact represented in US court cases, US statutes and court doctrines guarantee that, in appropriate cases, private individuals and entities can actually intervene in and become party to a case involving the Government in order to protect their own interests.³⁷ ISDS, however, provides no such

³⁵ *Kleissler v. United States Forest Serv.*, 157 F.3d 964, 974 (3d Cir. Pa. 1998); *see also* *Am. Farm Bureau Fed’n v. United States EPA*, 278 F.R.D. 98, 111 (M.D. Pa. 2011).

³⁶ *Mausolf v. Babbitt*, 85 F.3d 1295, 1303 (8th Cir. Minn. 1996).

³⁷ FED. R. CIV. P. 24(a) (under which a moving party can intervene in a dispute as a matter of right if it “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest”), and 24(b) (under which a court may

safeguards. There is no right for interested or affected domestic constituents to intervene in those Government-defended arbitrations. Under the language of the TPP, the only avenue that interested or affected individuals or entities can pursue to ensure their positions are raised before an ISDS tribunal is to try to make a submission to the tribunal as an *amicus curiae*, a potentially useful, but relatively powerless option that the tribunal has significant latitude to allow or disallow.³⁸ Consequently, the vast range of constituents that may be affected by ISDS disputes must simply hope that the Government represents their interests in ISDS cases when adopting litigation strategies or settlement options.

As has been recognized by US courts and commentators, giving the government such broad powers to unilaterally determine what arguments to make and what settlements to adopt can significantly – and negatively – impact the rights and interests of non-parties to the litigation.³⁹ Indeed, it has been often noted that the government’s efforts to dispose of cases through settlements are not always consistent with public interests.⁴⁰ In this context, as one academic has noted, “consent of the *Government*” to resolve a case is not necessarily the same as “consent of the *governed*.”⁴¹ Accordingly, some mechanisms exist in US law for public and court oversight of settlement agreements and consent decrees. These include state and federal rules requiring the Government to give the public notice of and an opportunity to comment on certain settlement agreements the

permit a moving party not covered by 24(a) to intervene if it “has a claim or defense that shares with the main action a common question of law or fact.”).

³⁸ Federal legislation implementing US trade agreements also include provisions regarding the relationship between state and federal law. Implementing legislation for the NAFTA, for example, states that “the States will be involved (including involvement through the inclusion of appropriate representatives of the States) to the greatest extent practicable at each stage of the development of United States positions regarding matters [that directly relate to, or will have a direct impact on, the States] ... that will be addressed ... through dispute settlement processes provided for under the Agreement.” 19 U.S.C.S. § 3312(b)(5). Such provision, however, does not constitute a guarantee that the affected US state’s positions will prevail.

³⁹ See, e.g., Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637, 647-649 (2014); see also *Kleissler v. United States Forest Serv.*, 157 F.3d 964 (3d Cir.1998); *United States v. Union Elec. Co.*, 64 F.3d 1152 (8th Cir. 1995).

⁴⁰ Recognizing this reality, there are federal and state law checks over certain settlement agreements entered into by the government; these require government settlements of disputes to be in the public interest, and permit judicial review of settlements to ensure that requirement is satisfied. See, e.g., 42 U.S.C.S. § 9622 (requiring settlement agreements under the Comprehensive Environmental Response, Compensation, and Liability Act to be in the public interest); *United States v. Akzo Coatings of Am.*, 949 F.2d 1409, 1435 (6th Cir. 1991) (“[I]n addition to determining whether a [consent] decree is rational and not arbitrary or capricious, we must satisfy ourselves that the terms of the decree are fair, reasonable and adequate -- in other words, consistent with the purposes that CERCLA is intended to serve.’ ... Protection of the public interest is the key consideration in assessing whether a decree is fair, reasonable and adequate.”). *New Jersey Dep’t of Env’tl. Protection v. Exxon Mobil Corp.*, UNN-L-3026-04, 23, Super. Ct. N.J. (August 25, 2015) (“New Jersey caselaw concerning settlements shows that New Jersey courts generally review settlements to ensure fairness, reasonableness, consistency with the governing statute, and public interest.”). See also Morley, *supra* n.39 (discussing concerns regarding consent decrees and settlement agreements).

⁴¹ Morley, *supra* n.39 (emphasis added).

Government might enter into,⁴² and doctrines preventing enforcement of settlement agreements that try to skirt or otherwise violate the law.⁴³

The rules of ISDS in the TPP, however, do not include those protections. There is no mechanism for public oversight of proposed or actual settlement agreements agreeing to pay funds or to reverse existing laws or policies. Indeed, even if the Government's commitment in a settlement agreement were illegal or unconstitutional under US law, the Government would still likely be bound to that settlement agreement as a matter of international law and could be held liable under the TPP for violating the settlement.⁴⁴ The power of the Government to determine whether and how to try to settle ISDS claims, therefore, is largely unchecked.

One can imagine, for example, a decision by the Government to settle an ISDS case brought by a foreign investor challenging a state environmental law banning use of a particular chemical deemed harmful.⁴⁵ In that settlement, the company would agree to drop its case if the Government conceded that the chemical was in fact safe, and committed to take action against the state to invalidate the state's law if the state did not do so itself.⁴⁶ The state (and/or entities within it such as environmental groups or the environmental protection agency), might maintain serious legitimate concerns regarding the safety of the chemical, and contend that the measure was in fact consistent with the TPP. Nevertheless, those entities would not have been a party to the ISDS arbitration, nor would they have been able to control the Government's defense of the ISDS case or its

⁴² See *supra* n.40.

⁴³ Morley, *supra* n.39, at 644, 683-688.

⁴⁴ *Id.* If US law governed the settlement agreement, several doctrines may result in the settlement agreement being deemed void or unenforceable. If entered into in the context of the TPP, however, the parties could presumably decide to have the settlement agreement controlled by non-US law. Yet even if governed by and illegal under domestic law, ISDS cases decided to date indicate that that would not prevent a tribunal from attempting to hold the Government to the terms of the settlement agreement. (Railroad Development Corp. v. Guatemala, ICSID Case No. ARB/07/3, Award, June 29, 2012, para. 234; Kardassopolulos v. Georgia, Decision on Jurisdiction, July 7, 2007, paras. 182-184). If the settlement agreement were invalidated by a domestic court, the investor would then likely be able to pursue damages against the Government.

⁴⁵ See, e.g., Jeremy Sharpe, *Representing a Respondent State in Investment Arbitration*, in LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER'S GUIDE (Chiara Giorgetti ed., 2014) (citing the example of *Dow Agrosciences LLC v. Canada*, a NAFTA case, in which the parties agreed to a settlement agreement "memorializing withdrawal of [the investor's] arbitration claim and [the] Government of Quebec's statements concerning the safety of a certain pesticide." (*Id.* n.104). Like the TPP, the NAFTA contains language limiting arbitral awards to monetary remedies or restitution of property. This example is therefore also useful to show that different forms of relief can be agreed to in the context of settlement agreements.

⁴⁶ The settlement agreement could be embodied in an order issued by the tribunal. Although the TPP states that final awards may only award monetary damages or, in some cases restitution, the TPP recognizes that orders could order injunctive relief or other remedies. If the state ultimately failed to comply with the settlement agreement, an ISDS tribunal could also presumably issue an award of damages against the respondent state if the tribunal retained jurisdiction over the dispute or if the investor brought a separate case based on breach of the settlement agreement. As illustrated *supra*, note 45, there is also authority for the proposition that the treaties' provisions stating that awards may only order monetary damages or restitution do not prevent governments from agreeing to provide other forms of relief.

settlement decision.⁴⁷ If the state did not agree to comply with the terms of the order, the federal Government could potentially sue the state based on preemption grounds.⁴⁸ There is also a risk that the Government could withhold federal funds appropriated by Congress in order to try to compel compliance with the order.⁴⁹

It is possible to envision many other cases in which the Government could sacrifice disfavored domestic laws or policies through decisions on how to defend and resolve ISDS cases. In short, the provision in the TPP calling for greater transparency and input by interested parties as *amicus curiae* is a step better than the total confidentiality of many ISDS cases under other treaties; but the provisions calling for governments to defer to tribunals' determinations on confidentiality are a step backward on transparency as compared to other recent US agreements and, overall, the ISDS mechanism continues to fall far short of ensuring that the interests of the various affected parties are represented.

USTR Claim: “Remedies. A government can only be required to pay monetary damages. ISDS does not and cannot require countries to change any law or regulation.” (Point 10).

The US's investment treaties have long contained provisions stating that ISDS tribunals may only order payment of monetary damages or, in some cases, restitution. Thus, this is not a new development. Nevertheless, it is important to highlight some limits of this assertion.

First, while this may be technically true, the awards may be such that the government is effectively required to abandon or change its laws or regulations.

Second, as the TPP expressly recognizes, the tribunal can order other types of relief as “interim measures” while the dispute is pending.⁵⁰

Third, respondent states defending the cases could presumably consent to provide other forms of relief as part of a settlement agreement recorded as part of a tribunal's order or award.⁵¹

⁴⁷ See *supra* n.38 (referring to US requirements to consult).

⁴⁸ Implementing legislation of the NAFTA and other US agreements recognize the ability of the United States to sue US states to declare a law or its application invalid. See, e.g., 19 U.S.C.S. § 3312(b).

⁴⁹ See William S. Dodge, *Investor-State Dispute Settlement between Developed Countries: Restrictions on the Australia-United States Free Trade Agreement*, 39 VANDERBILT J. INT'L L. 1, 20-21 (2006):

The National Conference of State Legislatures (NCSL) has sought assurances “that the federal government will not shift the cost of compensation under a Chapter 11 award to states whose measures are challenged and will not withhold federal funds otherwise appropriated by the Congress to a state as a means of enforcing compliance with provisions of NAFTA.” The NCSL has also asked the federal government not to “seek to preempt state law as a means of enforcing compliance with NAFTA without expressly stated intent to do so by the Congress.” The federal government has provided only the latter assurance.

(Internal citations omitted).

⁵⁰ Ch. 9, art. 9.22(9).

⁵¹ See *supra* n.45.

Fourth, if the challenged measure is a measure taken by a local or state government entity, federal preemption may require the local or state government to actually abandon that measure.

USTR Claim: “Challenge of awards. All ISDS awards are subject to subsequent review either by domestic courts or international review panels.” (Point 11).

Review and enforcement of international arbitral awards is primarily governed by two treaties – the New York Convention and the ICSID Convention – and the TPP does not change that.

Under each of those treaties, arbitral awards can only be challenged on narrow grounds. Errors committed by an ISDS tribunal when reviewing the facts or interpreting the law, for example, are not bases for overturning awards under either the New York Convention or the ICSID Convention.

The New York Convention allows challenges to arbitral awards to be brought before domestic courts, and also allows awards to be challenged on the grounds that they are inconsistent with public policy. The ICSID Convention, in contrast, does not permit challenges to be brought before domestic courts. Challenges must be brought before a new panel of private arbitrators. And unlike under the New York Convention, under the ICSID Convention, there is no possibility to challenge awards on the ground that they violate public policy.

Under both the New York Convention and ICSID Convention, challenges to awards are only very rarely successful. There is no system of appeals similar to what exists in domestic courts.

Notably, however, what is not reflected in the USTR’s claim is that the TPP contains a new annex to the investment chapter, Annex 9-L, which further expands the role of arbitration and enforcement of arbitral awards under the New York and ICSID Conventions, and minimizes the role of domestic courts. More specifically, new provisions added in that annex dictate that certain contracts between the federal government and investors or investments⁵² must be decided through arbitration.⁵³ Even if

⁵² Article 9.18 of the TPP allows investors to arbitrate claims that the government has violated an "investment agreement." An "investment agreement" is defined in Article 9.1 as the following (explanatory footnotes omitted):

Investment agreement means a written agreement that is concluded and takes effect after the date of entry into force of this Agreement between an authority at the central level of government of a Party and a covered investment or an investor of another Party and that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 9.24(2) (Governing Law), on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, and that grants rights to the covered investment or investor:

(a) with respect to natural resources that a national authority controls, such as oil, natural gas, rare earth minerals, timber, gold, iron ore and other similar resources, including for their exploration, extraction, refining, transportation, distribution or sale;

the contract required litigation of any contract dispute in domestic courts, the investor would be able to override that provision and take its claim to international arbitration instead. If the foreign investor opts for arbitration, the government will have to comply with that choice, losing its right to defend the case before domestic courts, as well as its rights under domestic law to appeal decisions that incorrectly interpret applicable contract law or make errors in reviewing the relevant facts.

Looking at implications for US law, these new requirements are a significant change from current practice and inconsistent with longstanding federal policy embodied in the Tucker Act. That law requires claims against the federal Government seeking compensation for contract breach to be litigated in the Court of Federal Claims and reviewed in the Federal Circuit.⁵⁴ To help enforce that policy, other courts scrutinize plaintiffs' claims to ensure that they do not seek to avoid "the Court of Federal Claims' exclusive jurisdiction" by artfully framing their complaints as tort instead of contract suits.⁵⁵

(b) to supply services on behalf of the Party for consumption by the general public for: power generation or distribution, water treatment or distribution, telecommunications, or other similar services supplied on behalf of the Party for consumption by the general public; or

(c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams or pipelines or other similar projects; provided, however, that the infrastructure is not for the exclusive or predominant use and benefit of the government.

⁵³ Annex 9-L(A)(1). This provision provides that, even if the contract between the federal government entity and foreign investor/investment had a contractual provision that required litigation of any or all disputes in US courts, the TPP would override that exclusive forum selection clause and mandate arbitration of the dispute.

Annex 9-L(A) states:

1. An investor of a Party may not submit to arbitration a claim for breach of an investment agreement under Article 9.18.1(a)(i)(C) (Submission of a Claim to Arbitration) or Article 9.18.1(b)(i)(C) if the investment agreement provides the respondent's consent for the investor to arbitrate the alleged breach of the investment agreement and further provides that:

(a) a claim may be submitted for breach of the investment agreement under at least one of the following alternatives:

(i) the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the Party of the investor are parties to the ICSID Convention;

(ii) the ICSID Additional Facility Rules, provided that either the respondent or the Party of the investor is a party to the ICSID Convention;

(iii) the UNCITRAL Arbitration Rules;

(iv) the ICC Arbitration Rules; or

(v) the LCIA Arbitration Rules; and

(b) in the case of arbitration not under the ICSID Convention, the legal place of the arbitration shall be:

(i) in the territory of a State that is party to the New York Convention; and

(ii) outside the territory of the respondent.

⁵⁴ See 28 U.S.C. §§ 1491(a)(1), 1346(a)(2). This law is referred to as the "Tucker Act". Tucker Act claims for \$10,000 or less may also be litigated in federal district courts. Those claims, however, may only be reviewed on appeal in the Federal Circuit. See *Union Pac. R.R. Co. v. United States ex rel. United States Army Corps of Eng'rs*, 591 F.3d 1311, 1314-1315 (10th Cir. 2010).

⁵⁵ *Union Pac. R.R. Co.*, *supra* n.54, at 1314.

This policy and practice of centralizing judicial authority “has an obvious purpose—uniformity” in interpretation, application, and development of principles and norms of US contract law.⁵⁶ This enables the federal government to “use the same language in its contracts ... and be confident that it will have the same contractual rights and obligations everywhere.”⁵⁷

The ISDS provisions in the TPP, however, abandon that policy, and allow international arbitral tribunals – not judges of the Federal Court of Claims – to interpret and apply US contract law. This gives ISDS tribunals the ability not even granted to other US state or federal courts to shape the meaning of US contract law and to issue decisions without any possibility of having their erroneous decisions appealed.

Other “Additions”

Many of the “upgrades and improvements” referred to by the USTR have been expressly or implicitly included in agreements since at least the NAFTA. These include the following:

USTR Claim: “Expert reports. A panel can consult independent experts to help resolve a dispute.” (Point 14).

Similar language can be found in other treaties including the NAFTA (art. 1133), and US-Peru FTA (art. 10.24).

USTR Claim: “Binding interpretations. TPP countries can agree on authoritative interpretations of ISDS provisions that ‘shall be binding on a tribunal.’” (Point 15).

This has been a common feature of US treaties since NAFTA (art. 1131), and can be an important mechanism for states to exert some control over arbitral tribunals. There appear, however, to be limits to its actual use. For example, although the provision has been included in the NAFTA and all other investment treaties/investment chapters concluded by the US since the NAFTA, this mechanism has only been used *once* to clarify the interpretation of a substantive protection. (It was used to clarify the meaning of FET under the NAFTA in 2001).

USTR Claim: “Consolidation. A panel can consolidate different claims that ‘arise out of the same events or circumstances.’ This protects against harassment through duplicative litigation.” (Point 16).

⁵⁶ *Id.* at 1315.

⁵⁷ *Id.*

While a useful provision, this was also included in the NAFTA (art. 1126) and has been a common feature of other US agreements concluded since that treaty (see, e.g., US.-Peru FTA, art. 11.25).

Conclusion

Overall, the US claims to have made a number of improvements to the ISDS system and investment protection standards included in the TPP. While reforms would of course be welcome, the changes that have been made to the TPP do not address the underlying fundamental concerns about ISDS and strong investment protections; in some cases, the changes represent just small tweaks around the margins, while in other cases, the provisions represent a step backwards. At their core, ISDS and investor protections in treaties establish a privileged and powerful mechanism for foreign investors to bring claims against governments that fundamentally affect how domestic law is developed, interpreted and applied, and sideline the roles of domestic individuals and institutions in shaping and applying public norms. For this reason, the TPP should drop ISDS altogether, or replace it with a new and truly reformed mechanism that addresses the myriad concerns that are still lurking in the TPP.

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Secret TPP Text Unveiled: It's Worse than We Thought

As one would expect for a deal negotiated behind closed doors with 500 corporate advisors and the public and press shut out:

- **The TPP would make it easier for corporations to offshore American jobs.** The TPP includes investor protections that reduce the risks and costs of relocating production to low wage countries. The pro-free-trade Cato Institute considers these terms a subsidy on offshoring, noting that they lower the risk premium of relocating to venues that American firms might otherwise consider.
- **The TPP would push down our wages by throwing Americans into competition with Vietnamese workers making less than 65 cents an hour.** The TPP's labor rights provisions largely replicate the terms included in past pacts since the "May 2007" reforms forced on then-president George W. Bush by congressional Democrats. A 2014 Government Accountability Office report found that these terms had failed to improve workers' conditions. This includes in Colombia, which also was subjected to an additional Labor Action Plan similar to what the Obama administration has negotiated with Vietnam.
- **The TPP would flood the United States with unsafe imported food,** including by allowing new challenges of border food safety inspections not provided for in past trade pacts.
- **The deal would raise our medicine prices, giving big pharmaceutical corporations new monopoly rights to keep lower cost generics drugs off the market.** The TPP would roll back the modest reforms of the "May 2007" standards with respect to trade pact patent terms.
- **The TPP includes countries notorious for severe violations of human rights, but the term "human rights" does not appear in the 5600 pages of the TPP text.** In Brunei LGBT individuals and single mothers can be stoned to death under Sharia law. In Malaysia, tens of thousands of ethnic minorities are trafficked through the jungle in modern slavery.

This initial analysis compiles contributions by labor and public interest experts. For more info on labor, jobs, wages, ROO, SOEs and more, contact: Celeste Drake, AFL-CIO and Owen Herrstadt, Machinists Union; on climate, environment, and ISDS challenges to such policies contact Ben Beachy and Ilana Solomon, Sierra Club; on food safety and ag issues, contact Patrick Woodall and Tony Corbo, Food and Water Watch; on copyright issues, contact Maira Sutton and Jeremy Malcolm, EFF and Burcu Kilic, Public Citizen; on Investment/ISDS, Financial Services, Accession, National Security and Other Exception Texts contact Lori Wallach and Robijn van Giesen, Public Citizen's Global Trade Watch; on access to medicines, patent and medicine pricing rules, contact Peter Maybarduk and Burcu Kilic, Public Citizen's Access to Medicines program.

ACCESSION OF NEW COUNTRIES/ FINAL PROVISIONS CHAPTER: Congress Not Guaranteed A Meaningful Role in Docking/Accession Regime that Lets Not Just China, but Nations Beyond Pacific Rim Join

- The TPP is open to be joined by any nation or separate customs territory that belongs to the Asian Pacific Economic Cooperation (APEC) Pacific Rim bloc **AND** *“such other State or separate customs territory as the Parties may agree...”* if the country is prepared to comply with the TPP’s obligations and meet extra terms and conditions that may be required by existing signatories. (**Article 30.4.1**)
- **The executive branch alone gets to decide whether to initiate accession negotiations with a country seeking to join the TPP.** Congress would only be given any role in deciding whether negotiations about any country’s prospective TPP accession *should even begin* if Congress explicitly requires this in legislation implementing the TPP. Absent such a requirement, under the TPP text the executive branch alone would decide for the United States. (**Article 30.4.3-4**)
 - The TPP text calls for establishment of a working group to negotiate the terms and conditions for a new country to join the TPP. The U.S. administration and any current TPP country can participate. The working group is considered to have agreed on terms if either all countries that are members of the working group have indicated agreement, or if a country that has not so indicated fails to object in writing within 7 days of the working group’s consideration.
 - Once this working group completes negotiating accession terms with a new country, it is to report to the “TPP Commission” with a recommendation for accession and terms. The Commission is the TPP governance body (Article 27.1) on which the executive branch represents the United States.
 - The TPP Commission is deemed to have approved the terms if all countries agreed to the establishment of the working group in the first place or if a country that did not indicate agreement when the Commission considers the issue does not object in writing within seven days.
- **Congress would only be guaranteed a vote to approve new TPP entrants if such a congressional role is explicitly required in the U.S. legislation implementing the TPP.** A country’s entry into TPP only goes into effect after “approval in accordance with the applicable legal procedures of each” existing TPP country and prospective new entrant. (**Article 30.4.1**) The World Trade Organization has similar accession rules, requiring approval by two-thirds of existing WTO members for a new country to join (Agreement Establishing the WTO, Article XII: Accession). **However, U.S. administrations have systematically denied Congress a role in approving new countries’ admission to the WTO unless changes to specific U.S. tariff lines or laws are required.**
 - As with the TPP, at the WTO the United States government is represented by the executive branch. Congress has no vote on whether the United States approves new countries’ admission to the WTO. Because a change to U.S. tariff policy was required, Congress voted on whether to grant China Permanent Most Favored Nation status in 2000 when it sought to join the WTO. But, before and after that successive **administrations have approved the WTO accessions of scores of countries that already enjoyed U.S. Permanent Most Favored Nation status and Congress had no say.** Yet admission of a country to the TPP, even if under the same terms and tariffs as current prospective signatories, is a major decision Congress must control.
 - U.S. administrations also have systematically denied Congress a role in approving new WTO agreements, such as the WTO’s Financial Services Agreement and Telecommunications Agreement using this logic: unless a U.S. law or tariff requires alternation, Congress has no role.

- A new country is considered a TPP member, subject to the terms and conditions approved in the Commission’s decision, on the later date that either the new country deposits an instrument of accession indicating that it accepts the terms and conditions; or the date on which all existing TPP countries have sent notice that they have completed their respective applicable legal procedures. (Article 30.4.5) An administration factsheet states that the applicable U.S. legal procedures “would include Congressional notification before entering into negotiations with a potential new entrant, Congressional notification of intent to sign, consultation with Congress throughout the process, and final Congressional approval.” Yet, in fact this is not the process that any administration has followed with respect to dozens of new countries entering the WTO, even including China for which Congress did have to vote to alter an existing U.S. statute. And, the administration factsheet makes clear that it would be the administration alone that would select new countries for TPP admission with the only obligation to Congress being notification of such a decision and the commencement of access talks.

ENVIRONMENT CHAPTER: The TPP Would Increase Risks to Our Air, Water, and Climate

- **Multilateral Environmental Agreements (MEAs) Rollback:** The TPP actually takes a step back from the environmental protections of all U.S. free trade agreements (FTAs) since 2007 with respect to MEAs. Past deals have required each of our FTA partners to “adopt, maintain, and implement laws, regulations, and all other measures to fulfill its obligations under” *seven* core MEAs. The TPP, however, only requires countries in the pact to “adopt, maintain, and implement” domestic policies to fulfill *one of the seven* core MEAs – the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). This regression violates:
 - The bipartisan “May 2007” agreement between then-President George W. Bush and congressional Democrats;
 - The minimum degree of environmental protection required under the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, also known as “fast track;” and
 - The minimum obligation needed to deter countries from violating their critical commitments in environmental treaties in order to boost trade or investment.
- **Weak Conservation Rules:** While the range of conservation issues mentioned in the TPP may be wide, the obligations – what countries are actually required to do – are generally very shallow. Vague obligations combined with weak enforcement, as described below, may allow countries to continue with business-as-usual practices that threaten our environment.
 - Illegal Trade in Flora and Fauna: Rather than *prohibiting* trade in illegally taken timber and wildlife – major issues in TPP countries like Peru and Vietnam – the TPP only asks countries “to combat” such trade. To comply, the text requires only weak measures, such as “exchanging information and experiences,” while stronger measures like sanctions are merely listed as options.
 - Illegal, Unreported, and Unregulated (IUU) Fishing: Rather than *obligating* countries to abide by trade-related provisions of regional fisheries management organizations (RFMOs) that could help prevent illegally caught fish from entering international trade, the TPP merely calls on countries to “endeavor not to undermine” RFMO trade documentation – a non-binding provision that could allow the TPP to facilitate increased trade in IUU fish.

- Shark Finning and Commercial Whaling: Rather than *banning* commercial whaling and shark fin trade – major issues in TPP countries like Japan and Singapore – the TPP includes a toothless aspiration to “promote the long-term conservation of sharks...and marine mammals” via a non-binding list of suggested measures that countries “should” take.
- **Climate Change Omission**: Despite the fact that trade can significantly increase climate-disrupting emissions by spurring increased shipping, consumption, and fossil fuel exports, the TPP text fails to even *mention* the words “climate change” or the United Nations Framework Convention on Climate Change – the international climate treaty that all TPP countries are party to.
- **Lack of Enforcement**: Even if the TPP’s conservation terms included more specific obligations and fewer vague exhortations, there is little evidence to suggest that they would be enforced, given the historical lack of enforcement of environmental obligations in U.S. trade pacts. The United States has never once brought a trade case against another country for failing to live up to its environmental commitments in trade agreements – even amid documented evidence of countries violating those commitments.
 - For example, the U.S.-Peru FTA, passed in 2007, included a Forestry Annex that not only required Peru “to combat trade associated with illegal logging,” but included eight pages of specific reforms that Peru had to take to fulfill this requirement. The obligations were far more detailed than any found in the TPP environment chapter, and were subject to the same enforcement mechanism. But after more than six years of the U.S. – Peru trade deal, widespread illegal logging remains unchecked in Peru's Amazon rain forest. In a 2014 investigation, Peru’s own government found that 78 percent of wood slated for export was harvested illegally. For years, U.S. environmental groups have asked the U.S. government to use the FTA to counter Peru’s extensive illegal logging. Yet to date, Peru has faced no formal challenges, much less penalties, for violating its trade pact obligations. It is hard to imagine that the TPP’s weaker provisions would be more successful in combatting conservation challenges.
- **New Rights for Fossil Fuel Corporations to Challenge Climate Protections**
 - The TPP would undermine efforts to combat the climate crisis, empowering foreign fossil fuel corporations to challenge our environmental and climate safeguards in unaccountable trade tribunals via the controversial investor-state dispute settlement system.
 - The TPP’s extraordinary rights for foreign corporations virtually replicate those in past pacts that have enabled more than 600 foreign investor challenges to the policies of more than 100 governments, including a moratorium on fracking in Quebec, a nuclear energy phase-out in Germany, and an environmental panel’s decision to reject a mining project in Nova Scotia.
 - In one fell swoop, the TPP would roughly double the number of firms that could use this system to challenge U.S. policies. Foreign investor privileges would be newly extended to more than 9,000 firms in the United States. That includes, for example, the U.S. subsidiaries of BHP Billiton, one of the world's largest mining companies, whose U.S. investments range from coal mines in New Mexico to offshore oil drilling in the Gulf of Mexico to fracking operations in Texas.
- **Locking in Natural Gas Exports and Fracking**: The TPP’s provisions regarding natural gas would require the U.S. Department of Energy (DOE) to automatically approve *all* exports of liquefied natural gas (LNG) to *all* TPP countries – including Japan, the world’s largest LNG importer. This would:

- Facilitate Increased Fracking: Increased natural gas production would mean more fracking, which causes air and water pollution, health risks, and earthquakes, according to a litany of studies.
- Exacerbate Climate Change: LNG is a carbon-intensive fuel with significantly higher life-cycle greenhouse gas emissions than natural gas. LNG dependency spells more climate disruption.
- Increased Dependence on Fossil Fuel Infrastructure: LNG export requires a large new fossil fuel infrastructure, including a network of natural gas wells, terminals, liquefaction plants, pipelines, and compressors that help lock in climate-disrupting fossil fuel production.

EXCEPTIONS CHAPTER: National Security Exception Weakened, No New Safeguards for Environmental, Health, Human Rights Policies

- **The final text reveals a significant roll back of the standard Security Exception that has been part of U.S. trade agreements over the past decade.** (See Article 29.2) Following a major port security concern relating to the U.S.-Oman Free Trade Agreement, U.S. trade pacts since have included a footnote making explicit that a country raising a national security defense for a policy that otherwise violates a trade pact obligation is empowered to determine in its sole discretion what are its essential security interests. While the language of the Security Exception in the TPP is otherwise identical to past U.S. pacts, the footnote has been eliminated. Yet the footnote was inserted in past pacts to ensure that trade pact tribunals could not substitute their judgement for that of governments with respect to what policies were deemed “necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.” The footnote missing in the TPP text required: “For greater certainty, if a Party invokes Article 23.2 in an arbitral proceeding initiated under Chapter Eleven (Investment) or Chapter Twenty-Two (Institutional Provisions and Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies.”
- **The language touted as an “exception” to defend countries’ health, environmental, and other public interest safeguards from TPP challenges is nothing more than a carbon copy of past U.S. free trade agreement language that “reads in” to the TPP several World Trade Organization (WTO) provisions that have already proven *ineffective* in more than 97 percent of its attempted uses in the past 20 years to defend policies challenged at the WTO.**
 - In two decades of WTO rulings, Article XX of the WTO’s General Agreement on Tariffs and Trade (GATT) and Article XIV of the WTO’s General Agreement on Trade in Services (GATS) **have only been successfully employed to actually defend a challenged measure in one of 44 attempts.** Incorporating the GATT/GATS “general exception” means TPP governments must clear a list of high hurdles to successfully use the “exception” to defend a challenged measure.
- **This ineffective general exception does not even apply in the case of Investor-State challenges. Indeed, the General Exception explicitly does not apply to the entire Investment chapter of the TPP.** Many other TPP countries demanded that the exception apply to ISDS cases, and leaked drafts of TPP text included such proposals. The U.S. government strenuously opposed such reforms. The exception language included in the investment chapter is circular, applying only to countries whose policies do not conflict with the other rules of the agreement.

FINANCIAL SERVICES CHAPTER: First U.S. Pact Negotiated Since Global Financial Crisis Fails to Remedy Past Pacts' Deregulatory Terms and Grants Firms New Rights to Challenge Financial Policies

Although the TPP is the first U.S. trade deal to be negotiated since the 2008 financial crisis that spurred a global recession, it would impose on TPP signatory countries the pre-crisis model of extreme financial deregulation that is widely understood to have spurred the crisis. After nearly six years of negotiations under conditions of extreme secrecy, the Obama administration has only now released the text of the controversial deal after it has been finalized and it is too late to make any needed changes. The TPP financial services and investment chapters provide stark warnings about the dangers of "trade" negotiations occurring without press, public or policymaker oversight.

- **Unlike Past Pacts, the TPP Would Empower Financial Firms to Use Extrajudicial Tribunals to Challenge Financial Stability Measures that Do Not Conform to their "Expectations."** The TPP's Financial Services chapter "reads in" Investment Chapter provisions that would grant multinational banks and other foreign financial service firms expansive new substantive and procedural rights and privileges not available to U.S. firms under domestic law to attack our financial stability measures. For the first time in any U.S. trade pact, the TPP would grant foreign firms new rights to attack U.S. financial regulatory policies in extrajudicial investor-state dispute settlement (ISDS) tribunals using the broadest claim: the guaranteed "minimum standard of treatment" (MST) for foreign investors. MST is the basis for almost all successful ISDS challenges of government policies under existing pacts. Past U.S. trade pacts allowed ISDS challenges of financial regulatory policies, but limited the substantive investor rights that applied to the Financial Services Chapter, and thus the basis for such attacks. The TPP explicitly grants foreign investors new rights (Article 11.2.2) to launch attacks on financial policies using the extremely elastic MST standard that ISDS tribunals regularly interpret to require compensation if a change in policy undermines an investors' expectations.
- **Despite the pivotal role that new financial products, such as toxic derivatives, played in fueling the financial crisis, the TPP would impose obligations on TPP countries to allow new financial products and services to enter their economies if permitted in other TPP countries.** (Article 11.7)
- **The TPP constrains signatory governments' ability to ban risky financial products, including those not yet invented, via rules designating a regulatory ban to be a 'zero quota' limiting market access and thus prohibited.** (Article 11.5) TPP rules also would jeopardize efforts to keep banks from becoming too big to fail and to firewall the spread of risk between financial activities.
- **The TPP would be the first U.S. pact to empower some of the world's largest financial firms to launch ISDS claims against U.S. financial policies. The TPP would greatly expand U.S. liability for ISDS attacks because currently these firms cannot resort to extrajudicial tribunals to demand taxpayer compensation for U.S. financial regulations.** Among the top banks in the world based in TPP countries are: Mitsubishi UFJ, Mizuho, ANZ, Commonwealth Australia, West Pac, National Australia Bank, Bank of Tokyo, Sumitomo, Royal Bank of Canada, and Toronto Dominion. These multinational firms own dozens of subsidiaries across the United States, any one of which could serve as the basis for an ISDS challenge against U.S. financial regulations if the TPP were to take effect. Under current U.S. pacts, none of the world's 30 largest banks may bypass domestic courts, go before extrajudicial tribunals of three private lawyers, and demand taxpayer compensation for U.S. financial policies. The TPP would allow foreign firms to challenge policies that apply to domestic and foreign firms alike and that have been reviewed and affirmed by U.S. courts. And not

only foreign financial firms but foreign subsidiaries of U.S. firms operating in TPP nations could demand taxpayer compensation for financial regulations and regulatory actions. Meanwhile, the TPP would newly empower U.S. banks, four of which rank among the world's 30 largest, to launch ISDS claims against domestic financial regulations in TPP countries that do not already have an ISDS-enforced pact with the United States (Australia, Brunei, Japan, Malaysia, New Zealand and Vietnam).

- **A provision touted as a “prudential filter” would fail to effectively safeguard financial policies from ISDS challenges under the TPP.** The provision (Article 11.11.1) states that if a foreign investor uses ISDS to challenge a government's financial measure, and if the government invokes a highly-contested provision for defending prudential measures, financial authorities from the challenged government and from the firm's home government, rather than the ISDS tribunal, will aim to determine whether the prudential defense applies (Article 11.22). *But if those officials cannot agree within 120 days, meaning officials from the challenging corporation's home country opt not to shut down their investor's claims, the decision goes back to the ISDS tribunal.*
- **The use of capital controls and other macro-prudential financial policies that regulate capital flows to promote financial stability are forbidden and subject to compensation demands by foreign corporations.** Like past U.S. free trade agreements (FTA), the TPP text requires that governments “shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory” (Article 9.8). This obligation restricts the use of capital controls or financial transaction taxes, even as the International Monetary Fund, many prominent economists and world leaders have shifted from opposing capital controls to endorsing them as a tool for preventing or mitigating financial crises. Strong concerns about the TPP's ban on the use of such policies resulted in inclusion of a new “temporary safeguard” provision (Article 29.3) despite years of U.S. opposition. But unfortunately, the language that was ultimately agreed would not adequately protect governments' ability to regulate speculative, destabilizing capital flows. The safeguard is subject to a litany of constraining conditions, largely replicating the narrow GATS Article XII “Restrictions to Safeguard the Balance of Payments” terms. But, the TPP provision adds two *further* constraints: capital controls are subject to ISDS challenges as indirect expropriations. Thus, while the temporary safeguard may permit a TPP country to enact a capital control for a limited amount of time, the country may also be required to compensate a foreign investor if doing so results in a significant reduction in the value of an investment. There is no comparable obligation to compensate private investors in the GATS. And, in TPP capital controls “shall not apply to payments or transfers relating to foreign direct investment,” a significant limitation. As a result, Chile, which has in place policies that allow long term limits on capital flows, had to negotiate for a separate carve-out of its policies so as to be able to preserve them.
- **The United States, unlike most other TPP countries, has chosen to subject sovereign debt restructuring to ISDS challenges.** An annex in the Investment Chapter seeks to ensure that disputes related to sovereign debt and sovereign debt restructuring are not subject to the full range of investment chapter disciplines (Annex 9-G). But a footnote states that the partial safeguards for sovereign debt restructuring “do not apply to Singapore or the United States.” That is, were Singapore or the United States to negotiate a restructuring of its sovereign debt that applied equally to domestic and foreign investors, foreign investors alone would be empowered under the TPP to challenge the non-discriminatory restructuring before an ISDS tribunal, claiming violations of any of the broad substantive foreign investor rights provided by the TPP Investment Chapter.

These deregulatory rules were written under the advisement of Wall Street firms before the financial crisis. Some are included in one of the most extreme World Trade Organization (WTO) agreements to

which most TPP nations are not signatories. Rather than update these terms to reflect the post-crisis consensus on the importance of robust financial regulation, the TPP would expose an even wider array of financial stability measures to challenge as violations of the 1990s-era rules. With few exceptions, TPP governments have bound existing and future financial policies to these deregulatory rules, curtailing their policy space to respond to emerging financial products and risks if the deal takes effect.

INTELLECTUAL PROPERTY CHAPTER – PATENT PROVISIONS: TPP Rolls Back “May 10th Agreement” Reforms, Undermines Access to Medicines in Developing Countries

- **The TPP does not conform to the “May 10” access to medicine reform standards, and it will harm access to medicines in developing countries. TPP provisions require patent term extensions and marketing exclusivity for new uses and forms of old drugs that clearly exceed the bounds of May 10 and will contribute to preventable suffering and death.** On May 10, 2007, Democratic leaders in the U.S. House of Representatives brokered a deal with the George W. Bush Administration designed in part to reduce the negative consequences of U.S. trade agreements for global access to medicines. The May 10 Agreement placed limits on the new monopoly powers that would be granted to pharmaceutical companies in trade agreements, including those with Peru and Panama. This would facilitate the continued generic competition on which many people depend for access to affordable medicine.
- **TPP Final Text vs. May 10th standard: In contrast to the TPP, the May 10 standard made patent term extensions optional for pharmaceuticals and provided important limitations on data exclusivity rules for developing countries. There were no transition periods by which developing countries were expected to adopt the more pro-monopolistic rules that applied to developed countries.**
 - **Exclusivity:** Marketing and data exclusivity rules delay generic drug registration for a specified period of time by limiting the ability of generics manufacturers and regulatory authorities to make use of an originator company’s data.
 - ✓ **May 10th standard:** Exclusivity normally runs for a five-year concurrent period, meaning that the clock runs on exclusivity from the date of first marketing in the United States or agreement territory. This expedites generic entry.
 - ✓ **TPP rule:** Exclusivity runs for a minimum five years. Countries must choose between offering an extra three years exclusivity for new uses, forms and methods of administering products, or five years exclusivity for new combination products. Only Peru may run the exclusivity clock by the concurrent period measurement. Other countries must provide at least five years exclusivity from date of marketing approval in their country, which may be considerably later than the first marketing approval, including cases that are purely a result of the pharmaceutical company moving slow to register a product in a developing country. Biologics exclusivity includes USTR insistence that countries adopt “other measures” toward providing a market outcome comparable to (presumably) eight years. A TPP Commission shall review the biologics exclusivity period, under likely industry pressure to lengthen it. Malaysia and Brunei will have an “access window,” allowing them to foreclose marketing exclusivity if a company waits more than eighteen months to begin product registration.

- **Patent Term Extensions**: Patent term adjustments (typically called extensions) significantly delay market entry of generic medicines and restrict access to affordable medicines. While they are allocated ostensibly for “delays” in regulatory review or patent prosecution, variance in review periods is a normal part of each system, and patent terms are not shortened when review proceeds more quickly than usual.
- ✓ **May 10th standard**: Patent extensions are optional. Countries may choose whether or not to make available patent term extensions for pharmaceuticals.
- ✓ **TPP rule**: Patent extensions are required for regulatory review periods or patent prosecution periods deemed “unreasonable” (regulatory review) or beyond a period of years (prosecution periods) – five years from application or three years from examination request.
- **Transition Periods, Exemptions**: Undermining the core premise of the May 10 Agreement standard, the TPP would require developing countries to transition to the same patent rules that apply to developed countries. The transition periods are short and only apply to a few rules while the rest would apply immediately to all signatories. Some countries have negotiated exemptions from one or two TPP rules. But again, the rules are beyond the limits of May 10, and will apply to the rest of the TPP parties, including developing countries that may join this aspired “living agreement” in the future.
- **Additional ways the TPP extends monopoly rights relative to the May 10 standard**: While the May 10 Agreement did not make express reference to patent evergreening or other intellectual property rules that can compromise access to medicines, many health advocates take the content of the U.S.-Peru Trade Promotion Agreement as the standard. That agreement did not, for example, require the grant of patents for new uses of old medicines. In contrast, the TPP does. This would allow pharmaceutical firms to “evergreen” their patents, maintaining a monopoly and high prices.
- **The most controversial TPP provision concerns biotech drugs, or biologics – medical products derived from living organisms – for which the pharmaceutical industry obtained new exclusivity periods.** Many TPP countries provided for no special exclusivity rights for such drugs. While TPP countries refused to agree to an automatic monopoly term longer than five years, USTR insisted on text that will allow the U.S. government to pressure and pull countries towards a longer period - eight or even more years of protection. The eight-year position is dangerous, will likely cost lives, and contravenes the May 10 Agreement. Since the text was released,, administration officials have stated explicitly that the deal requires more than five years of monopoly.

PHARMACEUTICAL PRODUCTS AND MEDICAL DEVICES ANNEX: Opportunities for Drug Firms to Contest Medicine Purchasing and Pricing Decisions

- **The TPP “Annex on Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices,”** which sets rules that TPP country health authorities would be required to follow regarding pharmaceutical and medical device procurement and reimbursement, expressly names the Centers for Medicare & Medicaid Services (CMS) as covered by its text. “...with respect to CMS’s role in making Medicare national coverage determinations.” Medicare’s national coverage determinations include whether Medicare Part A and Part B will pay for an item or

service. Among other things, Part A and B cover drugs administered in a hospital or a physician's office, and durable medical equipment

- **Under the TPP CMS determinations would be subject to a series of procedural rules and principles, the precise meaning of which are not clear and perhaps not knowable.** Pharmaceutical companies could attempt to exploit the general language of the Annex to mount challenges to Medicare and health programs in many TPP negotiating countries. The Annex may potentially constrain future policy reforms, including the ability of the U.S. government to curb rising and unsustainable drug prices.
- **The Office of the United States Trade Representative (USTR) claims that Medicare today is fully compliant with the proposed provisions of the TPP. Yet the ambiguous language of the TPP leaves our domestic healthcare policies vulnerable to attack by drug and device manufacturers.** For example:
 - Could companies use the Annex to compel Medicare to cover expensive products without a corresponding benefit to public health? Medicare reimbursement is limited to products that are "reasonable and necessary" for treatment. But the TPP "recognize[s] the value" of pharmaceutical products or medical devices through the "operation of competitive markets" or their "objectively demonstrated therapeutic significance," regardless of whether there are effective, affordable alternatives.
 - The TPP also requires countries to make available a review process for healthcare reimbursement decisions. Medicare national coverage determinations allow for appeals, but only in a limited set of circumstances. Might this conditional appeal process be construed as insufficient, if companies argue the TPP grants them an unconditioned right to review?
 - The TPP mandates that parties provide opportunities for applicants to comment on reimbursement considerations "at relevant points in the decision-making process." Though Medicare national coverage determinations allow for comments in certain stages of the process, these determinations may be vulnerable to legal challenge depending on the construction of "relevant points."
- **In addition to its application to Medicare Part A and B, the Annex would apply to any future efforts related to national coverage determinations by the CMS, including potential Medicare Part D reforms.** In response to soaring drug costs, advocates have increasingly called on the government to enable the Secretary of Health and Human Services to negotiate the price of prescription drugs on behalf of Medicare beneficiaries. Vital to this reform would be the establishment of a national formulary, which would provide the government with substantial leverage to obtain discounts. The development of such a national formulary would be subject to the requirements of the TPP. These procedural requirements would pose significant administrative costs, enshrine greater pharmaceutical company influence in government reimbursement decision-making and reduce the capability of the government to negotiate lower prices.
- **Inclusion of Annex Could Bolster Case of a Pharmaceutical Company Suing the U.S.. Under the TPP's ISDS Regime.** A foreign pharmaceutical company that has launched an investor-state suit against a government for a reimbursement decision could use the Annex to demonstrate the basis for establishing legitimate expectations for certain treatment that a government decision has frustrated.

INTELLECTUAL PROPERTY - COPYRIGHT PROVISIONS:

Undermines Internet Freedom, Privacy By Tipping Balance Away from Users and Public Interest

- **The final TPP text threatens to lock United States into its current broken copyright rules that undermine access to knowledge, creativity, and autonomy over digital devices and content, and the TPP will export these rules around the world.**
- **TPP copyright provisions will create even more legal uncertainty over the right of anyone to tinker with their devices that contain software or digital content.**
- **Communities that will be most adversely affected: students, teachers, librarians, archivists, researchers, hobbyists, students, journalists and whistleblowers.**
- **Fair use is left out of the TPP:** Instead, there are weak provisions on upholding the public interest. There is no binding requirement that signatory countries enact necessary safety valves to copyright's restrictions. This further tips the balance away from public interest concerns and towards the interests of rightsholders, undermining general rights to access knowledge and participate in and comment on existing cultural works.
- **Expansion of excessive copyright terms: the TPP extends copyright terms for six of the 12 negotiating countries by another 20 years.** This comes as a huge cost for public access to culture, while there has been no empirical evidence that this incentivizes the creation of creative works. This eats away at the public domain, which is critical as a cultural commons from which people can adapt and build upon existing works. This would exacerbate the orphan works problem, where works whose authors has deceased or have gone missing become difficult or nearly impossible to find or access.
- **Bans tinkering with software and digital devices:** Digital rights management (DRM), also known as technological protection measures, is encryption that comes on an increasing number of digital devices and content. DRM is designed to restrict their owner from tampering with or changing the underlying product. The TPP prohibits the circumvention of DRM and criminalizes those who share the knowledge or tools to do so. Such provisions impact people's ability to tinker with or repair their own phones, video game consoles, computers, and increasingly on everyday machines like kitchen appliances and cars. Similar prohibitions against the removal of rights management information are also enforced, making life more difficult for those who quote, reference or sample existing works.
- **Heavy-handed criminal enforcement and civil damages:** Countries will be compelled to enact or maintain high penalties and damages that are grossly disproportionate to the actual loss to the rightsholders. It also empowers law enforcement to seize or destroy "materials or implements" used in the alleged infringing activity. Excessive penalties lead to a chilling effect on innovators and everyday people who wish to try and access or use existing copyrighted works. This could lead to a family's home computer becoming seized simply because of its use in sharing files online, or for ripping Blu-Ray movies to a media center.
- **Dangerously vague, severe punishment for trade secrets revelations:** Provisions criminalize anyone who gain access to or disclose a trade secret held in a computer system. There are no exceptions for cases where the disclosed information may serve the public interest. This could be used to criminalize investigative journalists or whistleblowers who reveal corporate wrongdoing through

any online or digital means. Such provisions echo the draconian Computer Fraud and Abuse Act law in the U.S.

- **Undermining online privacy and helping trademark owners to seize domains:** The U.S. has repeatedly committed to an open, multi-stakeholder model of Internet governance for domain name policy; yet the TPP undermines this by requiring countries to provide databases of contact information of domain name registrants, and to adopt an extrajudicial system for resolving disputes over domain names that privileges trademark owners over users. This means owners of websites would be unable to shield themselves from identity thieves, scammers, harassers, and copyright and trademark trolls. It also overrides the bottom-up processes that TPP countries have evolved to manage their own processes for resolving domain name disputes.
- **Further enforcing rules that enable censorship by copyright takedown:** The United States already has a system for dealing with infringement allegations of live online content—the copyright holder sends a notice to the website or platform, and the service must remove it immediately and enable the user to contest the takedown. The burden of proof is on the user to show that their use of the work is not infringing. Provisions requiring ISPs to take measures to combat infringement may compel increasing use of algorithms or "bots" to scan works for its inclusion of copyrighted content, where even non-infringing uses of works (such as when it is a fair use) are taken down from the Internet. Overall, it incentivizes web platforms to take down content in order to avoid liability, despite legality of the contested content.

INVESTMENT CHAPTER: Expanded List of Policies Exposed to Attack by 9,200 Foreign Firms Newly Empowered to Use ISDS Against the U.S.

- **Contrary to administration claims that the TPP's Investment Chapter would limit the uses and abuses of the controversial investor-state dispute settlement (ISDS) regime, much of the text replicates, often word-for-word, the most provocative terms found in past U.S. ISDS-enforced pacts.** Worse, the TPP would expand the controversial ISDS regime that elevates individual foreign investors to equal status with the 12 sovereign governments signing the deal. Many fixes and reforms included in a 2012 leaked draft version of the Investment Chapter have been eliminated. The final TPP text does include some new verbiage seemingly designed to counter the growing political blow back against ISDS. While the tone is different in some provisions, in practice the TPP's binding legal language does not constrain ISDS tribunals from making ever-expanding interpretations of the rights countries owe foreign investors and thus the compensation they can be ordered to pay foreign firms.
- **Contrary to Fast Track negotiating objectives, the TPP would grant foreign firm greater rights that domestic firms enjoy under U.S. law and in U.S. courts.** One class of interests – foreign firms – could *privately enforce* this public treaty by **skirting domestic laws and courts** to challenge U.S. federal, state and local decisions and policies on grounds not available in U.S. law and do so before extrajudicial tribunals authorized to order payment of unlimited sums of taxpayer dollars. Under the TPP, compensation orders could include the "expected future profits" a tribunal surmises that an investor would have earned in the absence of the public policy it is attacking.
- **TPP would expand U.S. ISDS liability by widening the scope of domestic policies and government actions that could be challenged. For the first time in any U.S. free trade agreement:**

- **The provision used in most successful investor compensation demands would be extended to challenges of financial regulatory policies.** The TPP would extend the “minimum standard of treatment” obligation to the TPP Financial Services Chapter’s terms, allowing financial firms to challenge policies as violating investors’ “expectations” of how they should be treated. The “safeguard” that the U.S. Trade Representative (USTR) claims would protect such policies repeats an ambiguously written World Trade Organization (WTO) provision that has not been accorded significant deference in the past.
- **Pharmaceutical firms could use TPP to demand cash compensation for claimed violations of World Trade Organization rules on creation, limitation or revocation of intellectual property rights.** Currently, WTO rules are not privately enforceable by investors.
- **With Japanese, Australian and other firms newly empowered to launch ISDS attacks against the United States, the TPP would *double* U.S. ISDS exposure. More than 1,000 additional corporations in TPP nations, which own more than 9,200 subsidiaries here, could newly launch ISDS cases against the United States.** Currently, under ALL existing U.S. investor-state-enforced pacts, about 9,500 U.S. subsidiaries for foreign firms have such powers. Almost all of the 50 past U.S. ISDS-enforced pacts are with developing nations with few investors here. That is why the United States has managed largely to dodge ISDS attacks to date. But, the TPP would subject U.S. policies and taxpayers to an unprecedented increase in ISDS liability at a time when the types of policies being attacked and the number of ISDS case are surging. Just 50 known cases were launched in the regime’s first three decades combined while about 50 claims were launched in *each* of the last four years.
 - **The TPP also would newly empower more than 5,000 U.S. corporations to launch ISDS cases against other signatory governments on behalf of their more than 19,000 subsidiaries in those countries.** (These are firms not already directly covered by an ISDS-enforced pact between the United States and other TPP governments.)
- **U.S. negotiators succeeded in pressuring other TPP nations to empower foreign investors to bring certain sensitive contract disputes with TPP signatory governments to ISDS tribunals, instead of resolving such matters in domestic courts.** This includes disputes with the federal government about natural resource concessions, government procurement projects for construction of infrastructure projects and contracts relating to the operation of utilities. **TPP 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.** (Section B) *Contrary to claims that the process was “reformed”:*
 - **TPP tribunals would still be staffed by three private sector attorneys allowed to rotate between acting as “judges” and as advocates for investors launching cases.** Such dual roles would be deemed unethical in most legal systems.
 - **The TPP text has no requirement for tribunalists to be independent or impartial.** Rather, the text relies on weak impartiality rules set by the arbitration venues themselves.
 - **The text does not include new conflict of interest rules for tribunalists.** TPP negotiators punted a so-called “Code of Conduct” for ISDS tribunalists to a side agreement to be created and put in place before the pact goes into effect (Article 9.21.6). Whether such rules will be effective with respect to tribunalists’ direct conflicts of interest is an open question. It seems improbable that Congress and the public will get to evaluate the rules and how enforceable they will be before votes to approve the pact. However, even if the Code of Conduct were to stop the outrageous practice of lawyers with direct financial interests in the companies and issues involved being allowed to serve as “judges,” the TPP text does not address the bias inherent in the ISDS system

and underlying the business model of lawyers engaged in this field: ISDS tribunalists have a structural incentive to concoct fanciful interpretations of foreign investors' rights and order compensation to increase the number of investors interested in launching new cases and enhance the likelihood of being selected for future tribunals.

- **The provisions on expedited dismissal of “frivolous” cases replicate the language included in U.S. pacts since the Bush II administration with respect to timelines for such claims and tribunals’ authority to order claimants to pay costs for dismissed cases.** The only new term makes explicit a factor (that a claim is “manifestly without legal merit”) that is inherent in the standard for expedited dismissal that has been included in past U.S. pacts and in the TPP: that “a claim submitted is not a claim for which an award in favour of the claimant may be made...”
- **There is no system of outside appeal on the merits of a decision. Nor is an appellate body established within TPP.** The text retains tribunalists’ full discretion to determine how much a government must pay an investor. This can include claims for the “expected future profits” the tribunal surmises would have earned in the absence of the policy under attack. ISDS tribunals have ordered billions in compensation under existing U.S. pacts alone for toxic bans, land-use policies, financial stability measures, forestry rules, water services, economic development policies, mining restrictions and more. Pending claims under U.S. pacts total more than \$25 billion.
- **There is no “exhaustion” requirement – that foreign firms seek redress in domestic legal and administrative venues before resorting to ISDS.** Instead, foreign investors can forum shop.
- **Even when governments win, under TPP rules they can be ordered to pay for the tribunal’s costs and legal fees, which average \$8 million per case.**
- **TPP does not include the promised “reforms” of the substantive foreign investor rights underlying egregious past rulings.**
 - **The TPP retains the “Minimum Standard of Treatment” and “Indirect Expropriation” language from past U.S. pacts that grants foreign investors “rights” to not have expectations frustrated by a change in government policy.** Under the TPP, it does not matter if the changed policy came in response to a new financial crisis or health discovery or environmental catastrophe, *or if it applies to domestic and foreign firms alike.*
 - **There are no new safeguards that limit ISDS tribunals’ discretion to issue ever-expanding interpretations of governments’ obligations to investors and order compensation on that basis.** The text reveals virtually identical “limiting” annexes and terms that were included in U.S. pacts since the 2005 Central America Free Trade Agreement (CAFTA) that have failed to rein in ISDS tribunals. CAFTA tribunals have simply ignored the “safeguard” annexes that are replicated in the TPP and as with past pacts, in the TPP such tribunal conduct is not subject to appeal.
 - **The TPP includes an overreaching definition of “investment” that would extend the coverage of the TPP’s expansive substantive investor rights far beyond “real property,” permitting ISDS attacks over government actions and policies related to financial instruments, intellectual property, regulatory permits and more.** Proposals to narrow the definition of “investment,” and thus the scope of policies subject to challenge, that were included in an earlier version of the text that leaked have been eliminated.
 - **The lack of robust “denial of benefits” provisions would allow firms from non-TPP countries and firms with no real investments to exploit the extraordinary privileges the TPP would establish for foreign investors.** This includes firms from non-TPP countries that have incorporated in a TPP signatory country. Thus, for instance, one of the many Chinese state-owned

corporations in Vietnam and Malaysia (that also have U.S. investments), could “sue” the U.S. government under this text. Language limiting investors to those that have “substantial business activities” is not defined, and tribunals have been willing to consider very minimal investments in host states as conferring nationality for the sake of gaining treaty protections.

- **Proposals included in leaked earlier drafts to extend even the TPP’s weak general exceptions for environmental and health policies to the Investment Chapter were rejected.** Instead of real safeguards to stop attacks on nations’ environmental, health and other regulatory policies, the TPP text replicates the same self-cancelling provision included in past U.S. pacts, although with more Policy types listed. The provision, which limits the rule of construction to only environmental and other policies that *already are consistent* with the agreement makes the measure meaningless. A safeguard is only needed to protect policies that would otherwise violate the agreement’s rules. The relevant provision (Article 9.15) reads “Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure **otherwise consistent** with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.” (emphasis added)
- **The only meaningful new ISDS safeguard included in the final TPP text is a carve-out for tobacco-related public health measures that allows countries to elect to remove such policies from being subject to ISDS challenges, either in advance or once a policy is attacked.** Leading health groups, pro-free-trade former New York City mayor Michael Bloomberg and TPP nations like Malaysia pushed for years for more expansive terms. These proposals would have prevented all TPP challenges to tobacco-related health policies, including by other governments and would have excluded tariff cuts on unprocessed tobacco and tobacco products that would result in the lowering of the price of cigarettes. The final tobacco provision makes clear that government-to-government challenges to tobacco control measures are allowed as is tariff elimination on tobacco and tobacco products. But even with these unfortunate limitations, the final provision is considerably better than past ISDS tobacco control exception proposals. It provides an example of how a meaningful trade pact safeguard against ISDS attacks could be structured. That said, because the TPP’s Investment Chapter includes a Most Favored Nations provision, a tobacco company could demand the better investor rights provided in other ISDS-enforced investment agreements the regulating country has enacted. (Indeed, the TPP tobacco language was motivated in part by various subsidiaries of Phillip Morris using the ISDS clauses of various countries’ ISDS-enforced agreements to attack Australian and Uruguayan tobacco control policies.) However, even with those not insignificant caveats, this real carve-out from ISDS liability for various forms of health-related tobacco control policies makes apparent how ineffective and meaningless the chapter’s language advertised by the White House as protecting other health policies and the environment actually is (Article 9.15). The tobacco provision also begs the question why only tobacco control policies are excluded from ISDS attacks, given no other provision of the Investment Chapter nor the TPP’s General Exceptions Chapter provides any meaningful safeguard or effective exception to stop ISDS attacks on other public health measures, from toxins bans to patent policies to pollution cleanup requirements. (For more on the TPP’s tobacco-related provisions, see the text analysis from Action on Smoking and Health.)

LABOR CHAPTER: Vietnam, Malaysia Side Agreements a New Low, Labor Text Does not make Significant, Meaningful improvements Over Bush Standards that Have Not Improved Conditions

- Firms that can operate in conditions in which ILO core labor standards are not respected drive down wages and working conditions, drawing in additional investment, enabling social dumping of lower-priced goods, and suppressing wages and working conditions in other markets against which producers everywhere are forced to “compete.”
- **Past trade agreements, even those that contain the so-called “May 10” provisions, failed to protect labor rights and reverse the race to the bottom. The TPP Labor Chapter does not make significant, meaningful improvements over the nearly decade old George W. Bush era standard.** Rather, the side arrangements made with Vietnam, Malaysia and Brunei represent a new low. The “achievements” touted by USTR appear to be of limited value.
- **The vast majority of the recommendations made by organized labor were completely ignored. A sampling of labor asks omitted from the TPP:**
 - To improve compliance and enforceability, define the core labor standards, e.g., by referring to ILO Conventions
 - To protect workers and raise wages, require that Parties not waive or derogate from *any* of their labor laws (laws implementing either ILO Core Conventions or acceptable conditions of work)—regardless of whether the breach occurred inside or outside of a special zone
 - To protect workers and raise wages, define “acceptable conditions of work” more broadly to include such concepts as payment of all wages and benefits legally owed and compensation in cases of occupational injuries and illnesses
 - To increase compliance with labor obligations, include commitments aimed at ensuring effective labor inspections
 - To increase compliance with labor obligations, allow a petitioner to make a complaint based on a single egregious violation, rather than waiting for a “sustained or recurring course of action” to occur
 - To remove requirement that violations must be in a manner affecting trade or investment between the parties”, which leaves out most public sector workers.
 - To prevent abuse of vulnerable workers and a spiral to the bottom in wages and working conditions, ensure migrant workers receive the same rights and remedies as a country’s nationals
 - To prevent human trafficking and forced labor, establish enforceable rules for international labor recruiters
 - To ensure timely enforcement and reduce unwarranted delays, establish clear, universal timelines for consideration of labor complaints
 - To reduce excessive discretion to ignore or delay labor complaints, require that a Party that has received a meritorious complaint will promptly and zealously pursue the case (to avoid years-long delays like those confronted in the Guatemala and Honduras cases)
 - To help raise standards across the region, create an independent labor secretariat that researches emerging labor issues and reports on best practices and establish Trans-Pacific works councils for firms operating in more than one TPP country
- **Instead, the USTR made minor changes likely to have little impact:**
 - The commitment to “discourage” trade in goods made with forced labor is not equivalent to a commitment to prohibit trade in such goods. It could be met by hanging a poster, for example.

- The commitment to have laws regarding acceptable conditions of work fails to set standards for such laws. The minimum wage in Brunei could be a penny an hour, for example.
 - The commitment not to waive or derogate from laws implementing acceptable conditions of work in an Export Processing Zone leaves most TPP workers unprotected. The commitment is too narrow to be of clear value to workers.
 - Too much of the new text (vis a vis “May 10”) relies on legally imprecise language like “may” and “endeavor to encourage”. Such language, which is aspirational rather than obligatory, does not provide the clear protections workers in the region need to organize, collectively bargain, and raise their wages in a safe and just working environment. Aspirational language will not help build new markets for U.S. products.
- **Analysis of the country specific plans to follow in the coming days, but we note with great disappointment the lack of any plan for Mexico**, which is and has long been woefully out of compliance with international labor standards. To be clear, we maintain that no country should get TPP benefits until it complies with all the obligations of the TPP, including its labor standards.

MARKET ACCESS: Where is the Upside for U.S. Workers and Producers Because Downside is Clear

- The TPP lowers U.S. tariffs to zero, giving our competitors unfettered access to the U.S. market while some other countries are allowed dramatically longer periods of time to open their markets.
- The ability of other countries, like Vietnam, to maintain their tariffs for significant periods of time will provide further incentives for U.S. companies to outsource production and offshore jobs and use Vietnam as an export platform to send their products back to the U.S. A good example of this is our experience with China where more than 45% of the products produced by foreign-invested enterprises are exported to the U.S. rather than sold to Chinese consumers.
- According to an initial analysis published in the Wall Street Journal, the U.S. market access concessions alone will increase the U.S. trade deficit in manufactured goods and autos and auto parts by more than \$55 billion dollars resulting in the loss of more than 330,000 jobs.
- Tariffs are not the only impediment to U.S. exports to TPP countries. The TPP countries with whom the U.S. does not have existing free trade agreements with have utilized various market access impediments as well as maintain state-owned enterprises and non-market economic policies (Vietnam) to ensure the success of their companies. The TPP will do little to ensure that access for U.S. exports will increase to offset the flood of imports that are anticipated.
- Currency manipulation can ensure that any “market access” achieved in this chapter is undermined.

PROCUREMENT CHAPTER: Rules on Buy America, Buy Local - America's Domestic Producers & Their Employees, Responsible Purchasing Policies Net Losers

- Trade commitments that require the federal government to treat foreign bidders as if they were U.S. bidders undermine one of most important job creation tools: fiscal policy. Governments should be able to use stimulus funds to create jobs within their borders, and not be required to spend those funds to create jobs elsewhere—nor should developing countries be prevented from using their limited funds on domestic stimulus. That is why the AFL-CIO recommended omitting a Government Procurement chapter from TPP.
- **Tthe TPP gives bidders from Vietnam, Malaysia, Brunei, and other TPP countries expansive access to U.S. goods, services, and construction contracts.**
- **It is not clear that responsible bidding criteria (such as a requirement that a bidder not have outstanding environmental clean-up obligations or the use of bonus points for bidders with better safety records) will be free from “barriers to trade” type challenges.**
- **Though the agreement does not cover state procurement at this time, the TPP requires that the Parties “commence negotiations with a view to achieving expanded coverage, including sub-central coverage” within three years.** Such provisions could undermine popular local and state preference programs.
- Given that USTR has not produced any studies showing that Government Procurement provisions in prior agreements are net job and wage winners for U.S.-based workers—despite repeated requests—we can only conclude that such evidence does not exist and that this entire chapter is a gain for global corporations, but not for U.S. workers.
- Partial List U.S. Procuring entities now open to TPP bidders (there are at list 93 specific procuring entities listed): Department of Transportation (in part), Department of Defense (in part), Department of Veterans Affairs, Department of State, Department of Agriculture (in part), Department of Homeland Security (in part), General Services Administration, The Smithsonian Institution, Federal Prison Industries, Inc., Federal Reserve System, Federal Communications Commission, Tennessee Valley Authority (except Malaysia)

RULES OF ORIGIN CHAPTER: ROOs, Particularly for Autos, Won't Promote Jobs in U.S., Or Wider TPP Area

- The single most critical area where the rules of origin concern domestic production and the workforce is in the auto and auto parts sector. **The TPP dramatically lowers the existing North American Free Trade Agreement requirement of 62.5% content (which itself did not work well and promoted a major production shift to Mexico) to a new 45%, TPP-wide regional value content standard based on the net cost method. This is a substantial drop in the requirement for**

content that will increase the percentage of parts from China and other non-TPP countries that could be in a vehicle and still qualify for the vast preferences of the Agreement.

- **Essentially, an auto with 55% Chinese content could be considered to be Made in America or Made in the TPP under the provisions of the Agreement, qualifying** for its tariff benefit while undermining the premise that somehow China would have to raise its standards in order to benefit from the TPP.
- **In the final days of the negotiations, the TPP text was modified to include a new provision that would grant preferences for additional parts that would be considered to be made by a TPP country whether or not they, in fact, were actually produced in those countries.** This new approach opens up a huge loophole that might, in fact, result in the stated 45% requirement actually being closer to 30-35% making it the lowest rule of origin requirement of any FTA involving the U.S.
 - **This new provision establishes a standard that appears to be similar to a “deemed originating” standard—meaning many important auto parts will count as TPP-originating whether or not they actually came from a TPP country.** Parts subject to this weaker rule include certain body parts, glass and other items.
- **In addition, the rules of origin would potentially allow for further reductions in the value of the content that might have to come from a TPP country to qualify for the Agreement’s benefits: parts that met the low thresholds in the Agreement would then be considered to originate in the TPP essentially then being considered to be 100% sourced in the TPP, driving the nominal 45% regional value content down even further.**
- **The *Wall Street Journal* published an initial estimate that the U.S. trade deficit in autos and auto parts would increase by \$23 billion making it the single greatest loser of any sector.**
- **Finally, it is important to note that additional countries could “dock on” to this agreement in the future. Therefore, the ROO standard could prove to be weakened over time as more production is shifted to non-TPP countries, threatening U.S.-based auto supply chain jobs.**

SANITARY AND PHYOSANITARY CHAPTER: Constraints on Food Safety Provisions

- **New language on border inspection allows exporters to challenge border inspection procedures:** The TPP contains specific language on border inspections that allow challenges to the U.S. border inspection system. Border inspections must “limited to what is reasonable and necessary” and “rationally related to available science,” which allows challenges to the manner inspections and laboratory tests are conducted. (Art. 7.11 at para. 5.)
- **New language allows exporters to challenge specific detentions at the border for food safety problems:** New language that replicates the industry demand for a so-called Rapid Response Mechanism that requires border inspectors to notify exporters for every food safety check that finds a problem and give the exporter the right to bring a challenge to that port inspection determination. (Art. 7.11 at paras. 6 to 8.) This is a new right to bring a trade challenge to individual border inspection

decisions (including potentially laboratory or other testing) that second-guesses U.S. inspectors and creates a chilling effect that would deter rigorous oversight of imported foods.

- **Stronger language on risk assessment makes it easier to challenge U.S. food safety laws and allows foreign review of U.S. regulatory process:** The TPP SPS risk assessment language is considerably stronger than the WTO SPS rules and includes deregulatory catch-phrases that are designed to make it easier to lodge trade disputes against food safety measures. (Art. 7.9 at para. 5.) Food safety oversight would be assessed based not on the extent to which it protected consumers but primarily on the extent it impacted trade, and the language favors risk management strategies that put trade before food safety. (Art. 7.9 at para. 6(b).) The U.S. regulatory process already has considerable risk assessment and cost benefit requirements, this language allows foreign countries to challenge the underlying determination, science and analysis in the rulemaking process.
- **Encourages the use of private certifications for food safety instead of government inspection:** The TPP includes new language that encourages the use of private certifications of food safety assurances — either third party certifications or potentially even self-certification — that would meet the same food safety objectives. (Art. 7.12.) 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).
- **Thematically prioritizes the international trade in food ahead of food safety:** The TPP SPS preamble says governments can protect human, animal and plant health and life “*while facilitating and expanding trade*” — which means that food safety oversight can exist only in conjunction with trade expansion. The WTO SPS preamble allows food safety oversight but warns of food safety programs that are discriminatory or act as barriers to trade. (Art. 7.2(a).)

STATE OWNED ENTERPRISES TERMS: Rules Won't Reverse Rise of SOEs and their Undermining of U.S. Domestic Production and Employment

- The negative impact of state-owned enterprises and state controlled and supported entities on domestic production and employment in the U.S. has increased dramatically over the years. While China's SOEs have had an enormous negative effect on the U.S., other countries – including TPP participants Vietnam, Malaysia and Singapore maintain and support vast SOEs which control significant portions of their economies. Indeed, Vietnam continues to be considered as a non-market economy under the terms of their WTO accession.
- Other countries have taken a cue from China and these other countries to actually increase the power and reach of their SOEs not only in their own markets, but in global commerce. The effect has been devastating in industries ranging from steel and other metals, to telecommunications, chemicals and many others. The TPP has been touted as the first agreement with a chapter addressing the activities of SOEs and proponents have argued that we need to write the rules so China doesn't have the

opportunity to set the standards. Unfortunately, the standards created in the TPP text will do little to nothing to reverse the rise of SOEs and their role in undermining U.S. domestic production and employment.

- The definitions of what a state-owned entity are not broad enough and fail to include all commercial entities that are, or potentially could, operate on behalf of the state. The text provides a definitional structure that leaves substantial flexibility for the state to exert control or influence over its entities while evading coverage of the TPP and harming U.S. companies and their workers.
- The TPP precludes action against any existing support or preferential arrangement benefitting an SOE that was provided prior to the entry into force of the Agreement. This provides a safe harbor for all the existing benefits that SOEs have received as well as those that might be provided over the potentially lengthy period of time before the agreement enters into force, for example, a 40-year no interest loan.
- The TPP fails to cover sub-federal, state-owned enterprises and only calls for a possible review of this issue after a several year period. But if China is to join, the omission of sub-central entities is critical. As The Economist magazine noted last year, while the number of SOEs in China at the federal level has been reduced over the years, there are still 155,000 enterprises owned by central and local governments. The failure to cover sub-federal SOEs in the current TPP countries, as well as a TPP acting as template for future countries, including China, via the docking clause, is a massive loophole that will have potentially devastating consequences for domestic production and employment in the U.S. The lack of coverage of foreign sub-federal entities is a critical flaw with no expectation of future coverage.
- The TPP fails to recognize the pervasive and perverse impact of SOEs in foreign countries. The text requires proof of a “direct effect” which, in many cases, is difficult to prove because of the lack of transparency (which is not sufficiently addressed in the so-called transparency clause) and the reluctance of firms to question activities of SOEs or those entities operating with state support because of concern about threats of market consequences and retaliation.
- The adverse effects provision in the TPP requires, in part, a showing of “significant” harm which fails to recognize the often corrosive, persistent effect of the operations of SOEs.
- The adverse effects provision requires a showing of harm, under normal circumstances, of at least one year. This ignores the fact that harm is often the result of individual, but repeated sales in a market such as for steel and other commodities.
- In particular, the provisions seem ill suited to adequately protect small manufacturers and ensure they can remain in business during the time it takes to gather evidence sufficient to demonstrate a harm, pursue a case, and secure relief.
- Finally, we are not confident that the SOE definition and chapter is carefully crafted to ensure the integrity of important public services including entities such as the U.S. Postal Service, Amtrak, and the Tennessee Valley Authority. Public services are not commercial enterprises and should not be treated as such.

FINAL PROVISIONS – ENTRY INTO FORCE: TPP Only Enters into Force if U.S. & Japan Approve

- There are three scenarios for how the TPP could enter into force. (Article 30.5) All would require the United States and Japan plus some additional countries to approve the deal. Thus, if Congress does not approve the TPP, it will not enter into force for the other countries.
 - The TPP could go into effect 60 days after all of the original countries have provided notice in writing that they completed their domestic approval processes if this occurs within two years of the deal being signed.
 - If two years pass and all of the original signatory countries have not provided the notification, then the deal could go into effect 60 days after the two year period ends if notification has been given by at least six of the original signatories that together account for at least 85 percent of the combined gross domestic product of the original signatories in 2013. (Based on data of the International Monetary Fund using current prices in U.S. dollars.) The 85 percent requirement means both the United States and Japan must be among the six nations.
 - If neither of those two scenarios occur, then the TPP could enter into force 60 days after the date on which at least six of the original signatories, which together account for at least 85 per cent of the combined gross domestic product of the original signatories in 2013, have provided the required notification that they approved the deal.
 - To create pressure on countries other than the United States and Japan to ratify the deal and provide notice, the pact empowers the TPP Commission (the governing body) to determine whether the agreement will enter into force for a country providing notice it has completed its approval processes at a date after the deal went into effect for the initial group of countries.

BIOTECHNOLOGY AND GMO TALKING POINTS - VARIOUS CHAPTERS: First Trade Pact to Subject GMOs to new Trade Rules

- **The TPP is the first trade agreement to specifically identify agricultural biotechnology/GMO products and policies as subject to new trade rules:** The biotechnology, seed and agribusiness industries lobbied for and secured new trade protections for GMOs in the TPP. The National Treatment chapter includes an all-encompassing definition (all agricultural products including fish developed with a host of biotechnology techniques, including the combination of traits from unrelated plants or animals). (Art. 2.21.)
- **USDA and USTR have long-identified foreign governments' biotechnology oversight as a trade barrier, language in the TPP makes it easier to challenge these rules:** USTR has identified all agricultural biotechnology oversight (including a country's GMO approval process, GMO import monitoring and GMO labeling requirements) as potential trade barriers. Language in the TPP provides more specific avenues of attack for countries and companies to challenge foreign government oversight of agricultural biotechnology. (Art. 2.29 at paras. 4, 9 and 10.)
- **Special language designed to attack rules regulating approval of GMO crops and products:** The TPP requires countries to submit to other countries their regulatory approval process, their scientific documentation used to establish their regulatory approval process and the list of approved agricultural

biotech crops or products. The TPP specifically encourages countries to expeditiously approve GMO crops and products. (Art. 2.29 at paras. 4, 8.) These affirmative obligations facilitate foreign governments and agribusiness, biotech and food manufacturing companies to challenge biotechnology regulations under the SPS (food safety) or investor-to-state provisions.

- **Special language on testing for GMO contamination:** Countries that prohibit the import of unapproved GMO crops (or categories of GMO crops) often test imports for unapproved GMO traits (what USDA and the TPP refer to as low-level presence). U.S. companies have exported both GMO corn and rice that were unapproved (even in the U.S.) and recently a GMO corn variety that was unapproved overseas contaminated U.S. corn exports. The TPP requires countries to submit their requirements for regulating and testing for GMO contamination of imports and the scientific basis for these policies — again providing a venue for countries to challenge rules governing unapproved GMO contamination in imports and challenge at TPP tribunals whether any actions taken to stop unapproved GMO contamination are “appropriate.” (Art. 2.29 at paras. 6 to 8.)
- **Specifically allow GMO regulations and safeguards to be challenged at TPP tribunals under pro-industry rules:** The TPP language on food and crop safety establishes limits on permissible regulation of GMOs unless the regulations meet very high thresholds of scientific certainty required by the TPP language on risk assessment. (Art. 7.9 at para. 5.) Regulations will be held to a standard established at a UN body known as the Codex Alimentarius (which means food law in Latin). Agribusinesses, biotechnology companies and pro-GMO governments have effectively used the Codex forum to lower the bar on what GMO regulations are acceptable for international trade. Other TPP provisions adopted from the WTO text make it easier for pro-GMO countries to challenge GMO rules for “discriminating” against “like products” (a corn-is-corn standard) or for being more trade-restrictive than necessary. (Art. 2.3 at paras. 1 and 2.)
- **Leaves state and local GMO measures vulnerable to challenge:** Consumers increasingly want to know what is in their food — including GMO ingredients. Several states (Vermont, Maine and Connecticut) have already passed GMO labeling requirements, dozens of other states are considering GMO labeling laws and some local governments have enacted rules governing the cultivation of GMO crops or the use of GMO-associated herbicides. Foreign countries or companies could use the TPP provisions on labeling and National Treatment to challenge these local and state efforts to increase food chain transparency. (Art. 2.3 at para 2, Art. 8.2 and Art. 8.3 at paras. 1 and 1bis.)

TOBACCO - VARIOUS TPP CHAPTERS: How Tobacco Is Treated

- **ISDS Carve Out - Right to elect for exemption:** Exceptions chapter Article 29.5 gives Parties the right to deny the benefits of the investor-state dispute settlement mechanism with respect to claims against tobacco control measures. The definition of “tobacco control measures” is robust, and includes alternative nicotine delivery devices (ANDs, often referred to as e-cigarettes). The language explicitly exempts trade in tobacco leaf from the exemption. This falls well short of the full exemption for tobacco measures from the entire agreement proposed by Malaysia. However, it is a huge step forward for tobacco control from previous TIAs, and is strong enough to invoke strong opposition from pro-tobacco industry politicians here in the U.S. It is the result of a nearly 5-year effort by public health groups in nearly all TPP countries.

- **Caveat to Carve Out:** Aside from its application only to ISDS, the biggest weakness of the exemption is its status as an election for individual Parties. This leaves the door open to back-door pressure by host governments, the tobacco industry and chambers of commerce to allow ISDS cases to proceed. Note that state-to-state disputes are not limited by this exemption.
- **Tobacco Tariffs Treated Like Any Other Product:** Tobacco is treated like any other product in terms of tariff reduction. For the most part, this means that tobacco tariffs are reduced to zero, which produces a windfall of tobacco profits—unless there is a later compensating increase in domestic excise taxes. This explicit promotion of tobacco exports appears to violate the Doggett Amendment, a congressional limit on authority of U.S. agencies to promote tobacco sales.
- **Tobacco Still Treated Like Other Products in Rest of TPP.** This signals that governments are still not recognizing that tobacco is unique in international trade (we want less, not more, and these same governments have agreed to this in the FCTC and other international instruments, such as the SDGs and the NCD summit). The failure to approve the full exemption will have consequences for tobacco control. For example, the chapter on regulatory coherence requires Parties to set up mechanisms for "interested persons" to provide input into regulatory oversight. This creates a direct conflict of law with FCTC Article 5.3, which requires Parties (11 of whom are also TPP Parties) to limit government interaction with the tobacco industry.

This initial analysis compiles contributions by labor and public interest experts.

For more info on labor, jobs, wages, Rules of Origin, State Owned Enterprises and more, contact: Celeste Drake, AFL-CIO and Owen Herrnstadt, Machinists Union; on climate, environment, and ISDS challenges to such policies contact Ben Beachy and Ilana Solomon, Sierra Club; on food safety and ag issues, contact Patrick Woodall and Tony Corbo, Food and Water Watch; on copyright issues, contact Maira Sutton and Jeremy Malcolm, EFF and Burcu Kilic, Public Citizen; on Investment/ISDS, Financial Services, Accession, National Security and Other Exception Texts contact Lori Wallach and Robijn van Giesen, Public Citizen's Global Trade Watch; on access to medicines, patent and medicine pricing rules, contact Peter Maybarduk and Burcu Kilic, Public Citizen's Access to Medicines program.

December 8, 2015 | By [Maira Sutton](#)

How the TPP Will Affect You and Your Digital Rights

The Internet is a diverse ecosystem of private and public stakeholders. By excluding a large sector of communities—like security researchers, artists, libraries, and user rights groups—trade negotiators skewed the priorities of the [Trans-Pacific Partnership](#) (TPP) towards major tech companies and copyright industries that have a strong interest in maintaining and expanding their monopolies of digital services and content. Negotiated in secret for several years with overwhelming influence from powerful multinational corporate interests, it's no wonder that its provisions do little to nothing to protect our rights online or our autonomy over our own devices. For example, everything in the TPP that increases corporate rights and interests is binding, whereas every provision that is meant to protect the public interest is non-binding and is susceptible to get bulldozed by efforts to protect corporations.

Below is a list of communities who were excluded from the TPP deliberation process, and some of the main ways that the TPP's copyright and digital policy provisions will negatively impact them. Almost all of these threats already exist in the United States and in many cases have already impacted users there, because the TPP reflects the worst aspects of the U.S. Digital Millennium Copyright Act (DMCA). The TPP threatens to lock down those policies so these harmful consequences will be more difficult to remedy in future copyright reform efforts in the U.S. and the other eleven TPP countries. The impacts could also be more severe in those other countries because most of them lack the protections of U.S. law such as the First Amendment and the doctrine of fair use.

General Audience

- Excessive copyright terms deprive the public domain of decades of creative works. They also worsen the orphan works problem, which arises when obtaining permission to use works is impossible because the rightsholder is unknown, deceased, or is nowhere to be found, and using them without permission is legally risky.
- Lose autonomy and control over legally purchased devices and content because it is a crime to remove its digital locks or Digital Rights Management (DRM). This means modifying, repairing, recycling, or otherwise tinkering with a digital device or its contents could be banned or is at least legally risky.
- If you post a personal video that contains someone's copyrighted song, video, or image online without permission, it may get taken down or the user may be forced to pay a penalty no matter how insignificant that copyrighted content is to the whole of the video. Their account may also be suspended or restricted permanently or for a prolonged amount of time. If it happens to go viral they may be held criminally liable because it's arguably available at a "commercial scale."

- Those who put on a themed party or cosplay based on a character from a favorite show or movie could be forced to pay a penalty or have images from it removed from the Internet. Again, the risks and penalties are much higher if it happens on a “commercial scale.”
- If you stream some copyrighted gameplay with commentary to friends and other fans, the video may get taken down or the user may be forced to pay a fee.
- It will hamper introduction of new user protections in the law, such as new fair use rules or new permanent permissions to circumvent DRM on devices, because several thousands of companies would be empowered to challenge new public interest rules as undermining their "investments" or expected future profits.
- New rules applicable to national-level domains will block reforms that EFF and others are working on to protect website owners from having to reveal their real name, address, and other personally identifying information through the domain name system (DNS), making them vulnerable to copyright and trademark trolls, identity thieves, scammers, and harassers.
- Safety of devices and networks could be compromised because the TPP bans countries from requiring source-code disclosure and code auditing for most software and devices.

[\[Link to this section\]](#)

Innovators and Business Owners

- DRM is often used for anti-competitive purposes. It can block innovators from building interoperable services or products to be used with existing platforms, and prevents third-party repair services. More fundamentally, it blocks tinkering and experimentation which is critical to open innovation.
- Small web-based businesses and platforms may not have the legal resources or expertise to deal with excessive or faulty copyright takedowns.
- Services that may want to use or build upon existing content for new purposes will have less protections in other countries because fair use is not enshrined in the TPP. No incentive is created for TPP countries to pass flexible exceptions and limitations to copyright's restrictions.
- New legal protections for independent innovators and small businesses may be undermined if a multinational company alleges it undermines their investment or expected future profits and challenges the rule in an investor-state proceeding.

[\[Link to this section\]](#)

Libraries, Archives, and Museums

- Excessive copyright terms harm the availability of books, photographs, and all creative works in the public domain. It also worsens the orphan works problem, when obtaining permission to use works is impossible because the rightsholder is unknown, deceased, or is nowhere to be found, and so preserving or archiving copies of them could be legally risky.

- Heavy penalties for infringement, in the form of pre-established statutory damages that are not connected to the actual harm from infringement, chills preservation and archival efforts, where copying or changing the format of existing works is already legally risky.
- Research and quotation can be hampered by bans on circumventing DRM on books or other kinds of digital content, and also limit the availability of digital works
- Despite explicit exception for libraries and museums, a ban on tools for circumvention limits their ability to take advantage of it because they often lack the knowledge or tools to do so.
- Weak exceptions and limitations language gives no incentive for countries to give legal certainty to activities of libraries, archives, and museums that involve technical acts of copying or DRM circumvention—such as enabling the use of copyrighted works for research and quotation, preservation, and copying material for educational purposes.

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Students

- Use of textbooks, documents, movies, photographs, or other copyrighted works for school assignments and projects could be restricted even further because such rights are not enshrined in the TPP.
- Removing DRM or rights management information from textbooks, articles, or any kind of creative work could lead to criminal liabilities if they share the unlocked work with friends or fellow students.
- Excessive copyright terms harm the availability of books, photographs, and all creative works in the public domain. It also worsens the orphan works problem, when obtaining permission to use works is impossible because the rightsholder is unknown, deceased, or is nowhere to be found, and so using them for research or school projects could be legally risky. Too-long-copyrights also make books more expensive.
- Heavy-handed criminal and civil penalties for copyright infringement can be chilling on students who seek to share or use copyrighted works for educational purposes, or at worst, it could lead to imprisonment or leave them with huge fines.

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Impacts on Online Privacy and Digital Security

- New rules will block reforms that EFF and others are working on to protect website owners from having to reveal their real name, address, and other personally identifying information through the DNS, making them vulnerable to copyright and trademark trolls, identity thieves, scammers and harassers.
- ISPs may block Virtual Private Networks (VPNs) as part of their duty to cooperate with copyright owners to deter the unauthorized transmission of copyright material. As an intermediary, VPNs could also be made liable for the transmission of infringing works if they fail to follow safe harbor rules such as disconnecting repeat infringers.

- If a user sends a counter-notice to restore wrongfully removed content, the online service provider can be required to pass on personal information of the user to the rightsholder to allow them to serve the user with a lawsuit in case they insist that the work infringed on their copyright.
- There is no explicit exception for security researchers to circumvent DRM in order to conduct encryption research on digital devices or content, unlike under U.S. law. This is deeply problematic when third party researchers have been credited with finding security holes in many modern devices. This criminalization of DRM circumvention discourages people from identifying security flaws when doing so requires breaking the law.

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Website Owners

- Copyright enforcement rules incentivize website owners to take down content or block users from their site from a mere copyright infringement allegation. They will do so in order to protect themselves from liability, even if the work in question is fair use or otherwise legal.
- New rules will block reforms that EFF and others are working on to protect website owners from having to reveal their real name, address, and other personally identifying information through the DNS, making them vulnerable to copyright and trademark trolls, identity thieves, scammers, and harassers.
- If the website's domain is alleged to infringe on someone's trademark, the dispute resolution process that national domain registries are required to adopt is one based on a flawed global model that favors established trademark holders.
- If the webpage receives several copyright infringement notices, it may be downranked or completely removed from search results.

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Gamers

- Modifying games or sharing the information on how to do so is illegal under rules that ban the unlocking of DRM, even if it has nothing to do with piracy. Circumventing DRM is a separate criminal offense from copyright infringement.
- Streaming or uploading recorded gameplay, even with commentary, can be taken down. Otherwise they may be forced to pay a fine or be unable to object to advertisements being added to the video. Their account may also be suspended or restricted permanently or for a prolonged period of time.

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Artists

- Ongoing legal uncertainty, or even heightened illegality, of remixing or appropriating creative works for their own projects.
- Bans on circumventing digital locks or DRM on devices and content can make it difficult or impossible to re-use locked content for new works.
- Excessive copyright terms deprive the public domain of decades of creative works. They also worsen the orphan works problem, when obtaining permission to use works is impossible because the rightsholder is unknown, deceased, or is nowhere to be found, and so using them is legally risky.
- Artists could face liability for stripping off watermarks (AKA rights management information) from works, even if you're reusing them for fair use or other legal purposes.

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Journalists and Whistleblowers

- Criminal or civil penalties for publishing information that reveals a corporate "trade secret" and is accessed, disclosed, or made available through any kind of computer system, even if it is for the purpose of revealing corporate wrongdoing. They could face criminal liabilities for publishing information from sources whom they know obtained the information improperly.
- There is continued legal uncertainty about the scope of rights to quote from sources, due to the lack of a fair use or journalistic usage right.
- It could undermine anonymity of journalists or whistleblowers online by obligating countries to require the availability of a real name and address for registered domains on websites.

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People with Sensory Disabilities

- There are no compulsory copyright limitations or exceptions for persons with disabilities. That means countries would be required to enact stronger copyright enforcement mechanisms without having to enact legal safeguards for persons with disabilities, even if new rules lead to greater restrictions on the availability of content in accessible formats.
- Excessive copyright terms of life of the creator plus 70 years keep digital creative works, including software, locked behind onerous restrictions for longer and have been shown to further worsen the availability of books.
- Bans on getting around digital locks or circumventing DRM undermine people's ability to modify their own content and devices. Removing DRM on books, movies, video games or software to turn them into accessible formats becomes a criminal act, or is at least legally risky.
- Works that are remixed or modified for accessibility purposes, such as subtitling, could be removed from the Internet even if it's fair use. If it happens to go viral they may be held criminally liable because it's arguably available at a "commercial scale."

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Tinkerers and Repairers

- Bans on getting around digital locks or circumventing DRM undermines people's ability to experiment and modify their own content and devices or to take it to a third-party repair service. Although countries may create exceptions to DRM rules, there is no incentive for them to do so because there are no obligatory exceptions.
- DRM is used for anti-competitive purposes and blocks people from building services or products for use with existing platforms.
- It is a separate criminal offense to share the knowledge or tools to unlock DRM restrictions.
- Repairing a part in a car with embedded software may be a crime if it requires circumvention of the car's DRM.
- Countries will be prohibited from requiring independent repair shops to be given access to the source code of the products they repair.
- Modifying a home entertainment system, video game console, TV, ebook, or other type of digital platform to show content that is not available through official content providers could be illegal.

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Free Software

- Bans on DRM circumvention undermine people's ability to examine and pick apart software used in or with devices and content, and experiment to create interoperable content and devices. DRM is often used for anti-competitive purposes and can be used to block free software services or products to be used with existing proprietary platforms.
- Excessive copyright terms of life of the creator plus 70 years keep digital creative works, including software, locked behind onerous restrictions for longer.
- The TPP would prohibit countries from requiring products be supplied with open source licenses, even where this would be helpful to curb rampant information security problems.

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Cosplayers and Fans of Anime, Cartoons, or Movies

- Excessive copyright terms of life of the creator plus 70 years keep digital creative works, including anime, comic books, and movies, locked behind onerous restrictions for longer.
- Fans putting on a themed party or cosplay based on a character from a favorite show or movie could be forced to pay a penalty or have images from it removed from the Internet. If it happens to go viral they may be held criminally liable because it's arguably available at a "commercial scale."

- Fans could face a lawsuit or a criminal prosecution even if the author of the work they used or modified does not care about the activity in question. That means law enforcement can go after fans for derivative works on a “commercial scale” without the author of the original work filing charges.