

December 3, 2015

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

Dear Ambassador Froman:

In accordance with section 5(b)(4) of the Bipartisan Trade Priorities and Accountability Act of 2015, and section 135(e) of the Trade Act of 1974, as amended, I am pleased to transmit the report of the Industry Trade Advisory Committee on Services and Finance Industries (ITAC 10) on the Trans-Pacific Partnership Trade Agreement (TPP), reflecting consensus advisory opinion on the proposed Agreement.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth Benson", with a long horizontal line extending to the right and a loop at the end.

Elizabeth Benson, Chairman
Industry Trade Advisory Committee on
Services and Finance Industries (ITAC 10)

A handwritten signature in blue ink, appearing to read "Timothy C. Brightbill", with a stylized, cursive script.

Timothy C. Brightbill, Vice Chairman
Industry Trade Advisory Committee on
Services and Finance Industries (ITAC 10)

The Trans-Pacific Partnership Trade Agreement (TPP)

**Report of the
Industry Trade Advisory Committee on Services and Finance Industries**

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Industry Trade Advisory Committee on Services and Finance Industries (ITAC 10)

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

I. Purpose of the Committee Report

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, require 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 on Services and Finance Industries (“ITAC 10”) hereby submits the following report.

II. Executive Summary of Committee Report

The Committee believes the Trans-Pacific Partnership Trade Agreement (“TPP”) on balance provides new trade and investment opportunities, investor protections and other benefits for American companies and recommends that Congress implement it. While there are elements of TPP described below that the Committee believes should be strengthened, clarified or removed to better conform with previous bilateral free trade agreements (“FTAs”) and the 2012 U.S. Model Bilateral Investment Treaty (“BIT”), TPP on balance promotes the economic interests of the United States, overall meets the principal negotiating objectives set out by the 2015 Trade Promotion Authority Act (“TPA”), and provides for equity and reciprocity within the services sector.

For some sectors, TPP includes new, high-standard commitments that will address trade concerns and allow American companies to maximize the efficiencies that a trade agreement among twelve economies potentially creates. This includes cross-sectoral commitments on customs and trade facilitation, new procedures to assist small and medium-sized enterprises (“SMEs”), and new mechanisms to address the commercial distortions caused by governments’ preferential treatment of state-owned enterprises (“SOEs”). For individual services sectors, improvements have been made for accounting, architecture and engineering, energy, express delivery, financial, and trade promotion services. For audiovisual industries, commitments have been secured from most TPP Parties to protect the openness of the emerging online, on demand

marketplace; and provisions on intellectual property rights protection, particularly on copyright and online enforcement, will materially improve the industry's ability to engage in trade in TPP countries.

In addition, the inclusion of an investor-state dispute settlement ("ISDS") mechanism applying to all TPP countries is a vital enforcement tool that provides American investors the ability to challenge arbitrary, discriminatory, and unfair government actions against their investments before a transparent and neutral arbiter. Without ISDS, investment commitments are essentially unenforceable.

For other sectors, TPP's provisions fall short of the Committee's aspirations. In particular, the Committee is disappointed that the provisions of the Financial Services Chapter fail to provide financial institutions with access to ISDS enforcement for violations of TPP's commitments to national treatment and most-favored nation treatment, and allow only delayed access to ISDS enforcement for violations of the minimum standard of treatment protections for several countries. Additionally, for financial services, TPP does not include adequate protections against data and server localization requirements; this approach should not be replicated in future agreements. There are also some significant non-conforming measures ("NCMs") taken by some TPP Parties specific to the financial services sector which are likely to limit meaningful market access, and should be addressed as the agreement progresses. TPP does not create new opportunities for the full development of health care services, though commitments on data flows may enable a continuum of care as patients seek cross-border health care. Market access restrictions on legal services will continue under TPP due to NCMs taken by all TPP countries, including the United States. Finally, in audiovisual services, certain existing restrictions on foreign companies' ability to provide content and services to cinemas, and to broadcast and cable television remain in place.

III. Brief Description of the Mandate of Industry Trade Advisory Committee on Services and Finance Industries (ITAC 10)

ITAC 10 performs functions and duties and prepares reports, as required by Section 135 of the Trade Act of 1974, as amended, with respect to the services sector. To fulfill its mandate the ITAC meets to review negotiations with U.S. trade officials and to advise as required by law.

ITAC 10 advises the Secretary of Commerce and the U.S. Trade Representative ("USTR") concerning the trade matters referred to in Sections 101, 102, and 124 of the Trade Act of 1974, as amended; with respect to the operation of any trade agreement once entered into; and with respect to other matters arising in connection with the development, implementation, and administration of the services trade policy of the United States, including those matters referred to in Reorganization Plan Number 3 of 1979 and Executive Order 12188, and the priorities for actions there under.

In particular, ITAC 10 provides detailed policy and technical advice, information, and recommendations to the Secretary of Commerce and the USTR regarding trade barriers and implementation of trade agreements negotiated under Sections 101 or 102 of the Trade Act of 1974, as amended, and Sections 1102 and 1103 of the 1988 Trade Act, which affect the services

sector, and performs such other advisory functions relevant to U.S. trade policy as may be requested by the Secretary and the USTR or their designees.

IV. Negotiating Objectives and Priorities of ITAC 10

ITAC 10's overall goal is to liberalize trade in the wide range of services provided by U.S. businesses, thereby promoting the expansion and health of the U.S. economy and, by extension, the economies of its trading partners. This goal aligns with the principal negotiating objective of the Congress for trade in services, as stated in the 2015 TPA, which is "to expand competitive market opportunities for United States services and to obtain fairer and more open conditions of trade, including through utilization of global value chains, by reducing or eliminating barriers to international trade in services, such as regulatory and other barriers that deny national treatment and market access or unreasonably restrict the establishment or operations of service suppliers."

The services sector plays a vitally important role in the United States economy. In the United States today, services industries provide approximately 100 million jobs, or over 80% of total private sector employment. Most new jobs created in the United States are services jobs. Further, according to the Bureau of Economic Analysis ("BEA"), U.S. exports of services were \$710 billion in 2014, providing a surplus of \$233 billion in cross-border trade. The BEA further reported that services sales by U.S. foreign affiliates – that is, sales by U.S. services companies by their overseas operations to foreign customers – which totaled \$685 billion in 2004, had increased to \$1.3 trillion by 2013, the latest year for which these data are available. Services exports and sales by U.S. foreign affiliates will both benefit from the commitments included in TPP.

ITAC 10's objective for the TPP Agreement and other trade agreements is to achieve substantial additional market access for U.S. service industries. This means commitments to greater access to foreign markets for U.S. cross-border trade, to investment abroad, and to the temporary movement of persons who provide services. Without similar U.S. commitments extended to our trading partners, U.S. service providers will be less able to realize the full opportunities this Agreement and others like it appear to offer.

With respect to the protection of U.S. investment abroad, ITAC 10's objective is to ensure high levels of protection for U.S. investors. These include: assurance of national treatment and most-favored nation treatment, protection against expropriation without prompt and full compensation; the free transfer of capital both into and out of the country, fair and equitable treatment and full protection and security by local agencies and courts, prohibitions of performance requirements on foreign investors, and effective and efficient investor-state dispute settlement procedures.

ITAC 10 also sees an opportunity to advance U.S. policy objectives to liberalize foreign markets by focusing U.S. agencies' and private entities' efforts to provide technical assistance and trade-related capacity-building abroad, especially in developing countries and transitional economies. ITAC 10 believes that intensive technical assistance is imperative in many parts of the world if mutual trade liberalization goals are to be attained.

With respect to government procurement, ITAC 10's objective is to ensure access on a transparent, open and non-discriminatory basis to foreign government procurements for U.S. service providers and, where needed, to objective reviews of procurement decisions.

ITAC 10 believes these goals can be met, and at the same time can support efforts to protect the environment, maintain fair and humane working conditions and encourage the expansion of new technologies that foster the exchange of trade and human interactivity.

V. Advisory Committee Opinion on Agreement

A. Crosscutting Provisions

The Committee's opinions on TPP provisions that cut across more than one services sector follow.

Anti-Corruption

Corruption is an issue that goes to the very heart of the business community's ability to conduct business openly and fairly, and to the ability of governments to use their resources for the benefit of all their people. It thrives in an atmosphere of secrecy and favoritism. TPP has established anti-corruption requirements and standards intended to create an environment in which corruption is deterred. TPP Chapter 26 on Transparency and Anti-Corruption, and particularly Section C of that chapter, promotes anti-corruption principles and actions including, among other provisions, committing TPP Parties to have and enforce anti-bribery laws, to promote rules against conflicts of interest in government, to adopt or maintain laws that criminalize offering an undue advantage to a public official, and to promote rules against other acts of corruption in matters affecting international trade or investment. The Parties have also committed to effectively enforce their anticorruption laws and regulations. In so doing, TPP provides a foundation of openness and commitment to anti-corruption measures that can act as a significant deterrent to corruption. The Committee applauds the efforts of the U.S. government in this area.

Customs

TPP includes a high-standard chapter on customs and trade facilitation that addresses the express industry's unique need for expedited clearance and effective risk management. In this chapter, TPP Parties have committed to adopt time-release guarantees; electronic systems for customs users; simplified documentation, including use of a single manifest for clearance; and separation of the release of goods from the payment of duties, taxes and fees. These measures should help reduce time, cost, and complexity of trade for companies of all sizes, and particularly small businesses.

Industry had sought a \$200 TPP-wide *de minimis* level, the low-value threshold beneath which goods can cross borders with simplified procedures and without payment of duties and taxes. Unfortunately, the final agreement does not contain a specific *de minimis* threshold, but does state that parties will periodically review the amount set in their respective laws, taking into account factors they may consider relevant, including the effect on trade facilitation, cost of cross-border trade transactions, and the impact on small and medium-sized business – factors which should highlight the benefits of ensuring commercially meaningful *de minimis* levels.

Investment

Since the inception of the United States' trade agreements program in the 1950s, investment protection provisions have been an essential element of trade agreements and a major element of the United States' effort to extend the rule of law to international investment.

Over time these provisions have been substantially refined to respond to economic changes and the needs of new negotiating partners. These refinements have, importantly, included provisions that allow private investors to sue governments in certain, very carefully defined instances. This provision is known as investor-state dispute settlement, or ISDS. It is an essential alternative to "state-to-state" dispute settlement which has proven, for investors, to have been ineffective.

The TPP Investment Chapter presents a particularly challenging opportunity, because it includes five countries (Malaysia, Vietnam, Brunei, New Zealand and Japan) with which the United States does not have agreements on investment, and six countries with which it does. Thus the challenge of TPP has been to win agreement from countries with exceptionally highly developed legal/regulatory systems like Japan, to countries like Vietnam with much more rudimentary legal and regulatory frameworks particularly as regards foreign participation in their economies.

Overall, the TPP investment provisions will help promote greater access to and a more secure and predictable legal framework for a wide range of U.S. investors in TPP countries where the United States does not have existing enforceable commitments. In the six countries where the United States already has enforceable investment provisions, the TPP investment provisions give some greater access and investment protections. Essentially, TPP reinforces and extends the fundamental principle that foreign firms should have the right to establish, acquire, and operate investments on an equal basis with nationals and to operate without discrimination in favor of nationals. While TPP does not fully mesh with the provisions of the U.S. Model BIT or with other trade agreements, it is a significant step forward in extending and improving investment protection. The Committee hopes that TPP will be enlarged to include other countries, and that in this process investor protection provisions will be improved.

Very importantly, TPP includes the ISDS mechanism and applies it to all TPP countries. ISDS is a vital enforcement tool that provides U.S. investors the ability to challenge arbitrary, discriminatory, and unfair government actions against their investments before a transparent and neutral arbiter. Even though it has been used only twice in cases involving the United States, ISDS has long been viewed as the main enforcement mechanism in the more than 30 years that it has been included in U.S. trade and investment agreements. Without ISDS, investment commitments are essentially considered unenforceable.

As a consequence, the Committee is disappointed that the provisions of the Financial Services Chapter fail to provide financial institutions with access to ISDS enforcement for violations of TPP's commitments to national treatment and most-favored nation treatment, and allow only delayed access to ISDS enforcement for violations of the minimum standard of treatment protections for several countries. Furthermore, the Financial Services Chapter exempts from protection any government procurement of financial services, which is weaker than prior U.S. FTAs. These issues are further discussed in financial services section of this report. ITAC 10

urges that full protections for financial institutions subject to ISDS enforcement be included in future agreements.

In addition, unlike any past FTA, TPP extends the prudential exception (allowing governments to avoid certain obligations with respect to financial institutions in case of economic crises) beyond the investment and financial services chapters to most provisions of TPP. This unusual expansion is of concern because it is not viewed as directly relevant to sectors other than financial services. Further, it is of concern that the decision as to whether or not a government measure qualifies for the prudential exception will now be decided by a state-to-state panel, rather than an investor-state panel, as has been stipulated in previous U.S. FTAs. This will add substantial delay to disputes that will hurt investors, particularly small and medium-sized ones.

Though TPP does not achieve the high standards set out in the U.S. Model BIT or in other U.S. trade agreements, it does provide substantial improvement in investor protection by extending the practice to five new countries, and improving it with regard to the remaining six. TPP is an important step forward for investors.

Small and Medium-Sized Enterprises

For the first time ever in a U.S. Free Trade Agreement, TPP includes a separate chapter addressing the concerns of SMEs. It recognizes the important role SMEs play in job creation and economic growth – both in the United States and abroad – and the disproportionate challenges and expenses many face when navigating international markets. These challenges include often opaque regulations, and a range of complex requirements related to technical standards, customs regulations and procedures, employment, business licensing, registration procedures, and taxation.

TPP's SME Chapter requires each Party to establish or maintain a public website that provides TPP information germane to SMEs and enables them to access current, accurate, and complete information on required laws and regulations in that Party's jurisdiction. The Parties further establish a Committee on SMEs to identify ways to help these companies take advantage of the opportunities under TPP, to collaborate on best practices, to explore opportunities for SME capacity building and program development, and to report regularly and consider recommended improvements in support to SMEs.

Beyond this Chapter, and of great importance to ITAC 10, TPP offers strong services commitments integral to SMEs' success. These include electronic payment services, e-commerce, logistics services, and express delivery services. All of these will help ensure that SME opportunities will not be diminished by high costs, poor communications, or unexpected red tape, and that SMEs will have world-class support to compete globally from the moment they enter TPP markets.

State-Owned Enterprises

ITAC 10 commends TPP's important contribution of a chapter specifically designed to govern the conduct of SOEs in the global marketplace. The chapter's overarching recognition of the commercial distortions caused by governments' preferential treatment of SOEs is important to

many U.S. services and finance companies, who face unfair competition with foreign state-owned enterprises.

The rules in this chapter build on provisions in existing FTAs and BITs and make a number of important advances that should help to address certain harmful distortions.

- The rules require SOEs to operate in accordance with commercial considerations in their purchase or sale of goods or services, and to apply most-favored nation and national treatment principles to the commercial operations of SOEs, in line with existing US agreements.
- The rules discipline the provision of non-commercial assistance to SOEs that causes adverse effects to other Parties. Again, these provisions cover not only production and sale of goods by an SOE, but also the supply of services from one TPP Party to another.
- The rules apply not only to SOEs operating in their home countries, but also to covered SOE investments in the territory of other TPP Parties and to SOEs operating in the territory of non-Parties.
- The chapter's transparency requirements could be an important means of identifying and addressing problematic SOE conduct.

At the same time, certain aspects of the chapter could weaken the usefulness of these important disciplines.

First, the chapter defines SOEs narrowly, as enterprises “principally engaged in commercial activities” and in which a government (i) directly owns more than 50 percent of the share capital; (ii) controls, through ownership interests, more than 50 percent of the voting rights; or (iii) holds the power to appoint a majority of the members of the board of directors. The limitation to majority ownership may allow governments to avoid the chapter's disciplines, while maintaining effective ownership and control over commercial enterprises.

Second, the non-commercial assistance provisions do not cover services supplied by an SOE within its own borders. Services supplied by SOEs within their own country are deemed to not cause adverse effects on their competitors.

Third, Annex 17-D to the chapter provides expansive exemptions from rules governing commercial considerations, non-discrimination, and non-commercial assistance for sub-central SOEs for all Parties. There does not appear to be any clear economic logic behind exempting SOEs from these critical disciplines simply because they are not owned by the central government. ITAC 10 believes that the monetary thresholds under Annex 17-A adequately limit application of the rules to SOEs of a certain commercial scope. The exemptions for sub-central SOEs thus become a loophole that threatens the effectiveness of the entire chapter. The Committee urges the U.S. government to limit these exemptions to the greatest extent possible in further negotiations pursuant to Annex 17-C.

Fourth, the chapter's transparency rules appear to provide TPP Parties with unlimited discretion in claiming confidential treatment for any information provided pursuant to another TPP member's request. These rules in principle should aim not only to increase transparency among governments, but also to increase transparency among the general public and the industries that must compete with SOEs in global markets. While it is important to respect confidentiality of legitimate business proprietary and national security information, the rules do not appear to allow TPP Parties to request this type of sensitive information. Rather, the rules allow TPP members to request only information relating to government ownership shares and voting rights, the identities of government officials acting as company officers or board members, the company's annual revenues, legal exemptions and immunities, and non-commercial assistance.

TPP Parties should not be able to claim confidential treatment of this information simply to avoid public scrutiny of clear violations of the chapter's disciplines, to prevent the information from being used as evidence in domestic trade remedies proceedings, or to otherwise prevent legitimate remedial action from being taken. Any request by a TPP Party for confidential treatment of SOE information should be justified by a clear need to protect proprietary information or information related to national security.

Finally, ITAC 10 notes that some TPP Parties, particularly Malaysia and Vietnam, have taken broad exceptions to Chapter 17's disciplines. As a consequence, the intended goal of addressing the distortions created by SOEs in those markets will be limited.

Overall, Chapter 17 represents a significant improvement over prior U.S. trade agreements. At the same time, additional steps may be necessary to ensure that these new disciplines are effective in practice.

Temporary Entry for Business Persons

While Chapter 12 of TPP seeks to ensure efficient visa processing and improved transparency procedures related to temporary entry application requirements, and while the eleven other TPP Parties have agreed on country-specific commitments on access for each other's business persons, TPP nationals who wish to travel to the United States to provide services can only do so through the existing U.S. visa structure.

ITAC 10 supports efforts to improve visa processing and transparency, but, as in its prior advisory reports, strongly urges the appropriate Congressional Committees to participate in the development of ways by which foreign nationals can visit the United States for short periods of time to provide services and return home. Temporary entry for business persons to provide scarce skills is an essential element of services trade and the Committee regrets that Congress has blocked this avenue.

B. Sectoral Issues

The Committee's opinions on TPP provisions related to different services sectors follow.

Accounting Services

It is widely accepted by international policy and decision makers that one of the pillars that supports a country's sustainable growth and economic development, and that attracts

international investment is the presence of transparent, credible, and comparable financial reporting conducted according to international standards. Mobility of accountancy professionals enhances financial reporting by enabling shortages of capacity and experience to be reduced.

Multinational accounting and auditing services (to the extent that they require some type of license or credential) are typically delivered through networks or associations of national firms. This structure is driven in part by requirements in most countries that licensed audit firms be owned entirely or principally by individual licensees of that country. Over and above visa requirements, restrictions on professional activities that may be undertaken by individuals not licensed in a country can restrict mobility. Of the twelve countries which are signatory to the TPP Agreement only five (Australia, Canada, Mexico, United States and New Zealand) meet the “substantial equivalency” in professional practice through Mutual Recognition Agreements (“MRA”)¹. Through the MRA, qualified professional accountants from another country can practice in the United States and other MRA countries without having to completely re-credential. Similar recognition is given to U.S. CPAs who wish to practice in MRA countries. Most of the TPP signatory countries (including the United States) have included exceptions to one or more of the national treatment, market access, local presence and senior management obligations by including NCMs such as residency, local presence and nationality requirements. Of these, only the nationality requirement cannot be effectively addressed by an MRA. The exceptions are generally in line with those in the General Agreement on Trade in Services (“GATS”). The countries that have made nationality exceptions are Brunei, Japan (limited) and the United States (North Carolina only).

Articles 10.8 (Domestic Regulation) and 10.9 (Recognition) delineate the requirements under TPP to meet the “substantial equivalency” criteria for providing cross-border professional services. These provisions appear to be acceptable.

Chapter 26, Section C sets forth anti-corruption measures to be taken by TPP Parties, including accounting and auditing measures. This Section appears to effectively serve the objectives of creating a fair and efficient market for goods and services while placing appropriate responsibilities on the various market participants with the flexibility to adapt specific provisions to each Party’s circumstances. The strengths of the provisions include:

- Requiring all Parties to ratify or accede to the United Nations Convention Against Corruption;
- Requiring legislation and regulation based on an objectives-based framework that balances the responsibilities placed on public officials, enforcement authorities, preparers and auditors;
- Appropriately recognizing that accounting and auditing standards are among the measures – not the only measures – included in a system to prevent corruption; and

¹ The NASB/AICPA International Qualifications Board (IQAB) is the link between the U.S. accounting profession and that of other General Agreement on Trade in Services (GATS) signatory countries

- Accommodating the U.S. approach to auditor reporting of certain suspected illegal acts, which is that the auditor's obligation to resign and/or report is triggered only if a company's management or board of directors fails to take timely and appropriate remedial action.

Architecture and Engineering Services

ITAC 10 believes that the goal of any trade agreement is to focus on the elimination of trade barriers and to create equal treatment for all competitors. Under these conditions, U.S. architectural and engineering firms can demonstrate their technical and creative capabilities to win contracts. U.S. firms need not only equal treatment for the present, but also consistent business rules and requirements that are reliably implemented and enforced.

Many architectural and engineering concerns are addressed in Chapter 10 (Cross-Border Trade in Services) and Annex 10A. These include most favored nation, market access, local presence, licensing, application processing and fees, residence, and similar factors that could inhibit U.S. firms from competing in various countries. While the intent to be fair is included, implementation and consistency over time are critical.

With respect to recognition of professional qualifications, licensing and registration, ITAC 10 supports the establishment of the Professional Services Working Group, and believes that the specific priority should be the development and implementation of a temporary or project-specific licensing or registration regime of architects and engineers at the first meeting of that Working Group. The Committee would encourage the early conclusion of an agreement governing such temporary licensing.

Chapter 8 (Technical Barriers to Trade) addresses technical regulations and compliance, with a focus on products rather than services. That being said, U.S. architectural and engineering firms work to high standards and requirements, due to U.S. procurement requirements which place emphasis on the qualifications and past performance, as well as reputational risk, and ethical considerations related to licensure requirements. These factors, which include strong technical standards and professional accreditation requirements, are critical to safety, operations, and long-term maintenance costs, and the overall success of infrastructure projects and should not be diminished in the context of a trade agreement. At the same time, U.S. firms are hesitant to participate in foreign markets that lack high standards, transparent procurement rules and strong ethical protections in the contract. These considerations, as well as competitors being subsidized by their governments, will affect decisions by U.S. firms to compete for certain work, and should be considerations to address in this and future trade agreements.

The NCMs for professional architectural and engineering services described in Annexes I and II of TPP do not appear to place an undue burden on U.S. entities seeking entry into TPP markets. Moreover, there appear to be improvements over the status quo. Additionally, it appears that U.S. access to TPP markets is no more challenging from an engineering registration/licensure perspective than is foreign entry into the engineering services market of any of the 50 United States.

Audiovisual Services

The U.S. audiovisual services industry is confronted by significant challenges as the marketplace for U.S. copyrighted content (including films and television programming) shifts to include

online, on-demand offerings to consumers. In addition to the need for open and non-discriminatory access to local platforms, legitimate e-commerce requires accountability within the Internet ecosystem – intellectual property rights of content creators must be respected, intermediaries that facilitate commerce must be encouraged to take reasonable steps to prevent or deter storage and transmission of infringing content, and there must be effective penalties to deter online theft. TPP has made progress in addressing these issues.

Intellectual Property Rights. For the audiovisual industry, online theft is considered a (possibly the) major trade barrier today. Thus, the benefits of TPP are tied directly to the provisions of Chapter 18 (the specificities of which are discussed in more detail in the ITAC 15 report). Chapter 18 incorporates the structure of prior FTAs, including requirements to adopt legal remedies for infringement; to maintain for Internet Service Providers (“ISPs”) a safe harbor and incentives to cooperate to deter infringement; to establish a notice/takedown/counter-notice regime; and to create a judicial procedure under which a rights holder can obtain the identity of an alleged infringer. While Chapter 18 softens or qualifies certain of the provisions in comparison to prior FTAs, and certain parties have been granted partial carve-outs for their national regimes, the Parties’ commitment to the chapter creates the foundation for expanded commercial opportunities in the TPP region.

Market Access (Non-discrimination, national treatment). With respect to national restrictions affecting the historical platforms for distribution of content – cinemas, broadcast and cable television and radio – TPP makes few changes. Existing FTA partners have largely reiterated in TPP their FTA commitments and their reservations of NCMs. It is particularly disappointing to review the extent to which broadcast and cable television remain subject to restrictions on ownership, program nationality and quantity, and the potential for broad cultural governmental support. Vietnam, with no prior FTA commitments and otherwise a promising market for audiovisual content, has locked in its existing cinema screen quotas and reserved a broad array of rights and measures to control all audiovisual and other recorded content.

However, when considering the developing online, on-demand marketplace, the TPP overview changes markedly. With some exceptions, TPP Parties have made market access commitments with respect to online services. Of particular note:

- Canada. Canada was unable to take the broad Cultural carve-out of the NAFTA. Its reservation for measures affecting Cultural Industries and designed to promote Canadian content (Annex I) explicitly excludes “measures restricting the access to on-line foreign audiovisual content.”
- Singapore. Singapore does maintain reservations related to Broadcasting Services (defined expansively as any “transmission ... via any technology ... for the reception ... of visual programme signals), including television and radio content quotas. However, Singapore also acknowledges its earlier FTA commitment to national treatment for U.S. suppliers for non-scheduled broadcasting, thus allowing non-discriminatory access for video streaming.
- Japan. Japan’s reservations respecting broadcasting note specifically that on-demand and online services are not encompassed. It reserves only the right to discriminate in the case of new services not yet technically feasible.

Progress also has been made with each of TPP Parties to avoid the application to the emerging online market of discriminatory provisions affecting cinema or television and cable broadcasting.

While TPP does not address all of the marketplace barriers affecting the U.S. audiovisual services sector in the region, its achievements in expanding access to the increasingly important online marketplace and in establishing a solid level of intellectual property protection for U.S. business are substantial.

Electronic Payment Services

The Financial Services Chapter includes for the first time a set of specific provisions related to electronic payment services (“EPS”). In Section D of Annex B, all Parties affirm their general commitment to allow EPS to be supplied on a cross-border basis into their territories from the territory of another Party, i.e. without conditions requiring such services to be provided locally.

To be sure, the EPS commitment is limited by the fact that it does not provide national treatment, nor does it allow EPS suppliers to engage in the full range of business activities that relate to electronic payments. Its scope is limited to the cross-border processing of payment transactions (including authorization, clearing, and settlement), which is further circumscribed by each TPP Party according to the categories and conditions listed in its respective definitions (found in sub-section 4 of Section D).

The most significant impact of the EPS commitment, if implemented fully and faithfully by all Parties, would be to limit the ability of TPP Parties to impose localization measures or certain other requirements that could put foreign EPS suppliers at a competitive disadvantage relative to their domestic counterparts. In this regard, it is important to note that the United States and Vietnam exchanged side letters describing the necessary conditions for development and operation of Vietnam’s proposed national payments gateway, the implementation of which will require close and consistent consultations between all government and industry stakeholders to ensure consistency with the EPS commitment and a level playing field for the growth and development of competitive and innovative payment systems in Vietnam.

Overall, the EPS commitment is an important step forward that, if implemented fully and faithfully by all TPP Parties, should provide a strong foundation for further trade liberalization including comprehensive market access and national treatment commitments for EPS in future agreements.

Energy Services

The twelve TPP countries have widely different energy profiles and energy needs. They range from some of the world’s largest producers, exporters, and refiners of hydrocarbons, to some of the most industrially advanced economies, which are heavily dependent on energy imports. They include countries that have both ample energy resources and sophisticated economies, and others that are resource-rich but under constant pressure to match their energy infrastructure with the needs of their rapidly growing economies. In all twelve countries, energy is a key element of their development and prosperity, and managing energy resources and requirements is a highly sensitive matter of both economics and national security.

Measured against this complex picture, U.S. energy services companies are well qualified to address the needs of TPP countries. The proposed TPP Agreement, on balance, will provide them with increased opportunity to do so.

The provisions in the TPP's Services chapter addressing market access, domestic regulation, and transparency provide a framework that increases certainty and opportunity for U.S. energy services firms, especially SMEs. Article 10.3 ensures that services provided by companies from TPP member countries will be treated in an equal basis with their domestic counterparts. Article 10.5 stipulates that TPP countries will not limit market access through numerical quotas, monopolies, employment caps or economic needs tests. Given the nature of energy services, these guarantees of market access are meaningful to ensuring that American companies will have equal access to markets in these important economies. Article 10.8's provisions on domestic regulation ensure that TPP countries cannot use technical standards and licensing and qualification requirements to undermine the market access openings included in the TPP Agreement. Article 10.11 requires TPP countries to respond to inquiries about its services regulations and provide notice and comment on new rules and regulations prior to implementation, both essential to the day-to-day operations of companies. SMEs in particular will benefit from all of these provisions, given their limited resources to challenge discriminatory practices on their own.

The Investment chapter provides energy services investors with substantial protections, including due process protections. These protections include a broad definition of "investment;" guarantees of prompt, adequate and effective compensation for expropriations; a ban on performance requirements; and commitments to provide national treatment, most-favored nation treatment, fair and equitable treatment, and full protection and security. The performance requirement provisions of the TPP Agreement include important new prohibitions against indigenous innovation measures, such as the government purchase, use or preferences for particular technologies, which have not been included in prior agreements, as well as other important provisions to prevent foreign localization requirements. Each of these provisions is critical to ensure that U.S. energy services providers overseas are not mistreated and that the value of their foreign investments provides benefits back to the United States.

The Government Procurement chapter includes transparent bidding procedures, non-discriminatory technical specifications, and objective review of procurement decisions. These protections are particularly important to energy services companies, since they impact the ability of U.S. companies to compete fully in a sector that is frequently dominated by government-led project development.

The Environment chapter provides opportunities for market-based solutions to environmental problems, an approach of particular interest to many energy services providers whose environmental expertise and experience with renewable and lower carbon energy resources and technologies can provide opportunities in all TPP countries.

NCMs that retain the rights of most TPP countries to keep their utility industries, or the transmission and distribution sectors of those industries, out of reach of competition are noted, but are neither surprising nor damaging to U.S. interests. In practice, they do not differ

substantially from the policies of many U.S. states, which maintain highly regulated vertically integrated electric utilities, or which have opened the generation sector, but not the transmission and distribution sectors, to competition.

Express Delivery Services

TPP's Express Delivery Services ("EDS") Annex targets barriers that prevent a level playing field for private sector express delivery providers that compete against state-owned postal service providers. The Annex includes important disciplines on cross-subsidization, which will prevent parties from using revenues derived from monopoly postal services to cross-subsidize their own or any other express delivery services. Parties commit to maintain the same level of openness as they do for express delivery services on the day of signing the agreement. For example, if the sector does not already have foreign ownership restrictions, they may not be applied in the future.

Other language in the EDS Annex prohibits abuse of a public postal operator's monopoly position and insists on independent regulation that is impartial, non-discriminatory, and transparent. The Committee expects these provisions to be influential in shaping the competitive behavior of postal administrations, especially in emerging markets where laws remain undeveloped.

The provisions of the EDS Annex are expected to place additional scrutiny on Japan Post to ensure parity with private express players. While Japan continues to reserve the right of Japan Post to provide postal services, such services are defined in their schedule as delivery of correspondence only, not including parcels. Additionally, Japan Post has committed to annually disclose the revenue and expense statement of its Express Mail Service ("EMS") consistent with standard accounting principles. Both the U.S. and Japanese governments also agree to support electronic advance data on international postal items to enhance the security of international postal supply chains and to contribute to the efficiency of customs procedures applied to postal items.

Provisions in other sections of TPP will support the ability of U.S. express delivery services providers to grow their business and provide seamless end-to-end service to their U.S. and global customers. For example, Vietnam has removed foreign equity restrictions on freight agency, warehousing, and customs clearance, while Malaysia liberalized its customs clearance services. This new access is critical in markets where ancillary but key services continue to be restricted to joint ventures with local entities.

Financial Services

Financial services are the lifeblood of global trade. Particularly since the 1994 Uruguay Round trade negotiations, the United States has worked to instill in the global trading system a body of rules for open and fair trade and investment in financial services. The Uruguay Round itself failed to achieve these goals, but its "built in agenda" required a subsequent financial services negotiation that resulted in the so-called Fifth Protocol to the GATS in 1997. Since then, progress toward establishment of widely accepted rules for financial services trade has taken place in bilateral and regional agreements, where much progress has been made.

The TPP provisions on financial services continue to build on this foundation and represent affirmative progress in extending core U.S. FTA disciplines to new markets, albeit with some notable exceptions. Additionally, TPP includes some improvements over prior FTAs, as described below. The baseline protections and improvements, coupled with the growth potential of the TPP Parties (particularly considering the low insurance penetration rates in many of them) should, overall, expand opportunities for U.S. financial services companies. Moreover, the interest of other key countries in the region in joining TPP (including Korea, Indonesia, and the Philippines) underscores the overall potential and value of the Agreement, provided that new entrants are required to adhere to a high level of ambition.

As noted previously in this report, the United States does not have existing free trade agreements with Malaysia, Brunei, New Zealand, Vietnam or Japan. Therefore, TPP represents an improvement in those markets relative to current market conditions for insurers, banks and other financial services companies. Specifically, TPP should create more competitive conditions in those countries through the standard U.S. FTA commitments. These core obligations include:

- National Treatment & Most-Favored Nation Treatment. The chapter includes the standard national treatment and most-favored nation (“MFN”) provisions, which require Parties not to discriminate against investors, financial institutions, and investments of other TPP Parties in favor of their own, or third country, investors, financial institutions or investments in like circumstances.
- Market Access. The chapter prohibits parties from adopting or maintaining various measures, such as quantitative restrictions on the number of financial institutions or the total value or number of financial services transactions, or restrictions on the type of legal entity (i.e., subsidiary or branch) through which a financial institution may supply a service.
- Cross-Border Trade. The chapter requires Parties to permit, on a national treatment basis, the sale of certain financial services across borders (e.g., from suppliers located in the United States to consumers in another TPP Party). Each TPP Party lists in an annex which particular financial services are subject to the commitment (unlike most services commitments, the cross-border financial services commitments are “positive list”). The chapter also requires Parties to permit its nationals and companies to purchase financial services from cross-border financial services suppliers of another party (i.e., consumption abroad).
- Transparency. Parties commit to promote regulatory transparency in financial services and to ensure that all measures of general application covered by the chapter are administered in a reasonable, objective, and impartial manner. The chapter also includes “soft” obligations pertaining to the development and promulgation of such regulations.
- Payments and Transfers. Parties must allow payments and transfers that relate to the cross-border supply of the financial services that are covered by the cross-border trade commitment to be made freely, without delay, and in a freely usable currency at the prevailing market rate.

- Investment Protections. Parties commit to provide U.S. investors in the financial services sector with certain additional investment protections, including adherence to a minimum standard of treatment, which requires both fair and equitable treatment and full protection and security for investments, as well commitments to compensate for damages due to civil strife, and for expropriations, including indirect expropriations.
- Senior Management and Boards of Directors. Parties may not impose nationality requirements on senior management or key personnel of financial institutions of another Party, and may not require more than a minority of boards of directors be residents or local nationals.
- New Financial Services. Parties committed to permitting financial institutions to supply any new financial services in their territories if they can do so without adopting a new law or modifying an existing law.

In Canada, a "widely held" requirement exists for banks with equity of over \$8 billion and demutualized insurance companies with equity over \$5 billion at the time of demutualization. Under the rule, no owner can hold more than 20 percent of the voting shares or 30 percent of the non-voting shares of such financial institutions. We understand that Canada initially proposed an NCM that would permit it to maintain the rules of the "widely held" requirement for TPP Parties, but dropped it after negotiations with USTR.

The U.S. government also successfully introduced new commitments in TPP not included in any previous trade agreements, which apply to all TPP Parties. These new commitments should be included in future trade agreements, including those currently under negotiation such as the Transatlantic Trade and Investment Partnership ("T-TIP") and the Trade in Services Agreement ("TiSA").

One such new set of commitments limits the anti-competitive advantages enjoyed by state-owned post offices that underwrite insurance, as well as broader commitments related to other types of state-owned enterprises. Specifically, the postal commitments state that "No Party shall adopt or maintain a measure that creates conditions of competition that are more favourable to a postal insurance entity with respect to the supply of insurance services [...] compared to a private supplier of like insurance services in the market." It also includes specific commitments not to impose "more onerous conditions" on licenses for private insurers or give access to distribution channels that are more favorable to postal insurance entities. The Postal Insurance Entities commitments also require that a TPP Party "apply the same regulations and enforcement activities" to postal insurance entities, and require that they release public financial statements annually. However, for the commitments to apply to a postal insurance entity, it must account for at least 10% of total life or non-life annual premiums.

These provisions will help level the playing field for U.S. insurers with Japan Post Insurance ("JPI"), which is the fourth largest insurer in the world in net premiums and the largest in the world in regard to non-banking assets. JPI has grown due to historical preferences given to it by its owner, the Japanese government, including preferential access to the postal distribution network, cross-subsidization across the Japan Post Group, and for many years having a different

regulator than other insurance companies. In addition to the commitments on postal insurance entities in the text of TPP, the United States and Japan negotiated specific commitments on JPI in a side letter that reflect the general commitments on postal insurance entities in the TPP text.

Additionally, the U.S. government expanded beyond previous trade agreements the availability of investor-state dispute settlement procedures for the financial services sector to include violations of commitments on the minimum standard of treatment (“MST”) and armed conflict and civil strife (core protections discussed above). This expansion helps bring U.S. FTA policy into closer alignment with the approach in U.S. BITs and the U.S. Model BIT, where ISDS is available for such claims in the financial services sector.²

While this step to align U.S. FTA and BIT policy is welcome, the Committee notes that inconsistencies remain. Specifically, unlike the approach in the U.S. Model BIT, TPP does not give financial services companies recourse to ISDS for violations of national treatment or the MFN obligation. The absence of the ability to adjudicate such claims under ISDS leaves financial services providers without one effective remedy for discriminatory government action, i.e., no monetary award to make the investor “whole.” The Committee also notes that the TPP Financial Services Chapter includes a new, additional procedural “filter” in ISDS cases where a responding Party invokes a defense under Article 11.11 (the exceptions provision, which includes the prudential carve-out). In more recent FTAs and BITs, if the responding Party and the claimant Party could not jointly agree on whether the exception applied, the ISDS panel would decide the issue. Now, under TPP, if the Parties cannot agree, the matter will be decided in a new panel convened under state-to-state dispute settlement procedures. This additional mechanism will extend the already lengthy time frame for resolution of an ISDS case. Investor-state dispute settlement continues to be applicable to violations of commitments on expropriation, including indirect expropriations.

While the Committee commends the U.S. government’s efforts in forging this landmark Agreement with important regional trading partners, it falls short in some important respects for financial services, including: (1) inadequate protections against data and server localization requirements; (2) significant exceptions to national treatment by allowing investment screens; and (3) NCMs in the financial services sectors in TPP markets not already covered by a U.S. FTA, as well as limited new market access in TPP markets where U.S. FTAs are already in force. Additional details are below:

- Data Flows and Forced Localization. The Committee notes that while TPP includes a provision to ensure financial institutions can transfer data for processing (similar to what was included in the WTO’s 1997 Financial Services Understanding), the provision falls short with respect to prohibiting requirements for companies to localize servers and data storage. While the E-Commerce Chapter includes a new provision that prohibits such requirements for other industry sectors, it specifically exempts providers of financial services from its scope. Instead, the TPP Financial Services Chapter provision largely tracks the US-Korea Free Trade Agreement (“KORUS”) text, which has not afforded the degree of protection against restrictions on cross-border data flows and data and server localization requirements

² Brunei, Chile, Peru, and Mexico were granted lengthy transition periods (3 years for all except Mexico, which has 7 years) before such an ISDS claim may be brought.

that U.S. financial services companies expected. The outcome on this issue in TPP puts U.S. financial services companies at a competitive disadvantage relative to their local competitors in markets that impose such requirements. This also appears to be an unnecessary outcome, because the Chapter's exceptions, such as the prudential exception, should have provided sufficient flexibility to mitigate any genuine regulatory concerns. There are other differences in the approach to data flows/localization prohibitions between the two Chapters as well. In future agreements, the Committee strongly urges the U.S. government to ensure that financial services companies benefit from the same robust protections against digital trade barriers as non-financial services companies, as directed in the House and Senate reports on Trade Promotion Authority.³

- Investment Screens. The Committee also notes a number of countries retained investment screens (i.e., Australia, Canada, Mexico, Malaysia and New Zealand), most of which are not specific to the financial services sector. In most instances, U.S. negotiators were successful in mitigating the potential impact of these screens. Specifically, with Canada, Mexico, and New Zealand, U.S. negotiators successfully increased triggering thresholds for application of the screens (notably, Canada's threshold was significantly increased in TPP over the current NAFTA threshold). With respect to Australia, U.S. negotiators left in force commitments under the U.S.-Australia FTA that carefully define the operation of the investment review mechanism, and that clarify that Australia's policy (past and present) is not to use the screen in a manner that restricts investment or discriminates against foreign investors. In contrast to these situations, however, Malaysia was permitted to retain a non-prudential, highly subjective, facially discriminatory screen specific to the financial services sector. This screen will impact both new investments, as well as acquisitions, as it applies to any licensing or approval decisions required for a financial services company. Steps should be taken to both address the specific issue and clarify that it will not create a precedent for future agreements.
- NCMs Affecting Operation and Form of Establishment. Eliminating restrictions on the form of commercial presence and providing broad obligations for national treatment remain fundamental objectives of trade negotiations. Unfortunately, TPP includes exemptions that permit nearly all parties to restrict the forms of commercial presence by foreign-owned entities and stipulate certain advantages in treating local companies. Such exemptions include, in addition to investment screens, foreign ownership limitations and restrictions on the scope of operation when incorporated in a certain form (Canada, Vietnam); quantitative restrictions on the number of branches, operational requirements or asset requirements (Brunei, Malaysia, Singapore, Vietnam); and subsidies and other advantages for local entities (Brunei, Malaysia, Mexico, New Zealand and Singapore). The Committee also notes that some existing FTA partners, notably Singapore and Chile, have not provided significantly improved offers on commercial presence and scope of operation, and instead resubmitted many commitments from their existing FTAs, in line with the low quality offers by some of

³ See e.g., H. Rept. 114-100 Report, Bipartisan Congressional Trade Priorities and Accountability Act of 2015. 47, stating that negotiators should "seek provisions in trade agreements to ensure that governments refrain from imposing restrictions on cross-border data flows or requirements to store and process data locally, which are detrimental to all sectors of the economy. The Committee expects U.S. negotiators to pursue provisions that afford equal protection to all sectors, including financial services."

the other TPP Parties. Finally, with respect to reinsurance, the Committee notes a number of countries maintained restrictions, including no cross-border commitment on reinsurance (Malaysia), mandatory local cessations and right of local first refusal prior to cessations to locally incorporated foreign insurers (Malaysia), and limits on cessations to foreign reinsurers (Chile).

- Residency and Citizenship Requirements. U.S. trade agreements as well as BITs include provisions to eliminate restrictions on companies' ability to, without regard to nationality, hire qualified personnel; serve on the boards of directors; or perform managerial and other operational functions. Companies' ability to deploy essential, well-qualified personnel is important to U.S. companies' global strategies. In some developing markets, like Brunei, the pool of qualified, licensed financial experts is understandably limited. Therefore, the requirement that insurance agents must be local citizens or residents, or that brokers should be incorporated in Brunei, can be costly and disruptive to local consumers of insurance products. Residency and citizenship exceptions (e.g., Canada, Chile, Malaysia, Mexico, Singapore) also appear to contain arbitrary quantitative requirements for specified numbers of local citizens and/or residents on boards or in managerial positions.

The Committee recommends that future FTA negotiations apply the strict WTO principle of progressive liberalization and use the existing commitments as a starting point for commercially valuable market access improvements. If new countries express interest in acceding to TPP, their offers must improve on the existing TPP provisions and not replicate the barriers described above.

Furthermore, the Committee recommends that where issues cannot be addressed prior to signing of TPP or entry into force, the United States utilize the Committee on Financial Services to address those areas. Due to its broad jurisdiction, the Financial Services Committee can serve as a forum to further liberalize remaining barriers.

Health Care Services

TPP clearly underscores health care's role as an essential human service. Most, if not all, TPP Parties have a goal of broadly expanding access to health care, and TPP protects this goal. To its credit, TPP states in its Preamble that the Agreement recognizes the "inherent right (of the Parties) to adopt, maintain or modify health care systems." It goes on to protect the Parties' right to "set legislative priorities, safeguard the public welfare, and protect legitimate public welfare objectives, such as public health." ITAC 10 recognizes the value of these TPP goals.

However, TPP does not seem to fully appreciate health care as it may be practiced in the next decade, and does not seem to fully lay a foundation for health care services as a contributor to global economic growth and innovation.

For instance, as health care moves toward a more seamless global service, with opportunities for use of telemedicine to extend access to skilled medical care across borders, TPP is mostly silent on issues such as licensing, residency requirements and other barriers. Annex I contains many exclusions as NCMs, such as Vietnam's reservation of the right to adopt any measure regarding residential health services other than hospitals, and other human health services. Mexico

maintains a requirement than only Mexican nationals licensed as physicians may provide in-house medical services in Mexican enterprises. Singapore's NCMs in Annex 1 reserve the right to limit the supply of health professionals, and to impose any measure with respect to regulating health care.

While TTP encourages the formation of committees to establish mutual recognition agreements in law, engineering, accounting and architecture, it does not include medicine and nursing.

TPP is mostly silent on issues such as private development of hospitals by foreign investors. When the subject is addressed, it is as an NCM to restrict foreign-owned hospitals.

However, within the overarching provisions there are articles that may have a benefit to the health care services sector. For instance, the provisions on data flow generally prevent requirements to keep data onshore by unjustifiably restricting the flow of data. Allowing cloud-based data may expand the sharing of health care data among providers in TPP nations. This is important for the continuum of care as patients seek cross-border health care. It also may assist in the development of new personal health applications and technology that facilitate remote monitoring of patients across borders. Further, the exchange of data on outcomes may lead to global improvements in medical quality.

Other provisions remove restrictions for consulting, such as requirements to have a local office, which impact health care consultants, hospital management consultants and public health consultants. Generally, localization requirements should be strongly discouraged across the health care services spectrum to avoid restraints on free access to an increasingly global activity. TPP provisions also require Parties to allow transfers and payments that relate to the cross-border supply of services to be made freely, without delay, and in a freely usable currency – a provision that will ease the ability of patients to pay for medical care within the TPP nations.

Legal Services

Chapter 10 of TPP provides some new market access opportunities for trade in legal services, which could help U.S. lawyers and law firms to better serve clients in other TPP countries. TPP also provides greater transparency in this area and encourages the regulatory bodies in TPP countries to work together to remove additional barriers to the practice of law. ITAC 10 supports these developments, which are significant. At the same time, the NCMs taken by all TPP countries appear to limit substantial new market opening for the legal services sector.

Some of the most important obligations that are relevant to the supply of legal services include:

- **National Treatment & Most-Favored Nation Treatment.** Each Party is required to provide services and service providers of another Party treatment no less favorable than that provided to its own services and service providers in like circumstances or to services and service providers of any other Party or non-Party in like circumstances.
- **Market Access.** Parties are prohibited from adopting or maintaining measures that restrict or require the types of legal entities through which a service supplier may supply a service or that impose limitations on the volume or value of services or service providers.

- Local Presence. Parties are prohibited from requiring a service supplier of another Party to establish or maintain an office or enterprise in or be a resident in its territory as a condition of the cross-border supply of services.
- NCMs. Each Party has identified as exempt at least some measures that relate to the provision of legal services. These restrictions are briefly discussed in Appendix I of this report. The measures identified by New Zealand, Peru, and Singapore appear to be relatively narrow, while Brunei, Chile, Malaysia, and Vietnam exempted much more restrictive measures. Nearly all countries adopted an NCM allowing them to give more favorable treatment to legal service suppliers under a bilateral or multilateral international agreement currently in force or signed by that country. A majority of countries, including Australia, Canada, Mexico, and the United States, included umbrella exemptions for all NCMs that are consistent with the country's obligations under the GATS. Brunei, Chile, Malaysia, Peru, and Singapore also specifically identified activities and/or sectors related to the provision of legal services as areas in which NCMs may be adopted.

The scope of these NCMs is likely to significantly limit the market opening effect of this chapter. Notably, many TPP Parties (such as Singapore) still regulate lawyers and/or law firms based on nationality. Thus, many TPP countries maintain measures restricting the provision of legal services that are inconsistent with the core obligations of MFN and national treatment.

- Domestic Regulations. Parties must ensure that all measures affecting trade in services are administered in a reasonable, objective, and impartial manner. Measures regulating the supply of services must be based on objective and transparent criteria and (for licensing procedures) not a restriction on the supply of services.
- Recognition. Parties may recognize the education or experience obtained, requirements met, or licenses or certifications granted in the territory of another Party or non-Party.
- Payments and Transfers. Parties must allow transfers and payments that relate to the cross-border supply of services to be made freely, without delay, and in a freely usable currency at the prevailing market rate.
- Professional Services. Parties are directed to encourage their relevant bodies to establish a dialogue with the relevant bodies of other Parties with a view to recognizing professional qualifications, licensing, or registration and to take into account agreements that relate to professional services in developing agreements on recognition. Parties are also directed to establish a Professional Services Working Group to facilitate these activities.
- Foreign Lawyers. Parties that regulate or seek to regulate foreign lawyers and transnational legal practice are also directed to encourage the relevant bodies to consider: (1) how foreign lawyers may practice foreign law based on their right to practice law in their home jurisdiction; (2) how foreign lawyers may prepare for and appear in commercial arbitration, conciliation, and mediation proceedings; (3) how local ethical, conduct, and disciplinary

standards are applied to foreign lawyers; (4) alternatives for minimum residency requirements for foreign lawyers; (5) how the provision of transnational legal services on a temporary fly-in, fly-out basis and/or through the use of web-based or telecommunications technology or by establishing a commercial presence; (5) foreign and domestic lawyers may work together in the provision of legal services; and (6) whether a foreign law firm may use the firm name of its choice.

Appendix 10A also may have a significant impact by requiring countries that regulate foreign lawyers (which includes the United States and most TPP members) “to encourage the relevant bodies” to consider a list of specified regulatory issues, many of which are similar to the issues addressed in the American Bar Association’s model policies on foreign lawyers. Appendix 10A also requires the Professional Services Working Group to file an annual report.

The provision of legal services may also be affected by Chapter 12, which encompasses measures relating to the temporary entry of a business person of a Party into the territory of another Party. Annex 12-A lays out the commitments the Parties undertake with regard to the temporary entry of business persons and the conditions and limitations for entry and temporary stay. Australia, Brunei, Chile, Mexico, New Zealand, Singapore, and Vietnam identify specific conditions and limitations for entry relating to business visitors, professionals, contractual service providers, and/or intra-corporate transferees, but do not otherwise identify conditions or limitations specific to the provision of legal services.⁴ Canada, Japan, and Peru do identify certain conditions and/or limitations with respect to the provision of legal services. Annex 12-A for Malaysia does not identify conditions or limitations for the provision of legal services and legal services are excluded from Malaysia’s allowance for Intra-Corporate Transferees. However, Annex I, which identifies exempt NCMs, explains that foreign lawyers providing legal services in Malaysia on a “fly-in and fly-out” basis are subject to the provisions under section 37(2B)(b) of the Legal Profession Act 1976. The United States did not include a schedule of commitments or specify any restrictions in this area.

Finally, because many U.S. lawyers serve as international arbitrators, the provisions of Chapter 28 (Dispute Resolution) and Chapter 27 (Administration and Institutional Provisions) may be important. In Chapter 28, the Parties establish detailed rules for dispute consultations, the establishment and composition of arbitral panels, and the rules of procedure for those panels. In Chapter 27, the parties have agreed to develop a code of conduct for the panelists, i.e. those acting as arbitrators. The Parties will establish a Trans-Pacific Partnership Commission, which will establish Model Rules of Procedure for Arbitral Tribunals. Because of the number of TPP Parties and the scope of its obligations, the dispute resolution processes of TPP may be more widely used than those of other U.S. free trade agreements.

Maritime Services

The TPP Agreement does not include provisions that will allow the parties to participate in certain maritime transportation services, including specifically those in the United States. The

⁴ New Zealand specifically identifies legal services as one of the types of services falling under the provision for independent professionals. Vietnam specifically states that the entry of contractual services suppliers is allowed for legal services.

United States, like the nations of Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam, have made an explicit reservation of their maritime transportation services to TPP.

The United States made specific reservations of its cabotage trades – cargo, towing, passenger, fishing, and dredging – to the vessels and nationals of the United States. Similar reservations were made by Australia, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, and Vietnam for cabotage in their respective countries. For the United States, this is consistent with the longstanding position of the U.S. Trade Representative.

Trade Promotion Services

Trade promotion is intrinsically connected to the larger themes and incentives of the consistent and agreed upon rules which are stated throughout the TPP Agreement. The overall goal of TPP is to liberalize trade which would by extension expand the growth of the U.S. economy and those of its trading partners by eliminating current tariffs and non-tariff barriers. The resulting free transfer of capital will encourage companies to further engage and expand into new markets. TPP will provide greater opportunity for trade promotion which will lead to creating and retaining jobs. It will provide new opportunities for firms to actively take advantage of the many state programs and federal agency grants and assistance programs included under the U.S. Trade Promotion Coordinating Committee, which will further attract a wide variety of U.S. firms across a multitude of sectors.

With greater trade liberalization and transparency in place, promoting inward and foreign direct investment as well as the importation and exportation of goods and services would be more effective as it would be simplified. Businesses, especially SMEs, do not have the time or resources to become policy experts or read the fine print of trade agreements to expand abroad, nor can they waste precious resources attempting to gain access to a new market only to encounter an unforeseen impediment. TPP would demonstrate a step towards a free trade zone of the Pacific, which would lend itself to the promotion of trade in the region.

The SME chapter will resonate with and provide additional opportunities and incentives for SMEs to participate and engage in/with trade missions, trade shows, freight forwarders, trade services, e-payments and e-commerce, consulting services and facilitation of overall trade creating additional opportunities for U.S. firms.

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IV. Membership of the Committee

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Appendix I

Legal Services Non-Conforming Measures

NCMs Identified in Annex I and Activities and Sectors Identified in Annex II Relating to the Provision of Legal Services

Note – GATS NCM = A country may adopt any non-conforming services measure that is consistent with the country's GATS commitments.

FTA NCM = A country may adopt any non-conforming measure that accords more favorable treatment to service suppliers under a bilateral or multilateral international agreement currently in force or signed by that country.

Australia: Restrictions on all existing NCMs at the regional level of government for all sectors. Patent attorney restrictions. + GATS NCM + FTA NCM

Brunei: Foreign nationals and service suppliers may not provide legal services in Brunei Darussalam except in relation to international or home country law and may not establish an enterprise for the provision of legal services in Brunei Darussalam in relation to international or home country law except through a partnership with at least one Bruneian advocate and solicitor. Any NCM relating to the supply of legal services in Brunei Darussalam, except in relation to international or home country law, may be adopted. + GATS NCM

Canada: Restrictions on all existing NCMs of all provinces and territories for all sectors. Patent and trademark agent restrictions, + GATS NCM + FTA NCM

Chile: Only Chilean and foreign nationals with a residence in Chile, who have completed the totality of their legal studies in the country, are authorized to practice as lawyers, and only lawyers qualified to practice law are authorized to plead a case in Chilean courts, to file the first legal action or claim of each party, and to draw up certain documents; however, these restriction do not apply to foreign legal consultants who practice or advise on international law or on another Party's law. Restrictions on justice ancillaries, public defenders, public notaries, custodians, archivists, public defenders, and arbitrators at law, process servers, and superior court attorneys. Any NCMs related to receivers in bankruptcy may be permitted. + FTA NCM

Japan: Qualification and office establishment restrictions; A natural person who intends to supply legal advisory services concerning foreign laws is required to be qualified as a registered foreign lawyer under the laws and regulations of Japan, to establish an office within the district of the local bar association to which the natural person belongs, and to stay in Japan for not less than 180 days per year. Restrictions on patent practice and on judicial scrivener services. + FTA NCM

Malaysia: Restrictions on patent and trademark practice. Restrictions on practice of Malaysian law restrictions on Qualified Foreign Law Firms (QFLF) or International Partnerships (IP) with Malaysian law firms. Foreign lawyers providing legal services in Malaysia on a "fly-in and fly-out" basis shall be subject to the provisions under section 37(2B)(b) of the Legal Profession Act

1976. Foreign law firms and foreign lawyers are not permitted to practice in Sabah and Sarawak. Any NCMs relating to mediation and Shari'a law may be adopted.

Mexico: All existing NCMs of all states of Mexico. Restrictions on majority ownership of an enterprise established in Mexico that provides legal services. Restrictions on professional practice by foreigners. Except as provided, only lawyers licensed in Mexico may have an ownership interest in a law firm established in the territory of Mexico. A law firm established by partnership of lawyers licensed to practice in another Party and lawyers licensed to practice in Mexico may hire lawyers licensed in Mexico as employees. This reservation does not apply to the provision, on a temporary fly-in, fly-out basis and/or through the use of web based and/or telecommunications technology, of legal advisory services in foreign law and international law and, in relation to foreign and international law only, legal arbitration and conciliation/mediation services by foreign lawyers. + FTA NCM

New Zealand: Restrictions on patent attorneys. + GATS NCM + FTA NCM

Peru: All employers in Peru must give preferential treatment to nationals when hiring employees. Restrictions on foreign natural persons who are service providers and who are employed by a service-providing enterprise Restrictions on notary services + FTA NCM

Singapore: Restrictions on patent practice and on practice of Singapore law. Any NCM relating to the supply of services, affecting the recognition of educational and professional qualifications for the purposes of such as admission, or affecting the supply of legal services in the practice of Singapore law may be adopted. + FTA NCM

United States: All existing NCMs of all states of the United States, the District of Columbia, and Puerto Rico. Restrictions relating to patent practice. + GATS NCM + FTA NCM

Vietnam: NCMs relating to foreign lawyers organizations. Foreign lawyers practicing laws in Vietnam are not permitted to advise on Vietnamese laws unless they have graduated from a Vietnamese law college and satisfy requirements applied to like Vietnamese lawyers and are not permitted to defend or represent clients before the courts of Vietnam. Any NCMs on notary, bankruptcy, and other legal services. + GATS NCM + FTA NCM