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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 generic 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 5,600 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-day 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 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.*

## 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 the 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 (WTO) 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 to which all TPP countries are party.
- **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 also 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 rainforest. 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 (ISDS) 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 rollback of the standard Security Exception that has been part of U.S. trade agreements over the past decade (Article 29.2).** Following a major port security concern relating to the U.S.-Oman FTA, 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. FTA language that “reads in” to the TPP several 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 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 investor’s 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. FTAs, 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 upon 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: First, 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. Second, 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 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 10 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 10 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 10 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 the insistence from the Office of the United States Trade Representative (USTR) 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 10 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, Parts 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 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 Parts 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.
- **The inclusion of the Annex could bolster the case of a pharmaceutical company suing the United States 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 the 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 owners 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 gains access to or discloses 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 in the United States.

- **Undermining online privacy and helping trademark owners to seize domains:** The United States 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 Internet service providers 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 the 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 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 blowback 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 USTR claims would protect such policies repeats an ambiguously written WTO provision that has not been accorded significant deference in the past.
- **Pharmaceutical firms could use the TPP to demand cash compensation for claimed violations of WTO 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** [emphasis added] 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.”
- **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 International Labour Organization (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, offshore jobs and use Vietnam as an export platform to send their products back to the United States. A good example of this is our experience with China where more than 45 percent of the products produced by foreign-invested enterprises are exported to the United States 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 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 the TPP.
- **The 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 least 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 (ROOs) 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 (NAFTA) requirement of 62.5 percent content (which itself did not work well and promoted a major production shift to Mexico) to a new 45 percent, 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 55percent 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 percent requirement actually being closer to 30-35 percent, making it the lowest rule of origin requirement of any FTA involving the United States.
  - **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 percent sourced in the TPP, driving the nominal 45 percent 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 PHYTOSANITARY 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 be “limited to what is reasonable and necessary” and “rationally related to available science,” which allows challenges to the manner in which inspections and laboratory tests are conducted.
- **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. 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 Sanitary and Phytosanitary (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. 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. 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. 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.)

## **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 (SOEs) 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 United States, 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 is 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 for current TPP countries, as well as the 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 occurs, 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 percent 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.

## **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 FTAs, and is strong enough to invoke strong opposition from pro-tobacco industry politicians here in the United States. 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 World Health Organization Framework Convention on Tobacco Control (FCTC) and other international instruments, such as the Sustainable Development Goals and the summit on Non-Communicable Diseases. 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.***

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