

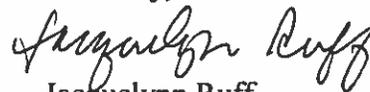
December 3, 2015

The Honorable Michael B.G. 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 for Information and Communications Technologies, Services and Electronic Commerce (ITAC 8) on The Trans-Pacific Partnership Trade Agreement, reflecting our consensus advisory opinion on the proposed Agreement.

Sincerely,

A handwritten signature in cursive script that reads "Jacquelynn Ruff".

Jacquelynn Ruff
Chair, ITAC 8

The Trans-Pacific Partnership Trade Agreement

Report of the
Industry Trade Advisory Committee for Information and Communications Technologies,
Services and Electronic Commerce (ITAC 8)

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Industry Trade Advisory Committee for Information and Communications Technologies, Services and Electronic Commerce (ITAC 8)

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

I. Purpose of the Committee Report

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 principal 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 for Information and Communications Technologies, Services and Electronic Commerce (ITAC 8) hereby submits the following report.

II. Executive Summary of Committee Report

ITAC 8 views the provisions of the Trans-Pacific Partnership Trade Agreement (TPP or the “Agreement”) that fall under the scope of the Industry Trade Advisory Committee as consistent with the negotiating objectives the committee has established for U.S. trade agreements. ITAC 8 finds that the TPP Agreement meets our objectives, promotes the economic interests of the United States, and provides equity and reciprocity for our sectors, and therefore we endorse its approval and implementation by all Parties.

The Chapter on Market Access will help to ensure that the goods exported by the U.S. information, communications, and technology (ICT) industry to the other TPP Parties receive national treatment and have full market access. In this regard, we note the incorporation of the broad WTO obligations regarding import and export restrictions into TPP; a first-time application of the general prohibition on import restrictions to the importation of commercial

cryptographic goods; the requirement to participate in the Information Technology Agreement (albeit only a commitment to endeavor by Chile and Mexico), and elimination of customs duties for virtually all ICT-related goods.

The Government Procurement Chapter sets forth a number of measures to expand the procurement opportunities for the U.S. ICT sector and other businesses. Vietnam, Malaysia, and Brunei have made their first ever government procurements commitments to the United States, and other TPP partners have made additional commitments beyond previous agreements. The Committee is also pleased at the inclusion of commitments to cooperate on the international liberalization of government procurement markets regarding topics such as facilitating the participation of SMEs in the procurement process.

The Telecommunications Chapter includes numerous commitments that should foster increased opportunities for market access and trade for U.S. providers in TPP telecommunications markets. These include provisions that will ensure nondiscriminatory access for U.S. companies to the Parties' public telecommunications services, including submarine cable landing stations. Modeled on U.S. law, most of these provisions were introduced in the 2003 Singapore-U.S. FTA and repeated in subsequent U.S. FTAs and thus apply for the first only to certain TPP Parties. A new provision commits the Parties to endeavor to cooperate in promoting transparent and reasonable rates for international mobile roaming. The Chapter also introduces an innovative provision on flexibility in approaches to regulation and includes safeguards to help protect technology choice, both measures being well-suited to today's telecommunications sector in which technology is evolving rapidly.

The Electronic Commerce Chapter includes two groundbreaking provisions to address the high priority objectives of ITAC 8 and the Congress regarding cross-border data flows and avoidance of requirements to use or locate computing facilities locally. While these are major achievements, ITAC 8 is disappointed that financial services are not covered by these provisions, and we urge the Administration to avoid this exception in future agreements. Related to electronic commerce users, the Parties have recognized the benefits of consumer choice and information regarding use of the Internet and have committed to having legal frameworks to protect personal information of users and to taking steps to address spam.

In the Chapter on Cross Border Trade in Services, the Agreement ensures full market access and national treatment for most services by including limited reservations and by adopting a "negative list" approach, whereby Parties must expressly identify any sectors to be excepted from coverage under the TPP. This approach ensures that rapidly evolving services, such as computer and related services, will be covered by commitments in the Agreement.

Technical Barriers to Trade (TBT) is an area of significant concern for the U.S. ICT industry, and we find that the TBT Chapter of the Agreement meets ITAC 8's objectives in this regard. The Chapter contains provisions that emphasize the importance of the WTO Agreement on Technical Barriers to Trade (TBT) and improves upon the WTO Agreement and previous FTAs in numerous critical areas. A novel achievement of the Chapter is that it establishes restrictions on the regulation of cryptography. While ITAC 8 is disappointed at exceptions pertaining to financial institutions and law enforcement, and we would hope that in future agreements these

exceptions will be eliminated or drafted more narrowly, we welcome this breakthrough in the treatment of cryptographic products.

The Investment Chapter provides generally strong protection for U.S. investment in TPP markets, including an important investor-state dispute settlement mechanism. Critical to the ICT industry are the prohibitions on performance requirements related to local content, technology transfer, and technology localization. An exception allowing temporary capital controls is drafted very narrowly.

Strong protection for intellectual property rights is very important for U.S. ICT companies that engage in international trade. ITAC 8 finds that the Chapter on Intellectual Property Rights meets our objectives in this area, and we support this part of the Agreement.

With regard to the Trade Remedies Chapter, the Committee finds that the provisions regarding trade remedies and enforcement in the TPP will be important to effective implementation of the Parties' commitments as applicable to the ICT sector.

The TPP is the first trade agreement to provide comprehensive stipulations for State Owned Enterprises (SOEs) that compete with private business. The Chapter's provisions will benefit ICT firms and other U.S. industry by ensuring that enforcement actions can be brought against foreign SOEs for anticompetitive behavior and by protecting U.S. companies from foreign SOEs and designated monopolies that may discriminate against them.

The Regulatory Coherence Chapter, which appears for the first time in an FTA, contains valuable commitments to establish regulatory process to ensure that all parties impacted by regulations have an opportunity to participate and to utilize other widely-accepted good regulatory practices. These regulatory approaches should provide an enabling environment well-suited to the U.S. ICT sector, which is characterized by rapid evolution in technologies and services. ITAC 8 urges the U.S. government and non-governmental organizations to provide resources for training and other capacity development in this area.

The Customs Administration and Trade Facilitation Chapter contains provisions that are vital for the ICT sector in areas such as transparency, release of goods, advanced rulings and express shipments.

The Annexes on Non-Conforming Measures (NCMs) demonstrate that negotiations resulted in significant improvements over status quo under GATS. For example, the percent of WTO services (W/120) sub-sectors with National Treatment coverage rose significantly under TPP as compared with GATS, and the percent of sub-sectors in which Parties can impose foreign equity caps of 49 percent or less fell significantly. The Committee understands that many more NCMs were proposed than were ultimately included and commends the negotiators for achieving this favorable outcome.

III. Brief Description of the Mandate of ITAC 8

The Industry Trade Advisory Committee for Information and Communications Technologies, Services and Electronic Commerce (ITAC 8) performs such functions and duties and prepares reports, as required by Section 135 of the Trade Act of 1974, as amended, with respect to information and communications technologies, services and electronic commerce. ITAC 8 provides detailed policy and technical advice, information, and recommendations to the Secretary of Commerce and the U.S. Trade Representative regarding trade barriers and implementation of trade agreements.

IV. Negotiating Objectives and Priorities of ITAC 8

ITAC 8 supports an ambitious trade agenda that has included the following negotiating priorities applicable to TPP.

A. Goods Issues

1. Eliminate tariffs on all information technology products (hardware and software) and components, infrastructure equipment, medical equipment and scientific instruments. Seek to gain new signatories to the Information Technology Agreement (ITA) and agreements on sectoral tariff eliminations..
2. Support global, market-led, voluntary standards developed through an open and transparent process. Ensure that standards do not create unnecessary barriers to trade.
3. Reduce technical barriers to trade. Ensure that product testing, licensing and certification requirements, supplier conformity procedures, certificate of origin mandates, and customs procedures are fair, transparent and streamlined. Eliminate those procedures that are duplicative, increase costs to users and delay the availability of products to market. Liberalize trade in commercial products with encryption.
4. Where product regulations are deemed necessary they must be nondiscriminatory, based on sound and widely accepted scientific principles and available technical information, and should not impede the effective functioning of the market. Consistent with existing WTO rules, regulations should be the least trade restrictive possible.

B. Services Issues

1. Secure broad market access for both basic and value-added telecommunications services. Increase the number of countries with obligations in telecommunication services and the range of services covered. Ensure that telecommunication services are liberalized on a technology-neutral basis. Promote independent regulatory authorities and transparency in the regulatory process. Ensure nondiscriminatory access to, and use of, public telecommunication networks and services.
2. Obtain full market access and national treatment for computer and related services. Ensure that technologically evolving IT services, including those that are delivered

electronically, continue to be covered by trade agreements and that barriers to these services do not develop.

3. Maximize the liberalization of all services that can be delivered electronically.

C. E-Commerce and Digital Issues

1. Ensure that current obligations, rules, disciplines, and commitments under regional trade agreements apply to digital trade in goods and services and to cross-border data flows.
2. Ensure that electronically delivered goods and services receive no less favorable treatment under trade rules and commitments than like products delivered in physical form. Trade classification should ensure the most liberal treatment possible, fully encompassing both existing and new trade. Software and other digital products should be duty free.
3. Ensure that governments refrain from implementing trade related measures that impede digital trade in goods and service, restrict cross-border data flows, or require local storage or processing of data.
4. Where legitimate policy objectives require domestic regulations that affect digital trade in goods and services or cross-border data flows, obtain commitments that any such regulations are the least restrictive on trade, nondiscriminatory, and transparent, and promote an open market environment.
5. Ensure that access to software source code is not a requirement for market access, investment, or regulatory approval.
6. Monitor other e-commerce issues and take action as required: data privacy, security, consumer protection, spam, and digital signatures.

D. Intellectual Property Issues

1. Combat global software piracy and technology product counterfeiting, including through adoption and enforcement of criminal and civil penalties for trafficking in counterfeit goods.
2. Increase intellectual property rights protection for trade secrets.
3. Require that countries maintain patent, trademark, and copyright limitations and exceptions that enable the global digital economy to grow, including rules governing Internet service provider intermediary liability that are consistent with U.S. law.

E. Government Procurement Issues

1. Seek open, nondiscriminatory market access and transparency in government procurement.
2. Promote global use of electronic publication of procurement information, including notices of procurement opportunities.

V. Advisory Committee Opinion on Agreement

ITAC 8 reviewed the chapters on Market Access, Government Procurement, Telecommunications, Electronic Commerce, Cross Border Trade in Services, Technical Barriers to Trade, Investment, Intellectual Property Rights, Trade Remedies, State Owned Enterprises, Regulatory Coherence, and Customs/Trade Facilitation and the Annexes on Non-Conforming Measures. ITAC 8 finds that the TPP Agreement meets our objectives, promotes the economic interests of the United States, and provides equity and reciprocity for our sectors, and therefore we endorse its approval and implementation by all Parties.

Market Access

National treatment and market access for technology goods and services continue to be challenging, especially in jurisdictions that are promoting domestic national champions in the high tech industry through regulations that favor indigenous products. In that regard, it is quite helpful that the Goods chapter incorporates the broad WTO obligations regarding import and export restrictions into the TPP Agreement as the fundamental framework for trade in goods between the Parties. These obligations include a prohibition on import licensing conditioned on performance requirements, and on requirements that exporters establish contractual relationships with domestic distributors as a condition of importation. We have seen these kinds of market access barriers involving ICT goods in Argentina, India, and other jurisdictions. The requirement that TPP parties notify each other of new import licensing procedures, the reasons for them, and their eligibility criteria, will help prevent new forms of market access barriers.

The Chapter explicitly notes that its general prohibition on import restrictions applies to the importation of commercial cryptographic goods – a new requirement never before imposed in a trade agreement. This requirement will ensure that TPP countries do not maintain or expand discriminatory trade barriers, or invent new barriers to trade, in commercial goods containing encryption technology. It also should set a helpful precedent when the U.S. government deals with non-TPP jurisdictions like China and India, which have indicated that broad regulation of encryption used in the commercial sector is needed.

The Chapter requires that each Party be a participant in the WTO Ministerial Declaration on Trade in Information Technology Products (Information Technology Agreement, or ITA), and have completed the procedures for modification and rectification of its Schedule of Tariff Concessions. The ITA has been one of the most successful agreements in the WTO. ITA participation by TPP parties enables broader dissemination and use of ICT goods, and allows duty-free trade in covered ITA goods regardless of their origin. The ITA takes into account the globally integrated nature of ICT supply chains. It is unfortunate, however, that as part of their TPP commitment Chile and Mexico have only agreed to “endeavor” to become ITA participants.

To the extent that ICT goods shipped within the TPP region are not covered by the zero tariff ITA, they may still be duty free. Under the Goods Chapter, all TPP parties will eliminate customs duties on all originating goods in Chapters 84, 85, and 90 (where virtually all ICT-related goods are classified). Most duties will be eliminated immediately on entry into force of the TPP. Tariffs on some goods will be phased out over 5 or 10 years.

Overall, the Goods Chapter will be helpful in ensuring that the goods exported by the U.S. ICT industry to the other TPP Parties receive national treatment and have full market access. We hope the new Committee on Trade in Goods, established to achieve full implementation of the Chapter's provisions by the Parties, effectively performs its responsibilities.

Government Procurement

In the Agreement, the TPP Parties commit to transparency, predictability, and fair dealings in the government procurement process. The Agreement requires that each TPP Party under national and most-favored-nation treatment extend the same treatment to all bidders that it extends to its own firms. The Agreement sets forth standardized information for inclusion in a procurement publication and requires prompt posting of changes or additions to the published information. The Committee appreciates that the Agreement requires TPP Parties to publish timely and complete information on the procuring entity, specific procurement procedures, deadlines for the submission of tenders, and a description of any conditions for the participation of suppliers as this creates a level playfield for all potential suppliers.

It is to the advantage of suppliers of all TPP Parties that the Agreement encourages the Parties to provide opportunities for secure, electronic means to undertake the submission of tenders as well as the covered procurement. The Agreement provides that a procuring entity may reduce the time for submission of tenders where the entity publishes a notice of intended procurement in an electronic medium and provides the tender documentation in an electronic medium. The Committee appreciates that efficiency the use of electronic means for submitting tenders and procurement affords suppliers outside the procuring Party's territory.

By placing a limit on any conditions for supplier participation to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to fulfill the procurement, the Agreement precludes discrimination against suppliers while maintaining a specified level of supplier qualification. The Agreement furthers ensures fairness and impartiality by a TPP Party by requiring the fair treatment of tenders and contract awards.

The Committee appreciates that it is critical to the successful implementation of the Agreement that the TPP Parties cooperate on the international liberalization of the government procurement markets. To this end, the Agreement properly sets forth matters on which the TPP Parties should cooperate, including facilitating the participation of SMEs in the procurement process, exchanging best works and practices in regulatory frameworks, using electronic means in procurement systems, and building capacity of government officials to use best government procurement practices.

Telecommunications

The Telecommunications Chapter includes a number of important commitments that should foster increased opportunities for market access and trade for U.S. providers in TPP Parties' telecommunications markets. The Chapter ensures that U.S. providers will have access to and use of the public telecommunications services, including leased circuits, on reasonable and nondiscriminatory terms and conditions. The Chapter also includes "WTO-plus" obligations for all public telecommunications services suppliers, including interconnection and number portability. More rigorous commitments apply to major suppliers regarding affiliate relationships, competitive safeguards, resale, interconnection, leased circuits, co-location, and access to poles and other structures. Most of the above commitments have been in U.S. FTAs dating back to the Singapore-U.S. FTA signed in 2003, and therefore apply for the first time only to the TPP Parties that do not have post-Singapore FTAs with the United States. They are based on provisions in the U.S. Telecommunications Act of 1996, *e.g.*, 47 U.S.C. Sections 251/252, consistent with which the Chapter recognizes that the major supplier obligations do not apply to the commercial mobile market in the United States. In a provision covered less frequently in FTAs, the Chapter also applies some of these major supplier obligations for purposes of ensuring access to submarine cable landing stations.

The Chapter commits the Parties to endeavor to cooperate in promoting transparent and reasonable rates for international mobile roaming. The Chapter identifies steps Parties may choose to take including accessible information on retail rates, minimizing impediments to alternatives to roaming, and/or using reciprocal regulatory or commercial measures designed to achieve reasonable rates. At the same time, the Chapter makes clear that nothing therein requires a Party to regulate rates or conditions for international roaming services.

The Chapter includes an important and innovative provision on flexibility in approaches to regulation. The provision recognizes that economic regulation may not be necessary where competition exists and that regulatory needs and approaches differ market by market. Parties may choose to engage in direct regulation or rely on market forces and may forbear from applying existing regulation under certain conditions. This recognition of regulatory flexibility is well-suited to a sector like telecommunications in which technology is evolving rapidly and competition is increasingly dynamic.

The Chapter commits the TPP Parties to ensure transparency with respect to regulatory processes applicable to the telecommunications sector. Parties will provide that respective regulatory bodies are separate from, and not accountable to, any supplier of public telecommunications services and that the regulatory body does not hold a financial interest or operating role in any supplier. The Chapter provides for enforcement authority, guarantees recourse to regulatory bodies, and specifies an appellate process for resolution of domestic telecommunications disputes, all of which help to ensure effective market access for U.S. providers.

The Chapter also includes important safeguards on restrictions that regulators can impose on operators' technology choice. By limiting the conditions under which Parties can specify technology, the Chapter helps to avoid the arbitrary denial of technology choice.

The Chapter establishes a Committee on Telecommunications to be composed of government representatives of each Party. The Committee's purpose will include ensuring effective implementation of the Chapter by enabling responsiveness to technological and regulatory developments, with the option of inviting private sector experts to attend the meetings.

Electronic Commerce

The Electronic Commerce Chapter establishes new trade rules to facilitate growth of the global digital economy, where U.S. ICT companies – both large and small – play leading roles. Highlights include commitments to enable cross-border data flows, prevent forced localization, protect consumers, cooperate in helping small- and medium-sized businesses in electronic commerce, and promote interoperability among TPP parties on information protection, online consumer protection, and cybersecurity threats and capacity.

The Chapter continues the concept of “digital products” in terms of trade as defined in previous agreements. The Chapter affirms the importance of avoiding e-commerce barriers and of applying WTO rules. The Chapter contains commitments from the Parties not to impose customs duties on electronic transmissions, including content transmitted electronically and to accord non-discriminatory treatment of digital products.

The Agreement includes two groundbreaking provisions to address the high priority objectives of ITAC 8 and the Congress regarding cross-border data flows and avoidance of local data storage and facilities location requirements. First, the Chapter includes the firm commitment that the Parties shall allow the cross-border transfer of information by electronic means, including personal information (a concept that had only been hortatory in the Korea-U.S. FTA (KORUS)). Second, the Chapter introduces for the first time a commitment that no Party shall require a covered person to use or locate computing facilities in that Party's territory as a condition for conducting business in that territory. (Note that the Investment Chapter in addition prohibits requirements for local content and use of local goods, *e.g.*, equipment.) The Committee is disappointed that these two commitments do not cover financial services and urges the Administration to avoid this and any other coverage exceptions in future trade agreements. The provisions recognize the Parties' continuing ability to adopt measures, such as those related to security and confidentiality, to achieve legitimate public policy objectives, within limits: as long as such measures are not arbitrary, discriminatory, trade restrictive, or greater than necessary. A shortcoming is that existing measures in Malaysia and Vietnam are not subject to the dispute settlement process for these provisions and the general non-discrimination provision for the first two years of the Agreement. Nonetheless, taken as a whole, these two TPP commitments are vital to the United States for maximizing the economic and societal benefits of growth in digital trade and establish important precedent for other trade agreements.

The Chapter includes a non-binding statement in which the Parties recognize the benefits to consumers of being able to access and use services and digital products of their choice, run applications of services of their choice, subject to reasonable network management, connect their choice of devices to the Internet, and access information on their providers' network management practices. There is no requirement to adopt regulation in this regard. This is similar to a provision in KORUS, for which a side letter recognized that contracts and commercial arrangements could achieve the objectives of the hortatory provision.

The Agreement also promotes the use of e-commerce by facilitating the use of electronic authentication and electronic signatures, requiring Parties to have domestic e-commerce legal frameworks and online consumer protection laws, and promoting paperless trading. These build on similar provisions in KORUS. The Agreement goes beyond KORUS with commitments ensuring that the Parties will have legal frameworks to provide for the protection of the personal information of users of electronic commerce. The Agreement recognizes the range of differing approaches the Parties may use, while also encouraging development of mechanisms to encourage compatibility. Other new provisions include commitments to take steps to address unsolicited commercial electronic messages (spam) and to cooperate generally around global e-commerce and cybersecurity matters. The Agreement contains a commitment not to require access to source code of software and recognizes that Internet interconnection between suppliers of the Parties should occur on a commercial basis and may include compensation.

Cross Border Trade in Services

The TPP ensures full market access and national treatment for most services by including limited reservations and by adopting a “negative list” approach, whereby Parties must expressly identify any sectors to be excepted from coverage under the TPP. The negative-list approach, which the U.S. seeks in its free-trade agreements, ensures that the TPP covers cross-border delivery, including by electronic means such as the Internet, for computer and related services, management consulting and other services. This approach thus ensures that rapidly evolving computer services, driven by continual advances in technology, will be covered by commitments contained in the Agreement. By contrast, with a positive-list approach, which would require affirmative agreement as to each such service covered, computer-related services, definitions, and commitments could quickly become obsolete as new ways of delivering these services are innovated. The Committee appreciates the current and future benefits of TPP’s negative-list approach in ensuring full market access and national treatment for a broad range of electronically delivered services.

These services commitments complement the commitments contained in the Electronic Commerce Chapter. Exceptions to the negative list are annexed to the TPP as either measures the Parties agree may not be more restrictive in the future or as services in sectors over which the Parties retain full regulatory discretion.

Additionally, the TPP prohibits quantitative restrictions on the supply of cross-border services, and it prevents Parties from requiring suppliers from another Party to adopt specific forms of entities or joint ventures to provide services in the territory of any other party. Similarly, no requirement that a supplier from another Party establish a domestic office or affiliate to access the markets of any other Party is permitted.

Technical Barriers to Trade

As tariff-based barriers to trade have been reduced over the years, technical barriers to trade (TBT) have become a growing concern of U.S. industry. As ITAC 8 has noted in its reviews of earlier FTAs, the high technology industry increasingly is experiencing more complicated and difficult technical barriers worldwide, including unique encryption standards, unique wireless

standards, data privacy barriers, software preference and other technology mandates, and chemical content requirements, among others. Strong enforcement of the WTO Agreement on TBT, and reinforcement of its principles through FTAs, are, therefore, critically important. This importance to high technology industry is particularly pronounced in the case of an FTA that governs such a large percentage of international trade in high technology products, as does the TPP.

Against this backdrop we have considered whether the TBT chapter of the TPP promotes the economic interests of the United States and achieves the statutory and other applicable negotiating objectives. We have concluded that it does.

In reaching this conclusion we initially identified key provisions of the WTO TBT agreement, reaffirmed by the Parties in the TPP, in order to determine to what extent, if any, the TBT chapter of the TPP improves upon the corresponding provisions of WTO TBT. In numerous critical aspects, we find that the TBT chapter of the TPP does, in fact, provide for significant benefits to U.S. industry as compared to the counterpart provisions of the WTO TBT.

Among the more important provisions of the TPP's TBT chapter are the improvements in mutual recognition of conformity assessment bodies located in member countries, increased transparency with respect to the development of technical regulations, standards and conformity assessment procedures by central government bodies, and commitments to endeavor to provide an interval of more than six months between the publication of final technical regulations and conformity assessment procedures and their entry into force.

Other important provisions of the TPP's TBT chapter include commitments to intensify collaboration on mechanics to support greater acceptance of conformity assessments, explain the reasons why a Party may not have accepted a technical regulation of another Party as equivalent, and encourage cooperation between their respective organizations responsible for standardization, conformity assessment, accreditation and metrology.

A novel achievement of the TPP's TBT chapter which is of particular importance to ITAC 8 advisors is that it establishes an Annex regarding Information and Communications Technology (ICT) Products that Use Cryptography. For the first time, the TPP mandates that no Party may impose or maintain a technical regulation or conformance assessment procedure that requires a manufacturer or supplier of a product, as a condition of manufacture, sale, distribution, import or use, to (1) transfer or provide access to a particular technology, production process or other information (such as a private key or other secret parameter, algorithm specification or other design detail) that is proprietary to the manufacturer or supplier and relates to the cryptography in the product, to the Party or a person in the Party's territory; (2) partner with a person in its territory; or (3) use or integrate a particular cryptographic algorithm or cipher.

These valuable restrictions on the regulation of cryptography are subject to two notable exceptions pertaining to financial institutions and law enforcement. The first two-part exception involves (a) requirements that a Party adopts or maintains relating to access to

networks that are owned or controlled by the government, including those of central banks; and (b) measures taken pursuant to supervisory, investigatory or examination authority relating to financial institutions or markets. The second exception preserves the ability of law enforcement authorities to obtain, pursuant to legal procedures, unencrypted communications from service suppliers using encryption they control. We understand the need for the second exception, but are concerned with the industry-specific nature (i.e., banking, financial institutions and markets) as well as the breadth of the first one. In particular, exempting all government controlled networks regardless of their function (i.e., whether or not they are networks utilized by central banks) seems far broader than the U.S. government's concerns that originated the exemption.

We would hope that in future trade agreements, the exception pertaining to banks and other financial institutions will be subject to greater scrutiny and, if required, then drafted more narrowly. Currently, that exception includes government controlled over networks, which are not limited to those of central banks. In some jurisdictions with heavy government intervention and a number of state owned enterprises, this category could include extensive parts of the digital infrastructure. In any event, as encryption becomes increasingly ubiquitous in products connected to the Internet, which are used by everyone in their daily life, the provisions of the TPP dealing with cryptography will be regarded as groundbreaking and fundamental to progress in the field of information and communications technology. This Committee commends U.S. negotiators for achieving this breakthrough in the treatment of cryptographic products, and again, requests careful consideration of the scope of the exemption in future agreements.

Similar important annexes exist for wine and distilled spirits, pharmaceuticals, cosmetics, medical devices, prepackaged foods and food additives, as well as organic products.

Key to successful implementation of these and other commitments will be the information exchange and technical discussions among Parties, and the new Committee on Technical Barriers to Trade which shall be comprised of representatives of each Party. ITAC 8 believes that such an ongoing forum is essential to successful implementation of the TBT chapter of the TPP, and we encourage U.S. negotiators to actively involve ITAC 8 members in such TBT Committee to the maximum extent possible.

Investment

The TPP's investment chapter includes generally strong protections for U.S. investors and investment within the territory of other Parties that will benefit businesses in the ICT sector. These include with respect to national treatment and most-favored nation treatment; "minimum standard of treatment" protection for investments under customary international law; prohibition on expropriation for other than a public purpose and without due process and compensation; fair and equitable treatment; full protection and security; prohibition on performance requirements; and the free transfer of capital. Critical to the ICT industry are the prohibitions on performance requirements related to local content, technology transfer, and technology localization. The Parties negotiated narrow exceptions allowing temporary, nondiscriminatory capital controls to safeguard in the event of an economic crisis or to prevent the collapse of a Party's financial

system. The Committee recognizes that these exceptions can be applied only in narrow circumstances.

Of particular importance and public interest, the TPP also includes an investor-state dispute settlement (ISDS) mechanism, which applies to breaches of the core investment protections and breaches of an investment agreement or authorization. The ISDS mechanism contains several procedural safeguards to ensure due process and to prevent frivolous and abusive claims that might undermine the Parties' rights to regulate in the public interest (*e.g.*, on issues of health, safety, and the environment).

Intellectual Property Rights

The Agreement enshrines important rights and obligations of TPP Parties with respect to intellectual property rights (IPR). The technology sector's main goals for this Chapter are, by and large, addressed by the Agreement.

The Chapter overall reflects a careful balance of interests in the IPR area, particularly with regard to new obligations of interest to the U.S. technology sector, specifically on coverage, trade secrets, copyright, and remedies.

Coverage has been expanded to include state-owned enterprises (SOEs), which is a welcome development.

In addition, TPP is the first trade agreement to require criminal penalties for trade secret thefts. While the Agreement allows the Parties significant latitude to impose limitations on the availability of criminal penalties, and the Committee would like to see in future agreements a broader list of circumstances when criminal penalties would apply, we recognize and appreciate USTR's efforts in this new area.

Moreover, the Committee believes that the first-time obligations related to balancing the protection of copyrighted material and innovation in digital trade are important. Specifically, the Chapter includes commitments dealing with the rights of creators and their works, while at the same time includes a commitment to endeavor to achieve an appropriate balance in copyright systems via limitations and exceptions giving due consideration to legitimate purposes.

The Chapter includes an important requirement for copyright safe harbors for Internet Service Providers (ISPs), consistent with U.S. law. In appropriate circumstances, the safe harbors provide ISPs legal protection from liability for infringing material posted by others.

The TPP's IPR Chapter also clarifies that most of the IPR enforcement provisions extend to include infringement in digital trade. In patent infringement, the IPR Chapter includes new language to ensure that remedies are proportional to harm, appropriately weighing the equities of multiple stakeholders.

Trade Remedies

As with other sectors, the provisions regarding trade remedies and enforcement in the TPP will be essential to effective implementation of the Parties' commitments as applicable to the ICT sector. The Agreement contains trade remedies provisions addressing safeguard measures (*e.g.*, global safeguards, transitional safeguard measures, investigation procedures and transparency requirements, notification and consultation, and compensation), antidumping, and countervailing duties. Although TPP countries' rights and obligations under the WTO agreements relating to safeguards, antidumping, or countervailing duties are not affected, their obligations under this chapter include the following:

- (1) recognizing certain transparency and due process practices (*e.g.*, written notification of receipt of an antidumping/countervailing duties application) in trade remedy proceedings;
- (2) providing electronic notifications once a party initiates a WTO safeguard investigation; and
- (3) imposing no more than one safeguard (*e.g.*, global safeguard, transitional safeguard, or other special safeguard) on the same good at the same time.

Additionally, TPP countries may apply transitional safeguard measures (*e.g.*, customs duty increases, but not quantitative restrictions) to restrain the importation of goods from other TPP countries, subject to certain requirements, including the following:

- (i) a transitional safeguard may be applied if imports from other TPP countries have increased as a result of the tariff cuts under the TPP Agreement;
- (ii) the duration of a transitional safeguard may not exceed two years, with a one-year extension;
- (iii) any transitional safeguard lasting longer than a year must be progressively liberalized over the course of its duration;
- (iv) no transitional safeguard may be imposed more than once on the same good; and
- (v) the Party applying a transitional safeguard must provide mutually agreed compensation in the form of concessions having substantially equivalent trade effects.

These trade remedies provisions will allow the United States to maintain its existing laws on trade remedies, while helping to ensure that U.S. exporters facing trade remedy investigations initiated by other countries will receive procedural due process in a transparent environment. The United States also will be able to impose temporary safeguards to protect domestic jobs and production.

State Owned Enterprises

The Agreement contains provisions to ensure that state-owned enterprises ("SOEs") and certain "designated monopolies" (*i.e.*, government or privately owned monopolies that a TPP country has designated or authorized) compete on the basis of quality and price, rather than through discriminatory regulation, subsidies, or favoritism. The TPP is the first free trade agreement to provide comprehensive stipulations for SOEs that compete with private businesses. Since such

competition does occur in various ways in the ICT sector, this provision will be key as a standard in TPP countries and as a global norm. TPP countries' obligations under this Chapter include:

- (1) ensuring that SOEs and designated monopolies do not discriminate against the enterprises, goods, and services of other TPP countries, unless (i) an SOE or designated monopoly is required to comply with terms of its public service mandate or designation; or (ii) the TPP country is responding temporarily to a global economic emergency;
- (2) ensuring that designated monopolies do not use their monopoly power to engage in anticompetitive practices in other competitive markets in their home countries that would negatively affect trade with other TPP parties;
- (3) providing courts with civil jurisdiction over the commercial activities of foreign SOEs so as to prevent foreign SOEs to evade legal action by invoking sovereign immunity (although SOEs will not be subject to a TPP country's investor-state dispute settlement mechanisms);
- (4) ensuring that administrative bodies regulating both SOEs and private companies do so impartially; and
- (5) providing a list of SOEs and notification of designated monopolies to other TPP parties, as well as (upon request by other TPP parties) additional information, such as ownership and financial statements.

The Chapter's SOE and designated monopoly provisions will benefit ICT firms and other U.S. industry by ensuring that enforcement actions can be brought against foreign SOEs for anticompetitive behavior and by protecting U.S. companies from foreign SOEs and designated monopolies that may discriminate against them.

Regulatory Coherence

The Regulatory Coherence Chapter, which appears for the first time in an FTA, contains major commitments to establish regulatory and procedural process to ensure that all parties impacted by regulations have an opportunity to participate. The Chapter also encourages sound bases for decisions, coordination among agencies within Parties, and cooperation among TPP parties. The regulatory approaches highlighted in the Chapter should provide an enabling environment well-suited to the U.S. ICT sector, which is characterized by rapid evolution in technologies and services.

The Chapter encourages certain widely-accepted good regulatory practices. These include impact assessments of proposed regulatory measures in order to assess the need and range of feasible alternatives, and communication of the grounds for the selection of the chosen regulatory alternative and the nature of the regulation being introduced. They also include ensuring that regulations are clearly and concisely written; that the public has access to information on new regulatory measures, if possible online; and that existing regulatory measures are periodically reviewed to determine if they remain the most effective means of achieving the desired objective. In addition, the Chapter 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.

In order to fully realize the benefits of establishing “good regulatory practices,” we recommend that the U.S. government and non-governmental organizations provide resources to educate and inform countries that do not have long-standing regulatory procedural frameworks in place.

Customs Administration and Trade Facilitation

The TPP’s provisions regarding customs administration and trade facilitation are vital in the ICT sector with sophisticated, global supply chains and the need to hasten time-to-market in a sector where the lifetime of many products can be counted in weeks, not months or years. The sections on transparency, release of goods, advanced rulings and express shipments are a strong set of commitments that the Committee believes will help facilitate trade among TPP Parties.

Non-Conforming Measures

There are a number of non-conforming measures (NCMs) that limit the trade liberalization benefits from TPP. These NCMs, however, do not rise to the level of overriding the robust benefits of TPP, especially in the Telecommunications and E-Commerce Chapters. For example, the full benefits of cross border data flows and prohibition on localization are included in the Agreement. We recommend that ratification of TPP not be interpreted to establish negative precedents for future agreements for such outstanding NCM issues. In other words, we recognize that, as in any trade agreement, negotiations will result in trade-offs in order to secure a final agreement. For the most part, core issues in the ICT sector, such as market access and behind the border trade restrictions (*e.g.*, cross border data flows, prohibitions on forced localization and technology transfers) were achieved through the Agreement.

Specific NCMs to note (alphabetically and not necessarily in order of importance) are:

- Australia
 - o Investment in the telecommunications sector greater than A\$25 million requires government approval and is limited to 35% of Telstra.
- Brunei
 - o Market access for Telecom is limited to 51% equity (with no restrictions on Over the Top Internet Providers).
- Canada
 - o Investment in existing telecommunications companies is limited to 10% market share; however, there is no market share limit after entering the market.
 - o Cultural services.
- Chile
 - o Owners of concessions to provide (a) public telecommunication services; (b) intermediate telecommunication services provided to telecommunications services through facilities and networks established for that purpose; and (c) sound broadcasting must be juridical persons constituted and domiciled in Chile.
- Japan
 - o Restricts market access FDI to 1/3 for NTT.

- Malaysia
 - o Foreign equity is restricted to Malaysia incorporated legal entities. Note: while this NCM restricts cross border ownership and services provided in Malaysia, foreign companies can establish a Malaysian legal entity to overcome any FDI limits to obtain telecommunications license. There are some limitations, however for certain video services.
 - o Annex II, Culture: post-market surveillance, as opposed to pre-approval, for content; cross-referencing Telecom Act, which prohibits Internet censorship.
- Vietnam:
 - o Facilities based Value Added Services and Basic Telecommunications Service are capped at 51% (extended to 65% after 5 years) and 49% respectively.
 - o Non-Facilities based license for both Basic and Value Added Services is extended to 100% FDI no later than 5 years after date of entry.
 - o For mass communications, restricts investment but does not cross-border supply.

VI. Membership of Committee

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