

December 2, 2015

The Honorable Michael Froman
United States Trade Representative
Office of the United States Trade Representative
600 17th Street, Northwest
Washington, DC 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 Intergovernmental Policy Advisory Committee (IGPAC) on the Trans-Pacific Partnership, reflecting consensus majority advisory opinion on the proposed Agreement.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Hamilton", is written over the typed name.

Robert Hamilton
Chair, Intergovernmental Policy Advisory Committee

The Trans-Pacific Partnership Agreement (TPP)

Report of the
Intergovernmental Policy Advisory Committee

December 3, 2015

Intergovernmental Policy Advisory Committee

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

I. Purpose of the Committee Report

Section 135 (e)(1) of the Trade Act of 1974, as amended, requires that advisory committees provide the President, the US 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 Bipartisan Congressional Trade Priorities and Accountability Act of 2015. 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.

II. Executive Summary of Committee Report

IGPAC members believe that the TPP meets most of the overall and principle negotiating objectives as set forth in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 and most members believe the TPP promotes the overall economic interests of the United States, provided that the serious reservations about the investor-state dispute mechanism and other issues outlined below are addressed. That being stated, not all members of IGPAC have expressed complete support for the TPP.

More members would likely support the TPP if some of the issues discussed below were addressed prior to sending the agreement to Congress for consideration. IGPAC members believe firmly that this FTA -- like all trade agreements -- should be drafted, implemented, and interpreted, to respect and give due consideration to existing state and local level regulatory, tax, and economic development policies, and to support the social, economic, and environmental values that those policies promote. Consistent with longstanding principles of federalism, statutes and regulations that states and local governments have validly adopted, that are constitutional, and that reflect locally appropriate responses to the needs of our residents, should not be overridden by provisions in trade agreements.

III. Brief Description of the Mandate of the Intergovernmental Policy Advisory Committee

Established by the United States Trade Representative (USTR), pursuant to Section 135(c)(2) of the Trade Act of 1974 (19C. 2155(c)(2), as amended, the Federal Advisory Committee Act (5 C. App. II) and Section 4(d) of Executive Order No. 11846 dated March 27, 1975, the Intergovernmental Policy Advisory Committee (IGPAC) is charged with providing overall policy advice on trade policy matters that have a significant relationship to the affairs of state and local governments within the jurisdiction of the United States.

IGPAC consists of approximately 21 members appointed from, and reasonably representative of, the various states and other non-federal governmental entities within the jurisdiction of the United States. These entities include, but are not limited to, the executive and legislative branches of state, county, and municipal governments. Members may hold elective or appointive office. The Chair of the Committee is appointed by the US Trade Representative, and members are appointed by, and serve at the discretion of, the US Trade Representative for a period not to exceed the duration of the IGPAC charter. The US Trade Representative, or the designee, shall convene meetings of the Committee.

IGPAC's objectives and scope of its activities are to:

- Advise, consult with, and make recommendations to the US Trade Representative and relevant Cabinet or sub-Cabinet members concerning trade matters referred to in 19 C. Section 2155(c)(3)(A).
- Draw on the expertise and knowledge of its members and on such data and information as is provided it by the Office of the US Trade Representative.
- Establish such additional subcommittees of its members as may be necessary, subject to the provisions of the Federal Advisory Committee Act and the approval of the US Trade Representative, or the designee.
- Report to the US Trade Representative, or the designee. The US Trade Representative or the designee will be responsible for prior approval of the agendas for all Committee meetings.

The US Trade Representative, or the designee, will have responsibility for determinations, filings, and other administrative requirements of the Federal Advisory Committee Act. The Office of Intergovernmental Affairs and Public Liaison of the Office of the Trade Representative will coordinate and provide the necessary staff and clerical services for IGPAC. IGPAC Members serve without either compensation or reimbursement of expenses.

IV. Negotiating Objectives and Priorities of the IGPAC

State and local governments play a vital role in advancing America's global competitiveness. IGPAC members affirm that our nation's economic interests are best served by embracing trade and economic development policy strategies that:

- (1) Are developed in a nonpartisan manner in close consultations with relevant stakeholders;
- (2) Yield significant, measurable economic gains for the country, increase the competitiveness of American industries, and promote full employment while broadly raising living standards;
- (3) Create more open, transparent, and reciprocal market access;
- (4) Commit resources to global market research and trade development assistance for small and mid-sized US businesses, in order that they can take advantage of new and growing market opportunities, and increase exports;
- (5) Provide comprehensive assistance to workers negatively impacted by technology and changing trade and investment flows;

- (6) Invest in innovative research and technologies to foster commercialization and job creation in the globally competitive industries and jobs of the future;
- (7) Safeguard essential federalism principles;
- (8) Respect and promote basic American values;
- (9) Protect other US objectives including consumer interests, national security and the protection of health, environmental and safety laws and regulations;
- (10) Promote labor rights and the rights of children in keeping with ILO core labor standards;
- (11) Provide foreign investors with no greater substantive and procedural rights than those enjoyed by US citizens and businesses; and
- (12) Ensure that environmental and trade policies are mutually supportive.

Although the TPP meets a number of these strategic goals, IGPAC believes that the agreement could be significantly improved if the changes discussed below were incorporated in the agreement prior to Congressional consideration.

Recommendations for Improving Federal-State Trade Policy Consultations

IGPAC appreciates USTR's efforts launched in 2003 to broaden participation in trade policy formulation by state and local government representatives through the expansion of the Intergovernmental Policy Advisory Committee on Trade (IGPAC). In order for IGPAC to perform its duty it is absolutely critical that the committee consist of keenly interested cleared advisors that represent a wide variety of states and expertise in state and local interests potentially impacted by international trade agreements. Because effective consultation is critical to achieving consensus on essential trade policy matters, IGPAC hopes that its submission to USTR on August 5, 2004 entitled "**Recommendations for Improving Federal-State Trade Policy Coordination**" may eventually be considered by Congress and USTR, and implemented in some form.

In addition, while in recent years, USTR has greatly increased its outreach to IGPAC members and has frequently briefed committee members on the status of negotiations; this is no substitute for access to the working text. IGPAC strongly urges changes to the advisory committee process that allow committee members much more frequent access to the working text. Moreover, IGPAC seeks improvements in the collection and dissemination of international trade data. In particular, as the US economy is increasingly driven by the services sector, it is vital that state-level services export data collection be improved. Similarly, states and regions cannot assess their trade balances and relative global competitiveness unless the federal government makes significant progress in collecting state-level merchandise and services import data.

In the past, USTR briefed IGPAC on trade policy developments on the first Monday of every month, but this practice has been discontinued. IGPAC respectfully requests that regular briefings be scheduled at least once every quarter by phone and once a year in person in order for members to stay more fully abreast of trade policy developments. IGPAC would also appreciate receiving redacted summaries of trade policy negotiations that can be reviewed by non-cleared members and other state and local officials.

V. Advisory Committee Opinion on the TPP

IGPAC members believe that the TPP meets most of the overall and principle negotiating objectives as set forth in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 and most members believe the TPP promotes the overall economic interests of the United States, provided that the serious reservations about the investor-state dispute mechanism and other issues outlined below are addressed. However there is not uniform support for all TPP provisions. A fuller evaluation of the economic impacts of the agreement is hampered by the absence of the US International Trade Commission's (USITC) economic analysis of the TPP, which will not be prepared until next year. More members would likely support TPP in its entirety if some of the issues discussed below were addressed prior to sending the agreement to Congress for consideration.

IGPAC members believe firmly that all trade agreements should be drafted, implemented, and interpreted, in a manner that respects and gives due consideration to existing state and local level regulatory, tax, and economic development policies and supports the social, economic, and environmental values that those policies promote. Consistent with longstanding principles of federalism, statutes and regulations that states and local governments have validly adopted, that are constitutional, and that reflect locally appropriate responses to the needs of our residents, should not be overridden by trade agreements. In addition, our trade agreements must recognize and support the sovereignty of state judicial systems and the enforcement and finality of state court judgements.

These concerns are reflected in directive of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 that trade agreements “ensure that trade and environmental policies are mutually supportive and to seek to protect and preserve the environment and enhance the international means of doing so, while optimizing the use of the world's resources.” Further, the Act makes “ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States” a crucial trade policy negotiating objective. The principle that the United States may request, but not require, states to alter their regulatory regimes in areas over which they hold constitutional authority must be maintained.

IGPAC members reaffirm that international trade and investment agreements need to be structured in a manner consistent with the principles of US constitutional federalism. To the extent that USTR may wish to negotiate liberalization of services and other matters under states' sovereign jurisdiction, it is essential to confer with states in order to gain their informed, explicit advice and consent. The general “blanket” exemption for “existing” and subsequent state and local measures that do not increase the degree of non-conformity could leave open a myriad of potential disputes involving future state policies. The unintended consequence might be to freeze state and local legislation in ways that prevent them from adapting adequately to changing facts and circumstances.

At the same time that the United States pursues greater market access and more emphasis on SMEs in recent FTAs, IGPAC stresses the importance of expanding America's trade promotion capacity. While it is often stressed that small- and mid-sized firms stand to benefit the most from FTAs, these companies frequently find it difficult to enter foreign markets. The economic literature has extensively reported that US SMEs face numerous barriers to exporting their products including tariffs, the cost and resources to explore and test new markets, research and development, product localization, compliance with foreign technical standards and other regulations, trade finance, the small scale of SME production, time-consuming foreign customs procedures, and language and cultural differences. At the state-level, we are well aware of the many local companies that have successfully begun to export for the first time, entered new markets or expanded their exports as a result of both federal and state export promotion programs.

IGPAC believes that the agreement could be significantly improved if the changes discussed below were incorporated in the agreement prior to Congressional consideration.

Environment

IGPAC members support the increasing focus on environmental issues in recent US FTAs including the extension of dispute settlement provisions to the chapter. The committee also appreciates the exclusion of state and local environmental laws that are not enforceable by action of the federal government from the enforcement provisions of the TPP environment chapter.

Multilateral Environmental Agreements: The TPP environment chapter contains some improvements over environment chapters in other FTAs, while falling short in other areas. The Bipartisan Congressional Trade Priorities and Accountability Act of 2015 specifically requires TPP to “ensure that a party to a trade agreement with the United States—(i) adopts and maintains measures implementing internationally recognized core labor standards (as defined in section 11(17)) and its obligations under common multilateral environmental agreements (as defined in section 11(6)).” It is unclear whether the chapter in its totality meets this obligation.

TPP members have committed to implement all the MEAs to which they are a party but some TPP member countries have not signed on to the MEAs that were specifically cited in the May 10, 2007 bipartisan agreement on trade and the Bipartisan Congressional Trade Priorities and Accountability Act of 2015. The TPP environment chapter does not directly name the Ramsar Convention on Wetlands and Waterfowl, the Convention on the Conservation of Antarctic Marine Living Resources, the International Convention for the Regulation of Whaling, and the Inter-American Tropical Tuna Convention, although it contains provisions that address the issues underlying these MEAs. The TPP environment chapter does include obligations related to three other MEAs referenced in the May 10, 2007 agreement and the Bipartisan Congress Bipartisan Congressional Trade Priorities and Accountability Act of 2015; the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Convention on the Prevention of Pollution from Ships (MARPOL), and the Montreal Protocol on protection of the ozone layer, but it appears that CITES is the only MEA that is fully enforceable under the TPP. It is unclear why provisions related to the Montreal Protocol and MARPOL differ from earlier FTAs since all TPP members are signatories to these two MEAs. In short these MEAs must be fully enforceable under the TPP.

The four missing MEAs are significant. For example, Japan has a major whaling fishery and a record of non-compliance with international whaling provisions. As recently as April of this year, Japan announced that it would continue to kill Minke whales in the Antarctic despite the rejection of its plan by an expert panel advising the International Whaling Commission's Scientific Committee. Although the TPP environment chapter addresses the issue areas covered by the four missing MEAs, the agreement would be greatly improved if all seven MEAs were enforceable under the agreement for all TPP member countries. IGPAC firmly believes that the US government should make it a high priority to convince TPP members to sign and strongly enforce all of these seven MEAs if they have not already done so.

Other Natural Resource Provisions: The provisions relating to the prohibition of two of the most harmful fish subsidies and commitments to combat illegal trade in wildlife and plants and fish that go beyond CITES are a step in the right direction but should be strengthened, particularly given the problems in those areas in some TPP member countries. Specifically, the TPP includes legally binding rules that address two key subsidies that contribute to unsustainable fishing practices, which is a positive development. At the same time, the text on shark finning and whaling is not binding but rather merely aspirational, and provisions related to illegal trade in flora and fauna should be stronger, as the text only commits TPP countries to "combat" illegal trade, but not prohibit it. Given that a number of TPP countries are significant exporters, importers or transit countries for illegally taken wildlife, and sites of extensive illegal logging (for example the World Bank estimates that 80 percent of Peru's timber exports come from illegal logging), these provisions should be significantly stronger.

Enforcement: A key question is whether the environment provisions will be consistently enforced. For example, serious questions have been raised about whether Peru has complied with the environmental provisions as they relate to forestry products of its FTA with the United States. As of this time, no party has ever brought a formal case based on the environmental provisions of any US FTA, despite documented violations. The public submissions provisions found in Article 20.9 of the environment chapter, which could be a useful mechanism to identify violations and trigger enforcement, do not require any action to be taken in response to a submission. IGPAC recognizes the dispute settlement might not always be the most judicious way to address environmental complaints but the United States must utilize all consultative and environmental cooperative arrangements to expeditiously and thoroughly address any valid complaint under this chapter.

IGPAC strongly encourages the devotion of enough resources to ensure that the provisions of the TPP environment chapter are enforced. In addition IGPAC strongly supports the environment cooperation agreements that are negotiated in parallel with the FTA, which connect US technical assistance and capacity building efforts to the implementation of specific FTA obligations.

Government Procurement

The United States made no firm commitment to cover sub-federal government procurement under the TPP. (Thirty-seven states agreed to be covered by the WTO Government Procurement Agreement and a smaller number of states have agreed to adhere to the government procurement chapters of other FTAs, including those with some TPP-member countries.) The TPP, however, does include a built-in agenda where within three years the member countries shall initiate negotiations to consider expanding coverage at both the federal and sub-federal level. IGPAC endorses USTR's consistent approach of seeking the approval of sub-federal governments for any government procurement commitments under the TPP, particularly as sub-federal coverage has become increasingly controversial in recent years. IGPAC would object to any expansion of state-level coverage whether in the form of removing any exceptions, lowering procurement thresholds or coverage of state procurement entities without explicit state consent.

As IGPAC has pointed out many times in the past, one of the biggest difficulties for US sub-federal governments in this area is the complete lack of data on the success of US companies in obtaining foreign government contracts or foreign companies in obtaining US federal and state government procurement contracts. As a result, it is impossible for sub-federal governments to make a decision on government procurement coverage based on any concrete data. Moreover, little effort has been made by US trade agencies to provide follow up information or seminars about how US SMEs can take advantage of foreign government procurement opportunities. IGPAC members urge USTR, the US Department of Commerce, and other relevant federal agencies, to provide information to the public about the economic consequences of procurement market liberalization, collect and share data on the market value of international procurement opportunities, and provide technical assistance to US firms that will allow them to succeed in foreign procurement markets under all FTAs and the WTO Government Procurement Agreement.

As a matter of general principle, IGPAC members support the goal of improving transparency and increasing fair market access in government procedures and regulatory decisions related to procurement, while preserving the independent authority of state and local governments to adopt legislation, standards and procedures consistent with their experience and interests. IGPAC members are split on the advisability of sub-federal governments agreeing to adhere to procurement agreements.

Intellectual Property Rights

IGPAC recognizes the importance of intellectual property-intensive industries to the economy of our country and the estimated 40 million Americans jobs that are directly or indirectly related to these industries. The enforcement of strong intellectual property rights (IPR) helps ensure that IPR holders reap the benefits of their creativity and innovation, while preserving the comparative advantage of US intellectual property-intensive industries. The failure to enforce strong IPR damages US firms and workers and potentially exposes consumers to harmful counterfeit and pirated products. For example, several years ago the US International Trade Commission estimated that if China by itself improved the protection of IPR to that found in the United States, the US economy would enjoy an additional \$107 billion in additional sales while supporting an additional 2.1 million jobs in our country.

At the same, the TPP text must find the appropriate balance between protecting IPR and the affordability of products and services to consumers. In particular, given the increasing costs of healthcare, the affordability of pharmaceutical products is extremely important for consumers at home and abroad, particularly in developing countries. Any provisions that address patent linkage, the ever-greening of patents and excessive data exclusivity periods must allow for distinguishing between the failure of health care authorities to respect the bona fide rights of intellectual property holders and the efforts of pharmaceutical companies to expand their profits at the expense of consumers. One area of concern is the data exclusivity protections for biologics. While the final TPP data exclusivity provisions for biologics provide some flexibility for developing TPP member countries, they might fall short of the terms May 10, 2007 bipartisan agreement on trade with respect to developing countries.

Transparency and Procedural Fairness for Healthcare Technologies

IGPAC supports the non-application of dispute settlement to the annex.

Investment

Despite some welcome modifications to the TPP investment text, the investment chapter of free trade agreements continues to concern IGPAC, due to the inclusion of the investor state dispute settlement (ISDS) mechanism. IGPAC strongly urges that the mechanism be eliminated from the agreement. In addition to being concerned about cases that can be brought against the United States, IGPAC is concerned that investors from nations with well-developed legal systems appear to have abused these provisions to improperly and frivolously challenge the authority of developing country governments at both the central level and sub-central level.

IGPAC is concerned that the ISDS system creates greater procedural rights for foreign investors by establishing a mechanism that is not available to domestic companies and is free from the procedural and other rulings of domestic courts. Even more concerning, these rights are still not limited to procedural advantages; the expansive definition of “investment” in the TPP, and arbitrator interpretations of terms including “fair and equitable treatment,” have veered from the stricter Constitutional standards applicable within the domestic judicial systems. Some of IGPAC’s most important concerns and comments on the investment chapter are as follows:

- Amicus Briefs and Transparency: IGPAC supports the establishment of investor-state dispute procedures that empower state and local governments to file amicus briefs and the provisions to increase transparency of ISDS cases. IGPAC appreciates that the US has taken commitments to improve the transparency of proceedings and the disclosure of documents. IGPAC encourages USTR to actively oppose any proposals that would revise arbitration rules in order to increase the confidentiality of proceedings, and instead to continue to assert US principles of transparency and openness in investor-state proceedings.
- Appellate Body: IGPAC continues to support the creation of an appellate body that could review the merits of any panel finding. As a result, IGPAC believes that the TPP investment chapter should contain a firm commitment to establish such a mechanism.

- Capital Controls: IGPAC is concerned that the capital controls provisions of the chapter might go too far in limiting the ability of governments to restrict the cross-border transfer of funds where such limits might be necessary to mitigate or prevent a financial crisis.
- Costs to States: IGPAC strongly recommends that the federal government commit to seeking compensation for legal costs, including staff time, incurred by states and localities when assisting in the defense of investor-state disputes. IGPAC is aware that ISDS challenges cannot directly or automatically overturn local, state, or federal laws, regulations, or court decisions. Still, the possibility that state or local laws may be challenged (by way of an action against the United States) is itself a chilling factor for those governments considering legislative and regulatory action. While the federal government is responsible for defending investor challenges that are lodged against state and local measures, state resources are heavily taxed during the course of such disputes. IGPAC therefore strongly recommends that the federal government commit to seeking compensation for legal costs, including staff time, incurred by states and localities when assisting the federal government to defend investor-state disputes. At the close of the Methanex dispute, for instance, the federal government was awarded full payment of the millions of dollars in fees and costs that it incurred while defending the case, however California was not similarly compensated.
- Definition of Investment Overly Broad: The TPP definition of investment is overly broad, covering investment authorization, licenses, permits and the expectation of gain or profit and the assumption of risk. IGPAC recommends changing the definition of investment to only cover the types of property that are protected under the US Constitution.
- Financial Services: Given the considerable controversy concerning the ISDS mechanism and the economic devastation caused by the recent financial crisis, IGPAC is very concerned that financial service firms can bring a breach of the minimum standard of treatment claim under the TPP investment chapter. IGPAC strongly opposes the extension of MST claims to financial service providers. In addition, the TPP national treatment text in the financial service chapter appears to provide a higher standard for regional governments than the central governments. While national governments must provide no less favorable treatment to foreign investors than it provides to its own investors, regional governments have to give foreign investors the best treatment given to anyone - "treatment no less favourable than the most favourable treatment accorded" to its own investors. It is not clear why there is a distinction in the text between the central and regional level. IGPAC is concerned that this might be an issue in any national treatment claims under the financial services chapter or an ISDS dispute.
- Forum Shopping: The TPP investor-state dispute mechanism contains some welcome improvements over the mechanism found in earlier trade agreements. However, the TPP does not override conflicting provisions in earlier agreements as the TPP will co-exist with other US trade agreements. As a result, foreign investors can opt to pursue a challenge under those earlier agreements rather than the TPP agreement. For example, a Canadian or Mexican investor in the United States can invoke the NAFTA investment chapter instead of the TPP investor chapter to increase their chances of winning a dispute before an ISDS tribunal.

- Frivolous Claims: IGPAC supports the mechanism for expedited review and dismissal of frivolous claims.
- Impartiality and Independence of Arbitrators: Currently, there are no rules preventing an ISDS panelist from rotating between serving on a tribunal and then switching to representing an investor in other cases. This creates a huge conflict of interest. Given this concern, IGPAC is pleased that prior to the entry into force of the agreement, the TPP countries have agreed under Article 9.21 to provide guidance on the application of the Code of Conduct for Dispute Settlement Proceedings under Chapter 28 (Dispute Settlement) to arbitrators selected to serve on investor-State dispute settlement tribunals. As part of this effort, the signatories agreed to “provide guidance on the application of other relevant rules or guidelines on conflicts of interest in international arbitration. Arbitrators shall comply with that guidance in addition to the applicable arbitral rules regarding independence and impartiality of arbitrators.” Among other things, IGPAC urges that this guidance address the conflict of interest issue.
- Minimum Standard of Treatment/Fair and Equitable Treatment (MST/FET): IGPAC is troubled by the reasoning of several ISDS cases that determined that international investors were denied the Minimum Standard of Treatment/Fair and Equitable Treatment (MST/FET) (e.g.; Railroad Development Corporation (RDC) v. Guatemala and TECO Guatemala Holdings v. Guatemala). In those cases, the tribunals ruled in favor of investors, apparently disregarding Annex 10-B of the Dominican Republic – Central American Free Trade Agreement (CAFTA-DR FTA), which defined the term “MST,” determining that the defending country did not meet the “reasonable expectations” of the investor. This also appears to be an issue with the Bilcon v. Canada case.

IGPAC appreciates the new language that is intended to better protect governments from foreign investors’ challenges and to allow governments to regulate in the public interest. Specifically, IGPAC supports the provision that the burden is on the investor to prove all elements of its claims, including any MST violation, and that the investor cannot prove a MST violation just by showing that a government measure foiled the investor’s expectations. IGPAC, however, questions why “investors’ expectations” are allowed to be part of any investor-state dispute case because the concept is very open ended and subject to interpretation. Even the footnote in Annex 9-B (Expropriation) which seeks to define what is meant by “reasonable investment-backed expectations” still leaves great latitude for tribunals to interpret the term. The Bilcon case in which the panel found that the Canadian government interfered with the investor’s expectations was a significant factor in finding in favor of the investor.

In addition, it is our understanding that the laws of many states would provide no relief to an investor based on even an explicit change in the law during a pending application unless and until a permit was granted and construction initiated. The standard used in the investment chapter, as exemplified in *Bilcon*, would give foreign investors far greater rights than under that standard. Moreover, it is our understanding that, to date, the United States has taken the position that investor expectations (that do not derive from the actual statutes or case law in the applicable jurisdiction) are no part of the decision on whether there has been a violation of these provisions. The current language, by suggesting that they are not enough, “standing alone,” suggests that they are – as was held in *Bilcon* – a meaningful element in finding a violation. Thus, this language appears to be a step back from the position currently taken by the United States.

IGPAC supports the provision that “the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a Party, does not constitute a breach” of the MST. The test of the effectiveness of these changes, however, will be how future arbitrators interpret these provisions.

- National Treatment: IGPAC endorses the provision in the investment chapter, as well in other chapters of the agreement that clarifies that in terms of the regional level government (state level) the commitment to provide “national treatment” means “treatment no less favourable than the most favourable treatment, accorded in like circumstances” by that particular state, rather than the most favorable treatment offered by any state within the country. The TPP language removes the uncertainty that was left by language in earlier trade agreements.
- No U-Turn: IGPAC supports the “no u-turn” provision, which requires a claimant that has initiated an ISDS case to waive the right to have a domestic proceeding. However, it appears that investors from TPP member countries can bring a case under the ISDS system even after they have lost a case in domestic court except if they are bringing a case against the countries listed in Annex 9-J (Chile, Mexico, Peru and Vietnam.) IGPAC continues to support a “fork-in-the-road” provision that would require an investor to pursue a claim through domestic courts or through the ISDS system, but not both. IGPAC strongly recommends the inclusion of a “fork-in-the-road” provision in the investor chapter.
- Punitive Damages: IGPAC supports Article 9.28.6 of the investment chapter that make clear that tribunals cannot award punitive damages.

- Regulatory Safeguard: Annex II B – Expropriation contains a regulatory safeguard which states that “non-discriminatory regulations by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health¹, safety, and the environment, do not constitute indirect expropriations, except in rare circumstances.” While additional regulatory safeguards are appreciated, IGPAC is very concerned that the effectiveness of this provision could be undermined by panel determinations of what constitutes “rare circumstances” An earlier, leaked draft of this Annex was greatly preferable in that it did not include the “rare circumstances” clause.
- Subsidiaries of US Companies in TPP Countries: Although the TPP investment chapter includes a provision that would allow a Party to the FTA to deny the benefits of the chapter in certain cases, it does not appear to prevent US companies using their affiliate in another TPP member country from bringing a case against the United States by that affiliate. This appears to allow the US firm to challenge a US law or regulation under ISDS, thereby bypassing the US domestic court system. IGPAC recommends amending the chapter to clarify that overseas subsidiaries cannot bring investor-state dispute cases against the TPP member country of the parent company.

Labor

As with the environment chapter, IGPAC welcomes the growing US emphasis on labor rights in recent FTAs and the coverage of the chapter by the dispute settlement provisions of the agreement. IGPAC also strongly supports the inclusion of an enforceable commitment by the signatories to maintain laws addressing minimum wages, hours of work, and occupational safety and health, as this is the first FTA to include this requirement. The TPP’s labor chapter, however, falls short in several areas with the result that truly meaningful, enforceable commitments are missing in those areas. For example, the commitment to “discourage” trade in goods made with forced labor is not equivalent to a commitment to prohibit trade in such goods.

IGPAC also supports the side letters that establish the “labor consistency plans” with Brunei, Malaysia and Vietnam that will enter into force on the same date as the agreement and are subject to dispute settlement. IGPAC strongly encourages the devotion of enough resources to ensure that the provisions of the TPP Labor Chapter are enforced.

The committee also appreciates the exclusion of state and local labor laws that are not enforceable by action of the federal government from the enforcement provisions of the TPP labor chapter.

¹ “For greater certainty and without limiting the scope of this subparagraph, regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products.”

Market Access

In general, US tariffs are already quite low, except for a few sectors. To a large degree this is an outgrowth of the international trading system that was created at the end of World War II. As the only remaining strong economy at the end of that war, the United States agreed to lower its tariffs to a greater degree than other countries in order to help them recover from the destruction of the war. In subsequent negotiating rounds, the United States has been negotiating from behind in terms of tariff parity. FTAs, which eliminate almost all tariffs, can be a means to restore this balance.

In general, the same pattern holds true for the tariff levels for those TPP countries with which the United States does not already have a FTA (Brunei, Japan, Malaysia, New Zealand and Vietnam). Significant exceptions include low New Zealand agricultural tariffs and low Japanese non-agricultural tariffs.

It is also likely that the services provisions of FTAs will provide a net benefit to US companies as the US service market is one of the most open in the world. As a result, the United States receives greater market openings from other TPP countries than it provides under the agreement. In sum, the market opening provisions should provide a net benefit to US industries although some sectors will be injured by increased imports. However, as indicated above, a fuller evaluation of the economic impacts of the agreement is hampered by the absence of the USITC's economic analysis of the TPP, which will not be prepared until next year. Moreover, we note that the USITC's report, while greatly appreciated, typically does not address trade in services or change in investment flows caused by trade agreements.

Regulatory Coherence

The final text of the TPP Regulatory Coherence chapter indicates that no later than one year after the agreement enters into force each Party will determine what measures are covered under the chapter. USTR has informed IGPAC on several occasions that sub-federal measures will not be covered by the agreement. Although it is likely that most states already comply with most of the provisions of the TPP regulatory coherence chapter, it is critical that the United States not apply the chapter to sub-federal measures. In particular, IGPAC is opposed to any future cost-benefit/trade impact analysis requirement at the state level as currently this is not the consistent practice of states and would be quite expensive and burdensome, and could be entirely contrary to regulating and governing in the public interest. IGPAC also supports the non-application of dispute settlement to the chapter.

Services

Given the growing importance of services industries to the US economy, state and local governments generally support the objective of FTAs to liberalize trade in services industries as a means of increasing market access for US firms and for furthering trade development objectives. IGPAC members equally assert that the independent exercise of state and local legislative and regulatory power is critical to protecting citizens' interests and safeguarding the federal system. IGPAC, however, has always been concerned by the potential impact of trade rules on the ability of states to regulate services in the public interest. US states regulate a broad range of service activities, including health care, communications, financial, utilities, and professional services. States maintain many non-discriminatory regulations to advance important policy objectives that are not related to the quality of service at issue, including those related to environmental protection, land use, fair completion and economic development.

IGPAC members are very pleased that the TPP services text does not contain a domestic regulation “necessity test” which would require that services regulation be no more burdensome than necessary to ensure the quality of the service. Inclusion of such a test in the disciplines themselves would effectively reverse the deference that US courts have given for many years to state economic legislation. Dating back to at least the 1930s, US courts have deferred to legislatures’ choice of the degree of burden to impose on commerce, as long as such regulations are not applied without a rational basis or discriminatorily. For these reasons, IGPAC has been very concerned by the inclusion of a necessity test in earlier US FTAs. The absence of a necessity test in the TPP services domestic regulation text is a very positive outcome.

Although the absence of a necessity test is a positive outcome, IGPAC members are concerned with the “negative list” approach to scheduling commitments for services trade liberalization and would strongly prefer a positive scheduling approach. The WTO tribunal ruling against the United States in the GATS internet gambling case brought by Antigua and Barbuda illustrates the inherent peril of the “negative list” approach, which risks covering economic activities that were expected to be exempted, either by inadvertence or by lack of knowledge of relevant laws and regulations.

Many IGPAC members are also opposed to the ratchet provision contained in Annex I which bind autonomous liberalization of measures that currently violate the core obligations of the service chapter. The ratchet provision would prevent any reversal in the event that the liberalization of the sector led to unanticipated and unwelcomed results.

IGPAC also continues to be concerned by the narrow exemption for services supplied in the exercise of government authority contained in the WTO General Agreement on Trade in Services (GATS) and FTAs, including the TPP, which excludes “services supplied in the exercise of government authority.” The text provides that “services supplied in the exercise of governmental authority means, for each Party, any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers.” The concepts of “commercial basis” and “in competition” are undefined and are subject to conflicting interpretations. At worst, if narrowly interpreted the exclusion of services supplied in the exercise of government authority could expose state public service programs to challenge.

IGPAC supports provisions in the professional services annex that encourage cooperative work on licensing recognition and other regulatory issues because it leaves the cooperation up to the regulatory authorities and does not mandate any particular outcome.

State Owned Enterprises

IGPAC welcomes the inclusion of a chapter establishing rules for state-owned enterprises (SOEs) as US companies are facing increasing competition from them in international markets. Frequently, US companies cannot compete against SOEs on a level-playing field as they often receive government support including discounted loans, land grants, lower input costs or other subsidies, preferential access to government procurement, trade protection, regulatory advantages including national standards, and relaxed regulatory enforcement that unbalance the playing field. The TPP contains welcome transparency provisions that will throw light on the operation of SOEs and help to ensure that US companies can compete with them on a level playing field.

As of this time the Chapter only covers central government SOEs but calls for the future coverage of sub-federal SOEs. IGPAC welcomes the postponement of sub-federal coverage as it is unclear how the text would impact US sub-federal SOEs, as we are unaware of any comprehensive study identifying US sub-federal SOEs.

TBT

IGPAC supports the limited scope of the TBT chapter and annexes as they apply to state governments.

Tobacco

IGPAC strongly supports the provision (Article 29.5 of the Exceptions and General Provisions Chapter) that provides TPP members with the option of denying the use of the investor-state dispute mechanism in challenging a tobacco control measures. (A footnote makes clear that such measures are still subject to government-to-government dispute settlement.) IGPAC is very supportive of this measure in view of the investor-state cases brought against tobacco control measures in Australia and Uruguay. While this is an important safeguard, it highlights the major deficiencies and unfairness of the ISDS system, which has been successfully used to challenge legitimate, reasonable, non-discriminatory health and environmental laws and regulations in other countries. Some IGPAC members would also support the complete carve-out of tobacco from the agreement given public health concerns.

Currency Manipulation

The TPP does not contain firm provisions related to currency manipulation. The agreement, however, is accompanied by the “Joint Declaration of the Macroeconomic Policy Authorities of Trans-Pacific Partnership Countries,” which rules out competitive devaluations and the persistent misalignment of currency. This declaration also calls for greater public disclosure and transparency of data on exchange rate policies including government intervention into exchange rate policies. The Bipartisan Congressional Trade Priorities and Accountability Act of 2015 identifies addressing currency manipulation as one of the principal negotiating objectives of the United States.

In recent years an increasing number of economists and trade policy experts have identified currency manipulation as causing the United States to experience much larger trade deficits and jobs losses than the country otherwise would have experienced absent such manipulation. The current international economic system has been ineffective in addressing currency manipulation and it is questionable whether the declaration by the TPP members to avoid currency manipulation will be effective in addressing this perpetual problem. IGPAC would prefer strong enforceable currency manipulation provisions in the body of the TPP. It remains to be seen whether this declaration will effectively address currency manipulation by TPP member countries and whether it meets the objective outlined in the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, particularly since there is no enforcement mechanism.

VI. Membership of Intergovernmental Policy Advisory Committee (IGPAC)

Roster as of July 2015

Wes Aubihl	Ohio Development Services Agency
Lindora Baker	National Association of Counties (NACo)
Mark Chandler	City and County of San Francisco
Anthony Clarence	National League of Cities (NLC)
Thomas Cochran	US Conference of Mayors
Carol Colombo	State of Arizona
Dan Crippen	National Governors Association (NGA)
Jose (“Pepe”) Diaz	Miami-Dade County
Kathe Falls	State of Louisiana
Krista Ferrell	National Association of State Procurement Officers (NASPO)
Trey Martinez Fisher	Texas House of Representatives
Charles Gray	National Association of Regulatory Utility Commissioners
Robert Hamilton	Washington State Department of Commerce
Julia Hurst	National Lieutenant Governors Association (NLGA)
Gregory Ibach	National Association of State Departments of Agriculture (NASDA)
Jon Jukuri	National Conference of State Legislators (NCSL)
Andy Karellas	Council of State Governments (CSG)
Kathleen Keenan	National Conference of Insurance Legislators (NCOIL)
Joe McKinney	National Association of Development Organizations
Gregory Mize	National Center for State Courts
Peter Owens Lehman	South Carolina Ports Authority
Robert O’Neill	International City/County Management Association
Kristopher Sanchez	Nevada Governor’s Office of Economic Development
Ekrem Sarper	National Association of Insurance Commissioners (NAIC)
Sharon Treat	Maine Citizen Trade Policy Commission
Kay Wilkie	NYS Department of Economic Development
Gregory Zoeller	National Association of Attorneys General (NAAG)
Shirley Abrahamson*	Wisconsin Supreme Court

*recused from participation in this report