

The Honorable Michael Froman
United States Trade Representative
600 17th Street, N.W.
Washington, D.C. 20508

Dear Ambassador Froman:

In accordance with section 5(b)(4) of the Bipartisan Trade Priorities and Accountability Act of 2015, and section 135(e) of the Trade Act of 1974, as amended, I am pleased to transmit the report of the Industry Trade Advisory Committee on Distribution Services (ITAC 5) on the Trans-Pacific Partnership, reflecting consensus of the Members of the Committee without objection or minority reports on the proposed Agreement.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Holwill', with a long horizontal stroke extending to the right.

Richard Holwill
Chairman
Industry Trade Advisory Committee
on Distribution Service (ITAC 5)

The Trans-Pacific Partnership Trade Agreement

Report of the
Industry Trade Advisory Committee on Distribution Services

November 2015

November 25, 2015

Industry Trade Advisory Committee on Distribution Services (ITAC 5)

Advisory Committee Report to the President, the Congress and the United States Trade Representative on the Trans-Pacific Partnership Trade Agreement (TPP)

I – Purpose of the Committee Report

In accordance with section 5(b)(4) of the Bipartisan Trade Priorities and Accountability Act of 2015, and section 135(e)(1) of the Trade Act of 1974, as amended, requires that advisory committees provide the President, the U.S. Trade Representative, and Congress with reports not later than 30 days after the President notifies Congress of his intent to enter into an agreement.

Under Section 135 (e) of the Trade Act of 1974, as amended, the report of the Advisory Committee for Trade Policy and Negotiations and each appropriate policy advisory committee must include an advisory opinion as to whether and to what extent the agreement promotes the economic interests of the United States and achieves the applicable overall and principle negotiating objectives set forth in the Trade Act.

The report of the appropriate sectoral or functional committee must also include an advisory opinion as to whether the agreement provides for equity and reciprocity within the sectoral or functional area.

Pursuant to these requirements, the Industry Trade Advisory Committee on Distribution Services (ITAC 5) hereby submits the following report.

II – Executive Summary of Committee Report

The Members of ITAC 5 unanimously support approval of the Trans Pacific Partnership Agreement. We believe that the agreement substantially advances opportunities for companies involved in the distribution of products through various channels, namely retail, wholesale, catalogue and direct sales and that it advances the objectives of the franchising in a number of ways. That said, we note with dismay the number of reservations taken by Viet Nam, particularly with regard to the continued use of an Economic Needs Test for the expansion of large-scale stores and branch operations in a number of categories. In addition to matters specifically addressing distribution services, we offer comments with regard to other issues of importance to ITAC 5 companies in terms of business operations.

III – Brief Description of the Mandate of ITAC 5

ITAC 5 performs such functions and duties and prepares reports, as required by Section 135 of the Trade Act of 1974, as amended, with respect to the services sector. To fulfill its mandate the ITAC meets to review negotiations with U.S. trade officials and to advise as required by law.

ITAC 5 advises the Secretary of Commerce and the U.S. Trade Representative (USTR) concerning the trade matters referred to in Sections 101, 102, and 124 of the Trade Act of 1974, as amended; with respect to the operation of any trade agreement once entered into; and with respect to other matters arising in connection with the development, implementation, and administration of the services trade policy of the United States, including those matters referred to in Reorganization Plan Number 3 of 1979 and Executive Order 12188, and the priorities for actions there under.

In particular, ITAC 5 provides detailed policy and technical advice, information, and recommendations to the Secretary of Commerce and the USTR regarding trade barriers and implementation of trade agreements negotiated under Sections 101 or 102 of the Trade Act of 1974, as amended, and Sections 1102 and 1103 of the 1988 Trade Act, which affect the services sector, and performs such other advisory functions relevant to U.S. trade policy as may be requested by the Secretary and the USTR or their designees.

IV – Negotiating Objectives and Priorities of ITAC 5

The negotiating objectives of ITAC 5 are best stated in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 with regard to:

(2) TRADE IN SERVICES.—

(A) The principal negotiating objective of the United States regarding trade in services is to expand competitive market opportunities for United States services and to obtain fairer and more open conditions of trade, including through utilization of global value chains, by reducing or eliminating barriers to international trade in services, such as regulatory and other barriers that deny national treatment and market access or unreasonably restrict the establishment or operations of service suppliers.

(B) Recognizing that expansion of trade in services generates benefits for all sectors of the economy and facilitates trade, the objective described in subparagraph (A) should be pursued through all means, including through a pluri-lateral agreement with those countries willing and able to undertake high standard services commitments for both existing and new services.

V. Advisory Committee Opinion on Agreement

OVERVIEW –

The members of ITAC 5 strongly support ratification of the Trans-Pacific Partnership Agreement (hereafter TPP), to include appropriate amendments to Trade Acts to enact TPP as the governing law for U.S. trade with the 11 other members of TPP. Before discussing specific aspects of the agreement that are of importance to members of our committee, we want to salute the negotiators for the overriding achievement of this pluri-lateral agreement. The elimination of 18,000 tariff

lines is in and of itself reason enough to approve this agreement. We also applaud the fact that the rules will hold state-owned enterprises to market standards.

Other provisions will prevent TPP countries from subsidizing exports by failing to invest in environmental protection and will require countries to enforce labor standards to a greater degree than any other trade agreement. TPP also includes anti-corruption and good-governance standards that parallel those followed by U.S. companies in compliance with U.S. laws; this provision ensures that U.S. companies are not disadvantaged by companies from countries that do not have such anti-bribery laws with extra-territorial effect.

The strategic importance of TPP should also be noted here. Through this agreement the United States has established a rules-based trading system with some of the fastest growing markets in the world. In this agreement, Japan has opened its markets to a greater degree than ever before. History shows that vibrant, liberalized trading systems have helped to create a greater degree of prosperity than the world has ever known. The Trans-Pacific Partnership increases trade liberalization and installs rules that will allow countries to challenge subsidies and other trade-distorting measures. This agreement covers approximately 40 percent of the world's consumers, and we firmly believe that the approval of TPP will contribute to America's economic growth and prosperity.

The potential of TPP is further evidenced by the interest in joining TPP expressed by other countries in the region. Thus, the opportunity now arises to build upon these rules and move toward a Free Trade Area for the Asia Pacific Region. The members of ITAC 5 strongly support the development of the expansion of TPP as long as other countries fully accept the provisions of the TPP.

ANALYSIS OF SPECIFIC PROVISIONS OF TPP –

The primary focus of ITAC 5 is on distribution services. However, we will go beyond distribution services as a stand-alone topic and will offer comments on several other chapters of importance to the members of ITAC 5. In addition to Services, we offer comments on, National Treatment and Market Access, Rules of Origin, Customs and Trade Facilitation, Sanitary and Phytosanitary Measures including specific product annexes, Intellectual Property and Dispute Settlement.

CHAPTER 2 – Market Access

The language in TPP with regard to Performance Requirements, while essentially equivalent to the language in other agreements, nonetheless is particularly significant for a number of companies that are engaged in distribution services using independent contractors. At present, Viet Nam imposes manufacturing obligations on these and other companies that seek to

distribute and sell products in that jurisdiction. Viet Nam did not take an exception to this requirement, which we consider to portend an improvement in the Vietnamese business environment.

CHAPTER 3 – Rules of Origin

The members of ITAC 5 strongly support provisions in the Rules of Origin (ROO) Chapter that allow for the cumulation of materials from several TPP countries in qualifying as TPP origin products. This provision is needed as the supply chain structure of many companies includes inputs from several countries. In addition, we support the rules regarding transshipment. Many U.S. exporters have distribution hubs abroad where large shipments are broken down and then reshipped to different countries in smaller shipments. The ability to operate in this manner is protected in this Chapter.

The rule allowing cumulation makes this a truly regional agreement that improves the pre-existing model based on bilateral agreements. The complex 21st century economy requires a model such as this to encourage the development of a single market throughout the Pacific Basin. Some members of ITAC 5 believe that this provision offers an opportunity to increase exports to all TPP countries.

CHAPTER 4 – Textiles and Apparel

Some members of ITAC 5 are disappointed in the application of the “Yarn Forward” rule for Textiles. These members note that 21st century supply-chain practices require companies to have the flexibility to use in-puts from several sources in any final product. The Yarn Forward rule fails to recognize that reality. However, these members recognize the political reality and do not see this provision as a reason to oppose the Agreement.

CHAPTER 5 – Customs Administration and Trade Facilitation

The Customs Administration and Trade Facilitation chapter includes rules that will improve efficiency, transparency and predictability in day-to-day customs and cross-border trade mechanisms for importers and exporters amongst the 12 initial TPP nations.

On behalf of the U.S. retail industry, we note that TPP’s “New Features” include “disciplines on the imposition of customs penalties ... to ensure that our businesses are not unfairly charged inappropriate or excessive penalties.” To further that goal, ITAC-5 recommends that the U.S. government (USG) should be a model by adopting a clear regulatory definition of “Manufacturers’ Suggested Retail Price” [MSRP] within 19 USC 1526(f) (for excessive and unpredictable MSRP-based customs penalties with regard to alleged trademark counterfeit

import goods). Genuine and lawful import fair-use trademarked merchandise is prejudiced in many such un-defined MSRP allegations.

The provisions of TPP underline the responsibility of U.S. Customs to develop a regulatory definition of MSRP violations that defines the parameters of penalties for all U.S. importers. This transparency would benefit consumers and U.S. Customs itself. The language in TPP obliges the USG to undertake much needed Customs reforms in this area.

ITAC-5 also recommends that the USG and the U.S. Customs agency continue to allow the parallel importation of genuine and lawfully labelled trademarked merchandise from overseas markets. Indeed, allowance of parallel importation should be continued and expanded. Parallel imports of genuine and lawfully trademarked or copyrighted merchandise from abroad is vital to competitive and efficient importation for U.S. retail businesses and U.S. consumers. It frees users from price fixing imposed by some manufacturers that seek to control price and distribution from inception-to-consumption. Provided that an intellectual-property rights owner is fairly compensated for the first sale of trademarked goods, he should not be able to use IPR to control a market, create an oligopoly and impose retail price-fixing and ancillary anticompetitive measures on the U.S. free market system to the detriment of lawful traders and consumers.

CHAPTER 7 – Sanitary and Phytosanitary Measures

The SPS chapter requires that food health and safety rules be science-based and obliges countries to develop and implement rules in a transparent, predictable, and non-discriminatory manner. The rules preserve the ability of TPP regulatory agencies to take necessary steps to ensure food safety, and protect plant and animal health.

Of great importance to the Members of ITAC 5, the rules require all TPP member countries to allow all stakeholders, including industry, opportunities for public comment on regulations as they are developed. As such, the rules mirror U.S. regulatory procedures for identifying and managing SPS risks, while preserving the ability to maintain regulations that are not more trade restrictive than necessary and consistent with WTO principles.

New TPP obligations require all TPP countries to notify importers or exporters of shipments being detained for SPS concerns. This rapid notification will help importers and exporters address concerns and avoid costly delays.

In summary, the Members of ITAC 5 support the provisions in TPP that require SPS standards to evaluate risks, to be based upon science and that require TPP countries to notify companies when a shipment is detained for SPS inspection.

We also support the provision for Cooperative Technical Consultations (CTC). We recognize that consultations will be required to resolve differences that develop through the life of the agreement. We believe that the CTC process will be an important element of resolving these differences.

CHAPTER 8 – Technical Barriers to Trade (TBT)

The TBT chapter ensures that stakeholders, including industries from TPP countries, have the opportunity to participate in the development of technical regulations, standards, and conformity assessment procedures by government bodies. As in the United States, TPP countries will now be obliged to publish new technical regulations, offer opportunities for public comment, explain how the final regulations meet the objectives sought, and provide responses to substantive issues raised by comments.

Some TPP countries limit public participation in the development of standards, technical regulations, and conformity assessment procedures. Enabling a broad range of stakeholders to participate in the development of standards-related measures in TPP countries will help ensure that standards do not discriminate against U.S. manufactured goods, and will encourage wider acceptance of U.S. approaches to standards in the Asia-Pacific region. The TBT chapter ensures a reasonable interval between publication of regulations and entry into force so that stakeholders have sufficient time to meet the new requirements.

These new rules can best be described as WTO-plus, with new transparency requirements, including public consultation requirements early in the development of new measures, enabling trade-related concerns to be vetted and addressed before new measures are finalized. The rules also include requirements that ensure that information on regulatory decision-making is publicly available. They also provide clarification conformity assessment procedures imposed on imported products. In most cases, that assessment must be done only once before a product can be sold in a TPP market.

Members of ITAC 5 are also pleased with specific product annexes. The Annex on cosmetics promotes transparent and open practices when regulating products. For example, TPP Parties will have to consider relevant scientific and technical guidance when developing regulations, grant marketing authorizations based on specified and publically available criteria, provide reasons for rejecting applications, and establish due process procedures that allow for appeal so that U.S exporters are not unfairly or arbitrarily discriminated against in TPP markets. The Annex on organic products will promote trade in organic products and will encourage cooperation between the Parties on issues related to the production, processing, or labeling of products as organic. We also believe that the consultative process on the establishment of common requirements for labeling and definitions is a step in the right direction.

One member of ITAC 5 noted that specific standards for dietary supplements are not addressed in TPP. It appears that companies that export such products to TPP countries must request that they be treated as the equivalent of food products. While companies can ask that regulatory agencies initiate an equivalence assessment in a reasonable period of time, we note that this is a cumbersome procedure leading up to subjective interpretations of the definition of various

products. Noting that this issue is not covered in TPP, the ITAC 5 member company expressed a desire to have the issue addressed in future agreements.

CHAPTER 9-Investment

The TPP Chapter on Investment includes the core provisions of recent U.S. trade agreements such as National Treatment, MFN, “minimum standard of treatment” and due process for expropriation. In addition, there is a prohibition on performance requirements, including local content requirements. We also support the strong Investor-State Dispute Settlement provisions included in the Chapter.

We are disappointed that Viet Nam has taken reservations in a number of areas. The first of these is the prohibition on establishing new branches in all but a few sectors. The establishment of new large-scale stores (in excess of 500 square meters) continues to be subjected to an Economic Needs Test (ENT). Franchising services is among those that continues to be subjected to a restriction on the establishment of new branches without specific approval. Both requirements are subjected to Ratchet Rules, which limits the Government’s ability to roll back the current regulations and would require that any liberalization of the rule not be rolled back. Although these restrictions are to be phased out in five years, the continuation of the ENT suggests that Viet Nam does not plan to move away from a centrally planned economy in a more timely manner, which we believe will hold back economic progress in that Country.

CHAPTER 10 – Trade in Services

The TPP Chapter on Trade in Services includes provisions that add flexibility to Professional Services that will allow companies to use home-country professionals in support of overseas operations. This will greatly increase the confidence that management has in the development of overseas operations and lead to an increase in the exportation of professional services.

We note with dismay that Viet Nam has taken numerous reservations with regard to trade in services. Some of these are subjected to Ratchet Rules and are discussed above in the analysis of Chapter 9. Among the rules not subjected to Ratchet Rules are two that concern members of ITAC 5. Viet Nam claims the right to adopt any measure with respect to the establishment of “co-operatives, unions of co-operatives, household businesses and sole proprietorships.” Companies that use independent contractors to distribute their products usually rely on these types of businesses and are concerned by the implication that the Vietnamese might revoke the business licenses of household businesses and sole proprietorships.

The Vietnamese also took an exception with regard to “commissioned agents, wholesale trade services and retailing services to preserve the Government’s right to adopt or maintain the distribution of products other than products for personal use and legitimate computer software for personal and commercial use.” We note that this language creates an exemption to the non-

conforming measure for most products sold by direct selling companies, which is to say that such companies benefit from the double negative and will enjoy protection for those businesses.

We also note that, by way of a foot note, this exemption to the non-conforming measure includes “multi-level sales by properly trained and certified Vietnamese agents for which remuneration is received both for the sales effort and for sales support services that result in additional sales by other contracted distributors.” The Direct Selling Industry is grateful that language recognizing its business model is recognized in TPP.

CHAPTER 18 – Intellectual Property

TPP Chapter 18 on Intellectual Property seeks harmonization, transparency, and improved efficacy and predictability in intellectual property protections and enforcement rights for importers and exporters among the 12 initial TPP nations.

Most ITAC 5 member companies have faced issues with Intellectual Property Rights (IPR) enforcement over the past several years. We strongly support the provision of TPP that applies criminal penalties for trade-secret theft whether in violation of a contract or through cyber-intrusions. We also support the extension of IPR obligations to State Owned Enterprises. We recognize the need to provide a safe harbor for internet service providers (ISP’s), but are disappointed that TPP does not include stronger provisions to require ISP’s to delete content that includes material infringing on legitimately copyright protected images, trademarks and related property. We are concerned that the voluntary provisions in TPP do not provide copyright holders with stronger tools to attack the misuse of trademarks, logos and images.

That said, we fully support the provisions in TPP that establish criminal penalties against trademark counterfeiting and copyright piracy. We also note that these provisions allow companies to express concerns about cross-border supply-chain activities that imbed counterfeit inputs into finish products. In many cases, these activities result in products that threaten consumer health and safety. Early detection and aggressive enforcement of IPR standards will protect both producers and consumers.

We also support the provisions in TPP aimed at preventing squatting on top-level domain names. We note the availability of remedies that can be used to challenge bad faith registration of domain names that are confusingly similar to registered trademarks.

As discussed above in Chapter 5 on Customs and Trade Facilitation, ITAC 5 recommends that USG and its U.S. Customs agency continue and expand parallel importation of genuine and lawfully labelled trademarked merchandise from overseas markets.

CHAPTER 25 – Regulatory Coherence

The TPP Chapter on Regulatory Coherence encourages widely-accepted good regulatory practices. These include impact assessments of proposed regulatory measures in order to assess the range of feasible alternatives and a requirement that regulatory agencies in TPP countries explain the grounds for having chosen a particular regulatory alternative. The rules also require that regulations are clearly and concisely written; that the public has access to information on new regulatory measures; and that existing regulatory measures are periodically reviewed to determine if they remain the most effective means of achieving the desired objective. In addition, it encourages TPP governments to provide public notice annually of all regulatory measures it expects to take the following year. All these practices are standard in the United States.

TPP is the first U.S. Free Trade Agreement (FTA) to include a chapter on regulatory coherence, reflecting a growing appreciation of the relevance of this issue to international trade and investment. As in the United States, we expect these commitments to promote “good regulatory practice” principles in the regulatory development process, including coordination among regulators, opportunities for stakeholder input, and fact-based regulatory decisions that will serve to eliminate the prospect of overlapping and inconsistent regulatory requirements or regulations being developed unfairly and without a sound basis, including so as to benefit a particular stakeholder.

The members of ITAC 5 note the potential benefits of the rules in this Chapter but note that implementation of these provisions may prove to be more difficult than negotiators believe. That said, the members are optimistic about the creation of a Committee on Regulatory Coherence to consider issues associated with the implementation and operation of this Chapter. Although not stated in the text, we assume that companies and other stakeholders may bring concerns about over- or inappropriate regulations to the committee with a request for consideration of alternatives. To the extent that is the case, we are confident that many U.S. companies, including members of this committee will certainly use this provision to seek the revision of any number of ill-advised U.S. regulations.

CHAPTER 28 – Dispute Settlement

The members of ITAC 5 recognize that the many individuals and groups not involved in technical trade matters have expressed opposition to Investor State Dispute Settlement (ISDS) provisions. We congratulate the negotiators for the language in the text that should help to dispel several false assumptions about ISDS.

The text makes clear that TPP member countries have a right to regulate with regard to public health and safety. To the extent that new regulations result in the “taking” of an enterprise that was lawfully permitted and approved, it is only right and proper that the government that effectively expropriated the property compensate the aggrieved party. That party has no right to ask that a regulation be reversed. The government in question has a sovereign right to maintain the regulation and compensate the aggrieved party for its loss. It may choose to revise or rescind

the regulation but that choice is left to the government and not to arbitrators or the aggrieved party. We should note that these provisions essentially parallel those in the Fifth Amendment to the U.S. Constitution and, as such, extend protection against uncompensated takings to U.S. companies operating outside of the United States.

We note that the TPP language extends to Canada, Mexico and to Australia. Investor-State Dispute Resolution language was not included in the North American Free Trade Agreement (NAFTA) or in the Free Trade Agreement (FTA) with Australia. We are pleased to note that, in this regard, TPP supersedes both NAFTA and the U.S.-Australia FTA.

VI – Membership of Committee

Chairman

Mr. Richard N. Holwill
Vice President, Public Policy
Alticor, Inc.

Mr. Steven Becker
Executive Vice President
Southern Wine & Spirits of America, Inc.

Mr. Albert A. Gallegos
Director, International Affairs
and Industry Analysis
National Automobile Dealers Association

Mr. Peter V. Handal
President and Chief Executive Officer
J4P Associates

Mr. James C. Tuttle
Chairman and Chief Executive Officer
Tuttle International Group