

Chapter 6

Assessment of Cross-cutting and Procedural Provisions and Other Provisions Addressing Rules and Nontariff Measures

This chapter assesses the likely impact on the U.S. economy of the regulatory and administrative chapters of the TPP Agreement. For each TPP chapter, the report provides a qualitative assessment of the impact of that chapter on the U.S. economy, a summary of the provisions of the chapter, and a summary of the views of interested parties most directly relevant to the chapter. In most cases, the assessment is based on the views of interested parties as expressed in testimony at the Commission hearing, written submissions provided for the record, public reports of trade advisory committees working with the U.S. Trade Representative (USTR), and private interviews with Commission staff. Where available, the assessments take into account publicly available outside estimates of the effects of these TPP chapters. In the case of intellectual property rights, the Commission presents the results of an econometric model that estimates the relationship between a country's patent protections and its payments to the United States for the use of intellectual property. The provisions of the Investment chapter are described here as well; in addition, a quantified analysis of TPP investment provisions serves as an input into the computable general equilibrium model that generates Commission estimates of the economy-wide effects of the TPP Agreement.⁹⁰⁷

The TPP provisions addressed here comprise the 23 TPP chapters that do not specifically apply to the agriculture, nonagricultural goods, or services sectors (table 6.1). These provisions are cross-cutting in that, for the most part, they apply to more than one sector. These chapters address customs administration and trade facilitation, trade remedies, technical barriers to trade, sanitary and phytosanitary (SPS) measures, investment, government procurement, competition, intellectual property rights, labor, environment, dispute settlement, transparency and anticorruption, exceptions and general provisions, and the agreement's initial and final provisions. In addition, several chapters covering topics with broad application to many industries that have not been included in previous U.S. free trade agreements (FTAs) are addressed here, including temporary entry for business persons, state-owned enterprises,

⁹⁰⁷ See chapter 2 and appendix G of this report for additional information on the quantification of investment provisions.

cooperation and capacity building, competitiveness and business facilitation, development, small and medium-sized enterprises (SMEs), and regulatory coherence.

Table 6.1: TPP chapters described in chapter 6 of the report

TPP chapter number	TPP chapter title
1	Initial Provisions
5	Customs Administration and Trade Facilitation
6	Trade Remedies
7	Sanitary and Phytosanitary Measures
8	Technical Barriers to Trade
9	Investment
12	Temporary Entry for Business Persons
15	Government Procurement
16	Competition
17	State-Owned Enterprises
18	Intellectual Property
19	Labour
20	Environment
21	Cooperation and Capacity Building
22	Competitiveness and Business Facilitation
23	Development
24	Small and Medium-Sized Enterprises
25	Regulatory Coherence
26	Transparency and Anti-Corruption
27	Administrative and Institutional Provisions
28	Dispute Settlement
29	Exceptions and General Provisions
30	Final Provisions

Source: USTR, TPP full text.

Note: TPP Chapter 2 (National Treatment and Market Access) is covered in chapters 3 and 4 of this report. TPP Chapters 3 (Rules of Origin) and 4 (Textiles and Apparel) are covered in chapter 4 of this report. TPP Chapters 10 (Cross-Border Trade in Services), 11 (Financial Services), 13 (Telecommunications), and 14 (Electronic Commerce) are covered in chapter 5 of this report.

Customs Administration and Trade Facilitation

Assessment

Chapter 5 of the TPP Agreement focuses on Customs Administration and Trade Facilitation. The chapter addresses various components of the Customs clearance process, including publication of laws, regulations and procedures; release of goods; advance rulings; express shipments; penalties; and customs cooperation. According to USTR, TPP is the first U.S. trade agreement to include disciplines on the imposition of customs penalties, and the chapter also expands the customs cooperation commitments in previous trade agreements by committing all TPP

countries to cooperate on preventing duty evasion, smuggling, and other customs offenses.⁹⁰⁸ The provisions of the chapter would be expected to have a positive impact on the U.S. economy by reducing trading costs for U.S. businesses in many industries.

Summary of Provisions

The TPP Agreement would require that each party to the agreement ensure that its customs procedures are applied in a manner that is predictable, consistent, and transparent (Article 5.1). Parties would be expected to cooperate regarding significant customs issues; provide advanced notice of significant changes in rules and regulations that govern importations or exportations and share information, as needed or appropriate, with other parties on a number of issues. These include assessing the value of goods for customs purposes; import and export restrictions; how parties will go about initiating claims if a customs offense is suspected; and how offenses will ultimately be investigated. If a party has a reasonable suspicion of unlawful activity related to its laws or regulations governing imports, it would be able to ask another party to provide specific confidential information that is normally collected in connection with the importation of goods (Article 5.2).

At the written request of the importer or exporter of a shipment, TPP countries would be required to give advance rulings on the shipment before it is imported. These rulings would apply to tariff classification, customs valuation, country of origin, or other matters that involved parties may see as pertinent. These rulings must be issued no later than 150 days after the request is received, provided that all documentation needed to make a ruling has been received. The ruling would be required to remain in effect for a minimum of 3 years, provided that the law, facts, and circumstances on which the ruling is based remained unchanged (Article 5.3).

The Customs Administration and Trade Facilitation chapter would require TPP parties to endeavor to use international standards in their procedures for the release of goods and to implement other World Customs Organization standards. It would also require them to make electronic systems accessible to customs users and to employ automated systems for risk analysis and targeting (Article 5.6). The chapter also requires parties to expedite customs treatment of express shipments by streamlining the documentation required to move freight through the importation and customs clearance process (Article 5.7). Streamlining this process would help boost the competitiveness of U.S. businesses, especially U.S. SMEs, as discussed further in the section on Express Delivery Services in chapter 5.

⁹⁰⁸ USTR, Trans-Pacific Partnership Agreement, Chapter 5, Chapter Summary, downloaded from USTR website on April 6, 2016.

Article 5.8 sets out rules regarding the imposition of a penalty by a party's customs administration for a breach of its customs laws, regulations or procedural requirements. Existing U.S. FTAs with Peru, Chile, and Australia make a general mention of penalties as they pertain to customs and trade facilitation. Each of these agreements states that parties should adopt and maintain rules and regulations that allow them to impose civil, administrative, and, if necessary, criminal sanctions in response to violations of customs laws and regulations. TPP, however, goes into much greater depth on this point. Under TPP, all parties would be required to adopt and enforce an impartial protocol for imposing penalties should a breach of established customs laws and regulations occur. Should a penalty be issued by a party's customs administration, it is the issuer's responsibility to give the penalty recipient specific details, in writing, as to why the penalty is being issued. The chapter further states that the parties are responsible for adhering to strict, preset timelines in imposing penalties for breaches of customs law. It specifies that the penalty imposed should be "commensurate with the degree and severity of the breach" and that no part of the penalties that are assessed or collected may be used to remunerate a government official (Article 5.8).⁹⁰⁹

Article 5.10 requires each party to adopt or maintain simplified customs procedures for the efficient release of goods in order to facilitate trade between the parties, and provide for the release of goods within a period no longer than that required to ensure compliance with its customs laws and, to the extent possible, within 48 hours of the arrival of the goods. This Article also requires each party to adopt or maintain procedures that provide for the electronic submission and processing of customs information in advance of the arrival of the goods in order to expedite the release of goods from customs control upon arrival; allow goods to be released at the point of arrival without temporary transfer to warehouses or other facilities; and allow an importer to obtain the release of goods prior to the final determination of customs duties, taxes and fees by the importing Party's customs administration when these are not determined prior to or promptly upon arrival, provided that certain other conditions are met. This release provision is similar to provisions in existing U.S. FTAs, with the exception of the Australia and Singapore FTAs, which require a security mechanism to be put in place before the shipment is released.

Article 5.11 requires that each party make its customs laws, regulations, and general administrative procedures and guidelines publicly available, including online, and to the extent possible, in the English language. It also requires each party to appoint a designated point of contact whose primary responsibility would be to field and respond to questions from businesses and the general public (Article 5.11). These requirements are identical to

⁹⁰⁹ The TPP is the first U.S. trade agreement to include disciplines on the imposition of customs penalties. USTR, "TPP Made in America: Chapter 5," November 5, 2015.

requirements already in place under existing U.S. FTAs with Australia, Chile, Peru, and Singapore.

Summary of Views of Interested Parties

At the Commission hearing, several witnesses said that they expected TPP to improve and simplify customs procedures, partly by helping to standardize those procedures across countries.⁹¹⁰ According to the report of the International Trade Advisory Committee on Customs Matters and Trade Facilitation (ITAC-14), provisions put in place that allow the private sector to conduct administrative review of advance rulings and that require parties to make their rulings available electronically (via Internet) will not only heighten transparency, but will also provide an effective means of pinpointing inaccuracies and inconsistencies in ruling determinations.⁹¹¹ In contrast, in a written submission to the Commission, the Tile Council of North America said that TPP's customs rules would not be effective in combating transshipment and mislabeling problems faced by the tile industry in TPP countries, because the language of the Customs and Trade Facilitation chapter permits customs authorities too much discretion in enforcing customs rules.⁹¹²

Trade Remedies

Assessment

The Trade Remedies chapter of TPP is divided into two sections. Section A authorizes a TPP party to apply a safeguard measure against imports from one or more other TPP parties during a transitional period when certain conditions are met, and Section B sets out five nonbinding provisions designed to promote transparency and due process in countervailing duty and antidumping duty proceedings. The provisions in Section A should not have a direct economic impact on the United States except to the extent that another party imposes a safeguard measure on imports of U.S. goods during the transitional period, or the United States imposes a measure on imports from a TPP party. The provisions in Section B will likely promote greater transparency and due process in countervailing duty and antidumping duty investigations involving TPP parties.

⁹¹⁰ USITC, hearing transcript, January 14, 2016, 519 (testimony of Devi Keller, Semiconductor Industry Association); January 14, 2016, 535 (testimony of Jay Steinmetz, Barcoding Inc.); and January 15, 2016, 758 (testimony of Maryalice Panarello St Clair, Halosil Inc.) For additional information on the de minimis rules and other sections of TPP chapter 5, see the discussion of express delivery services in chapter 5 of this report.

⁹¹¹ ITAC-14, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 6.

⁹¹² Tile Council of North America, written submission to the USITC, January 22, 2016, 3-4.

Summary of Transitional Safeguard Provisions

Like other FTAs that the United States has entered into since 1988, the TPP Agreement includes a transitional safeguard provision that allows a party to the agreement to restore a duty or suspend further reductions in a duty during a transition period if, as result of a reduction in duties under the agreement, the party determines that increased imports are causing or threatening to cause serious injury to a domestic industry.

The eligibility test is met when, as a result of the reduction or elimination of a customs duty in accordance with the Agreement, an originating good from one party to the Agreement, or from two or more parties collectively, is being imported into the party's territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry (Article 6.3.1).

A remedy may be applied only during the "transition period" for a good. This is defined to mean the 3-year period beginning on the date of entry into force (EIF) of the TPP Agreement, except where the tariff on the good is eliminated over a longer period of time, in which case the transition period is the period of the staged tariff elimination for that good (Article 6.1). The remedy may only be in the form of a duty, with any increase limited to the lesser of the current applied most-favored-nation (MFN) rate of duty or the applied MFN rate preceding EIF of the agreement (Article 6.3.2). The duration of any remedy is limited to 2 years, with a possible extension of up to 1 year if the party applying the measure determines that the measure continues to be necessary to prevent or remedy serious injury and facilitate adjustment. A party may not apply a transitional safeguard measure on a good more than once (Article 6.4).

The chapter incorporates by reference certain provisions of the World Trade Organization (WTO) Agreement on Safeguards. These include provisions on the conduct of investigations and hearings, confidential business information, economic factors to be considered in making injury determinations, and the publication of a report setting out findings and reasoned conclusions reached on all pertinent issues of fact and law (Article 6.5). The chapter also defines terms such as "domestic industry," "serious injury," and "threat of serious injury" in the same way as in the WTO Safeguards Agreement (Article 6.1).

The chapter requires that each party promptly notify the other parties when launching an investigation, making an injury finding, deciding to apply or extend a measure, or deciding to modify a measure, and it identifies the types of information that must be included in the notification (Article 6.6). A party applying a measure is expected to provide mutually agreeable compensation to each party against whose good the measure is applied and provide opportunity for consultations in that regard (Article 6.7). Safeguard actions taken under the chapter are subject to the dispute settlement provisions of the TPP Agreement. The chapter

expressly states that nothing in the TPP Agreement affects the rights and obligations of the parties under Article XIX of the General Agreement on Tariffs and Trade (GATT) 1994 and the WTO Agreement on Safeguards (the global safeguards provisions) (Article 6.2.1)—with one exception. The exception is that a party initiating a safeguard process must provide other parties with an electronic copy of the notification given to the WTO Committee on Safeguards under Article 12.1(a) of the Safeguards Agreement (Article 6.2.2–3).

Summary of Views of Interested Parties

The parties participating in the Commission’s investigation did not specifically address the safeguard provisions in the trade remedies chapter in their written statements and hearing presentations. Other interested parties addressed the TPP transitional safeguard provision only to a limited extent. The Industry Trade Advisory Committee (ITAC) on Steel noted the limited remedy options available under the provision, stating that “Because U.S. tariffs on steel are already at zero, the safeguard would not assist U.S. companies in the event of a surge of imports from TPP countries.”⁹¹³ The American Farm Bureau Federation, in its comments about the effects of the agreement on the U.S. agricultural sector, stated that the trade remedies chapter ensures that U.S. producers are able to use all trade remedy laws, including the safeguard law. It said that the agreement will not affect the rights and obligations of TPP parties under the WTO Agreement on Safeguards.⁹¹⁴

Summary of Provisions Relating to Antidumping and Countervailing Duty Procedures

Consistent with the approach in other U.S. FTAs, each party retains its rights and obligations under Article VI of GATT 1994 and the WTO Antidumping (AD) and Subsidies and Countervailing Measures (SCM) Agreements. Nothing in TPP confers any rights or imposes any obligations on the parties with regard to procedures or measures taken under Article VI of GATT 1994 or the WTO AD and SCM Agreements. For this reason, no party shall have recourse to dispute settlement for any matter arising under Section B of the chapter (Antidumping and Countervailing Duties) or Annex 6-A of the Trade Remedies chapter (Article 6.8).

In order to promote transparency and due process in trade remedy proceedings, Annex 6-A contains a non-comprehensive list of five AD/CVD practices (Annex 6-A and n.1). This list is not comprehensive, and these provisions are not binding and not subject to dispute settlement

⁹¹³ ITAC-12, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 15.

⁹¹⁴ American Farm Bureau Federation, written submission to the USITC, February 26, 2016, 23.

(Article 6.8 and Annex 6-A, n.1). The Annex 6-A practices pertain to five issues: notification of petition filings; on-the-spot verifications; access to information; deficient information submissions; and disclosure of essential facts (table 6.2).

Table 6.2: Practices relating to antidumping and countervailing duty proceedings

AD/CD practice	Explanation
Notifying of AD/CVD petition filing	<p>After receiving a properly documented petition for an AD or CVD investigation, investigating authorities shall notify the government of the concerned exporting Member. (Article 6.7 AD Agreement; Articles 11.5, 13.1 SCM Agreement).</p> <p>No later than seven days before initiating an investigation, the Party provides written notification of its receipt of the application to the other Party. (Annex 6-A(a)).</p>
On-the-spot verifications	<p>Investigating authorities may conduct on-the-spot verification in others' territories, with the agreement of the firm and unless the other WTO member objects. Subject to the requirement to protect confidential information, the investigating authorities "shall make the results of any such investigations available, or shall provide disclosure thereof ... to the firms to which they pertain and may make such results available to {petitioners}." (Article 6.7 AD Agreement; Article 12.6 SCM Agreement).</p> <p>The investigating authorities "promptly notify each respondent of their intent" to conduct verification of "information that is provided by a respondent" that is "pertinent to the calculation of antidumping duty margins or the level of a countervailable subsidy," provide "at least 10 working days advance notice" of the verification dates, provide at least five working days prior to verification an outline of the topics that will be covered during the in-person verification and the types of supporting documentation that will be reviewed, and in sufficient time for interested parties to defend their interests (subject to the protection of confidential information),⁹¹⁵ issue a written report "that describes the methods and procedures followed in carrying out verification and the extent to which the information provided by the respondent was supported by the documents reviewed during the verification." (Annex 6-A(b)).</p>
Access to information	<p>Investigating authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information. Moreover, investigating authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof, except in exceptional circumstances where such information is not susceptible of summary. Where good cause is shown, investigating authorities shall maintain the confidentiality of such</p>

⁹¹⁵ (defining "confidential information" in footnote 3 as including "information which is provided on a confidential basis and which is by its nature confidential, for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information.").

AD/CD practice	Explanation
	<p>information, not disclosing it without permission of the submitting party. (Articles 6.4 to 6.51 AD Agreement; Articles 12.3 to 12.4 SCM Agreement).</p> <p>A Party’s investigating authorities maintain a public file that contains all non-confidential documents that are part of the record for each investigation and review. Moreover, the public file and a list of all documents that are contained in the record of the investigation or review are physically available for inspection and copying during the investigating authorities’ normal business hours or electronically available for download. Additionally, the public file contains to the extent feasible without revealing confidential information, non-confidential summaries of confidential information that is contained in the record of each investigation or review. Information that is not susceptible of summarization may be aggregated by the investigating authority. (Annex 6-A(c)).</p>
Deficient information submission	<p>Where an interested party “refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation,” the investigating authorities may make their determinations “on the basis of the facts available.” (Article 6.8 and Annex II to AD Agreement; Article 12.7 SCM Agreement).</p> <p>Investigating authorities inform interested parties that submit non-compliant but timely information of the nature of the deficiency, and to the extent practicable in light of the investigation’s time limits, “provide that interested party with an opportunity to remedy or explain the deficiency.” If investigating authorities disregard all or part of the original and any subsequent responses, they “explain in the determination or other written document the reasons for disregarding the information.” (Annex 6-A(d)).</p>
Disclosure of essential facts	<p>The investigating authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests. (Article 6.9 AD Agreement; Article 12.8 SCM Agreement).</p> <p>Before a final determination is made, the investigating authorities inform all interested parties of the essential facts that form the basis of the decision whether to apply definitive measures. Subject to the protection of confidential information, the investigating authorities may use any reasonable means to disclose the essential facts, including “a report summarizing the data in the record, a draft or preliminary determination or some combination of those reports or determinations” (TPP at Annex 6-A(e)).</p>

Source: TPP Annex 6-A.

Summary of Views of Interested Parties

None of the participants in the Commission’s hearing discussed Section B (Antidumping and Countervailing Duties) of the TPP Trade Remedies chapter. According to the American Farm Bureau Federation, the chapter ensures that all U.S. producers are able to use all trade remedy laws and does not affect TPP parties’ rights and obligations under the WTO AD and SCM Agreements. The federation also observed that U.S. exporters facing trade remedy measures from other TPP parties “are provided procedural due process and transparency.”⁹¹⁶ Three groups (the AFL-CIO, the United Steelworkers, and the Sweetener Users Association) argued in their prehearing written statements that existing trade laws are not used effectively.⁹¹⁷

In its submission to USTR, the Industry Trade Advisory Committee on Steel on the Trans-Pacific Partnership Agreement (ITAC-12) observed that the TPP Trade Remedies chapter “explicitly does not alter any of the rights or obligations of member countries’ antidumping and countervailing duty laws.” This is important, according to the ITAC, because U.S. AD/CVD laws need to remain strong to allow for maximum protection against dumped and subsidized steel imports. The Steel ITAC-concluded that the overall effect of the Trade Remedies chapter “on trade remedy laws is neutral, which is viewed as a positive for U.S. steel producers.”⁹¹⁸

Sanitary and Phytosanitary Measures⁹¹⁹

Assessment

The sanitary and phytosanitary (SPS) provisions in TPP Chapter 7 would likely benefit U.S. firms exporting food and agriculture products to all TPP members, particularly those firms exporting to TPP members that have not previously entered into FTAs with the United States. Many of the SPS provisions in TPP build on provisions in earlier U.S. FTAs and the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (WTO SPS Agreement). Many U.S. firms and other interested parties that appeared at the Commission’s hearing and/or filed written

⁹¹⁶ American Farm Bureau Federation, written submission to the USITC, February 26, 2016, 23.

⁹¹⁷ American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), written submission to the USITC, December 29, 2015, 36–37; Gerard, written testimony submitted to the USITC, December 29, 2015, 8; Sweetener Users Association, January 12, 2016, 4.

⁹¹⁸ ITAC-12, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 1, 2, 5, 14–15, 18.

⁹¹⁹ The World Trade Organization defines a sanitary or phytosanitary measure as “Any measure applied (a) to protect animal or plant life or health within the territory of the Member from risks arising from the entry, establishment or spread of pests, diseases, disease-carrying organisms or disease-causing organisms; (b) to protect human or animal life or health within the territory of the Member from risks arising from additives, contaminants, toxins or disease-causing organisms in foods, beverages or feedstuffs; (c) to protect human life or health within the territory of the Member from risks arising from disease carried by animals, plants or products thereof, or from the entry, establishment or spread of pests; or (d) to prevent or limit other damage within the territory of the Member from the entry, establishment or spread of pests.” WTO SPS Agreement, Annex A:1.

submissions expressed support for the chapter and expressed the view that TPP's requirements on SPS transparency and science-based risk analysis would be beneficial. Some, however, expressed concerns about these same provisions or raised concerns about the impact of TPP's SPS provisions on U.S. consumer safety.⁹²⁰ Multiple side letters were also negotiated as part of the TPP Agreement, which address several longstanding SPS disputes (see table 6.3).⁹²¹

U.S. firms investing in and exporting to TPP countries would benefit from the parallel negotiations between the United States and individual TPP parties to resolve specific outstanding SPS issues, as well as from cross-cutting provisions within the SPS chapter which would likely lead to the removal or avoidance of SPS barriers in TPP markets.⁹²² Several interested parties said that they were particularly pleased with the SPS chapter's overall transparency provisions and new requirements that measures be based on science.

Summary of Provisions

Chapter Overview

TPP incorporates by reference (Article 7.1) the definitions in Annex A of the WTO SPS Agreement. Chapter 7 would apply to SPS measures and is designed to require modern, science-based food safety regulations in TPP parties.⁹²³ This would require that TPP parties use science and risk analysis as a foundation for SPS measures, similar to U.S. food and agricultural safety requirements and building on current requirements under the WTO SPS Agreement. The TPP SPS chapter also creates enhanced rules, often referred to as "WTO Plus," that are

⁹²⁰ Article 5.3 of the WTO SPS Agreement addresses members' ability to achieve the "appropriate level of sanitary and phytosanitary protection from risk." TPP Article 7.2(b) purports to "reinforce and build on the [WTO] SPS Agreement."

⁹²¹ See following Summary of Provisions section for details on TPP side letter agreements.

⁹²² Not specifically related to the TPP negotiations, the United States recently made bilateral agreements with individual TPP parties for the removal of certain SPS barriers to U.S. exports. Peru agreed in March 2016 to remove barriers to U.S. beef and beef product exports that have remained in effect since 2003 and also opened the market to U.S. live cattle in July 2015. The United States also reached an agreement with Peru in April 2015 to resolve certain SPS issues which allowed greater access to Peru's market for U.S. pork and pork products. Separately, Vietnam removed SPS barriers and opened its market to all imports of U.S. beef products in March 2015. After seven years of negotiations with the United States, Mexico also agreed in March 2015 to immediately remove certain SPS measures that had blocked U.S. slaughter cattle exports to the country for more than a decade. Additionally, Chile and the United States recently resolved previous SPS issues that granted Chilean market access to U.S. live cattle and renewed domestic access to U.S. bovine embryos. Separately, Australia recently recognized the United States' BSE Negligible Risk status with the World Organisation for Animal Health (OIE), a pivotal step in re-opening the market for U.S. beef products. Because these specific SPS issues were resolved through bilateral negotiations technically separate from the TPP negotiations, they are not included in the discussion below of TPP's side letters. Where appropriate, they are addressed in the industry specific discussions in chapter 3 of this report.

⁹²³ Though the term "science" was used in the TPP SPS chapter, "science" was not defined in the TPP, or in the WTO SPS Agreement.

intended to ensure that science-based SPS measures are developed and implemented in a transparent, predictable, and nondiscriminatory manner, and establishes a TPP Committee on Sanitary and Phytosanitary Measures.

The chapter includes a number of provisions on adaptation to regional conditions, including pest- or disease-free areas and areas of low pest or disease prevalence; equivalence; science and risk analysis; audits; import checks; certification; transparency; emergency measures; cooperation; cooperative technical consultations; and dispute settlement. A brief summary of the specific provisions follows, focusing where possible on a comparison of TPP with the WTO SPS Agreement and other U.S. FTAs.

Scope: The chapter's provisions would apply specifically to all sanitary and phytosanitary measures of a party, and would not be limited to those of central governments. Nothing in the chapter would prevent a party from adopting or maintaining halal requirements for food and food products in accordance with Islamic law (Article 7.3).

Committee on Sanitary and Phytosanitary Measures: The chapter would establish a Committee on Sanitary and Phytosanitary Measures, composed of representatives of each party, to enhance the implementation of the chapter, to intensify their cooperation on matters of mutual interest, and to enhance communication and cooperation on SPS matters, including in preparing positions for meetings of the WTO's SPS Committee (Article 7.5).⁹²⁴

Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence: Article 7.7 of the chapter would require importing parties to assess the pest- or disease-free status of regions, zones, or compartments in the exporting party, or areas of low pest or disease prevalence there, in order to facilitate trade. The chapter creates new transparency rules for explaining the process and rationale used for making determinations in this domain, and creates stronger commitments about the expected timing for responding to requests of other parties (Article 7.7).

Equivalence: TPP parties would be required to apply equivalence to a group of measures or on a systems-wide basis, to the extent feasible and appropriate (Article 7.8.1). Upon request by one party, parties agree to recognize the equivalence of measures that can be demonstrated to achieve the same level of protection and that have the same effect in reaching the identified

⁹²⁴ U.S. bilateral agreements with Australia, Canada, Chile, Peru, and Mexico provide for bilateral cooperation and consultations on SPS measures. Coverage under the North American Free Trade Agreement (NAFTA) contains certain provisions regarding equivalency and audits that may surpass WTO SPS requirements, while TPP's cross-cutting horizontal SPS provisions in general still surpass current U.S. SPS commitments through NAFTA. Thus these TPP provisions are likewise new for NAFTA parties.

objective.⁹²⁵ Moreover, if a party chooses the option of requesting systems-wide equivalence, and the equivalence assessment were to result in approval of a systems-wide equivalence, then all producers authorized by the exporting party's regulatory authorities would be allowed to export to the party granting equivalence. The chapter also created new rules for transparency requirements. If a measure is found not to be equivalent, the rationale for this decision would have to be provided.

Science and Risk Analysis: The chapter creates new rules that go beyond previous WTO SPS and U.S. FTA commitments for assessing risk and determining the appropriate level of sanitary and phytosanitary protection. Importantly, TPP's SPS chapter is the first time that a U.S. trade agreement has included risk analysis, which is broader than the risk assessment standard applied in earlier U.S. FTAs.⁹²⁶ Article 7.1 defines risk analysis as containing three components: risk assessment; risk management; and risk communication (Article 7.1).⁹²⁷ Of those three components, only risk assessment was included in the WTO SPS Agreement or past U.S. trade agreements.

The chapter requires that SPS measures be based on science and that SPS measures either conform to the relevant international standards or on documented, objective, and scientific evidence that is rationally related to the measure.⁹²⁸ The requirement that the scientific evidence be rationally related to the measure is an expansion of the WTO SPS Agreement.⁹²⁹ The SPS chapter also expands on the WTO SPS Agreement in that it requires an importing party to provide information on requests concerning the progress of an analysis (Article 7.9).

Audits: TPP contains a new category of rules for audits, much of which builds on previous WTO SPS Committee work.⁹³⁰ Under TPP, importing parties would have the right to audit the exporting party's competent authorities and associated or designated inspection systems, in order to determine if an exporting party is able to meet the SPS requirements of the importing

⁹²⁵ Recognition of a measure as being equivalent if it has "the same effect" is an expansion of the concept of equivalence in the WTO SPS Agreement. This is also one of the very few concepts in the SPS chapter for which a party will not have recourse to the TPP dispute settlement process.

⁹²⁶ Risk assessments have been included or referenced in the following U.S. trade agreements: the WTO SPS Agreement, the U.S.-Korea Free Trade Agreement, the U.S.-Australia Free Trade Agreement, and NAFTA. Risk analysis was not included in any of these agreements.

⁹²⁷ Risk management is defined by TPP as "the weighing of policy alternatives in light of the results of risk assessment and, if required, selecting and implementing appropriate control options, including regulatory measures." Risk communication is defined by TPP as "the exchange of information and opinions concerning risk and risk-related factors between risk assessors, risk managers, consumers and other interested parties" (Article 7.1).

⁹²⁸ "Rationally related" was not defined by TPP.

⁹²⁹ The requirement that a measure be based either on relevant international standards or on scientific evidence is not subject to the dispute settlement provisions in TPP.

⁹³⁰ Though the chapter's new section on audits builds on past WTO SPS Committee work, audits have never been included in the WTO SPS Agreement, or in any past U.S. trade agreement.

party. Audits could include competent authorities' control programs, including inspection and audit programs, and on-site inspections of facilities. Importantly, audits would be systems-based and be designed to check the effectiveness of the exporting party's regulatory controls. The chapter also lays out detailed rules about transparency, about giving the audited party an opportunity to comment, about requirements for using objective and verifiable evidence and data, and about procedures to prevent the disclosure of confidential information (Article 7.10).

Import Checks: The SPS chapter creates a new section of rules concerning import checks, which also tie into the parties' most recent commitments under the WTO Trade Facilitation Agreement. The TPP rules (Article 7.11) build on the WTO SPS Agreement's Annex C, for control, inspection, and approval procedures. TPP's import check provisions are new rules which were not included previously in the WTO SPS Agreement (or its annexes), nor in past U.S. trade agreements (though NAFTA also contains separate and different rules on control, inspection, and approval procedures). The chapter would commit TPP parties to ensure that import checks for SPS requirements are based on the actual potential risk posed by the import, and that the import checks are carried out without undue delay. Importing parties would be required to ensure that any testing conducted uses appropriate and validated methods in a facility that operates under a quality assurance program that is consistent with international laboratory standards. The chapter would also create a rapid notification mechanism requiring parties to inform traders within seven days if a shipment is being prohibited or its entry restricted for a reason related to food safety or to animal or plant health (Article 7.11).

Certification: TPP's certification commitments go beyond that of the WTO SPS Agreement, in that it limits the information required for certificates to only what is related to SPS issues. Parties may cooperate to develop draft model certificates. Parties to TPP would promote the implementation of electronic certification and other technologies to facilitate trade (Article 7.12).

Transparency: Article 7.13 would require parties to give public notice of proposed, draft, and final SPS measures by using the WTO SPS notification submission system. Parties would normally allow for at least 60 days for interested parties to submit comments, and parties would be required to provide relevant documentation that was considered in developing the proposed measure, including supportive objective scientific evidence. Moreover, all final SPS measures would be required to be published in an official journal or on an official website (Article 7.13).

Emergency Measures: TPP's emergency measures are also new compared to both current U.S. FTAs and the WTO SPS Agreement. Article 7.14 requires that a party adopting an emergency measure needed to protect human, animal, or plant life or health promptly notify the other parties of that measure, and requires that the party adopting the emergency measure take into

consideration any information provided by other parties in response to the notification. A party adopting an emergency measure must review its scientific basis within six months and make the results available to parties upon request. If the measure is maintained after the review because the reason for its adoption remains, the party should review the measure periodically (Article 7.14).

Cooperative Technical Consultations: Article 7.17 provides a consultation process, known as a cooperative technical consultation (CTC), that a party may have recourse to at any time it considers that the continued use of the administrative procedures or bilateral or other mechanisms of another TPP party would not resolve the matter. One or more parties (“requesting party”) may initiate a CTC with another party (“responding party”) to discuss any matter arising under Chapter 7 that the requesting party considers may adversely affect its trade by delivering a request to the primary representative of the responding party. Unless the consulting parties agree otherwise, they must meet within 30 days of the responding party’s acknowledgement of the request to discuss the matter identified in the request, with the aim of resolving the matter within 180 days of the request if possible. No party may have recourse to dispute settlement under Chapter 28 of the TPP Agreement (Dispute Settlement) for a matter arising under Chapter 7 without first seeking to resolve the matter through a CTC in accordance with this article (Article 7.17).

Dispute Settlement: With several exceptions, Article 7.18 provides that a party to the TPP Agreement may have access to the dispute settlement mechanism in TPP’s Chapter 28 for disputes arising under TPP Chapter 7 when the CTC mechanism does not first resolve a matter (Article 7.18).⁹³¹ The application of dispute settlement would be phased in for certain provisions so that parties have enough time to align their SPS procedures with TPP requirements (Article 7.18(1)). Any underlying WTO-based SPS obligations upon which the commitments of TPP’s SPS chapter are based would also remain subject to WTO dispute settlement. The complaining party may select the forum used to settle the dispute (e.g., the WTO dispute settlement process or the TPP dispute settlement process), and that forum will be used to the exclusion of all others. Differently from the WTO dispute settlement process, TPP lays out strict timelines for consultations, formation of a panel to hear the dispute, and final resolution, which should lead to faster resolution of disputes.

Side Letters: In addition to the chapter’s horizontal SPS provisions, a number of TPP side agreements also address specific existing bilateral SPS issues with TPP parties (table 6.3). The impacts of these side letters on U.S. trade vary significantly and are presently unknown. One

⁹³¹ As noted, two provisions in the SPS chapter are specifically not subject to the dispute settlement provisions of the TPP. These are (1) recognition that a measure is equivalent if it has “the same effect” and (2) the requirement that an SPS measure be based either on relevant international standards or on scientific evidence.

example is beef trade between the United States and Singapore. In the letter, Singapore recognized the United States' classification by the World Organisation for Animal Health (OIE) as a country with a negligible risk for bovine spongiform encephalopathy (BSE or mad cow disease), and agreed to permit the importation of all beef and beef products from animals of all ages. The United States likewise recognized Singapore's status with the OIE as a country with negligible BSE risk. The United States and Singapore also agreed to open consultations on goods containing beef-derived products, pathogen reduction treatments used in producing meat and poultry products, and pork-related trade issues.⁹³² Because these specific SPS issues were resolved through parallel negotiations, and not through the horizontal measures contained in TPP's SPS chapter, they are not specifically referenced in the SPS chapter's provisions. Where appropriate, these issues are considered in the industry-specific discussions in chapter 3 of this report.

Table 6.3: Selected bilateral SPS outcomes addressed in TPP side letters

Country	Product	Relevant side letter	Summary of outcome
Canada	Milk	U.S.-Canada Letter Exchange on Milk Equivalency	Bilateral cooperation to achieve equivalency of "milk products" in the "Grade A" category.
Chile	Salmonid eggs	U.S.-Chile SPS Letter Exchange	Finalizing protocol to allow importation of salmonid eggs from an approved compartment in Washington State. Intensifying work on separate protocol for the importation of salmonid eggs into Chile from any approved compartment in the state of Maine.
Japan	Post-harvest fungicides	U.S.-Japan Letter Exchange on Non-Tariff Measures	Japan to implement streamlined approval process for fungicides, to cover both pre-harvest and post-harvest use in the application process.
	Food additives	U.S.-Japan Letter Exchange on Non-Tariff Measures	Japan is to faithfully implement a Cabinet decision to completely approve four specific food additives.
	Gelatin/collagen	U.S.-Japan Letter Exchange on Non-Tariff Measures	Japan has eased restrictions on imports of gelatin and collagen.
Singapore	Beef and all beef products	U.S.-Singapore SPS Letter Exchange	Singapore agreed to permit the importation of all U.S. beef and beef products from animals of all ages, regulated under the U.S. Federal Meat Inspection Act.
	Beef-derived products	U.S.-Singapore SPS Letter Exchange	Singapore agreed to open consultations by February 2017 to discuss full market access to Singapore for products containing beef-derived products regulated by the U.S. FDA.
	Pork	U.S.-Singapore SPS Letter Exchange	A bilateral cooperative mechanism on pork trade established for consultation between technical experts with respect to pork-related trade issues, including Trichinella-related mitigation.

⁹³² See the TPP, full text, U.S.-Singapore SPS Letter Exchange.

Country	Product	Relevant side letter	Summary of outcome
	Meat and poultry products	U.S.-Singapore SPS Letter Exchange	A bilateral cooperative mechanism on pathogen reduction treatments (PRTs) established to cooperate with respect to PRTs used in the production of meat and poultry products.
Vietnam	Offal (internal organs)	U.S.-Vietnam Letter Exchange on Offals	Vietnam confirmed that it currently maintains no import prohibition on offal products from the United States. Agreement to cooperate to facilitate trade of U.S. offal products exported to Vietnam.
	Fish	U.S.-Vietnam Letter Exchange on Catfish	U.S. and Vietnamese regulatory authorities will cooperate regarding the U.S.'s new inspection program for Siluriformes fish (which includes catfish).

Source: TPP, full text.

Summary of Views of Interested Parties

The views of interested parties were divided between stakeholders who voiced strong support for TPP's SPS chapter and those who expressed concern about its provisions. Additionally, certain stakeholders voiced concerns about U.S. regulatory authorities' ability to comply with and enforce food safety provisions in the United States.⁹³³ Most comments from agricultural interests were supportive of the SPS provisions in TPP. Industry representatives also widely supported the CTC process outlined in Article 7.17,⁹³⁴ and the ability to have recourse to dispute settlement under Chapter 28 for SPS measures.⁹³⁵

Several organizations specifically praised Article 7.9, which would require that SPS provisions either conform to international standards or be based on scientific evidence, including an assessment of risk. According to industry representatives, SPS import regulations not based on scientific evidence have been an important factor limiting trade, particularly in meat and

⁹³³ IATP, written submission to the USITC, February 16, 2016; BCTGM, written submission to the USITC, February 8, 2016, 5-6; FARFA, written submission to the USITC, February 10, 2016, 2.

⁹³⁴ USITC, hearing transcript, January 15, 2016, 461 (testimony of Stephen Sothmann, U.S. Hides, Skins, and Leather Association); ATAC for Trade in Animal and Animal Products, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 9-10.

⁹³⁵ NAM, written testimony to the USITC, January 8, 2016, 6; National Milk Producers Federation and the U.S. Dairy Export Council, written submission to the USITC, December 22, 2015, 4; USITC, hearing transcript, January 14, 2016, 383-84 (testimony of Thomas Suber, U.S. Dairy Export Council); U.S. Grains Council, written submission to the USITC, February 15, 2016, 9; American Farm Bureau Federation, written submission to the USITC, February 26, 2016, 23; California Citrus Mutual, written submission to the USITC, December 24, 2015, 2; Fonterra (USA) Inc., written submission to the USITC, February 12, 2016, 4; Wine Institute, written submission to the USITC, February 12, 2016, 3; North American Meat Institute and the U.S. Hide, Skin, and Leather Association (NAMI/USHSLA), written testimony to the USITC, December 28, 2015, 5-6; USITC, hearing transcript, January 14, 2016, 403 (testimony of Stephen Sothmann, NAMI/USHSLA).

poultry products.⁹³⁶ Others stated support for Article 7.11, noting that TPP would be the first U.S. trade agreement to require that import checks be based on actual risks and that checks should be conducted without undue delay, which is particularly important for trade in perishable products.⁹³⁷ Stakeholders also strongly supported the chapter's many transparency provisions.⁹³⁸

On the other hand, several trade advisory committees and organizations testifying before the Commission stated that TPP's SPS provisions would only be as effective as the willingness to fully implement and enforce them.⁹³⁹

The Pet Food Institute said that the Chapter 28 mechanism may help discourage parties from adopting domestic policies that adversely affect U.S. exports and help ensure that they abide by their WTO commitments to implement regulations that are science-based and transparent.⁹⁴⁰ The National Chicken Council said that "at the end of the day," the government needs to be willing to use and enforce the SPS provisions, which has been a "problem."⁹⁴¹ Other observers stated that the language of the SPS chapter is too ambiguous, potentially posing a threat to the public interest and/or undermining the ability to resolve disputes.⁹⁴²

The Farm and Ranch Freedom Alliance said that the SPS provisions in TPP might allow foreign firms in TPP member countries to challenge and ultimately weaken U.S. food safety regulations, such as restrictions on antibiotics use in livestock,⁹⁴³ and that lower food safety requirements in TPP partner countries could pose a danger to U.S. consumers.⁹⁴⁴ Other critical comments

⁹³⁶ The Agricultural Technical Advisory Committee (ATAC) on Trade in Animal and Animal Products, *The Trans-Pacific Partnership (TPP) Agreement*, December 3, 2015, 5, 9, 11; NAMI/USHSLA, written submission to the USITC, December 28, 2015, 5–6.

⁹³⁷ Dempsey, written testimony to the USITC, January 15, 2016, 8–9; ATAC for Trade in Processed Foods, *The Trans-Pacific Partnership (TPP) Agreement*, December 3, 2015, 9–10; USITC, hearing transcript, January 15, 2016, 463–464 (testimony of Devry Boughner Vorwerk, Cargill); ITAC-5, *The Trans-Pacific Partnership Trade Agreement*, November 25, 2015, 6.

⁹³⁸ ATAC for Trade in Tobacco, Cotton, and Peanuts, *The Trans-Pacific Partnership Trade Agreement*, November 25, 2015, 11; ATAC for Trade in Grains, Feeds, Oilseeds, and Planting Seeds, *The Trans-Pacific Partnership Agreement (TPP)*, December 2015, 10; ITAC-11, *The Trans-Pacific Partnership*, December 1, 2015, 6.

⁹³⁹ ATAC for Trade in Fruits and Vegetables, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 2–3; ITAC-7, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 6; National Foreign Trade Council, written submission to the USITC, January 13, 2016, 6.

⁹⁴⁰ USITC, hearing transcript, January 15, 2016, 436 (testimony of Peter Tabor, Pet Food Institute).

⁹⁴¹ USITC, hearing transcript, January 14, 2016, 464–65 (testimony of Kevin Brosch, Brosch Trade, LLC).

⁹⁴² ATAC for Trade in Fruits and Vegetables, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 2–3; APAC, *The Trans-Pacific Partnership Trade Agreement*, Minority Report, Annex, December 1, 2015, 10; USITC, hearing transcript, January 15, 2016, 462 (testimony of Bill Bullard, R-CALF USA). Peterson Institute for International Economics, written submission to the USITC, February 11, 2016, 57–58; ITAC-11, *The Trans-Pacific Partnership*, December 1, 2015, 6.

⁹⁴³ FARFA, written submission to the USITC, February 10, 2016, 2.

⁹⁴⁴ BCTGM, written submission to the USITC, February 8, 2016, 5–6; FARFA, written submission to the USITC, February 10, 2016, 2, 4–5.

focused on the potential for governments to challenge mandatory labeling laws for genetically engineered ingredients.⁹⁴⁵ Two agriculture industry representatives stated their concern that Article 7.11's rapid-response mechanism could be used to challenge U.S. inspection and testing of perishable agricultural goods, if goods were detained long enough to allow for lab testing.⁹⁴⁶ Other stakeholders voiced concerns that the SPS chapter did not address the products of modern biotechnology,⁹⁴⁷ and that TPP's Chapter 2 provisions on national treatment and market access could conflict with the agreement's SPS requirements.⁹⁴⁸

Technical Barriers to Trade (TBT)

Assessment

The technical barriers to trade (TBT) provisions of the TPP Agreement would likely provide significant benefits for U.S. firms investing in and exporting to TPP parties. Under the TBT chapter, the parties would commit to offer more transparency and greater access to the regulatory process for stakeholders from other TPP parties, and to cooperate on common regulatory approaches. Certain provisions in the TBT chapter are already included in existing U.S. FTAs with some TPP parties, but most of the provisions extend the TBT commitments for all parties. In particular, the TBT chapter would create detailed rules that would help to improve the day-to-day business environment for all goods sectors by ensuring that technical regulations, standards setting, and conformity assessment procedures do not create unnecessary barriers to trade. The chapter would also create new requirements in all TPP parties which would permit foreign firms to participate in regulatory, standards, and conformity assessment processes on an equal footing with parties' domestic interests. According to a number of interested parties, these changes would lower costs and create a more level playing field for U.S. businesses operating in the TPP region. Additionally, the chapter contains seven product-specific annexes that are likely to benefit U.S. exporters of wine and distilled spirits, information and communications technology (ICT) products, pharmaceuticals, cosmetics, medical devices, and prepackaged foods and food additive products.⁹⁴⁹ A number of key TPP commitments are new for the United States and all TPP partners (table 6.4).

⁹⁴⁵ FARFA, written submission to the USITC, February 10, 2016, 6.

⁹⁴⁶ FARFA, written submission to the USITC, February 10, 2016, 4–5; IATP, written submission to the USITC, February 16, 2016, 3.

⁹⁴⁷ For discussion of genetically modified organisms (GMOs), see chapter 3 of this report.

⁹⁴⁸ Peterson Institute for International Economics, written submission to the USITC, February 11, 2016, 57-58; IATP, written submission to the USITC, February 16, 2016.

⁹⁴⁹ Additional information on the impact of TPP on these industries is presented in chapters 3 and 4 of this report.

Table 6.4: Summary of key commitments that surpass those of previous U.S. FTAs

Article	Brief summaries of new aspects of provisions	New articles for all parties
8.5	Parties must apply international standards, guides, and recommendations to avoid creating unnecessary obstacles	8.5:3
8.6	Includes more detailed rules for conformity assessment procedures	8.6:3, 8.6:4, 8.6:8, 8.6:9, 8.6:15, and 8.6:16
8.7	Includes more specific transparency and regulatory revision provisions to close loopholes	8.7:3, 8.7:8, 8.7:14, and 8.7:15
8.8	Includes definitions of WTO TBT terminology and time periods for compliance.	8.8:1, 8.8:2, and 8.8:3
8.9	Supports regulatory alignment and acceptance of conformity assessment results	8.9:2 ^a , 8.9:4, 8.9:7
8.10	Allows consultations on local government requirements; matters must be discussed within 60 days ^b	8.10:2bis, 8.10:3, and 8.10:4
8.11	Cooperation with nongovernmental bodies, including in multilateral/regional bodies	8.11:3(e), 8.11:3(g), ^c 8.11:3(h), 8.11:7(b-c)

Source: USTR, TPP full text, Chap. 8, Technical Barriers to Trade.

^a The first half of this provision has been standard in all U.S. post-TBT FTAs (except that with Singapore), but TPP extends the provision to include two more goals: “to support greater regulatory alignment and to eliminate unnecessary technical barriers to trade in the region.”

^b The U.S.-Peru TPA has similar, but different wording. Under that agreement, parties must make every effort to obtain a mutually satisfactory solution within 60 days of consultations.

^c Previous FTAs have encouraged cooperation regarding third-party issues, but TPP is more detailed.

Based on information reported by the U.S. government and industry representatives regarding TBT measures that create unnecessary barriers to trade, the TBT commitments in TPP would likely be particularly helpful for U.S. exporters and investors in Japan, Malaysia and Vietnam. Table 6.5 outlines U.S. industries that currently face TBT barriers in those countries and would be expected to benefit from TPP’s TBT provisions.⁹⁵⁰

⁹⁵⁰ This assessment, and the sectors included, is based solely on information provided in the footnoted sources.

Table 6.5: U.S. industries that may potentially benefit from TPP’s TBT provisions, new FTA partners

TPP party	U.S. sector	Type of TBT	Principal relevant TBT provision
Japan	Automotive	Standards, certification	8.5:2 and U.S.-Japan Side Letter
	Medical devices	Lengthy approval periods, non-harmonization with certain international standards	8.5:2 and Annex 8-E
	Pharmaceuticals	Lengthy approval periods, non-harmonization with certain international standards	Annex 8-C
	Food and dietary supplements	Burdensome process and lack of protection for proprietary ingredients requirements	Annex 8-F
	Medicated cosmetics	Pre-market approvals	Annexes 8-D and/or 8-C
	Regulatory transparency, in general		8.7
Malaysia	Electrical manufacturing ^a		8.5:2, 8.6, and 8.7
	Medical imaging products ^b		8.5:2, 8.6, 8.7, and Annex 8-E
Vietnam	Prepackaged food and beverages	Labeling requirements	8.10 and/or 8.11
	Commercial cryptographic goods ^c	Restrictions on importation and sale	Annex 8-B

Source: USTR, *2015 National Trade Estimate Report*, 2015, relevant chapters—“Japan,” 222–26, “Malaysia,” 263, 268, and “Vietnam,” 425—unless footnoted otherwise.

^a NEMA, written submission to the USTR, November 22, 2010, 2.

^b NEMA, written submission to the USTR, November 22, 2010, 2.

^c SIA, written submission to the USITC, January 22, 2016, 4–5.

The TBT commitments included in the six existing U.S. FTAs with TPP parties are quite diverse. The U.S.-Peru TPA offers TBT commitments that are closest to those in the TPP Agreement; the U.S. FTAs with Singapore and Chile are among the older U.S. FTAs and are less comprehensive than TPP. The application of the TPP TBT chapter would likely offer U.S. companies significant gains over existing bilateral FTAs, such as those with Singapore and Chile. Many of TPP’s provisions regarding publication, notification, and comment would be new to U.S. FTAs concluded before 2004, so TPP’s rules in that area would represent new commitments for Canada, Mexico, Chile, and Singapore, and to a certain extent for Australia. Certain rules related to publication and notification would be new for all TPP parties except Peru. Table 6.6 lists possible U.S. industries that may benefit from the reduction or elimination of TBTs under TPP Chapter 8.

Table 6.6: U.S. industries that may potentially benefit from TPP’s TBT provisions, existing FTA partners

TPP party	U.S. industry	Type of TBT	Principal relevant TBT provision
Canada	Seeds (wheat, barley)	Registration	8.6, 8.10
	Cheese	Compositional standards	8.5, 8.9, 8.10
Chile	Labeled food products	Nutritional labeling	8.5, 8.7, 8.10
Mexico	Processed prepackaged foods	New labeling requirements; lack of notification; insufficient time for compliance period	8.7, 8.8
	Electronic and electrical equipment	Energy efficiency labeling, standby energy consumption limits, duplicative testing, specified testing methods, insufficient compliance period	8.5, 8.6, 8.8
Peru	Biotechnology agriculture	Biotechnology moratorium; lack of specific regulatory standards on risk assessment	8.5, 8.7, 8.10
	Biotechnology foods	Labeling of biotechnology foods which requires a highly complex and expensive conformity process; lack of regulatory capacity to set, monitor and enforce such standards	8.5, 8.6, 8.7

Source: USTR, *2015 National Trade Estimate Report*, 2015, “Canada,” 58, “Chile,” 65–66, “Mexico,” 270, and “Peru,” 315–16. Note: U.S. agricultural biotechnology and biotechnology foods could also benefit in Peru from the modern biotechnology provisions contained in TPP Chapter 2 and described in chapter 3 of this report, and the SPS provisions contained in TPP Chapter 7 and described in chapter 6 of this report.

Summary of Provisions

The applicable definitions, objectives and scope of the chapter are set out in the first several articles. Article 8.1 sets out definitions. Article 8.2 states that the objective of the chapter, including its Annexes, is to facilitate trade, including by eliminating unnecessary technical barriers to trade, enhancing transparency, and promoting greater regulatory cooperation and good regulatory practice. Article 8.3 states that the chapter “applies to the preparation, adoption and application of all technical regulations, standards and conformity assessment procedures of central government bodies (and, where explicitly provided for technical regulations, standards and conformity assessment procedures of governments on the level directly below that of the central government) that may affect trade in goods between the Parties, except” government procurement and sanitary and phytosanitary measures, which are covered in other TPP chapters. Article 8.4 incorporates and makes part of the chapter certain provisions in the WTO TBT Agreement.

The remaining portions of the TPP TBT chapter set out the various obligations of the parties: international standards, guides and recommendations (Article 8.5); conformity assessment (Article 8.6); transparency (Article 8.7); compliance periods for technical regulations and conformity assessment procedures (Article 8.8); cooperation and trade facilitation (Article 8.9); and information exchange and technical discussions (Article 8.10), in addition to establishing a Committee on Technical Barriers to Trade (Article 8.11). The TBT chapter also contains seven sector-specific annexes detailing particular provisions covering standards, regulatory issues, and conformity assessment for wine and distilled spirits, ICT, pharmaceuticals, cosmetics, medical

devices, proprietary formulas for prepackaged foods and food additives, and organic products. A brief summary of the specific provisions most likely to have an impact on the U.S. economy follows.

International Standards, Guides, and Recommendations (Article 8.5): Under Article 8.5, the parties acknowledge the important role that international standards, guides and recommendations can play in supporting greater regulatory alignment, good regulatory practice and reducing unnecessary barriers to trade; agree to apply the *WTO TBT Committee Decision on the Principles for the Development of International Standards Grades and Recommendations*, and agree to cooperate with each other, where feasible and appropriate, to ensure that international standards, guides and recommendations that are likely to become a basis for technical regulations and conformity assessment procedures do not create unnecessary obstacles to international trade.

Conformity Assessment (Article 8.6): Article 8.6 requires that each party accord to conformity assessment bodies located in the territory of another Party treatment no less favorable than that it accords to conformity assessment bodies located in its own territory or in the territory of any other party. It also requires that, in order to ensure that it accords such treatment, each party must apply to conformity assessment bodies located in the territory of another party the same or equivalent procedures, criteria and other conditions that it may apply where it accredits, approves, licenses or otherwise recognizes conformity assessment bodies in its own territory. Further, the chapter would ensure that conformity assessment bodies testing or certifying products would not be required to be located within a party's territory, nor that they would have to be accredited by an accreditation body which operates an office in the party's territory. TPP would also require parties to explain any non-acceptance of conformity assessment results conducted in the territory of another party. Furthermore, it would forbid parties to require consular transactions, including related fees and charges, connected to conformity assessment. Conformity assessment fees imposed by a party would be limited to the approximate cost of the services rendered.

Transparency (Article 8.7): Article 8.7 requires that each party allow persons of the other parties to participate in the development of technical regulations, standards and conformity assessment procedures by its central government bodies on terms no less favorable than those it accords to its own persons.⁹⁵¹ Article 8.7 also requires each party to publish all proposals for new technical regulations and conformity assessment procedures and proposals for amendments to existing technical regulations and conformity assessment procedures, and all final technical regulations and conformity assessment procedures and final amendments to

⁹⁵¹ This reflects the U.S. approach to standards-setting. TPP, Technical Barriers to Trade Summary. <https://medium.com/the-trans-pacific-partnership/technical-barriers-to-trade-20e57df6a7d1#.r6105lw2c>

existing technical regulations and conformity assessment procedures, of central government bodies. Each party must publish such proposals and final actions, preferably by electronic means, in a single official journal or website. Each party must also take “such reasonable measures as may be available” to ensure that proposals and final actions of local governments on the level directly below that of the central government are published. Article 8.7 also sets out a number of notification requirements relating to notices, including that the notice explain the objectives of a proposal and how the final technical regulation or conformity assessment procedure achieves them, and that the party provide a comment period (“normally” at least 60 days).

Compliance Period for Technical Regulations and Conformity Assessment Procedures (Article 8.8): To clarify ongoing differences in the way parties interpret various provisions of the WTO TBT Agreement affecting the time allowed to comply with technical regulations and conformity assessment procedures, TPP clarifies that the term “reasonable interval” normally means a period of not less than six months. Moreover, each party would endeavor to provide an interval of more than six months between the publication of final technical regulations and conformity assessment procedures and their EIF.

Cooperation and Trade Facilitation (Article 8.9): This chapter encourages parties to intensify their collaboration to facilitate the acceptance of conformity assessment results and to support greater regulatory alignment. Parties would give due consideration to any new sector-specific proposal for cooperation under the chapter. Upon request of another party, any party would explain the reasons why it has not accepted a technical regulation of that Party as equivalent.

Information Exchange and Technical Discussions (Article 8.10): Parties also agree to exchange information on technical matters within the scope of this chapter. The relevant parties are required to discuss the matter raised within 60 days of the request, and the discussions and any information exchanged would be confidential, unless the parties participating agree otherwise. The parties “shall endeavor” to resolve the matter as expeditiously as possible, recognizing that the time required to resolve a matter will depend on a variety of factors, and that it may not be possible to resolve every matter through technical discussions.

Committee on Technical Barriers to Trade (Article 8.11): Article 8.11 would establish a Committee on Technical Barriers to Trade (TBT Committee) to monitor the implementation and operation of the chapter and to intensify joint work with a view to facilitating trade between the parties. Among other functions, the TBT Committee may agree on priority areas of mutual interest for future work under the chapter and proposals for new sector-specific or other initiatives. All decisions by the TBT Committee would be taken by consensus.

Annexes (Article 8.12): Article 8.12 addresses the annexes. It would require that the Committee, unless the parties otherwise agree, no later than five years after the date of entry into force of the Agreement and at least once every five years thereafter, review implementation of the Annexes, with a view to strengthening or improving them and, where appropriate, make recommendations to enhance alignment of the Parties' respective standards, technical regulations and conformity assessment procedures in the sectors covered by the Annexes. It would also require the Committee to consider whether the development of annexes concerning other sectors would further the objectives of the chapter or the agreement.

Annexes

Annex 8-A: Wine and Distilled Spirits: This annex establishes guidelines for labeling products, while preserving the ability of regulators to ensure consumer protection. It creates a common definition of "wine" and "distilled spirits" to facilitate trade in these products, and also provides for supplementary labeling of wine and distilled spirits to help enable producers to comply with import requirements. TPP parties commit to not reject imports solely because they use certain descriptive terms and adjectives related to wine or winemaking, such as "chateau," "reserve," "noble," "tawny," or "vintage." Parties would not require a sample quantity larger than is strictly necessary to carry out relevant conformity assessment procedures. Moreover, a party would not normally apply any final technical regulation, standard, or conformity assessment procedure to wine or distilled spirits that have been placed on the market in the party's territory before the date on which the regulation/standard/procedure enters into force.

Annex 8-B: Information and Communications Technology Products (ICT Annex): The ICT Annex covers commercial products that contain cryptography and that promote the electromagnetic compatibility of ICT products.⁹⁵² Among other commitments, TPP parties would be prohibited from disclosing proprietary information of cryptography-containing ICT products, requiring foreign companies to partner with a person in its territory, or requiring products to use a particular cryptographic algorithm or cipher, in order to comply with technical regulations or conformity assessment procedures. Exemptions are granted for (1) a TPP government's production, sale, or use of a product; (2) requirements maintained by a TPP government related to the network it owns or controls; and (3) measures a TPP government takes related to financial institutions or markets. Another exemption "preserves the ability of law enforcement

⁹⁵² Additional information on the effects of the TPP on cryptographic goods is presented in chapter 4, box 4.1 of this report.

authorities to obtain, pursuant to legal procedures, unencrypted communications from service suppliers using encryption they control.”⁹⁵³

Additional provisions remove requirements and make it easier for U.S. companies to do business. For example, a party must accept a supplier’s declaration of conformity for unintentional electromagnetic emitters where a party requires assurance for electromagnetic compatibility, as is done in the United States.⁹⁵⁴

Annex 8-C, 8-D, and 8-E: Pharmaceuticals, Cosmetics, and Medical Devices: Each of these annexes promotes transparent and open practices when regulating products in these sectors.⁹⁵⁵ TPP would require that each party define which regulatory bodies have the authority to regulate products in its territory. Parties would be required to consider relevant scientific and technical guidance when developing regulations, grant marketing authorizations based on specified and publicly available criteria, give reasons for rejecting applications, and establish due process procedures that allow for appeal. Parties would apply a risk-based approach to regulating cosmetic products, and would recognize that cosmetic products are generally expected to pose less potential risk to human health or safety than medical devices or pharmaceutical products.

Parties would seek to work together through relevant international initiatives to better align their respective product regulations. Moreover, where more than one agency is authorized to regulate products within the territory of a party, the party would eliminate any unnecessary duplication of regulatory requirements for these product categories. No party may require that products in these categories receive marketing authorization from the country of manufacture as a condition for receiving marketing authorization from the party.

These annexes make additional sector-specific commitments about labeling, inspections, testing, authorizations and reauthorizations, and guidelines for developing regulations. Parties would not be required to adopt a single definition of “cosmetic” or “pharmaceutical,” nor would they be required to include or exclude a particular product in the definitions. Annex 8-C (Pharmaceuticals) harmonizes TPP data requirements for applications for marketing authorization (which includes product “approvals” and “registration”), though parties’ paperwork may differ.

Annex 8-F: Proprietary Formulas for Prepackaged Foods and Food Additives: The annex would allow parties to require companies to provide ingredient information about prepackaged food

⁹⁵³ ITAC-8, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 13.

⁹⁵⁴ Except in respect to products a party regulates as a medical device, medical device system, or a component of a medical device or medical device system.

⁹⁵⁵ These three annexes are separate, but have many duplicate provisions.

and food additives. At the same time, it would ensure the confidentiality of information about proprietary formulas that companies must provide in order to meet this requirement. Each party would also ensure that it limits its information requirements to what is necessary to achieve its legitimate object.

Annex 8-G: Organic Products: The Annex would encourage the exchange of information on issues related to the production, certification, and related control systems of organic products. Parties are also encouraged to cooperate in developing international guidelines, standards, and recommendations related to trade in organic products. Parties would be required to enforce their own requirements covering the production, processing, or labeling of products as organic. Parties would be encouraged to consider requests for recognition or equivalence of another party's standards, technical regulations, or conformity assessment procedures relating to the production, processing, or labeling of products as organic.

Summary of Views of Interested Parties

Most stakeholders strongly endorsed the TBT chapter, though others expressed critical views, and some views were mixed. Many of the ITAC committees provided strong positive comments on the TBT chapter. In particular, the ITAC on Standards and Technical Barriers to Trade (ITAC-16), which represents a wide range of industry groups and standards experts, strongly endorsed TPP's TBT chapter, calling it a "significant step forward" in contending with the "stealth-like" nature of nontariff barriers to trade, and stating that the provisions would improve the business climate for manufacturers and service providers in TPP countries. The Committee noted with approval the language on technical regulations, stating that the conformity assessment provisions would require U.S. trading partners to use processes similar to those in the United States, which would reduce the cost of testing incurred by U.S. exporters, especially for SMEs. The Committee also highlighted the chapter's strong provisions on transparency, but recognized that many of the transparency provisions might be difficult for some TPP parties to comply with.⁹⁵⁶

Other reports by ITACs and Agricultural Technical Advisory Committees (ATACs) highlighted the importance of the chapter's strong language on transparency;⁹⁵⁷ its provisions on testing requirements;⁹⁵⁸ its commitments to apply the WTO TBT Committee Decision regarding international standards;⁹⁵⁹ its inclusion of for-profit and nongovernmental conformity

⁹⁵⁶ ITAC-16, *The Trans-Pacific Partnership Trade Agreement*, December 2, 2015, 5–8.

⁹⁵⁷ ITAC-3, *The Trans-Pacific Partnership Trade Agreement*, December 2, 2015, 11; ATAC for Trade in Processed Foods, *The Trans-Pacific Partnership (TPP) Agreement*, December 3, 2015, 9.

⁹⁵⁸ ITAC-4, *The Trans-Pacific Partnership*, December 3, 2015, 7.

⁹⁵⁹ ITAC-5, *The Trans-Pacific Partnership Trade Agreement*, November 25, 2015, 7–8.

assessment and standards setting bodies within the Agreement;⁹⁶⁰ and its requirement to allow foreign participation in standards and conformity assessment procedures developed by central government bodies.⁹⁶¹

ASTM International (ASTM), one of the largest voluntary standards development organizations in the world, emphasized that “non-tariff barriers are among the biggest challenges facing exporters across the Asia-Pacific” and called the TBT chapter an opportunity to facilitate trade. In particular, ASTM applauded TPP’s commitment to applying the WTO TBT Committee Decision on the Principles for the Development of International Standards, its provisions on the use of science-based measures to support regulatory objectives, and its provisions ensuring increased transparency.⁹⁶²

Several companies testifying before the Commission noted the importance of the TBT chapter in reducing barriers to exports.⁹⁶³ General Electric (GE) noted that the TBT chapter would be important to facilitating exports of manufactured goods—in particular, those in novel product areas where companies are developing new standards, such as electricity smart grids. This would likely support additional sales by SMEs and other GE parts suppliers.⁹⁶⁴ Several companies testified at the Commission hearing that TPP would help to standardize the customs and registration process across member countries, reducing the delays and administrative costs associated with overly burdensome regulation.⁹⁶⁵

The American Chemistry Council (ACC), National Association of Manufacturers (NAM), and United States Fashion Industry Association (USFIA) supported the TBT and Regulatory Coherence provisions that would promote cooperation to address regulatory divergence and coherence. These associations particularly highlighted provisions that would increase transparency and require parties to employ nondiscriminatory procedures for developing technical regulations, standards, and conformity assessments procedures.⁹⁶⁶

The U.S.-Japan Business Council (USJBC) supported TPP’s transparency and TBT measures, stating that such issues have long been a concern among U.S. businesses and exporters doing business in Japan. The USJBC was particularly supportive of the TBT provision that would require a 60-day period, in principle, for comments on draft regulations.⁹⁶⁷ It also expressed a

⁹⁶⁰ ITAC-4, *The Trans-Pacific Partnership*, December 3, 2015, 7.

⁹⁶¹ ITAC-7, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 6.

⁹⁶² Quinn, written testimony to the USITC, January 6, 2016, 2.

⁹⁶³ Judd, written testimony to the USITC, January 13, 2016, 2.

⁹⁶⁴ GE, written submission to the USITC, January 5, 2016.

⁹⁶⁵ St Clair, written testimony to the USITC, December 18, 2015; Halosil International, written submission to the USITC, January 13, 2016; Hughes, written testimony to the USITC, December 29, 2015, 4, 7.

⁹⁶⁶ Skelton, written testimony to the USITC, December 29, 2015; Dempsey, written testimony to the USITC, January 8, 2016, 6; Hughes, written testimony to the USITC, December 29, 2015, 7.

⁹⁶⁷ Currently, in principle Japan has a 30-day requirement for comments on draft regulations.

positive view of a side letter in which Japan made unilateral commitments to better ensure the transparency of its advisory committees, which are central to the development of regulatory and legal reform proposals and policy direction.⁹⁶⁸

Not all views of the TBT chapter presented to the Commission were positive. The National Foreign Trade Council (NFTC) pointed out that the impact of the TBT provisions would depend on how they were implemented and enforced.⁹⁶⁹ Both Ford and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) expressed strong concerns regarding automotive standards, addressed in more detail in chapter 4 of this report. The USA Poultry and Egg Export Council (USAPEEC) lamented the lack of any provisions in the TBT chapter that would address existing halal-certification-based barriers in Malaysia to U.S. meat exports.⁹⁷⁰ While generally supportive, the American Olive Oil Producers Association (AOOPA) criticized the agreement for omitting olive oil from the list of sectors with a specific sectoral annex in the TBT chapter. The organization noted that a number of issues related to olive oil fraud—in particular, the lack of harmonization of grade standards and labeling packaging requirements—could be resolved through a TPP olive oil program.⁹⁷¹

The Commission received a number of comments focused on the TBT product-specific annexes. ITAC-4, which includes representatives of the U.S. wine and distilled spirits industry, expressed a belief that the annex will streamline U.S exports of those products and make it easier for U.S producers to comply with various labeling requirements. According to ITAC-4, the annex would likely lead to the elimination of many certificate requirements for wine and distilled spirits.⁹⁷² ITAC-4 was also pleased to note that Vietnam, Malaysia, and New Zealand have agreed to recognize bourbon and Tennessee whiskey as distinctive products of the United States, and that Japan has agreed to begin its internal process for affording such recognition.⁹⁷³

Interested party opinions on the ICT annex were divided. The majority of ICT stakeholders told the Commission that this annex would provide substantial benefits to the technology sector. In particular, they supported the Annex's encryption provisions, emphasizing that the provisions are specific as to whether a government can require transfer of or access to encryption keys as

⁹⁶⁸ U.S.-Japan Business Council, written submission to the USITC, December 29, 2015, 9–10.

⁹⁶⁹ Wolff, written testimony to the USITC, January 13, 2016, 6.

⁹⁷⁰ USITC, hearing transcript, January 15, 2016, 456 (testimony of Kevin Brosch, USA Poultry and Egg Export Council).

⁹⁷¹ AOOPA, written submission to the USITC, January 22, 2016, 4.

⁹⁷² ITAC-4, *The Trans-Pacific Partnership*, December 3, 2015, 8.

⁹⁷³ *Ibid.*

a condition of an encrypted product entering the marketplace.⁹⁷⁴ For example, in its hearing testimony, the Semiconductor Industries Association (SIA) stated that TPP provisions related to encrypted products would protect trade flows of semiconductors and other ICT products “on the scale of hundreds of billions of dollars.” SIA also noted that TPP would require Vietnam to amend its restrictions on the importation and sale of commercial cryptography, which currently threatens “a substantial amount of semiconductor and ICT trade flows into Vietnam.”⁹⁷⁵

There were diverse reactions to the annex’s exceptions pertaining to financial institutions and law enforcement. Several stakeholders stated that the annex is weaker than it seems, declaring that it would not prevent governments from requiring access to decrypted data or protect developers against backdoor demands from their own government.⁹⁷⁶ Others contended that the provisions go too far and might have national security implications.⁹⁷⁷ Still others expressed the belief that the true meaning of the encryption provisions will only be elaborated through litigation, and that until then, there will be some uncertainty as to what the provisions actually mean.⁹⁷⁸

The Commission received comments from the principal cosmetics industry trade association regarding the Cosmetics Annex. The Personal Care Products Council (PCPC) testified that it strongly supports both the TBT Chapter and the Cosmetics Annex. In particular, PCPC testified that this annex would increase U.S. exports because of its risk-based, transparent approach to cosmetics regulation, its promotion of international standards and approaches, and its recommendation that regulators move away from bureaucratic pre-market approval systems, instead relying, as the United States does, on shared responsibilities between manufacturers and governments.⁹⁷⁹ PCPC also expressed support for ending mandates for periodic and expensive reauthorizations for products that have been safely on the market for years, and for separate authorization processes for each product shade and fragrance variation. PCPC said that these and other changes required under the TBT provisions would reduce costs and facilitate trade in practical ways that are especially meaningful for small and medium-sized

⁹⁷⁴ USITC, hearing transcript, January 13, 2016, 331 (testimony of Edward Brzywta, Information Technology Industry Council); USITC, hearing transcript, January 13, 2016, 330 (testimony of Christopher Padilla, IBM Corporation); SIA, written submission to the USITC, December 17, 2016, 2; Fraser, “Why the TPP Trade Agreement Is Great,” October 23, 2015.

⁹⁷⁵ SIA, written submission to the USITC, January 22, 2016, 4–5.

⁹⁷⁶ EFF, “Has the TPP Ended the Crypto Wars? Hardly,” November 18, 2015; ITAC-8, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 3.

⁹⁷⁷ For example, Stewart Baker, a partner with Steptoe & Johnson LLP in Washington, criticized the provisions for “cement[ing] Silicon Valley’s position on encryption into international treaty law,” which he argued would necessitate reopening trade negotiations and making concessions to TPP countries if Congress were to decide in the future to change U.S. backdoor security requirements. Wright, “TPP Countries Can’t Insist on Software Code Disclosure,” November 10, 2015; Baker, “USTR Wins the Crypto War,” November 6, 2015.

⁹⁷⁸ Lester, “The TPP and Encryption,” November 18, 2015.

⁹⁷⁹ Lamoriello, written testimony to the USITC, January 15, 2016, 3.

cosmetics companies. It noted that one of its member companies expects to save in a single TPP country over \$100,000 in registration fees alone, once different fragrances or shades are taken into account.⁹⁸⁰

ITAC-3, the advisory committee for chemicals, pharmaceuticals, and health/science products and services, was the only group to comment on the Medical Devices Annex. ITAC-3 strongly supported the annex, in particular its inclusion of consideration for internationally developed guidance, use of risk-based systems, basing approvals solely on safety and effectiveness (not economics), and following reasonable timelines for reviews.⁹⁸¹

Investment Assessment

The TPP Investment chapter is likely to have a positive impact on the U.S. economy by providing new protections for U.S. investors abroad, primarily in the five TPP countries with which the United States does not already have an FTA: Brunei, Japan, Malaysia, New Zealand, and Vietnam. Investors from those five countries would also gain new commitments by the United States that may lead to additional inward U.S. foreign investment. However, because the U.S. economy is already substantially open to foreign investment, it is unlikely that TPP would generate significant new investment flows into the United States. In particular, Japan, by far the largest economy of the five, is already the second-largest investor in the United States.⁹⁸²

The Investment chapter consists of the chapter text, 12 annexes (see table 6.7), and the annexes on nonconforming measures (NCMs)(Annexes I and II), which apply to both investment and cross-border trade in services. The chapter follows the negative list format; that is, its provisions apply to all sectors of the economy, apart from specific cases identified in Annexes I or II. Such an approach means that new products and services are automatically covered as they are introduced, without having to negotiate new provisions of the agreement.⁹⁸³ The investment chapters of existing U.S. FTAs follow the same format, but U.S. investment commitments under two WTO agreements, the Agreement on Trade-related Investment Measures (TRIMs) and the General Agreement on Trade in Services (GATS), follow a positive list format, under which only products and services that are specifically identified in the agreement are covered. Thus, for the United States, the major expansion in commitments would be

⁹⁸⁰ Ibid., 4.

⁹⁸¹ ITAC-3, *The Trans-Pacific Partnership Trade Agreement*, December 2, 2015, 11.

⁹⁸² Japan's direct investment position in the United States was \$372.8 billion in 2014, valued at historical cost. USDOC, BEA, *Survey of Current Business*, September 2015, 14.

⁹⁸³ Peterson Institute, written submission to the USITC, February 11, 2016, 101.

between the United States and the five TPP countries with which it has not already entered into free trade agreements.

Many interested parties noted that while the provisions of the Investment chapter are critical for investors, it works together with the provisions of many other chapters to create an integrated environment that promotes investor confidence and encourages new investment both into and out of the United States. TPP chapters frequently cited in this regard include those on intellectual property, customs and trade facilitation, state-owned enterprises, technical barriers to trade, and many others, depending on investors' individual interests.⁹⁸⁴

Summary of Provisions

The format of the TPP Investment chapter is similar to that of the chapters in most existing U.S. FTAs. The chapter is divided into two sections: Section A outlines the rights of investors and the rules that govern cross-border investment, and Section B defines the investor-state dispute settlement (ISDS) process.⁹⁸⁵ As in other U.S. FTAs, investment by financial services firms is covered by the Financial Services chapter of the agreement (Chapter 11), which specifically incorporates some but not all parts of the Investment chapter.⁹⁸⁶

Section A of Chapter 9 sets out the rules that would govern new investments, and defines the types of investments that are covered by the chapter (Article 9.1). Specifically, the FTA would require each party to give national treatment (Article 9.4)⁹⁸⁷ and MFN treatment (Article 9.5) to investors and covered investments of the other party. The treatment of investors under the FTA must comply with but need not go beyond customary international law (Article 9.6). Other provisions include:

- Expropriation could be only for a public purpose; it must be nondiscriminatory and accompanied by payment of prompt, adequate, and effective compensation in accordance with due process of law (Article 9.7).
- All financial transfers relating to covered investments—including, but not limited to, contributions to capital, payment of interest, and payments under contracts—would be permitted to cover the full value of the investment and must be permitted freely and without delay (Article 9.8).

⁹⁸⁴ *Ibid.*, 102–3.

⁹⁸⁵ The U.S.-Australia FTA follows a different format, as that agreement does not contain an ISDS mechanism.

⁹⁸⁶ See chapter 5 of this report for additional discussion of the TPP Financial Services chapter.

⁹⁸⁷ National treatment is treatment at least as good as the treatment received by a country's domestic investors.

- Neither party could impose or enforce performance requirements as a condition of investment (Article 9.9).⁹⁸⁸
- Neither party could require that senior management be of any particular nationality; however, such a requirement is permitted for boards of directors, provided that the requirement does not impair the ability of the investor to exercise control over its investment (Article 9.10).

Section A also deals with NCMs (Article 9.11), subrogation (Article 9.12), and special formalities and information requirements (Article 9.13). See appendix E for a summary of each country's NCMs with regard to investment and cross-border trade in services. Some new language in Section A clarifies the rights of investors under the chapter. In particular, Article 9.6 (Minimum Standard of Treatment) clarifies that a party's taking an action that does not meet an investor's expectations—or failing to take an action that meets them—is not a breach of the article, and therefore not actionable under an ISDS arbitration case. Finally, Section A includes two articles that have not been included in existing U.S. FTAs. Article 9.15 (Investment and Environmental, Health and other Regulatory Objectives) provides that nothing in the chapter could be construed to prevent a party from adopting, maintaining, or enforcing “any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, or other regulatory objectives.” Article 9.16 (Corporate Social Responsibility) reaffirms the importance of parties' encouraging businesses operating in their territories to incorporate principles of corporate social responsibility into their operations.

Section B of this chapter would provide for consultation and negotiation of disputes under the ISDS process, and provides detailed information and procedures for pursuing dispute settlement. It covers submission of claims to arbitration (Article 9.18), selection of arbitrators (Article 9.21), conduct of the arbitration (Article 9.22), transparency of the arbitral proceedings (Article 9.23), governing law (Article 9.24), interpretation of annexes (Article 9.25), expert reports (Article 9.26), consolidation of claims submitted separately to arbitration (Article 9.27), and awards of monetary damages (not including punitive damages) or restitution (Article 9.28). Under the terms of the provisions of Section B, each party would consent to claims being submitted to arbitration under specified rules according to the process outlined in the FTA. The awards made by any arbitration tribunal would have binding force only between the disputants and with regard to the particular case.

Section B includes several provisions that have not been included in existing U.S. FTAs. In Article 9.22 (Conduct of the Arbitration), paragraph (4) adds new language permitting the arbitration

⁹⁸⁸ Examples include requirements to export a given level of goods or services, achieve a given level of domestic content, or to transfer certain technology.

tribunal to determine that a claim is “manifestly without legal merit” and to dismiss such a claim. Paragraph (7) explicitly states that an investor that submits a claim to arbitration bears the burden of proving all elements of the claim. Section B also outlines additional transparency procedures for the ISDS process, and an ethics system for ISDS arbitrators. Under TPP, financial services firms have access to the ISDS process for the first time in a U.S. trade agreement, but only for the breach of certain provisions. They are able to bring ISDS cases related to violations of the minimum standard of treatment, commitments to compensate for damages due to civil strife, and commitments to compensate for direct and indirect expropriations. However, they are not permitted to bring arbitration cases related to the national treatment or MFN provisions of the agreement.⁹⁸⁹ In addition, Article 29.5 (Tobacco Control Measures) of TPP Chapter 29 (Exceptions and General Provisions) allows parties to exempt from the ISDS process any claims challenging a tobacco control measure.⁹⁹⁰ Box 6.1 provides an overview of data regarding U.S. and global ISDS cases under previous FTAs.

Box 6.1: Selected Facts About ISDS Arbitration Cases

There have been 15 ISDS arbitration cases filed by investors against the United States, mostly under NAFTA. Ten of these were decided in favor of the United States, three were settled outside of the arbitration proceedings, one was discontinued, and one remains pending as of March 2016.^a In addition, TransCanada Corporation of Canada filed a notice of intent to submit a claim to arbitration on January 6, 2016. The notice requests damages of over \$15 billion from the U.S. government for failure to approve construction of the Keystone pipeline.^b Under NAFTA rules, the notice of intent must be filed at least 90 days before a claim is formally submitted.^c

Of 88 cases filed against various states under ISDS mechanisms in U.S. trade agreements, 22 cases (25 percent) were dismissed (i.e., the host governments won) and 15 cases (17 percent) were won by the investors. A total of \$444.1 million was awarded, compared with total claims for damages of \$3.2 billion (11 percent of total claims awarded).^d

There are nearly 2,400 bilateral investment treaties in force around the world. In over 90 percent of these, there has not been a single arbitration claim under ISDS; however, the number of disputes filed in the past 10 years has increased in proportion with the rise in global foreign direct investment (FDI). European investors have filed 46 percent of investment arbitration claims since 1987; U.S. investors, 22 percent. This is consistent with the U.S. and European shares of global outward FDI. In one analysis of the 268 ISDS cases arbitrated at the International Centre for Settlement of Investment Disputes, about one-third were settled in advance of a ruling. For the remainder, host states won about twice as often as investors. When investors were successful, final awards amounted to less than 10 cents on the dollar, on average, compared with the initial claim.^e

⁹⁸⁹ For additional discussion of TPP’s application to the financial services sector, see chapter 5 of this report.

⁹⁹⁰ A tobacco control measure is defined as a measure of a party related to the production or consumption of manufactured tobacco products (including products made or derived from tobacco), their distribution, labeling, packaging, advertising, marketing, promotion, sale, purchase, or use, as well as enforcement measures, such as inspection, recordkeeping, and reporting requirements. The exception does not apply to measures with respect to tobacco leaf that is not in the possession of a manufacturer of tobacco products or that is not part of a manufactured tobacco (fn 13, Art. 29.5).

^a UNCTAD, Investment Dispute Settlement Navigator database, accessed March 15, 2016.

^b Notice of Intent, TransCanada Corporation v. the United States of America, January 6, 2016.

^c NAFTA, Article 1119: "Notice of Intent to Submit a Claim to Arbitration."

^d The remaining cases are still pending. Public Citizen, "Table of Foreign Investor-State Cases and Claims," June 2015, based on data from UNCTAD's Investment Dispute Settlement Navigator database.

^e Miller and Hicks, "Investor-State Dispute Settlement," January 2015, 6–10.

The Investment chapter contains 12 annexes. Some of these deal with particular issues that apply to all TPP parties, such as the definition of "customary international law" or the treatment of public debt in relation to an ISDS claim. Others apply to specific situations for specific parties. Table 6.7 summarizes the annexes to the Investment chapter.

Table 6.7: TPP Investment chapter annexes

Title	Relevant TPP Parties	Summary
Annex 9-A: Customary International Law	All	Defines "customary international law" for purposes of the chapter.
Annex 9-B: Expropriation	All	Deals with expropriation (direct and indirect) in some detail. To be considered expropriation, a party's action or series of actions would be required to interfere "with a tangible or intangible property right or property interest in an investment."
Annex 9-C: Expropriation Relating to Land	Singapore and Vietnam	Deals with expropriation relating to land, specifically with regard to Singapore and Vietnam.
Annex 9-D: Service of Documents on a Party under Section B	All	Provides points of contact for each party with regard to service of documents in an ISDS matter.
Annex 9-E: Transfers	Chile	States that Chile reserves the right to restrict or limit transfers in order to ensure currency stability and the normal operation of domestic and foreign payments.
Annex 9-F: DL 600	Chile	States that Chapter 9 does not apply to certain aspects of Chile's Foreign Investment Statute (Decreto Ley 600) or its Foreign Capital Investment Fund Law (Ley 18.657).
Annex 9-G: Public Debt	All	Deals with the treatment of public debt in relation to ISDS claims.
Annex 9-H: Non-conforming Measures Ratchet Mechanism	Australia, Canada, Mexico, New Zealand	Clarifies that a decision not to approve an investment proposal would not be subject to dispute settlement provisions under Section B of Chapter 9 (ISDS) or Chapter 28 (Dispute Settlement).
Annex 9-I: Non-conforming Measures Ratchet Mechanism	Vietnam	Addresses an exception for Vietnam with regard to the imposition of nonconforming measures, for three years after entry into force of TPP.
Annex 9-J: Submission of a Claim to Arbitration	Chile, Peru, Mexico, Vietnam	States that an investment claim that has been submitted to a party's court or administrative tribunal may not later be submitted to ISDS arbitration.
Annex 9-K: Submission of Certain Claims for Three Years after Entry into Force	Malaysia	Addresses submission of claims under ISDS related to a government procurement contract.
Annex 9-L: Investment Agreements	All	Addresses conditions for submitting ISDS claims to arbitration, including certain limitations on consent to arbitration by Peru and Mexico.

Source: TPP Chapter 9 (Investment).

Nonconforming Measures Related to Investment

As noted above, the negative list structure of the Investment chapter includes all parts of the economy that are not specifically carved out. Those exceptions are contained in Annex I and Annex II of the agreement. Annex I lists exemptions for existing laws or regulations, maintained at the central or regional (state) government level, which might violate the provisions of the agreement. NCMs at the local government level would be exempted without requiring any notation in an annex. As an example, box 6.2 illustrates how Mexico's TPP commitments and its NCMs related to the energy sector combine to create new opportunities for U.S. investors in Mexico's energy sector.

Annex II lists reservations to ensure that a party maintains flexibility to adopt or maintain future measures that would be inconsistent with the requirements of TPP.⁹⁹¹ The actual content of the reservations in Annexes I and II vary widely. Some reservations are horizontal in nature, meaning that they address general policy provisions that affect all investment, whereas others only apply to investment in specific industries. In some cases, the reservation indicates a potential constraint on foreign investment that may not have a significant effect on investors' activities or business results. Consequently, the inclusion of a sector in an annex does not mean that the entire sector has been exempted from coverage by the investment disciplines of the FTA. In some cases, new instances of liberalization are found in the NCM annexes. Given the complexity of a multilateral FTA, the NCMs for each country are summarized in appendix E, and not addressed separately here.

⁹⁹¹ Each party's Annex III lists NCMs specific to financial services, relating to both existing and potential laws and regulations. This annex is part of the Financial Services chapter (TPP Chapter 11), not the Investment chapter.

Box 6.2: Investment Liberalization in Mexico’s Energy Sector under TPP

Compared with its commitments under NAFTA, the TPP would present new opportunities for U.S. investment in Mexico's energy sector, even though Mexico has taken several NCM exceptions to its general investment commitments in TPP that would impact the energy sector. According to one estimate, the liberalization of Mexico's oil and gas and electricity sectors could attract up to \$15 billion of additional foreign investment per year from all countries. For the first time, foreign companies would have guarantees that they would be able to bid to participate in the exploration, production, processing, and distribution of oil, gas, and geothermal resources in Mexico.^a

For example, the TPP Investment chapter's national treatment provision (Article 9.4) requires that foreign investors be treated equally with domestic investors. However, Mexico has scheduled an exception stating that, for all sectors, investors must receive prior government approval to control more than 49 percent of the equity of an investment valued above a certain threshold (set at \$1 billion). But this threshold level would be a significant increase from the existing level of \$250 million under NAFTA. The higher threshold is particularly important to investors in the energy sector, where individual investment projects tend to have high values.^b Mexico also has taken NCM exceptions permitting the Ministry of Energy to impose particular performance requirements on foreign investors, contrary to Article 9.4 (National Treatment) and Article 9.9 (Performance Requirements) of TPP’s Investment chapter. However, Mexico has unilaterally amended its constitution to liberalize certain aspects of the energy sector in recent years, so under both TPP and NAFTA, some of that liberalization would be captured by the “ratchet mechanism” (Article 9.11.1(c)), which requires Mexico to maintain its more liberal regulations in the future. This “ratchet” would only apply to foreign participation in cross-border services under TPP, not under NAFTA.

Several other aspects of Mexico's TPP commitments would likely prove beneficial to investors in the energy industry as well. First, unlike NAFTA, TPP covers written investment agreements, which investors rely on when establishing or acquiring an investment. Such investment agreements would relate to exploitation of natural resources, supply of infrastructure services, and construction of infrastructure projects (Article 9.1). Foreign companies would also have new access to Mexico's energy sector through the Government Procurement chapter (TPP Chapter 15), under which TPP-based companies would be able to bid for energy-related projects, and through the state-owned enterprises chapter (TPP Chapter 17), under which PEMEX (Mexico's state-owned energy company) would be required to act in accordance with commercial considerations.^c

^a Freehills, “Impact of Trans-Pacific Partnership on the Energy Sector,” November 2, 2015. (The original estimate was \$20 billion in Australian dollars, converted to USD at market rates on March 16, 2016).

^b Mexico, Annex I; Freehills, “Impact of Trans-Pacific Partnership on the Energy Sector,” November 2, 2015.

^c Taylor, Mansour, and Konstantopoulos, “The Trans-Pacific Partnership,” October 15, 2015.

Summary of Views of Interested Parties

In the Commission's hearing, ambassadors from Peru and Singapore credited the existing U.S. FTAs with encouraging investment between the United States and their countries. According to Ambassador Castilla of Peru, the U.S.-Peru TPA, together with other Peruvian trade agreements, has encouraged that country to maintain open economic policies, thus attracting

significant new investment to Peru. That may be the case for the other new TPP partners as well, which would benefit U.S. investors.⁹⁹² According to Ambassador Mirpuri of Singapore, the U.S.-Singapore FTA has led to significant increases in investment between the two countries, so TPP is likely to yield additional economic benefits as well.⁹⁹³

The Commission received a significant number of comments on the Investment chapter in written submissions and at the Commission's hearing. Business interests tended to be strongly supportive of the chapter, both for its provisions on investment protections in Section A and for the ISDS process in Section B. Overall, these groups stated that the Investment chapter provides critical protections that would protect and encourage investment by U.S. firms in TPP parties. Further, they agreed that outbound U.S. FDI helps to spur U.S. productivity, economic growth, and exports; improves U.S. competitiveness; and helps to secure stable energy supplies and other inputs needed for domestic production by U.S. companies.⁹⁹⁴

The majority of business groups testifying to the Commission hearing said that they regarded the ISDS process as a critical protection assuring access to rule of law in case of a dispute with a host country government.⁹⁹⁵ The National Association of Manufacturers stated in written testimony that TPP would represent a significant step forward in protection for U.S. investors in Brunei, Japan, Malaysia, and New Zealand, with which the United States has no investment agreement; in Vietnam, where U.S. investors have only limited access to ISDS; and in Australia, where the existing U.S.-Australia FTA does not include ISDS. For Canada and Mexico, TPP would grant some additional investor protections as compared with the NAFTA.⁹⁹⁶ Walmart said that a specific investment benefit for U.S. investors in Vietnam would be the elimination, within 5 years, of Vietnam's economic needs test for new investment in the retail and distribution industries.⁹⁹⁷

Several interested parties expressed concern about TPP's carve-out from the ISDS procedures for claims challenging tobacco control measures. They objected to the carve-out, both on its face and because they viewed it as likely to set a precedent for excluding a single product or industry from the ISDS process. Further, they stated that countries are free to impose

⁹⁹² USITC, hearing transcript, January 13, 2016, 88–90 (testimony of Luis Miguel Castilla, Ambassador of Peru).

⁹⁹³ USITC, hearing transcript, January 13, 2016, 36–38 (testimony of Ashok Kumar Mirpuri, Ambassador of Singapore).

⁹⁹⁴ ECAT, written testimony to the USITC, December 28, 2015, 5; USITC, hearing transcript, January 14, 2016, 513–14 (testimony of Linda Dempsey, NAM); USITC, hearing transcript, January 14, 2016, 467–68 (testimony of Robert Vastine, Georgetown University).

⁹⁹⁵ Proponents of this view at the USITC hearing included the Coalition of Service Industries, written testimony to the USITC, January 11, 2016, 7; National Association of Manufacturers (NAM), written testimony to the USITC, January 8, 2016, 7; U.S. Chamber of Commerce, written testimony to the USITC, January 13, 2016, 4; ECAT, written testimony to the USITC, December 28, 2015, 5; Vastine, written testimony to the USITC, January 14, 2016, 3.

⁹⁹⁶ Dempsey, written testimony to the USITC, January 8, 2016, 7–8.

⁹⁹⁷ Thorn, written testimony to the USITC, December 29, 2015.

regulations in the public interest without such a targeted exclusion.⁹⁹⁸ In addition, Universal Leaf Tobacco Company expressed concern that this provision would inhibit tobacco companies from marketing their products, thus reducing demand for leaf tobacco, leading the company to call for rejecting the agreement.⁹⁹⁹

In contrast, in written submissions and testimony at the Commission's hearing, several labor unions, environmental groups, and other nonbusiness interests expressed concerns about the Investment chapter. A number of organizations argued that the investment protections in Section A encourage U.S. companies to relocate jobs to other countries with lower wage rates, decisions that might be made differently without the protections for investors included in TPP agreement. The AFL-CIO specifically cited the automobile, auto parts, and call center industries as potentially vulnerable to offshoring of jobs.¹⁰⁰⁰ Richard Cunningham, a specialist in international trade law, in written testimony prepared for the Commission's hearing, raised the possibility that TPP would not necessarily encourage U.S. firms to move production overseas, but would affect their choice of location once such a decision was made, encouraging U.S. investors to choose offshore locations within the TPP region.¹⁰⁰¹

Many organizations have also raised concerns related to the ISDS provisions in Section B. According to the Farm and Ranch Freedom Alliance, TPP's ISDS provisions would threaten U.S. sovereignty by vastly increasing the number of foreign entities able to challenge U.S. laws through ISDS.¹⁰⁰² The AFL-CIO, the UAW, the United Steelworkers, the Sierra Club, and others have expressed concern that ISDS provisions will lead arbitration panels to overturn host country environmental, health, or other public interest regulations. Even where such regulations are not actually overturned, there are concerns that ISDS cases, or the threat of such cases, can create a "chilling" effect, such that host countries become less likely to regulate in the public interest, or are quick to change regulations when an investor threatens an arbitration case.¹⁰⁰³

Another concern frequently raised against the ISDS process is that it creates a special, extra-judicial dispute settlement process for investors that is not available to other groups. According

⁹⁹⁸ U.S. Chamber of Commerce, written testimony to the USITC, January 13, 2016, 9; Universal Leaf Tobacco Company, written submission to the USITC, February 12, 2015, 2–3; ECAT, written testimony to the USITC, December 28, 2015, 5; USITC, hearing transcript, January 14, 2016, 514 (testimony of Linda Dempsey, National Association of Manufacturers); Wolff, written testimony to the USITC, January 13, 2016, 6–7.

⁹⁹⁹ Universal Leaf Tobacco Company, written submission to the USITC, February 12, 2015, 2–3.

¹⁰⁰⁰ Drake, written testimony to the USITC, December 29, 2015, 18–23, 46; Citizens Trade Campaign, written submission to the USITC, February 17, 2016, 2.

¹⁰⁰¹ Cunningham, written testimony to the USITC, December 29, 2015, 4.

¹⁰⁰² FARFA, written submission to the USITC, February 10, 2016, 1.

¹⁰⁰³ Sierra Club, written submission to the USITC, February 12, 2016, 5–6; USITC, hearing transcript, January 13, 2016, 200 (testimony of Celeste Drake, AFL-CIO).

to views expressed to the Commission, this allows investors to enforce the terms of an FTA in a way that is not available to labor or environmental groups seeking to enforce the provisions of the Labor or Environment chapters of the agreement. Instead, non-investors must work through their home country government to enforce the FTA, a process that is subject to delays and political decisions by each government involved.¹⁰⁰⁴ Further, according to the AFL-CIO, “[b]y offering additional legal protections beyond those that exist under U.S. law or other countries’ national courts, ISDS makes it more attractive to send production and investment overseas.”¹⁰⁰⁵

The report of the Trade and Environment Policy Advisory Committee (TEPAC) stated that many of its members have expressed concern over TPP’s ISDS provisions, but also said that the TPP investment chapter goes further than previous FTAs in clearly addressing some of the specific concerns that have been raised about ISDS. In particular, according to TEPAC, the chapter provides for new levels of transparency and public participation in ISDS cases, compared with previous U.S. FTAs. For example, the TPP investment chapter specifically permits the filing of amicus curiae submissions in ISDS cases (though it does not require a tribunal to accept such submissions), and permits the investor’s home country government to submit briefs. The TEPAC report also stated that the chapter contains language clarifying the right of host countries to regulate for a public purpose in a nondiscriminatory manner, and allows the TPP parties to offer guidance on applying the code of conduct for dispute settlement proceedings outlined in Chapter 28 (Dispute Settlement) to ISDS arbitrators.¹⁰⁰⁶ Other observers disagree that these changes go far enough. The AFL-CIO, in a prehearing statement to the Commission, stated that “the minimal changes to the investment chapter do not fix the glaring shortcomings inherent in the undemocratic investor-to-state ISDS mechanism.”¹⁰⁰⁷

Temporary Entry for Business Persons

Assessment

TPP provisions on temporary entry of business persons will likely have little or no effect on the United States, as U.S. obligations under this chapter are limited to the expeditious processing of visa applications, transparency, and international cooperation. According to USTR, these obligations will not require any change in U.S. regulation or practice,¹⁰⁰⁸ and other countries’

¹⁰⁰⁴ TEPAC, *The U.S.-Trans-Pacific Partnership Free Trade Agreement*, December 3, 2015, 21; AFL-CIO, written submission to the USITC, 46.

¹⁰⁰⁵ AFL-CIO, written testimony to the USITC, December 29, 2015, 47; USITC, hearing transcript, January 13, 2016, 204–5 (testimony of Bruce Olsson, International Association of Machinists and Aerospace Workers).

¹⁰⁰⁶ TEPAC, *The U.S.-Trans-Pacific Partnership Free Trade Agreement*, December 3, 2015, 21.

¹⁰⁰⁷ AFL-CIO, written testimony to the USITC, December 29, 2015, 45. Emphasis in original.

¹⁰⁰⁸ USTR, “Chapter 12, Temporary Entry for Business Persons: Chapter Summary,” November 5, 2015.

observance of these obligations will likely not have a significant impact on U.S. business persons' access to foreign markets.

Summary of Provisions

The TPP chapter on temporary entry obligates parties to approve or disapprove applications for temporary entry in an expeditious manner, provide timely responses to requests for information on an application's status, and maintain reasonable application processing fees (Article 12.3). Parties agree to confirm commitments under the Asia-Pacific Economic Cooperation Forum (APEC) regarding the development or improvement of business travel programs, including programs for trusted travelers and the APEC Business Travel Card program (Article 12.5). Parties are also required to publish information on their respective temporary entry requirements and application processing times, and must maintain mechanisms for addressing inquiries on their temporary entry provisions (Article 12.6).

Article 12.4 requires each party to set out in Annex 12-A the commitments it makes with regard to temporary entry of business persons, which must specify the conditions and limitations for entry and temporary stay, including length of stay, for each category of business persons specified by that party. Most parties have submitted commitments and those commitments apply only to visitors from countries that have also scheduled commitments on the entry of certain types of business persons. However, Japan's schedule specifically indicates that its commitments will be extended to all TPP member countries, while Brunei, Malaysia, and Singapore submitted commitments that are not limited to TPP countries that also have scheduled such commitments. The United States has not submitted commitments to date.

The chapter establishes a Committee on Temporary Entry for Business Persons which is charged with considering and reviewing issues that are pertinent to the chapter. These include, among other things, the chapter's implementation and efforts to facilitate temporary entry (Article 12.7). The chapter also encourages cooperation among parties on border security and visa processing procedures (Article 12.8).

A party may have recourse to dispute settlement under Chapter 28 of TPP, but only if a refusal to grant temporary entry involves a pattern of practice and the business persons affected have exhausted all available administrative remedies regarding the particular matter (Article 12.10).

Summary of Views of Interested Parties

One hearing witness indicated that the United States may derive some benefit from the TPP chapter on temporary entry through the improved operation of partner countries' systems for processing transferees. However, he was uncertain if this chapter would have an impact on the U.S. economy, and stated that U.S. business persons do not currently face any obstacles to entering TPP member countries.¹⁰⁰⁹ The Commission received very few comments from industry, NGOs, or other interested parties regarding the provisions included in the TPP temporary entry chapter, and Commission staff found no third-party analyses of the potential impact of these provisions on the U.S. economy.

Government Procurement

Assessment

Under TPP, the most significant new government procurement opportunities for U.S. businesses would likely be in the markets of Brunei, Vietnam, and Malaysia, which are currently not covered by an existing U.S. FTA or the WTO Government Procurement Agreement (GPA). The procedural and legal changes required by the chapter to the procurement processes in those countries would likely make their markets more transparent and enable U.S. companies to compete more effectively there.

In addition, Canada and the United States have agreed to use TPP Government Procurement chapter to replace the government procurement commitments in NAFTA, essentially updating those prior commitments to incorporate the higher-level commitments of TPP.¹⁰¹⁰ TPP would not significantly affect the government procurement commitments of the other TPP member countries because several have already committed to the GPA, including the United States, Singapore, Japan, and New Zealand (2015 accession). Others, including Mexico, Chile, Peru, and Australia, will maintain their commitments under existing FTAs with the United States.

According to USTR, the commitments in the Government Procurement chapter would apply only to procurement that each country has agreed to cover. The chapter would continue to exclude from coverage the same elements of U.S. government procurement that are excluded from past U.S. agreements, including Buy America requirements attached to federal funds for state and local mass transit and highway projects and water projects; small business and other set-asides; procurement of transportation services; food programs for people; and sensitive

¹⁰⁰⁹ USITC, hearing transcript, January 14, 2016, 660–661 (testimony of Robert Vastine, Georgetown University).

¹⁰¹⁰ The TPP chapter is based upon the WTO 2014 Revised Government Procurement Agreement, which provides stronger commitments than the NAFTA or the prior Uruguay Round Government Procurement Agreement (1994).

elements of Department of Defense procurement, including defense systems, materials and textiles. USTR also stated that the United States had made no commitments to cover state or local government procurement at this time.¹⁰¹¹

Summary of Provisions

Article 15.2 of the chapter lists the activities that are covered and not covered by the chapter. It states that the chapter applies to any measure regarding “covered procurement.” It defines “covered procurement” to mean government procurement (a) of a good, service or any combination thereof as specified in each party’s Schedule to Annex 15-A; (b) by any contractual means; (c) for which the value equals or exceeds the relevant threshold specified in a Party’s Schedule to Annex 15-A; (d) by a procuring entity; and (e) that is not otherwise excluded from coverage under this Agreement. Article 15.2 states that the chapter does not apply to (unless otherwise provided in a party’s Schedule to Annex 15-A): (a) the acquisition or rental of land, existing buildings or other immovable property or the rights thereon; (b) non-contractual agreements or any form of assistance that a party, including its procuring entities, provides, including cooperative agreements, grants, loans, and certain other fiscal benefits; (c) the procurement or acquisition of fiscal agency or depository services and certain other enumerated financial activities; (d) public employment contracts; and (e) procurement relating to providing international assistance, funding related to an international organization or under an international agreement, or procurement of a good or service outside the territory of the party of the procuring entity, for consumption outside the territory of that party. Article 15.2 also addresses the contents of party schedules.

Article 15.3 lists other exceptions, and clarifies that nothing in the chapter shall be construed to prevent a party, including its procuring entities, from adopting or maintaining a measure that is (a) necessary to protect public morals, order or safety; (b) necessary to protect human, animal or plant life or health; (c) necessary to protect intellectual property; or (d) relating to the good or service of a person with disabilities, of philanthropic or not-for-profit institutions, or of prison labor.

Articles 15.4 sets out general principles with regard to national treatment and non-discrimination, procurement, rules of origin, offsets, measures not specific to procurement, and use of electronic means. Other articles address transitional measures for parties that are developing countries (Article 15.5), publication of procurement information (Article 15.6), notices of intended procurement (Article 15.7), conditions for participation (Article 15.8), qualification of suppliers (Article 15.9), limited tendering (for the purpose of avoiding

¹⁰¹¹ USTR Chapter Summary, Buy America and Other Exclusions, found at <https://medium.com/the-trans-pacific-partnership/government-procurement-ac9def5bba92#.9mtg2tknn> March 29, 2016.

competition between suppliers) (Article 15.10), negotiations (Article 15.11), technical specifications (Article 15.12), tender documentation (Article 15.13), time periods relating to the time that a supplier is given to obtain the tender documentation and to prepare and submit a request for participation and a responsive tender (Article 15.14), treatment of tender and awarding of contracts (Article 15.15), post-award information (Article 15.16), disclosure of information (Article 15.17), ensuring integrity in procurement practices (Article 15.18), domestic review (Article 15.19), modification and rectifications of the Annex (Article 15.20), facilitation of participation by small and medium-sized enterprises (Article 15.21), and cooperation between the parties (Article 15.22).

Article 15.23 would establish a Committee on Government Procurement composed of government representatives of each party. At the request of a party, the Committee would meet to address matters related to the implementation and operation of the chapter, such as (a) cooperation between the parties; (b) facilitation of participation by SMEs in covered procurement; (c) use of transitional measures; and (d) consideration of further negotiations as provided for in Article 15.24.

Article 15.24 requires the Committee to review the chapter and provides that it may decide to hold further negotiations with a view to (a) improving market access coverage through enlargement of procuring entity lists and reduction of exclusions and exceptions as set out in Annex 15-A; (b) revising the thresholds set out in Annex 15-A; (c) revising the Threshold Adjustment Formula in Section H of Annex 15-A; and (d) reducing and eliminating discriminatory measures. Article 15.24 requires the parties, no later than three years after the date of entry into force of the Agreement, to commence negotiations with a view to achieving expanded coverage, including sub-central coverage.

Summary of Views of Interested Parties

Several business trade associations expressed concerns that no commitments were made to open procurement at the state and local government (“sub-central”) level.¹⁰¹² Generally, however, these associations viewed the TPP commitments as beneficial to U.S. interests. As expressed by the National Association of Manufacturers, “The new access provided to these government procurement markets will expand opportunities to U.S. manufactured goods exports significantly and represents a significant step forward given many developing countries’ reluctance to engage in more reciprocal government procurement obligations.”¹⁰¹³

¹⁰¹² See statements by the U.S. Chamber of Commerce, NAM, and CSI.

¹⁰¹³ Dempsey, written testimony to the USITC, January 8, 2016, 8.

In a written submission, the Peterson Institute for International Economics provided an analysis of the strengths and shortcomings of the TPP government procurement chapter.¹⁰¹⁴ The institute noted the political difficulties for the United States of negotiating any procurement covered by the Buy America Act, and expressed concern about the inefficiencies that it stated were caused by the Act's provisions.

The AFL-CIO and the International Association of Machinists and Aerospace Workers expressed reservations concerning the government procurement commitments of TPP. One area of concern was the continued use of "offsets" by Vietnam and Malaysia under the terms of TPP,¹⁰¹⁵ which could induce manufacturers to build plants in TPP partners' territory to satisfy government procurement requirements, leading to a loss of U.S. jobs. Another concern is that foreign call centers would be able to supplant U.S. call centers providing government services, displacing U.S. workers with few options for alternative employment.¹⁰¹⁶ The AFL-CIO also pointed out the possibility that government economic stimulus actions to fight recession might be diminished if foreign firms share in the funds.

Competition

Assessment

Chapter 16 of the TPP Agreement addresses a range of topics: competition law and authorities, anticompetitive business practices, procedural fairness in competition law enforcement, private rights of action, cooperation, technical cooperation, consumer protection, transparency in competition enforcement policies, and consultations. The Competition provisions are similar in most respects to those in previous FTAs. New features in the TPP chapter include establishing detailed rules on procedural fairness in competition law enforcement, consistent with U.S. law and practice. USTR also notes that the chapter provides a regional standard that requires parties to adopt or maintain laws proscribing fraudulent and deceptive commercial activities.¹⁰¹⁷ None of the provisions of the Competition chapter would be subject to the TPP Dispute Settlement process.

The TPP Competition chapter includes more specifics on the elements of competition than existing U.S. FTAs. For example, the consumer protection provisions of the TPP chapter recognize that fraudulent and deceptive commercial activities can harm consumers, and TPP

¹⁰¹⁴ Moran, PIIIE, "Government Procurement," February 2016.

¹⁰¹⁵ Drake, written testimony to the USITC, December 29, 2015, 12; Olsson, written testimony to the USITC, January 13, 2016, 1, 3.

¹⁰¹⁶ Drake, written testimony to the USITC, December 29, 2015, 23–24.

¹⁰¹⁷ USTR, Trans-Pacific Partnership Agreement, Chapter 16, Chapter Summary, downloaded from USTR website on April 8, 2016.

also requires each party to adopt or maintain consumer protection laws. However, the TPP commitments to address fraudulent and deceptive activities and to cooperate with each party's respective laws and enforcement are not binding. In addition, unlike the consumer protection provisions in some other U.S. trade agreements, those in TPP do not support implementation of the Organisation for Economic Co-operation and Development (OECD) Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices across Borders (2003).¹⁰¹⁸

Brunei is exempt from certain sections of the competition policy for a period of no longer than 10 years after the date of EIF of the agreement because Brunei does not currently have domestic competition law and authority. Before the end of the 10-year period, it must endeavor to comply with these obligations.

Summary of Provisions

Chapter 16 addresses matters that encourage fair competition rules and behaviors. Article 16.1 requires that each party adopt or maintain national competition laws that proscribe anticompetitive business conduct, with the objective of promoting economic efficiency and consumer welfare, and shall take appropriate action with respect to that conduct. It states that these laws should take into account the APEC Principles to Enhance Competition and Regulatory Reform.¹⁰¹⁹ Article 16.1 also requires that each party “endeavor” to apply its national competition laws to all commercial activities in its territory, but allows each party to provide for certain exemptions. Article 16.1 also requires that each party maintain an authority or authorities responsible for the enforcement of its national competition laws.

Article 16.2 lists nine aspects of procedural fairness that parties must observe before imposing a sanction or remedy against a person violating a party's national competition laws. These items include notification and a reasonable opportunity to be represented by counsel, to seek review, to resolve allegations, to consult, and to exchange information.

Article 16.3 provides that each party “should” adopt or maintain laws or other measures that provide an independent private right of action. It states further that if a party does not do this, it must adopt or maintain laws or other measures that provide a right that allows a person: (a) to request that the national competition authority initiate an investigation into an alleged violation of national competition laws; and (b) to seek redress from a court or other independent tribunal following a finding of violation by the national competition authority.

¹⁰¹⁸ In TPP, several provisions covering monopolies and state-owned enterprises, which were included in the Competition chapter of some existing U.S. FTAs, are found in TPP Chapter 17, “State-Owned Enterprises and Designated Monopolies.”

¹⁰¹⁹ Auckland, September 13, 1999.

Article 16.3 also requires each party to ensure that such rights are available to persons of another party on terms that are no less favorable than those available to its own persons.

The chapter also requires that parties cooperate in the area of competition policy by exchanging information on the development of competition policy, and cooperate, as appropriate, on issues of competition law enforcement (Article 16.4). It also provides that parties should consider undertaking mutually agreed technical cooperation activities, subject to available resources, including providing advice or training on relevant issues, exchanging information and experiences on competition advocacy, including ways to promote a culture of competition, and assisting a party as it implements a new national competition law (Article 16.5).

The chapter sets out certain other requirements including consumer protection and transparency. For example, Article 16.6 requires that each party adopt or maintain consumer protection laws or other laws or regulations that proscribe fraudulent and deceptive commercial activities. Article 16.7 provides that at the request of another Party, a Party shall make available public information concerning competition law enforcement policies and practices. It also requires that each party ensure that a final decision finding a violation of its national competition laws is made in writing and sets out, in non-criminal matters, findings of fact and the reasoning, including legal and, if applicable, economic analysis, on which the decision is based; and that each party further ensure that final decisions and any order implementing that decision are published, or if publication is not practicable, are otherwise made available to the public in a manner that enables interested persons and other parties to become acquainted with them.

Article 16.8 requires that parties agree to enter into consultation with a requesting Party and afford them full and sympathetic consideration to the concerns of the other. Article 16.9 provides that no Party will have recourse to dispute settlement for any matter arising under this Chapter.

Summary of Views of Interested Parties

The National Association of Manufacturers stated that TPP's competition provisions "are important to reduce anti-competitive conduct in local markets and to prevent the abuse of competition policy systems in a discriminatory manner that will aid manufacturers in the United States that are doing business in these TPP markets."¹⁰²⁰ The U.S. Chamber of Commerce also

¹⁰²⁰ Dempsey, written testimony to the USITC, January 8, 2016, 9.

supports TPP's efforts to strengthen the competition rules "through notification, consultation and exchange of information."¹⁰²¹

State-Owned Enterprises and Designated Monopolies

Assessment

TPP would be the first U.S. FTA to include a separate chapter on state-owned enterprises (SOEs), and goes beyond previous agreements in addressing the distortions that SOEs can cause in the market. It is the first U.S. FTA to seek to comprehensively address the commercial activities of SOEs that compete with private companies in international trade and investment. According to USTR, the chapter's commitments build on principles found in the WTO agreements and in previous U.S. FTAs, but go beyond them in important ways, including by applying subsidies rules to services exports of SOEs and to the operations of SOE manufacturers outside their home territory.¹⁰²² According to one commentator, "Chapter 17 signals a new strategy to discipline SOEs through trade law commitments as distinct from antitrust principles."¹⁰²³

Generally, the Trade Advisory Committees and those who submitted statements and testimony to the Commission agreed that the provisions of the SOE chapter would be beneficial to U.S. firms.¹⁰²⁴ The interested parties that provided views to the Commission for the most part viewed the chapter as a positive step towards disciplining SOEs to assure that they compete fairly when engaged in commercial activities.

Summary of Provisions

Chapter 17 applies to both goods and services, and the provisions of the chapter apply to both designated monopolies and SOEs. Article 17.1 defines key terms used in the chapter. One is the term "state-owned enterprise" or SOE, defined as an enterprise that is principally engaged in commercial activities and in which any of three indicators of TPP party control are met: (1) the party owns more than 50 percent share of capital, or (2) the party controls, through ownership

¹⁰²¹ Murphy, written testimony to the USITC, January 13, 2016, 9.

¹⁰²² USTR, "Chapter 17, State-owned Enterprises: Chapter Summary," November 5, 2015. In some previous FTAs, including some with other TPP countries, the competition chapters have included provisions that reference SOEs, designated monopolies, or government enterprises. See the U.S.-Singapore FTA, Chapter 12; U.S.-Australia FTA, Chapter 14; U.S.-Peru FTA, Chapter 13; U.S.-Chile FTA, Chapter 16. See also United States-Columbia FTA, Chapter 13; United States-Korea FTA, Chapter 16.

¹⁰²³ Gadbow, "Competition Policy," March 2016.

¹⁰²⁴ See, e.g., ITAC-12, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015.

interests, the exercise of more than 50 percent of the voting rights, or (3) the party holds “the power” to appoint a majority of members of the board of directors or other equivalent management body. SOE is distinguished from another important term, “designated monopoly,” defined as a privately owned or governmental sole provider or purchaser of a good or service that a TPP party designates as such.

Article 17.2 defines the scope of the chapter. Nothing in the chapter would prevent financial regulators from exercising regulatory or supervisory authority over financial policy or financial services suppliers. The chapter would not apply to sovereign wealth funds or independent pension funds of the parties, with certain exceptions, nor to government procurement. Under this chapter, SOEs and designated monopolies must “act in accordance with commercial considerations” in the sale and purchase of goods and services, and parties must give nondiscriminatory treatment to enterprises, goods, and services of other TPP parties (Article 17.4).

The provisions of this chapter would apply anywhere the SOE/monopoly operates in the free trade area, including in their home or other TPP countries. One example of the way these rules may apply beyond the territory of the home country is contained in a provision that is unique to TPP. The provision obliges each party to assure that its provision of noncommercial assistance to an SOE that produces and sells goods in another party’s territory will not cause injury to a domestic industry in that territory (Article 17.6). The Chapter would also prohibit parties from providing non-commercial assistance to SOEs that would cause adverse effects to the interests of other TPP parties (Articles 17.6 and 17.7).

Under this chapter, the parties would be required to ensure that their SOEs make purchases and sales on the basis of commercial considerations, except when doing so would be inconsistent with any mandate under which the SOE is operating that would require it to provide public services (Article 17.4). Parties would agree to provide their courts with jurisdiction over commercial activities of foreign SOEs in their territory, and to ensure that administrative bodies regulating both SOEs and private companies do so in an impartial way (Article 17.5).

The SOE chapter also contains a number of detailed transparency and notification requirements (Article 17.10). The provisions of the chapter are subject to the provisions of the Dispute Settlement Chapter (TPP Chapter 28). The Chapter also establishes a Committee on SOEs and designated monopolies (Article 17.12) and provides for parties to engage in mutually agreed technical cooperation activities (Article 17.11).

Under Annex 17-D, the nondiscriminatory treatment and commercial considerations provisions, and some of the transparency provisions, do not apply to companies owned by regional and

local governments. The exemptions in that Annex only apply to the original 12 parties and apply for five years, after which the parties agree to conduct further negotiations on extending these exceptions. Any countries that join the TPP Agreement in the future would have to negotiate specific exemptions.

Summary of Views of Interested Parties

A number of interested parties agreed that the inclusion of an SOE chapter in the TPP Agreement is a positive and significant achievement and would help address the increasing importance and growth of SOEs in global markets, where they often compete with U.S. companies. Observers also noted that TPP's restrictions on SOEs could encourage investment among TPP members and set an important precedent for future agreements, especially those that might include China.¹⁰²⁵ In contrast, several labor unions and Robert Scott, representing the Economic Policy Institute, stated that TPP does not do enough to regulate SOEs and would promote the growth of U.S. trade deficits. These parties also expressed concern about the effects the SOE provisions might have, or that they might fall short of having, on potential future TPP partners, in particular China.¹⁰²⁶

Both interested parties who expressed generally favorable views about this chapter and interested parties who objected to the SOE provisions saw three areas as potential loopholes: (1) the perceived narrowness of the definition of "SOE" in requiring majority ownership; (2) the granting (in the annex) of certain exemptions for sub-central SOEs; and (3) other exemptions taken by TPP parties, particularly Vietnam and Malaysia.

Definition of an SOE: While TPP would extend the reach of existing subsidies disciplines in the WTO by broadening the definition of what constitutes an SOE, some interested parties expressed concern that the definition as applied to other competitive activities is narrower than that contained in existing U.S. FTAs with other TPP members. In particular, several commenters compared the TPP definitional provisions on SOEs to those of the U.S.-Singapore FTA. Nova Daly of Wiley Rein LLP viewed the Singapore definition of "government enterprises" as being broader than the TPP SOE definition; while recognizing the desire for clear definitions and the difficulties in negotiating a multicountry agreement, Mr. Daly expressed concern that what he viewed as TPP's more limited definition could in practice permit governments to avoid the

¹⁰²⁵ See, e.g., Emergency Committee on American Trade, written submission to the USITC, December 28, 2015; USITC, hearing transcript, January 13, 2016, 245-46 (testimony of Alan Wolff, National Foreign Trade Council); PIIE, *Assessing the Trans-Pacific Partnership*, Vol. 1: *Market Access and Sectoral Issues*, February 2016; Schmid, written testimony to the USITC, January 15, 2016.

¹⁰²⁶ See, e.g., written testimony of AFL-CIO; Gerard, written submission to the USITC, December 29, 2015; USITC, hearing transcript, (testimony of Robert E. Scott, Economic Policy Institute, January 13, 2016.

chapter's disciplines, while maintaining effective control over nominally commercial enterprises.¹⁰²⁷

Exceptions taken by TPP parties: Several interested parties, including some who viewed the SOE chapter in a generally favorable light, expressed concern that the exceptions taken by various countries would limit the benefits to U.S. firms of the chapter's obligations.¹⁰²⁸ They focused particularly on the exceptions taken by Malaysia and Vietnam, which have many SOEs operating across their economies.¹⁰²⁹ Another observer stated that the chapter's commitments on SOEs would likely have only a small effect on countries where SOEs have a less prominent role, but that countries like Vietnam, with a larger state sector, would need to drastically change their behavior under TPP.¹⁰³⁰ The AFL-CIO said that allowing existing SOEs, particularly in Malaysia, Vietnam, and Singapore, to continue to benefit from the government support they have been receiving would allow these SOEs to compete unfairly against firms based in the United States and elsewhere.¹⁰³¹

With regard to the United States, some commenters noted that the United States also obtained exceptions for Freddie Mac and Fannie Mae, which would be able to continue to provide government guarantees for timely payment on mortgage-backed securities.¹⁰³² The Intergovernmental Policy Advisory Committee (IGPAC), in its Advisory Committee report, stated that it welcomed TPP's establishment of rules for SOEs in an effort to help level the playing field for U.S. firms, but also welcomed the postponement of sub-federal coverage of SOEs, because it is not clear how TPP would impact U.S. sub-federal SOEs.¹⁰³³

Effects on U.S. industries: In written testimony to the Commission, Nova Daly stated that manufacturing sectors, particularly steel, aluminum, and solar energy, are the U.S. industries that have been hurt most by the activities of SOEs, and are thus the industries that potentially have the most to gain from TPP's SOE provisions. According to Mr. Daly, governments have used unprofitable SOEs to provide domestic employment and tax revenue, and shielded these firms from bankruptcy. This has led to global overcapacity in certain industries, with effects that have spread throughout the global economy. Mr. Daly also stated that SOEs often make investments outside of their home economies, relying on extensive financial support from their domestic governments, and that such investments may be driven by political or strategic

¹⁰²⁷ Daly, written testimony to the USITC, January 10, 2016, citing U.S.-Singapore FTA, Article 12.8(5).

¹⁰²⁸ ECAT, written submission to the USITC, December 28, 2015, 7.

¹⁰²⁹ Linda Schmid, representing Trade in Services International (TISI), noted that in Vietnam, SOEs accounted for 30 percent of GDP in 2013. USITC, written testimony to the USITC, January 15, 2016, 4; PIIE, *Market Access and Sectoral Issues*, February 2016 (submitted with PIIE submission).

¹⁰³⁰ Miner, "Commitments on State Owned Enterprises," March 2016.

¹⁰³¹ AFL-CIO, written submission to the USITC, December 29, 2015.

¹⁰³² PIIE, written submission to the USITC, February 11, 2016.

¹⁰³³ IGPAC, "The Trans-Pacific Partnership Agreement (TPP)," December 2, 2015, 15.

objectives rather than commercial considerations. According to Mr. Daly, TPP's SOE provisions are "useful in seeking to address these issues," but the chapter also has weaknesses that would limit the impact of the new provisions.¹⁰³⁴

Although not specifically addressing the provisions of TPP Chapter 17, UPS noted that TPP's Express Delivery Services (EDS) Annex¹⁰³⁵ protects express delivery providers that compete against state-owned postal service providers by ensuring that private companies providing services are not regulated by a government entity that is also a competitor. UPS added that this annex prohibits abuse of a public postal operator's monopoly position and insists on "impartial, non-discriminatory, and transparent" regulation.¹⁰³⁶

In written submissions and direct testimony, labor unions expressed the view that the SOE chapter is unlikely to have beneficial effects for U.S. jobs and trade. Leo Gerard, representing the United Steelworkers (USW), recommended evaluating TPP's SOE provisions under the framework they create for potential future TPP partners, especially China. According to the USW, the SOE provisions fail to provide sufficient guidance and disciplines to address the anticompetitive impact of existing SOEs. The USW expressed concern that, if China joins TPP, the SOE chapter would do little to curb the advantages afforded to China's SOEs, given the preponderance of sub-federal entities operating in China.¹⁰³⁷ Both the USW and the AFL-CIO objected to the requirement that economic injury would have to occur for more than a year to be actionable under TPP. While various witnesses expressed concerns about the perceived lack of clarity in defining "commercial considerations" in TPP's SOE chapter, the AFL-CIO said that it viewed this as a "fatal flaw," focusing on the absence of "specific guidance on how that term is to be applied."¹⁰³⁸

Intellectual Property Rights

Assessment

Full and effective implementation and enforcement of the provisions of the TPP's intellectual property chapter would likely benefit U.S. industries that rely on trademarks, patents, copyrights, trade secrets, and other intellectual property rights (IPR or IPRs). It would do so by reducing their losses from infringement and increasing exports of IPR-intensive services and

¹⁰³⁴ Daly, written testimony to the USITC, January 15, 2016, 1–2.

¹⁰³⁵ The EDS Annex is part of TPP, Chapter 10, Cross-border Trade in Services, addressed further in chapter 5 of this report.

¹⁰³⁶ Lane, written testimony to the USITC, December 29, 2015.

¹⁰³⁷ Gerard, written testimony to the USITC, January 13, 2015, 5–6.

¹⁰³⁸ Gerard, written testimony to the USITC, January 13, 2015, 5–6; Drake, written testimony to the USITC, December 29, 2015, 43.

goods, as well as foreign affiliate sales opportunities. This assessment relies on a review and analysis of the regulatory commitments required by the chapter, perspectives from hearing testimony and written submissions, the empirical literature, and an econometric estimate of the effects of strengthened patent protection on the income U.S. firms receive for the use of their intellectual property in TPP countries.

With regard to regulatory changes, the chapter incorporates IPR provisions already in force in other trade agreements—in particular, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and U.S. FTAs with Australia, Canada, Chile, Mexico, Peru, and Singapore—and builds on these standards to take into account experiences to date. The amount of regulatory change in each country that would be required by the chapter can be estimated based on the “transition periods.” Unless a transition period applies, the chapter’s obligations must be complied with on entry into force (EIF) of the agreement in that country. For six countries—Australia, Canada, Chile, Japan, Singapore, and the United States—there are no transition periods, suggesting substantial overlap between regulations currently in place and TPP’s requirements. The six remaining countries—Brunei, Malaysia, Mexico, Peru, New Zealand, and Vietnam—negotiated transition periods, with most related to test data protections and patents (table 6.8).¹⁰³⁹

Table 6.8: Transition Periods for TPP IPR Provisions

	Patent and test data provisions	Trademark provisions	Copyright and ISP provisions	Enforcement provisions	Ratification of international agreements
Australia	None	None	None	None	None
Brunei	1.5–4 years	3 years	3 years	None	3 years
Canada	None	None	None	None	None
Chile	None	None	None	None	None
Japan	None	None	None	None	None
Malaysia	4.5–5 years	3 years	2 years	4 years	4 years
Mexico	4.5–5 years	None	3 years	None	4 years
Peru	5–10 years	None	None	None	None
New Zealand	3 years	None	8 years	None	3 years
Singapore	None	None	None	None	None
United States	None	None	None	None	None
Vietnam	3–10 years	3 years	3–5 years	3 years	2–3 years

Source: TPP, article 18.83, annexes 18-A to 18-F.

Note: These transition periods are subject to additional conditions and limitations set forth in the relevant article and annexes. ISP = Internet service provider.

¹⁰³⁹ The term “data protection” generally refers to the period during which generic firms are precluded from using or relying on data on safety, efficacy, or other product characteristics that innovator firms submit to regulatory authorities to obtain marketing approval for their products. See TPP, Art. 18.50; PIIE, *Assessing the Trans-Pacific Partnership*, Vol. 2, March 2016, 22, n.7.

According to most witnesses who testified or made written submissions to the Commission or USTR, the chapter promotes the effective protection of U.S. intellectual property.¹⁰⁴⁰ For example, representatives of copyrighted content industries (such as movies, music, and books) and companies that provide Internet services supported provisions that foster digital services and a rules-based system for addressing online piracy. In the area of trademarks and geographical indications (GIs), new due process and transparency requirements were particularly important to the U.S. dairy sector. Similarly, representatives of U.S. manufacturing and semiconductor firms supported the chapter's requirement for enhanced trade secret protections to address the growing international problem of trade secret theft.

Opinions were mixed, however, on protections for pharmaceuticals and biologic products.¹⁰⁴¹ Representatives of firms that make innovative products objected to the data protection provision for biologics on the grounds that it provides fewer years of protection than is available in the United States. By contrast, representatives of nongovernmental organizations (NGOs) stated that data protection and patent requirements are too stringent. A middle ground was suggested by some commentators and representatives of generic firms, who stated that the provisions reflect a reasonable compromise on a difficult topic.¹⁰⁴²

In addition to these perspectives, there is a substantial body of empirical literature on the effects of IPR strengthening on trade and investment patterns. According to this literature, patent reforms undertaken since TRIPS have had a strong and positive effect on licensing, trade in high-technology goods, and FDI, particularly in larger countries and middle-income countries.¹⁰⁴³ The Commission's econometric estimate builds on this literature by examining the effects of increased patent protections on one type of IPR-sensitive trade—income that U.S. firms receive for the use of their intellectual property (IP receipts) in TPP countries.¹⁰⁴⁴ Based on this estimate, in 2010, U.S. IP receipts were \$2.9 billion dollars (or 11 percent) higher than they would have been had TPP partner countries not improved their patent regimes post-TRIPS, and would increase further as reforms continue (see table 6.10 below). This analysis does not take into account the effects of data protection, copyright, trademark, trade secret, or other non-patent protections in the IPR chapter, nor does it include effects on other types of IPR-sensitive trade or investment.

¹⁰⁴⁰ Citations to particular submissions and hearing testimony are provided in the relevant sections below.

¹⁰⁴¹ Article 18.52.2 defines a biologic as, at a minimum, a product that is or contains a protein produced using biotechnology processes, for use in human beings for the prevention, treatment, or cure of a disease or condition. As set forth below, biologic products represent a major area of U.S. biopharmaceutical innovation and investment.

¹⁰⁴² See ITAC-15, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 17–18; PIIE, *Assessing the Trans-Pacific Partnership*, Vol. 2, March 2016, 28.

¹⁰⁴³ See, e.g., Maskus, *Private Rights and Public Problems*, 2012, 74–81, summarizing the empirical literature on the effects of patent reforms on trade in IPR-sensitive goods, services, and FDI.

¹⁰⁴⁴ In official U.S. services trade statistics, this category is called “charges for the use of intellectual property.” See chapter 5 of this report for an overview of U.S. services trade trends.

Summary of Provisions

This summary highlights key provisions in the IPR chapter. The chapter is divided into 11 sections (sections A–K) and covers general obligations, trademarks and GIs, patents, copyrights, trade secrets, and other forms of intellectual property, as well as IPR enforcement. In annexes, it also sets out the transition periods that some of the TPP countries obtained to comply with particular obligations.

Sections A and B set out general provisions and commitments, including:

- A requirement that the parties give effect to the minimum standards set out in the chapter, while also permitting more extensive protections in domestic laws;
- Recognition that the parties may take measures to protect public health and promote access to medicine for all, consistent with the Declaration on TRIPS and Public Health;
- A requirement that the parties ratify or accede to key multilateral IPR treaties;
- A requirement that the parties provide national treatment on IPR matters (that is, treatment no less favorable than a party gives to its own nationals), subject to certain narrow exceptions;
- A transparency requirement that public information on IPRs be made available on the Internet; and
- A requirement that the parties endeavor to cooperate and engage in work sharing—for example, in patent processing—as appropriate.¹⁰⁴⁵

The only commitment in these sections that includes transition periods is the requirement to ratify or accede to international IPR agreements. Five countries obtained extensions of time to comply, as shown in table 6.9.

¹⁰⁴⁵ Articles 18.1–18.17.

Table 6.9: Transition periods for ratification or accession to international agreements

	Budapest Treaty^a	Madrid Protocol^b	Singapore Treaty^c	UPOV 1991^d	WIPO Copyright Treaty^e	WIPO Performances and Phonograms Treaty^f
Brunei	None	None	None	3 years	None	None
Malaysia	4 years	4 years	4 years	4 years	None	None
Mexico	None	None	None	4 years	None	None
New Zealand	None	None	None	3 years for UPOV 1991 or a sui generis system	None	None
Vietnam	2 years	None	None	None	3 years	3 years

Source: TPP, Article 18.83.

Note: New Zealand may enter UPOV 1991 or adopt a unique or sui generis plant protection system that gives effect to the requirements of UPOV 1991.

^aThe Budapest Treaty requires that all parties recognize microorganisms deposited as a part of the patent procedure, regardless of where the depository authority is located.

^bThe Madrid Protocol is one of two treaties comprising the Madrid System for the international registration of trademarks.

^cThe Singapore Treaty establishes common standards for procedural aspects of trademark registration and licensing.

^dThe International Union for the Protection of New Varieties of Plants or UPOV was established in 1961 and most recently revised in 1991. UPOV 1991 protects new varieties of plants as intellectual property rights.

^eThe WIPO Copyright Treaty deals with the protection of works and the rights of their authors in the digital environment.

^fThe WIPO Performances and Phonograms Treaty addresses the rights of performers and producers of phonograms, particularly in the digital environment.

Trademarks and GIs

The sections on trademarks and GIs provide substantive and procedural protections for the brand names and other signs that businesses and individuals use to distinguish their products in the marketplace (table 6.10).¹⁰⁴⁶ Particularly noteworthy is a series of provisions not contained in previous U.S. trade agreements that require due process and transparency procedures for proposed GIs.¹⁰⁴⁷ These provisions generally require the parties to publish new GI applications, provide opposition procedures, and allow the rejection of a GI under specific circumstances—for example, that it is a common name or is likely to be confused with an existing trademark application or registration.¹⁰⁴⁸

¹⁰⁴⁶ The chapter defines a GI as “an indication that defines a good as originating in the territory, region, or locality of a Party, where a given quality, reputation or other characteristics is essentially attributable to that geographical origin.” TPP, Art. 18.1.

¹⁰⁴⁷ TPP, Arts. 18.31–18.36

¹⁰⁴⁸ In side letters, Chile, Mexico, and Vietnam agree that they will not take actions that are contrary to the purpose of the TPP’s provision on the protection of GIs under international agreements during the period before the entry into force of the agreement.

Table 6.10: Key TPP commitments related to trademarks and GIs

Subject matter	Commitments
Trademarks	Requires protection for sound, certification, and collective trademarks, and best efforts to protect scent marks. Requires trademark protections in relevant circumstances, including confusing uses of identical or similar trademarks or GIs. Strengthens protections for well-known trademarks. Requires procedural fairness in examination, opposition, and cancellation processes, and the use of electronic systems. Requires a renewable term of protection of at least 10 years. Prohibits a requirement that trademark licenses be recorded.
Domain names	Requires parties to manage country code top-level domain names by making available appropriate procedures for the settlement of domain name disputes. Requires online public access to a reliable and accurate database of contact information for domain-name registrants. Requires that appropriate remedies be available for cases in which a person holds in bad faith a domain name that is identical or confusingly similar to a trademark.
GIs	Requires transparent procedures for GIs, including those linked to international agreements that are completed or under negotiation. Requires additional protections when a GI is likely to cause confusion with an earlier trademark or GI or with a generic or common name. Establishes guidelines for determining whether a term is generic. Prohibits the overprotection of generic individual components of multi-component terms.

Source: TPP, Arts. 18.18–18.36.

Note: Country code top-level domain names are unique two-letter sequences of characters assigned to a country or other geographical area to identify them in a domain name, such as “.jp” for Japan or “.nz” for New Zealand.

TPP countries would give effect to all of the trademark and GI provisions upon EIF of the agreement, with the exception of Brunei, Malaysia, and Vietnam. These countries would have 3 additional years to provide protections for trademarks that rely on sounds.¹⁰⁴⁹

Patents and Data Protection

The chapter next describes TPP countries’ commitments related to patents and test data protection. These include standards for criteria under which patents must be made available, the extension of patent terms to account for patent-office or regulatory delays, and the protection of data used to obtain marketing approval for new agricultural chemicals, pharmaceuticals, new uses for known products, and biologics (table 6.11).

¹⁰⁴⁹ TPP, Arts. 18.83.4(a),(b), and (f).

Table 6.11: Key TPP commitments related to patents and data protection

Subject matter	Commitments
Patents	<ul style="list-style-type: none"> • Patents must be available in all fields of technology when the invention is new, involves an inventive step, and is capable of industrial application, subject to limited exceptions. • Patents must be available for new uses for a known product, or new methods or processes for using a known product. • Parties must allow a grace period of 12 months during which certain public disclosures about the invention will not invalidate the patent. • Requires parties to limit reasons for patent revocations to certain identified grounds. • Requires best efforts to publish patent applications within 18 months from filing or priority date. • Requires adjustment of patent terms to account for unreasonable delays at the patent office.
Data protection and other measures for regulated products	<ul style="list-style-type: none"> • Requires a 10-year period of protection for safety and efficacy data generated for approval of new agricultural chemical products. • Requires parties to compensate for the unreasonable curtailment of the patent terms as a result of the marketing approval process for pharmaceutical products. • Requires a 5-year period of protection for safety or efficacy data supporting new pharmaceutical products. • Requires a 3-year period of protection for new clinical information supporting approval of new indications, formulations, or methods of administration. • Requires at least 8 years of protection, or at least 5 years of protection plus other measures to deliver a comparable outcome, for a new pharmaceutical product that is or contains a biologic. • Permits parties to take measures to protect public health in accordance with the Declaration on TRIPS and Public Health. • Establishes a system for addressing patent issues expeditiously in connection with applications to market pharmaceutical products. • Requires consultation on biologics data protections at least 10 years from EIF.

Source: TPP, Arts. 18.37–18.54.

Transition periods would apply for five countries to comply with particular patent and data protection provisions (table 6.12). Vietnam would have the longest periods, with 10 years and the potential of 2 additional years, to provide data protection for biologics, pharmaceuticals, and new indications or uses for known products.¹⁰⁵⁰

¹⁰⁵⁰ In addition, Brunei, Malaysia, Peru, and Vietnam may implement measures that incentivize the timely filing of applications for regulatory approval of biologics, pharmaceuticals, and new indications in their countries. TPP, Art. 18.83, and Annex 18-C and 18-D.

Table 6.12: Transition periods for patent and data protection commitments

	Data protection for biologics	Data protection for pharmaceuticals	Data protection for new indications	Data protection for agricultural chemicals	Patent term adjustment (regulatory approval delays)	Patent term adjustment (patent office delays)	Patent linkage
Brunei	4 years	4 years	4 years	1.5 years	None	None	2 years
Malaysia	5 years	None	None	None	4.5 years	None	4.5 years
Mexico	5 years	5 years	5 years	5 years	4.5 years	None	None
Peru	10 years	None	5 years	None	None	None	None
Vietnam	10 years*	10 years*	10 years*	5 years	5 years**	3 years	3 years

Source: TPP, Article 18.83.

Notes: *The parties also will consider a 2-year extension of this period based on justified requests from Vietnam.

** The parties also will consider a justified request from Vietnam for an extension of this period for an additional year.

Copyright Protections and Internet Service Providers

The chapter next addresses the scope of protections for copyrights and related rights.¹⁰⁵¹ Separate provisions address the issue of the remedies and safe harbors applicable to Internet service providers (ISPs) for infringement online (table 6.13).¹⁰⁵² Key new provisions would require that the parties seek to achieve an appropriate balance between liability for copyright infringement and exceptions to liability, including for purposes such as criticism, comment, news reporting, teaching, scholarship, and research.¹⁰⁵³ This section also requires a copyright term of protection of life plus 70 years or 70 years from publication. While this is the standard in the United States and many other countries, it represents a substantial increase from current 50-year terms in Brunei, Japan, Malaysia, New Zealand, and Vietnam.¹⁰⁵⁴

Table 6.13: Key TPP commitments related to copyrights and ISPs

Subject matter	Commitments
Copyrights and related rights	<ul style="list-style-type: none"> Requires that parties provide certain rights such as reproduction, communication to the public, and distribution, including in electronic form. Requires protections for the rights of performers and producers of phonograms. Requires a term of protection of at least the life of the author plus 70 years, or 70 years from publication for corporate works. Confines copyright limitations to special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder, consistent with international agreements.

¹⁰⁵¹ “Related rights” are those related to copyrights. They include the rights of performers (e.g., actors, singers, and musicians), producers of phonograms (sound recordings), and broadcasting organizations. WTO, “What Are Intellectual Property Rights?” n.d. (accessed April 10, 2016). For the legal definition in TPP, see Art. 18.62.

¹⁰⁵² ISPs are defined as providers of online services for the transmission, routing, or providing of connections for digital online communications, as well as providers of online services who store material at the direction of a user or refer or link uses to an online location by using information location tools. TPP, Arts. 18.81 and 18.82.

¹⁰⁵³ TPP, Art. 18.66.

¹⁰⁵⁴ ITAC-15, *The Trans-Pacific Partnership Agreement*, December 3, 2015, 20.

Subject matter	Commitments
	<ul style="list-style-type: none"> Requires an appropriate balance in copyright systems by means of limitations that consider legitimate purposes such as criticism, comment, news reporting, teaching, scholarship, research, and facilitating access for persons who are print disabled.
Technological protection measures (TPMs) and Rights Management Information (RMI)	<ul style="list-style-type: none"> Requires effective remedies for tampering with the TPMs used to protect access to and use of copyrighted works, including trafficking in circumvention technologies, subject to certain exceptions. Requires effective remedies for the knowing removal or alteration of the RMI used to identify digital works.
ISPs	<ul style="list-style-type: none"> Requires parties to ensure that legal remedies are available for rights holders to address online infringement. Requires parties to establish safe harbors that include legal incentives for ISPs to cooperate with copyright owners to deter the unauthorized storage and transmission of copyrighted materials. Precludes monetary relief against ISPs for copyright infringement on their systems that they do not control, initiate, or direct, subject to certain conditions. Provides that limitations of liability with respect to storage or linking must require ISPs to expeditiously disable access to material on their networks upon obtaining actual or red flag knowledge of infringement. Provides that limitations of liability cannot be conditioned on requiring ISPs to monitor services or affirmatively seek out infringing activity. In separate annexes (18-E and 18-F), describes requirements for ISPs in Canada and Chile.

Source: TPP, Arts. 18.57-18.70, 18.81-18.82, and Annexes 18-E and 18-F.

Three countries—Brunei, Mexico, and Vietnam—would obtain 3-year transition periods to implement laws providing ISP legal remedies and safe harbors. For extension of the copyright term of protection to 70 years, Malaysia would obtain a 2-year transition period, Vietnam 5 years, and New Zealand 8 years, subject to various conditions.¹⁰⁵⁵

Enforcement, Trade Secrets, and Other Provisions

This section of the chapter unites diverse topics, including civil, criminal, and border enforcement measures; trade secrets; and prohibitions on unauthorized camcording of movies in theaters (table 6.14). Key provisions new in TPP include the requirement that the parties provide criminal penalties for trade secret theft, including theft by state-owned entities.

¹⁰⁵⁵ TPP, Art. 18.83.

Table 6.14: Key TPP commitments related to enforcement, trade secrets, and other provisions

Subject matter	Commitments
Enforcement	<ul style="list-style-type: none"> • Requires parties to ensure that equivalent enforcement procedures are available for digital and physical goods (with the exception of border measures). • Promotes transparency and public accessibility to rulings and data. • Requires certain rebuttable presumptions in enforcement proceedings.
Civil remedies	<ul style="list-style-type: none"> • Requires remedies that reflect adequate compensation and, as an alternative, preestablished or additional damages. • Requires that judges have the authority to order injunctions and/or destruction of infringing goods and materials. • Requires that remedies be available for circumvention of TPMs and RMIs. • Requires expeditious response to requests for provisional measures, including the seizure of suspect goods.
Border measures	<ul style="list-style-type: none"> • Requires parties to provide a mechanism for border agencies to detain suspected infringing goods upon application and reasonable security by the rights holder. • Establishes measures for border enforcement so that officials may act on their own initiative to identify and seize infringing goods destined for import, export, or goods in-transit. • Requires parties to maintain procedures for determining infringement and to permit penalties, including fines, seizure, and/or destruction of infringing goods. • Requires parties to apply border measures to commercial goods sent in small consignments.
Criminal procedures	<ul style="list-style-type: none"> • Requires criminal procedures and penalties for certain cases of trademark and copyright infringement on a commercial scale. • Requires criminal penalties to be available for aiding and abetting infringement. • Requires the establishment of a criminal enforcement framework with deterrent penalties that are proportional to the gravity of the crime. • Requires criminal remedies for unauthorized camcording in movie theaters.
Trade secrets	<ul style="list-style-type: none"> • Requires parties to provide legal means to prevent misappropriation of trade secrets, including when conducted by state-owned enterprises. • Requires criminal procedures and penalties for misappropriation of trade secrets under certain circumstances, including by means of a computer system.
Protection of encrypted program-carrying signals	<ul style="list-style-type: none"> • Requires that criminal penalties be available to address piracy of encrypted satellite or cable signals and criminal or civil remedies for encrypted cable signal theft.
Government use of software	<ul style="list-style-type: none"> • Requires parties to issue rules requiring central government agencies to use only legitimate computer software.

Source: TPP, Arts. 18.71–18.80.

With the exception of Malaysia and Vietnam, all countries must implement the requirements of this section upon EIF. Vietnam would receive 3 years to implement a number of commitments including particular border measures, criminal procedures and penalties, camcording prohibitions, and protections for TPMs and RMIs, trade secrets, and encrypted program-

carrying signals. Malaysia would have 4 years to implement certain border measures and protections for encrypted signals.¹⁰⁵⁶

Summary of Views of Interested Parties

Representatives from a wide range of industry sectors have expressed support for the IPR chapter. For example, Industry Trade Advisory Committees (ITACs) that include representatives of IPR-intensive industries support the chapter to the extent it enhances U.S. economic interests and modernizes standards for IPR protection and enforcement, particularly in countries that do not have an FTA with the United States.¹⁰⁵⁷ According to the U.S. Conference of Mayors, the IPR chapter creates strong institutional “rules of the game” that make it possible for more companies, including small and medium-sized enterprises (SMEs), to engage in exports, expand their work, and help grow the U.S. economy.¹⁰⁵⁸ High standards of IPR protection are particularly important for U.S. manufacturers, who state that international IPR theft threatens large and small companies in every sector and every state.¹⁰⁵⁹ In contrast to this general support, opposition to the IPR chapter generally focuses on protections applicable to pharmaceuticals and biologics.¹⁰⁶⁰ Views of interested parties on particular provisions of the IPR chapter are set forth below.

Trademarks and Geographical Indications

Representatives of U.S. brand owners support provisions that assist in protecting trademarks.¹⁰⁶¹ For example, according to the American Apparel and Footwear Association

¹⁰⁵⁶ TPP, Art. 18.83.

¹⁰⁵⁷ See ITAC-8, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 15; ITAC-10, *The Trans-Pacific Partnership Trade Agreement (TPP)*, December 3, 2015, 1–2; ITAC-3, *The Trans-Pacific Partnership Trade Agreement*, December 2, 2015, 3; ITAC-15, *The Trans-Pacific Partnership Agreement*, December 3, 2015, 3; ACTPN, *The Trans-Pacific Partnership Agreement*, December 3, 2015, 9. See also USCIB, written submission to the USITC, February 15, 2016, 5–6; Dow Chemical Company, written submission to the USITC, February 15, 2016, 3; ECAT, written submission to the USITC, December 28, 2015, 6.

¹⁰⁵⁸ USITC, hearing transcript, January 13, 2016, 119–20 (testimony of Christopher Cabaldon, U.S. Conference of Mayors); USITC, hearing transcript, January 14, 2016, 534–35 (testimony of Jay Steinmetz, Barcoding Inc.); USITC hearing transcript, January 14, 2016, 611–13 (testimony of Devi Keller, Semiconductor Industry Association (SIA)).

¹⁰⁵⁹ NAM, written submission to the USITC, January 8, 2016, 7; USITC, hearing transcript, January 14, 2016, 611–13 (testimony of Devi Keller, Semiconductor Industry Association (SIA)); USITC, hearing transcript, January 14, 2016, 534–35 (testimony of Jay Steinmetz, Barcoding Inc.).

¹⁰⁶⁰ For the position that protections are too strong, see Medecins San Frontieres/Doctors Without Borders (MSF), written submission to the USITC, February 16, 2016, 3; Knowledge Ecology International, written submission to the USITC, December 29, 2015, 1; and Union for Affordable Cancer Treatment, written submission to the USITC, December 29, 2015, 2. For the perspective that protections are not strong enough, see PhRMA, written submission to the USITC, February 11, 2016, 2; BIO, written submission to the USITC, February 16, 2016, 4; ITIF, written submission to the USITC, February 15, 2016, 6.

¹⁰⁶¹ ITAC-15, *The Trans-Pacific Partnership Agreement*, December 3, 2015, 6–8; Wine Institute, written submission to the USITC, February 12, 2016, 3.

(AAFA), useful provisions include those that harmonize registration and enforcement procedures, and those that require countries to manage their country code top-level domain name systems so that brand owners can obtain information and remedies in cases in which a domain name that conflicts with a trademark is registered in bad faith. AAFA particularly notes the need to improve trademark procedures and enforcement in Canada and Mexico, where they have experienced difficulties.¹⁰⁶²

U.S. dairy and wine producers have expressed support for new due-process and transparency provisions governing the recognition of GIs, particularly GIs that may conflict with trademarks or common food names in TPP markets.¹⁰⁶³ The U.S. Dairy Export Council (USDEC) and the National Milk Producers Federation (NMPF), for example, state that prior FTAs left a vacuum in this area and that TPP's new requirements provide an "equitable international model" for resolving disputes between GIs and trademarks. They favorably contrast this model with the "horse-trading protection" the European Union has sought for common names (such as asiago, feta, fontina, and gorgonzola) in trade agreement negotiations with Canada, Japan, Malaysia, Mexico, Peru, Vietnam, Singapore, and others.¹⁰⁶⁴ They state that the new provisions will "significantly strengthen" the ability of the United States to combat barriers and help to preserve market access opportunities for U.S. companies.¹⁰⁶⁵

Patent and Data Protection Provisions

Data Protection for Biologics

The most contested provision in this section requires a period of protection for the safety and efficacy data that innovator biopharmaceutical companies submit to obtain marketing approval for new biologic products.¹⁰⁶⁶ While data protection provisions are common in U.S. FTAs—for example, Article 18.9 of the U.S.-Korea FTA requires a data protection period of at least 5 years for data supporting a pharmaceutical product that contains a new chemical entity and 10 years

¹⁰⁶² AAFA, written submission to the U.S. Trade Representative, February 5, 2016, 2–6.

¹⁰⁶³ Wine Institute, written submission to the USITC, February 12, 2016, 3; International Dairy Foods Association, written submission to the USITC, February 12, 2016, 15–16; Fonterra (USA), written submission to the USITC, February 12, 2016.

¹⁰⁶⁴ NMPF and USDEC, written submission to the USITC, December 22, 2015, 6–7; USDEC and NMPF, written submission to the USTR, February 5, 2016, 3–10.

¹⁰⁶⁵ NMPF, "NMPF Board Endorses TPP," March 8, 2016.

¹⁰⁶⁶ Section 18.52.1 requires the parties to provide "effective market protection" for 8 years from the date of marketing approval of a new pharmaceutical product that contains a biologic, or 5 years of protection plus other measures and market circumstances to deliver a comparable outcome. TPP, Art. 18.52.1.

for data supporting new agricultural products—TPP is the first trade agreement to explicitly extend protection to biologics data.¹⁰⁶⁷

Different constituencies object to this requirement on different grounds. NGO representatives state that early competition between generic and innovator companies is critical to reducing prices so that more patients in developed and developing countries can obtain access to medicines needed to treat HIV, hepatitis C, cancer, and other life-threatening illnesses. In the view of these groups, data protection and patent provisions delay access and increase the price of medicines.¹⁰⁶⁸ NGO representatives also state that data protection and patent provisions are not effective at stimulating biomedical innovation, particularly for diseases that disproportionately affect patients in developing countries. They further state that even in the United States and other developed countries, the high drug prices enabled by data and patent protections are not sustainable, particularly in the context of aging populations with a high incidence of serious diseases.¹⁰⁶⁹

In opposition to these arguments, some industry representatives state that while access to medicines is vitally important, it presumes the existence of effective medicines in the first place, and that this requires a system that enables the profits from one generation of innovation to fund investments in the next. For example, as the Information Technology and Innovation Foundation (ITIF) stated in a written submission, “more revenues means more R&D, more medical discovery, more innovative biologics drugs, and ultimately more generics competition.”¹⁰⁷⁰ Industry representatives further note that the United States has become a leading biologic innovator while also supporting a thriving generics market (generics reportedly accounted for 88 percent of prescriptions filed in 2015), suggesting that U.S. protection periods strike an appropriate balance between incentivizing innovation and access to medicine. Accordingly, representatives of innovator biopharmaceutical companies state that TPP’s

¹⁰⁶⁷ Previous FTAs contain a 5-year data protection period for new chemical entities, which most FTA partners interpret to require the protection of biologics data as well. However, non-FTA partners Vietnam, Malaysia, and Brunei also do not protect biologics data. Mahn and Francis, “Will the TPP Derail Biologics?” December 4, 2015.

¹⁰⁶⁸ According to studies cited by MSF, data protection requirements in Colombia, Guatemala, and Jordan have delayed the entry of generic medicines and substantially increased medicine prices and government spending on healthcare. MSF also cites language in the White House’s 2017 budget proposal estimating that reducing the U.S. data protection period for biologics by 5 years (from 12 to 7 years) would result in savings of nearly \$7 billion dollars over 10 years. See MSF, written submission to the USITC, February 16, 2016, 6.

¹⁰⁶⁹ MSF, written submission to the USITC, February 16, 2016, 6–7; Public Citizen, written submission to the USITC, December 29, 2015, 6–7; Ress, written testimony to the USITC, December 29, 2015, 5–6; KEI, written submission to the USITC, December 29, 2015, 1–4.

¹⁰⁷⁰ ITIF, written submission to the USITC, February 15, 2016, 5.

biologics data protection period is too short, and that the proper period is the 12 years enacted by Congress in 2010.¹⁰⁷¹

Industry representatives also point to the large role that the innovative biopharmaceutical industry plays in the U.S. economy as an important reason for not upsetting a balance that has worked well to date. They state that the sector generated \$97 billion in economic value added, produced \$54 billion in exports, and supported more than 3.4 million direct and indirect jobs in 2014. Moreover, the U.S. biopharmaceutical sector is research-intensive, reportedly investing over 21 percent of sales in R&D to support more than 3,400 drugs under clinical development. Industry representatives state that strong IPR protections are integral to this success.¹⁰⁷²

A middle ground is suggested by the position of some commentators and representatives of the U.S. generic pharmaceutical sector. These groups supported the biologics provision as a reasonable compromise, given the divergent levels of protection currently available in TPP countries, the ongoing debate within the United States about whether the 12-year period should be reduced to 7 years, and the fact that this is the first time that a protection period for biologics has been included in an FTA.¹⁰⁷³

Testimony at the Commission hearing by the Ambassador of Peru suggests that the potential effects of TPP's provisions on access to medicine may not be as negative as has been suggested. According to the Ambassador, arguments made several years ago that the patent and data protection provisions in the U.S.-Peru FTA would lead to higher drug prices and diminished access to medicines have not been borne out. To the contrary, after the FTA's EIF in 2009, the price of medicines reportedly increased less than inflation, and the retail market grew substantially. The Ambassador further stated that the FTA contributed to the strengthening of institutions and processes in Peru, as well as to more bilateral trade and investment.¹⁰⁷⁴

Other Patent Provisions

Representatives of the biopharmaceutical sector have expressed support for TPP provisions that require patents to be made available for new uses, methods, or processes related to known products; that extend patent terms to compensate for regulatory or patent office

¹⁰⁷¹ BIO, written submission to the USITC, February 15, 2016, 3–4; PhRMA, written submission to the USITC, February 11, 2016, 2; ITIF, written submission to the USITC, February 15, 2016, 5–6.

¹⁰⁷² BIO, written submission to the USITC, February 15, 2016, 2; PhRMA, written submission to the USITC, February 11, 2016, 1; ITIF, written submission to the USITC, February 15, 2016, 2.

¹⁰⁷³ ITAC-15, *The Trans-Pacific Partnership Agreement*, December 3, 2015, 18–19; ITAC-3, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 13; PIIE, *Assessing the Trans-Pacific Partnership*, Vol. 2, March 2016, 28.

¹⁰⁷⁴ USITC, hearing transcript, January 13, 2016, 72–73, 89 (testimony of Luis Miguel Castilla, Ambassador of Peru in the United States).

delays; and that require linkage between marketing approval and patent status so that rights owners have an opportunity to enforce their patents prior to approval of a generic product.¹⁰⁷⁵ By contrast, NGO representatives¹⁰⁷⁶ state that they oppose these provisions on the ground that they may delay the entry of generic medicines onto the market.¹⁰⁷⁷

Patent provisions that would harmonize regulations across TPP members—for example, by requiring accession to international treaties and by clarifying when there is a “grace period,” meaning that disclosure of information within a patent application will not defeat a patent—also are considered particularly useful by U.S. biopharmaceutical firms.¹⁰⁷⁸

Copyright Protections and Internet Service Providers

Representatives of content industries (including movies, music, books, and software) and of providers of digital services endorse the IPR chapter as a whole, given the different interests of industries active in the copyright space and the complexity of the subject matter.¹⁰⁷⁹ Digital service providers state that they support new provisions that require countries to seek an appropriate balance between liability and limitations or to make exceptions to liability for copyright infringement in the online environment.¹⁰⁸⁰ Representatives of content industries state that they expect that, if effectively implemented, the overall impact of TPP’s IPR provisions on U.S. creative sectors would be “substantial and positive.”¹⁰⁸¹

The copyright industries consider several commitments particularly valuable. First, they state that enhanced criminal and civil protections for TPMs reportedly would assist U.S. firms in

¹⁰⁷⁵ ITAC-15, *The Trans-Pacific Partnership Agreement*, December 3, 2015, 18–19; ITAC-3, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 13.

¹⁰⁷⁶ MSF, written submission to the USITC, February 16, 2016, 4–6; Public Citizen, written submission to the USITC, December 29, 2015, 7–9; UACT, written submission to the USITC, December 29, 2015, 3–6.

¹⁰⁷⁷ Although the generics industry did not state objections to these provisions in the ITAC reports, they have since stated that these provisions will result in new barriers to entry in foreign markets. See ITAC-15, *The Trans-Pacific Partnership Agreement*, December 3, 2015, 18–19; ITAC-3, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 13; Generic Pharmaceutical Association, written submission to USTR, February 5, 2016.

¹⁰⁷⁸ NAM, written submission to the USITC, January 22, 2016, 11; GE, written submission to the USITC, January 28, 2016; Leading Biosciences, written submission to the USITC, February 11, 2016, 1.

¹⁰⁷⁹ ITAC-15, *The Trans-Pacific Partnership Agreement*, December 3, 2015, 21, 27; ITAC-8, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 15; ITAC-10, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 11.

¹⁰⁸⁰ ITAC-3, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 15 (first-time obligations to balance the protection of copyrighted material with innovations in digital trade are important); ITAC-15, *The Trans-Pacific Partnership Agreement*, December 3, 2015, 21 (all members support the concept of balance in the copyright system, although there is disagreement about how the balance should be struck); Internet Association, “Statement in Support of the TPP,” March 30, 2016; but see EFF, written submission to the USITC, February 17, 2016, 1–2 (the fair use obligations in the TPP are not sufficiently robust).

¹⁰⁸¹ USITC, hearing transcript, January 13, 2016, 287 (testimony of Steven Metalitz, International Intellectual Property Alliance); Copyright Alliance, written submission to the USITC, February 12, 2016, 2; ITAC-10, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 11.

protecting their content from unauthorized access and use, while also permitting exceptions to enable non-infringing use.¹⁰⁸² The Entertainment Software Association and the Motion Picture Association of America, Inc. (MPAA) state that online business models rely on TPMs to provide customers with a diversity of price points and offerings; without effective protections, these business models would not succeed.¹⁰⁸³ ITIF states that the TPM requirements would be particularly valuable in Brunei, Chile, Japan, Mexico, New Zealand, and Vietnam, where legal protections have been inadequate.¹⁰⁸⁴

Content industry representatives also state that they see particular value in the extension of copyright terms to 70 years from the life of the author or publication.¹⁰⁸⁵ They state that this provision would increase copyright terms in Brunei, Canada, Japan, Malaysia, New Zealand, and Vietnam. Increased terms are expected to increase returns for the content industries in key markets; Japan, for example, is the world's second-largest market (behind the United States) for recorded music.¹⁰⁸⁶ With regard to the obligations of ISPs, content industry representatives state that strong implementation and monitoring will be essential going forward, particularly in Canada and Chile, where online piracy and weak mechanisms for ISP liability reportedly present substantial problems.¹⁰⁸⁷

Enforcement and Trade Secret Provisions

In written submissions and at the Commission's public hearing, interested parties generally praised TPP's enforcement commitments.¹⁰⁸⁸ Some industry representatives, however, have raised the concern that ineffective IPR enforcement is a longstanding problem in many TPP countries, notwithstanding detailed commitments in TRIPS and prior FTAs. They emphasize that

¹⁰⁸² TPP, Art. 18.68.4. Notwithstanding, EFF states that the TPM provisions may be used to punish innovators even when the circumvention is for a lawful purpose. EFF, written submission to the USITC, February 17, 2016, 1.

¹⁰⁸³ ESA, written submission to the USITC, February 11, 2016, 4; MPAA, written submission to the USITC, February 16, 2016, 4.

¹⁰⁸⁴ ITIF, written submission to the USITC, December 29, 2015, 6–7. See also IIPA, "2016 Special 301 Report," February 5, 2016 (requesting that Chile and Vietnam remain on the Special 301 priority watch list and that Canada and Mexico remain on the watch list for problems with TPMs and other copyright-related issues).

¹⁰⁸⁵ ESA, written submission to the USITC, February 11, 2016, 4; MPAA, written submission to the USITC, February 16, 2016, 4.

¹⁰⁸⁶ ITIF, written submission to the USITC, December 29, 2015, 6–7; USITC, hearing transcript, January 13, 2016, 132 (testimony of John Murphy, U.S. Chamber of Commerce); IFPI, "IFPI Publishes Recording Industry in Numbers," April 20, 2015.

¹⁰⁸⁷ ITIF, written submission to the USITC, December 29, 2015, 7; see also IIPA, "2016 Special 301 Report," February 5, 2016, 11–12, 81–82 (noting problems with ISP mechanisms in Canada and Chile).

¹⁰⁸⁸ USITC, hearing transcript, January 14, 2016, 559–60 (testimony of Linda Dempsey, NAM); ITIF, written submission to the USITC, December 29, 2015, 4; ECAT, written submission to the USITC, December 28, 2015, 6; USCIB, written submission to the USITC, February 15, 2016, 6; ESA, written submission to the USITC, February 11, 2016, 3–4; Intel, written submission to the USITC, February 16, 2016, 8; IIPA, written submission to the USITC, December 29, 2015, 1–2; MPAA, written submission to the USITC, February 16, 2016, 4–5. But see EFF, written submission to the USITC, February 17, 2016 (online enforcement provisions are expensive and harmful).

it is critical to ensure the effective implementation of enforcement commitments in TPP, including through training and capacity building as well as compliance reviews and monitoring.¹⁰⁸⁹

Provisions identified as particularly valuable include the recognition that enforcement measures should be equally available for digital and physical goods; the extension of criminal penalties to the aiding and abetting of IPR infringement; prohibitions on camcording in movie theaters; border protections for in-transit goods; and the granting of authority to border agents to act on their own to identify and seize infringing imports and exports.¹⁰⁹⁰ These new enforcement provisions are expected to be particularly useful to improve legal regimes and address ongoing challenges in Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, and Vietnam.¹⁰⁹¹

U.S. firms in a range of industry sectors also state that they support the chapter's new protections for trade secrets.¹⁰⁹² According to the National Association of Manufacturers, the theft of trade secrets is a significant threat in the TPP region, particularly because manufacturers rely on them to protect everything from product formulas to manufacturing processes.¹⁰⁹³ Similarly, industry sectors with substantial exports to and investments in the region—including aerospace and semiconductors—state that the protections would help them to address substantial risks to trade secrets.¹⁰⁹⁴ As noted by the Entertainment Software Association, as industries undergo digital transformations, protecting against the misappropriation of trade secrets through the use of computer systems is increasingly important.¹⁰⁹⁵

In this regard, TPP's requirements that the parties make available criminal procedures and penalties when misappropriation occurs through a computer system, as well as the explicit

¹⁰⁸⁹ ITAC-15, *The Trans-Pacific Partnership Agreement*, December 3, 2015, 22; USITC, hearing transcript, January 14, 2016, 559–60 (testimony of Linda Dempsey, NAM); ESA, written submission to the USITC, February 11, 2016, 3.

¹⁰⁹⁰ ITIF, written submission to the USITC, December 29, 2015, 4–5; Intel, written submission to the USITC, February 16, 2016, 8; ESA, written submission to the USITC, February 11, 2016, 3–4; MPAA, written submission to the USITC, February 16, 2016, 4.

¹⁰⁹¹ ITIF, written submission to the USITC, December 29, 2015, 4–5; IIPA, “2016 Special 301 Report,” February 5, 2016 (recommending the inclusion of Canada, Chile, Mexico, and Vietnam on USTR's watch lists for copyright enforcement-related problems).

¹⁰⁹² USITC, hearing transcript, January 13, 2016, 141 (testimony of Vanessa Sciarra, Emergency Committee for American Trade); ITIF, written submission to the USITC, December 29, 2015, 5–6.

¹⁰⁹³ NAM, written submission to the USITC, January 8, 2016, 7; see also Cummins, written submission to the USITC, February 15, 2016, 2; GE, written submission to the USITC, January 2016, 2.

¹⁰⁹⁴ The semiconductor industry also supports prohibitions on the forced disclosure of software and encryption source code, described above. SIA, written submissions to the USITC, January 14, 2016, 3–4; SIA, written submission to the USITC, January 22, 2016, 6; Intel, written submission to the USITC, February 16, 2016, 8–9; ITAC-1, *Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 10.

¹⁰⁹⁵ ESA, written submission to the USITC, February 11, 2016, 5. But see EFF, written submission to the USITC, February 17, 2016, 2 (the trade secret provisions are too broad).

extension of trade secret protection to misappropriation by state-owned entities, have been identified as particularly useful.¹⁰⁹⁶ Criminal liability would appear to be a new penalty for trade secret misappropriation in Australia, Brunei, and Malaysia.¹⁰⁹⁷

Economic Impacts of Strengthened Patent Protections

TPP contains provisions that would require members to strengthen their patent protections, as set forth above. This section uses an econometric model to estimate the relationship between countries' patent protections and U.S. IP receipts. While this model cannot directly estimate the effects of TPP on U.S. IP receipts, it can provide valuable context by examining the impact of increased patent protections in the past, using two scenarios. The first considers the historical effects of increased patent protection in TPP countries, and the second looks at what would have happened if TPP countries had more substantially increased their patent protections. The scenarios do not consider the effects of new patent protections required by TPP. They also do not address the effects of other provisions in the IPR chapter or effects on other types of IPR-sensitive trade and investment.

Since TRIPS entered into force in 1995, TPP countries have improved their patent protections in order to meet their TRIPS obligations, as well as those in FTAs and domestic initiatives. Due to these historical improvements, U.S. IP receipts from these countries in 2010 were an estimated \$2.9 billion dollars or 11 percent higher in 2010 than they would have been otherwise. Countries in the TPP region, however, still had weaker patent protections than did the United States and other developed countries. Under a counterfactual scenario in which TPP partners more substantially increased their levels of patent protection, U.S. IP receipts from TPP countries would have been 17 percent or \$5.0 billion dollars higher than they actually were in 2010.

Background

There is a substantial economic literature measuring the effects of changes in IPR protection on international trade of IPR-intensive goods, services, and foreign direct investment. One of the first studies of the trade effects of TRIPS analyzed the growth of high-technology exports from developed to developing countries. It found that TRIPS reforms contributed to a significant increase in exports by developed countries' IPR-intensive industries, including pharmaceuticals, chemicals, and ICT, to developing countries.¹⁰⁹⁸ Later studies have confirmed the positive

¹⁰⁹⁶ TPP, Art. 18.78; ITAC-15, *The Trans-Pacific Partnership Agreement*, December 3, 2015, 25.

¹⁰⁹⁷ U.S. Chamber of Commerce, "The Case for Enhanced Protection," n.d., 25–35 (accessed April 8, 2016).

¹⁰⁹⁸ Ivus, "Do Stronger Patent Rights?" 2010, 2; see also Maskus, *Private Rights and Public Problems*, 2012, 77.

effects of patent reforms, in particular, on trade in high-tech goods and services.¹⁰⁹⁹ Strong patent protections also can stimulate domestic innovation and investments in research and development.¹¹⁰⁰

Empirical studies of the effects of IPR strengthening have focused on patent reforms, due in large part to a consistent index of patent protection covering 122 countries developed by researchers Juan Ginarte and Walter Park (the Park Index).¹¹⁰¹ The index measures changes in each country's level of legislative patent protection at 5-year intervals during the period from 1960 to 2010. It scores countries' laws based on equally weighted categories that generally track requirements in five areas: scope of patent coverage, membership in international treaties, duration of coverage, enforcement mechanisms, and restrictions on patent rights.¹¹⁰²

This analysis focuses on the period 1995–2010, which encompasses important changes in patent protections under TRIPS.¹¹⁰³ This period also encompassed the negotiation and/or EIF of a number of FTAs. According to the Park Index, developed countries, including Australia, Canada, Japan, and the United States, generally saw a relatively modest increase in their patent rights during this period, as TRIPS did not require them to substantially change their laws (table 6.15). By contrast, more substantial changes were made by developing countries, including Malaysia, Mexico, Peru, and Vietnam, to address the requirements of TRIPS, NAFTA, and other FTAs.¹¹⁰⁴

The average value of the Park Index across all 122 measured countries rose 32 percent (from 2.5 to 3.3) during the period from 1995 to 2010. This increase was higher (a 44 percent

¹⁰⁹⁹ Maskus, "The New Globalisation of Intellectual Property Rights," 2014, 276 (based on more than 15 recent studies, patent reforms have strong positive effects on licensing, high-tech goods trade, and foreign direct investment, particularly for large and middle-income countries); Smith, "Are Weak Patent Rights Barriers?" 1999 (strong IPR protection has both a market-power and market-expansion effect on U.S. exports); Branstetter, Fisman, and Foley, "Do Stronger Intellectual Property Rights," 2006, 321 (U.S. firms expanded their sales, employment, investment, and production abroad in response to patent reforms); Briggs and Park, "There Will Be Exports and Licensing," 2014 (strong patent rights in developed countries have a positive impact on exports and licensing of developed country firms); Cavazos Cepeda, Lippoldt, and Senft, "Policy Complements," 2010 (increases in IPR protection are associated with increased foreign direct investment, trade, and domestic innovation in developed and developing countries).

¹¹⁰⁰ Park and Lippoldt, "Technology Transfer," 2008, 12; Arora, Branstetter, and Chatterjee, "Strong Medicine," 2011, 22; Haber, "Patents and the Wealth of Nations," 2016 (historical and econometric evidence establishes a causal relationship between patent rights and innovation and economic growth).

¹¹⁰¹ Ginarte and Park, "Determinants of Patent Rights," 1997; Park, "International Patent Protection," 2008, 761; and Park, "Patent Index 1960–2010," n.d. (accessed February 22, 2016).

¹¹⁰² Park, "International Patent Protection," 2008, 765.

¹¹⁰³ TRIPS entered into force in 1995 and included transition periods for some developing countries until 2005, and still later for least-developed countries.

¹¹⁰⁴ We cannot attribute these effects exclusively to these agreements, as FTAs with other trading partners and domestic initiatives also have played a role in reforms. Maskus, "The New Globalisation of Intellectual Property Rights," 2014, 271–73.

increase) for those countries that entered into an FTA with the United States than for those that did not (a 30 percent increase), suggesting that the FTAs had additional positive impacts on patent protections.¹¹⁰⁵

Table 6.15: The Park index for TPP countries, 1995-2010

	1995	2000	2005	2010	Percent change, 1995–2010
Australia	4.33	4.33	4.33	4.33	0
Canada	4.34	4.54	4.54	4.54	5
Chile	3.91	4.48	4.48	4.68	20
Japan	4.42	4.67	4.67	4.67	6
Malaysia	2.70	3.03	3.48	3.68	36
Mexico	2.68	3.22	3.42	3.75	40
New Zealand	3.68	3.68	3.68	3.68	0
Peru	2.57	3.03	3.03	3.43	33
Singapore	3.88	4.01	4.21	4.21	9
United States	4.88	4.88	4.88	4.88	0
Vietnam	2.65	2.65	2.78	3.43	29

Source: Park, “Patent Index 1960–2010,” n.d. (accessed February 22, 2016).

Note: Data not available for Brunei.

Modeling Description

In this econometric model, the amount of IP receipts that the United States receives from a particular country is determined by that country’s level of patent protection (measured by the Park Index), the size of the economy of the foreign country (measured by its GDP), many other country factors that do not vary over time (represented by a set of country fixed effects), and U.S. factors that do vary over time (represented by a set of year fixed effects). Regression results from the model indicate that the increase in patent protection in countries during the 1995–2010 period had a significant positive effect on U.S. IP receipts.¹¹⁰⁶

Estimated Impact of Increases in Patent Protections

This section describes the results of the Commission's IPR model, which show how increased patent protections in TPP countries are linked with increased U.S. IP receipts. The coefficient estimated by the regression is used to quantify the impact of the changes in patent protection under two different scenarios. Results are presented in table 6.16.

Under the first or historical scenario, the model calculates how much higher actual U.S. IP receipts were in 2010 relative to what they would have been if the Park index for TPP countries had remained at 1995 values (rather than rising to actual 2010 values). The effects ranged from

¹¹⁰⁵ Park, “Patent Index 1960–2010,” n.d. (accessed February 22, 2016).

¹¹⁰⁶ See Technical Appendix I for additional details about the model methodology, results, and sensitivity tests.

zero for Australia and New Zealand, because their Park index values did not change from 1995 to 2010, to a 45 percent increase for Mexico. The estimated value of the rise in U.S. IP receipts in 2010 from the 8 TPP countries for which data were available was \$2.9 billion, or 11 percent higher than the receipts would have been had reforms not occurred.¹¹⁰⁷

Table 6.16: Effect on US IP receipts of increases in patent protections for TPP countries

Country	Actual IP receipts in 2010 (billion \$)	Change in Park index of Patent Protection, 1995–2010	Historical effect ^a		Counterfactual effect ^b	
			Absolute (billion \$)	Percent	Absolute (billion \$)	Percent
Australia	2.7	0	0	0	0.6	21
Brunei	–	–	–	–	–	–
Canada	8.7	0.20	0.6	7	1.1	12
Chile	0.3	0.77	0.1	31	0.0	7
Japan	10.6	0.25	0.9	9	0.8	8
Malaysia	0.3	0.99	0.1	41	0.2	51
Mexico	2.6	1.07	0.8	45	1.2	48
New Zealand	0.3	0	0	0	0.1	52
Peru	–	0.86	–	35	–	65
Singapore	4.0	0.33	0.4	12	1.0	26
Vietnam	–	0.78	–	31	–	65
Simple average	–	0.58	–	21	–	36
Total	29.4	–	2.9	–	5.0	–

Source: USITC calculations.

Notes: Data on IP receipts and the Park index are not available for Brunei. Data on IP receipts are not available for Vietnam or Peru.

^a The historical effect is how much higher actual U.S. IP receipts were in 2010 relative to what they would have been if the Park index for TPP countries in 2010 had remained at 1995 values (rather than rising to actual 2010 values).

^b The counterfactual effect is the additional effects on U.S. IP receipts if TPP partner countries had further increased their patent protections to U.S. levels on the variables measured by the Park index.

In the second or counterfactual scenario, the model estimates what the additional effects on U.S. IP receipts would have been if TPP partner countries had further increased their patent protections to U.S. levels on the variables as measured by the Park Index (scope of patent coverage, membership in international treaties, duration of coverage, enforcement mechanisms, and restrictions on patent rights). Under this scenario, U.S. IP receipts from TPP countries would have increased above actual 2010 receipts by \$5.0 billion, or 17 percent.¹¹⁰⁸ This scenario does not take into account new patent protections in the TPP, the effects of other IPR provisions, or effects on other types of IPR-sensitive trade or investment.

¹¹⁰⁷ Note that there are no data available for Brunei. For Vietnam and Peru, percent changes in U.S. IP receipts can be predicted because their Park values are available, even though the IP receipts from them are not in the BEA dataset. Because the IP receipts from these countries are likely non-zero, and Vietnam and Peru experienced large percent increases in their patent protections, the average percent and total absolute IP charge increases in table 6.15 underestimate the actual gains which likely would occur.

¹¹⁰⁸ Note that the historical scenario uses a baseline in which countries kept their patent protections in 2010 at their 1995 values, while the baseline for the counterfactual is the actual 2010 patent protections.

Labor

Assessment

While a few organizations have suggested that the TPP labor provisions may have some impact on U.S. investment in other TPP countries, available evidence seems to suggest that the provisions included in this agreement’s Labor chapter will not have a substantial effect on the U.S. economy. As discussed in more detail below, several groups expressed the view that the TPP labor provisions are inadequate and unlikely to be enforced, and thus will do little to improve labor conditions or raise wages in partner countries that compete with the United States. Further, these groups argued that TPP labor obligations would not require changes in U.S. law, so they would likely have little effect on working conditions in the United States.

Many of the TPP provisions that would be expected to have the most significant impact on the U.S. workforce—such as the agreement’s rules of origin provisions—are found in other sections of the agreement and are therefore discussed elsewhere in this report.

Summary of Provisions

On May 10, 2007, the Bush Administration and Congressional leaders reached an agreement to include certain labor obligations in forthcoming U.S. trade agreements. These measures were first included in the U.S.-Peru TPA, and subsequently (and in a very similar form) in U.S. trade agreements with South Korea, Panama, and Colombia.¹¹⁰⁹ The TPP Labor chapter follows the basic template established with the U.S.-Peru TPA, and also includes several provisions not contained in any previous U.S. trade agreement.

As in the U.S.-Peru TPA, the TPP Labor chapter would obligate parties to maintain regulations that uphold the labor rights specified in the International Labour Organization (ILO) *Declaration on Fundamental Principles and Rights at Work and Its Follow-up* (Article 19.3.1). Also as in the U.S.-Peru TPA, it prohibits parties from weakening their labor laws (Article 19.4) and requires that parties effectively enforce their respective labor laws (Article 19.5).¹¹¹⁰ TPP’s Labor chapter adds to these obligations by requiring that all parties maintain laws that govern acceptable work conditions, including regulations and statutes on health and safety at the workplace, work hours, and minimum wage (Article 19.3.2). The TPP Labor chapter also extends the prohibition

¹¹⁰⁹ CRS, *Overview of Labor Enforcement Issues*, February 22, 2016, 3–4; Weisman, “Bush and Democrats in Accord on Trade Deals,” May 11, 2007; USTR, “Trade Facts: Bipartisan Trade Deal,” May 2007.

¹¹¹⁰ This provision allows for a reasonable exercise of discretion about enforcement, and allows parties to decide how to distribute resources among enforcement tasks so long as these decisions remain consistent with their TPP labor obligations.

on weakening worker protections to cover export processing zones and other trade zones (Article 19.4). Further, it calls on parties to discourage imports produced using forced labor (Article 19.6) and to encourage firms to establish social responsibility programs addressing labor issues (Article 19.7).

As in the U.S.-Peru TPA, TPP calls on parties to ensure the public availability of information about their respective labor laws and procedures for compliance and enforcement. Parties agree to provide access to tribunal proceedings, allowing interested persons to seek enforcement of labor laws. Among other things, such proceedings must be transparent and fair, and must offer an opportunity for persons involved in such proceedings to present evidence in support of their positions. Parties agree to provide for the review of tribunal actions and provide legal remedies to ensure enforcement. In addition to these provisions, TPP includes new language that calls on parties to maintain procedures for the enforcement of tribunal decisions (Article 19.8).

TPP provisions on public submissions and labor cooperation also build on the U.S.-Peru model. Like the U.S.-Peru TPA, TPP calls on parties to designate points of contact that will, among other things, receive and consider submissions on labor-related matters from persons of a member country. TPP expands on this obligation by establishing guidelines for the contents of a submission, enabling parties to request additional information from entities that have made a submission, requiring parties to publicize their timelines and procedures for receiving and considering submissions, and calling on parties to respond to submissions in a timely way and, if appropriate, in writing (Article 19.9). Further, while both the U.S.-Peru TPA and TPP include provisions on cooperation and labor consultations, TPP adds to the U.S.-Peru model by providing for the involvement of entities outside of TPP—such as the ILO or other international or regional organizations—in labor cooperation efforts (Article 19.10.3). TPP also establishes a process for cooperative labor dialogue, a new mechanism for addressing issues that arise under the agreement’s labor provisions (Article 19.11).

In keeping with the U.S.-Peru model, TPP includes provisions on labor consultations (Article 19.15) and establishes a Labor Council. Among its responsibilities, the TPP Labor Council is tasked with considering and discussing matters pertaining to the chapter and issues of mutual interest; establishing priorities and a work program for capacity building and labor cooperation efforts undertaken under Chapter 19; overseeing the work program; reviewing reports submitted by the designated contact points; and facilitating public awareness of, and participation in, efforts to implement Chapter 19 provisions (Article 19.12). Further, as under the U.S.-Peru TPA, parties would have recourse to dispute settlement (under Chapter 28 of the Agreement) for all matters arising under the Labor Chapter, provided that they have first sought to resolve the matter (Article 19.15.12).

The TPP Labor chapter also includes three separate bilateral side agreements on labor which require Brunei, Malaysia, and Vietnam to undertake certain labor reforms before the agreement would take effect between the United States and these countries (box 6.3).

Box 6.3: TPP Side Agreements on Labor

As part of the TPP labor negotiations, the United States concluded side agreements with Brunei, Malaysia, and Vietnam obligating these countries to undertake reforms addressing several labor rights issues, such as collective bargaining, forced labor, and discrimination.^a More specifically:

- Brunei must clarify and make certain changes to its labor legislation to expand workers' rights to associate and bargain collectively, ensure that measures which prohibit employers from retaining a worker's passport are enforced effectively, amend legislation to forbid employment discrimination and to specify which occupations are limited to persons aged 18 or older, and establish a minimum wage, among other things.
- The bilateral side agreement with Malaysia also specifies changes that must be made to that country's laws on collective bargaining and union organization. It also requires Malaysia to reinforce prohibitions on holding an employee's passport; mandates the amendment or establishment of regulations regarding fees for foreign worker recruitment, the protection of victims of forced labor, and the housing and movement of foreign workers; and obligates the country to prohibit employment discrimination, to limit light work^b to persons aged 13 or older, and to specify which occupations are limited to persons aged 18 or older.
- The U.S. bilateral side agreement with Vietnam obligates that country to establish laws allowing workers to form unions and ensuring the autonomy of those unions, to allow workers to strike and bargain collectively, to criminalize the employment of forced labor, and to prohibit employment discrimination. Further, the side agreement gives Vietnam 5 years to allow labor unions to join or establish workers' organizations, including regional and sectoral organizations. If the United States determines that Vietnam fails to make these reforms, it may hold back tariff reductions that were scheduled to occur after that time.

All three side agreements include provisions requiring these U.S. trading partners to establish procedures, provide resources, and make other necessary changes to implement the labor reforms specified in their respective side agreements. All three of these side agreements also include measures on information sharing and transparency and technical assistance, as well as implementation provisions stating that all or most of the reforms specified in these agreements must be enacted before the TPP comes into force between each of these countries and the United States. Further, the obligations contained in these side agreements are enforceable under TPP's dispute settlement processes.^c

^a USTR, "Chapter 19, Labour: Chapter Summary," November 5, 2015).

^b In International Labour Organization (ILO) convention No. 138, light work is considered to be any occupation that is not expected to have a detrimental impact on the development or health of an employee, and will not interfere with an individual's ability to attend of benefit from school or other approved training. ILO, C138—Minimum Age Convention, 1973 (No. 138) Article 7, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C138#A7 (accessed February 22, 2016).

^c USTR, "Chapter 19, Labour: Chapter Summary," November 5, 2015).

Summary of Views of Interested Parties

U.S. organizations have expressed differing views regarding the potential impact of TPP on labor conditions in member countries. Some industry representatives and at least one think tank expressed support for TPP's labor provisions, characterizing them as strong and enforceable.¹¹¹¹ For example, Third Way asserted that TPP labor provisions are more stringent and more enforceable than the provisions in any existing trade agreement, thus committing six current U.S. FTA partners to more robust labor obligations.¹¹¹² Representatives of the apparel, outdoor products, and cosmetics industries indicated that the agreement's labor chapter corresponds with industry values, practices, and labor initiatives.¹¹¹³ Further, a report published by the Peterson Institute provides a qualified but generally favorable assessment of TPP labor provisions. Specifically, this report asserts that while some labor concerns remain unaddressed and that the success of TPP's labor provisions will rely on their implementation, the TPP labor chapter's bilateral side agreements "are a major innovative component" and the chapter's provisions improve upon the obligations included in previous U.S. trade agreements.¹¹¹⁴

By contrast, unions and other labor rights advocates contended that while the existence of labor obligations in trade agreements creates a forum for discussing labor issues, TPP labor provisions are inadequate.¹¹¹⁵ These groups asserted that there is little difference between TPP labor provisions and the labor provisions included in previous U.S. trade agreements negotiated after May 10, 2007, which they believe to be weak, vague, and ineffective.¹¹¹⁶ Additionally, they asserted that some new provisions are not mandatory or enforceable, as they merely "encourage" or "discourage" certain practices.¹¹¹⁷

However, labor advocates indicated that their principal concern was that the U.S. government would be unwilling to enforce TPP's labor provisions, with one representative suggesting that the likelihood of competing diplomatic, commercial, and security interests discourages enforcement.¹¹¹⁸ They contended that the United States has not adequately enforced the labor

¹¹¹¹ USITC, hearing transcript, January 14, 2016, 635 (testimony of Gabriel Horowitz, Third Way); USITC hearing transcript, January 15, 2016, 727, 731 (testimony of Stephanie Lester, Gap Inc.), 739 (testimony of Rich Harper, Outdoor Industry Association), 754 (testimony of Francine Lamoriello, Personal Care Products Council).

¹¹¹² USITC, hearing transcript, January 14, 2016, 635 (testimony of Gabriel Horowitz, Third Way).

¹¹¹³ USITC, hearing transcript, January 15, 2016, 731 (testimony of Stephanie Lester, Gap Inc.), 739 (testimony of Rich Harper, Outdoor Industry Association), 754 (testimony of Francine Lamoriello, Personal Care Products Council).

¹¹¹⁴ Cimino-Issacs, "Labor Standards in the TPP," March 2016, 41, 53.

¹¹¹⁵ USITC, hearing transcript, January 13, 2016, 248–49, 250 (testimony of Celeste Drake, AFL-CIO).

¹¹¹⁶ USITC, hearing transcript, January 13, 2016, 152, 234, 236 (testimony of Celeste Drake, AFL-CIO), 170–1 (testimony of Bruce Olsson, International Association of Machinists and Aerospace Workers); DePillis, "The New Trade Deal Could Help Millions," October 6, 2015; BCTGM, written submission to the USITC, February 8, 2016, 5.

¹¹¹⁷ USITC, hearing transcript, January 13, 2016, 234 (testimony of Celeste Drake, AFL-CIO).

¹¹¹⁸ *Ibid.*, 235.

provisions in existing FTAs, despite reports of labor rights abuses in certain U.S. FTA partner countries, such as Colombia, Guatemala, Honduras, and Mexico.¹¹¹⁹ Similarly, a report published by the U.S. Government Accountability Office concluded that there are weaknesses in the enforcement and monitoring of partner countries' compliance with labor obligations under U.S. bilateral and regional trade agreements. The report stated that while the implementation of these obligations has advanced, labor conditions in certain countries continue to be of concern.¹¹²⁰ Labor advocates indicated that the lack of a mechanism through which unions and workers could bring cases against countries that fail to comply with the agreement's labor standards—much like the mechanism TPP's ISDS measures provide for investors—limits the potential effectiveness of the agreement.¹¹²¹

Senator Sherrod Brown said that recent history tells us that FTA provisions are “rarely enforced.” He explained that members of Congress “need to understand how current labor conditions in TPP countries and the enforcement or lack thereof of TPP's labor standards will influence business decisions on sourcing and on investment within the TPP region and how these business decisions will in fact affect American workers.”¹¹²² By comparison, Congressman Henry Cuellar said that TPP establishes more effective enforcement mechanisms for labor issues.¹¹²³

Comments regarding the potential impact of TPP labor provisions on the U.S. economy were also mixed. One industry representative indicated that these provisions will contribute to improving opportunities for trade and investment.¹¹²⁴ However, other industry representatives said that the provisions contained in the U.S. side agreement with Vietnam may have a negative effect on the industry. They stated that the lack of clarity about how the United States might implement tariff suspensions—a possible penalty under this agreement—may discourage investment in Vietnam.¹¹²⁵ Labor rights advocates contended that TPP labor provisions will do

¹¹¹⁹ USITC, hearing transcript, January 13, 2016, 238 (testimony of Leo W. Gerard, United Steel Workers), 239 (testimony of Bruce Olsson, International Association of Machinists and Aerospace Workers); Staff of Sen. Elizabeth Warren, “Broken Promises: Decades of Failure to Enforce,” May 18, 2015, 2, 12; BCTGM, written submission to the USITC, February 8, 2016, 4; AFL-CIO, “Ten Critical Problems with the Trans-Pacific Partnership,” n.d. (accessed December 2, 2015).

¹¹²⁰ GAO, *Free Trade Agreements*, November 2014, 18, 46.

¹¹²¹ USITC, hearing transcript, January 13, 2016, 204–5 (testimony of Bruce Olsson, International Association of Machinists and Aerospace Workers), 237–38 (testimony of Leo Gerard, United Steel Workers); DePillis, “The New Trade Deal Could Help Millions,” October 6, 2015; Prokop, “Why Obama Says TPP Is Historic for Workers,” November 12, 2015.

¹¹²² USITC, hearing transcript, January 14, 2016, 378 (testimony of Sherrod Brown, United States Senator).

¹¹²³ USITC, hearing transcript, January 13, 2016, 28 (testimony of Henry Cuellar, United States Representative).

¹¹²⁴ USITC, hearing transcript, January 15, 2016, 754 (testimony of Francine Lamoriello, Personal Care Products Council).

¹¹²⁵ USITC, hearing transcript, January 15, 2016, 716–17, 829–30 (testimony of Stephen Lamar, American Apparel and Footwear Association), 830–831 (testimony of Julia Hughes, U.S. Fashion Industry Association), 831–2 (testimony of Stephanie Lester, Gap Inc.).

nothing to improve labor conditions in TPP partner countries, and that weak labor protections depress wages in certain markets and put downward pressure on wages and benefits in competing countries, such as the United States.¹¹²⁶

Additionally, labor groups asserted that measures included in other chapters of the agreement—such as provisions on ISDS; rules of origin, particularly for automobiles; and state-owned enterprises, among others—as well as TPP’s lack of disciplines on currency manipulation may encourage outsourcing and depress wages, thus having a negative effect on U.S. workers.¹¹²⁷ A more detailed discussion of the potential impacts of these provisions can be found elsewhere in this report.¹¹²⁸

Environment

Assessment

The TPP Environment chapter is unlikely to have significant effects on the U.S. economy or on U.S. consumers. The goals of the Environment chapter are to promote mutually supportive trade and environmental policies, promote high levels of environmental protections and effective enforcement of environmental laws, and enhance the capacities of the parties to address trade-related environmental issues (Article 20.2). Overall, the consensus among interested parties is that the provisions of the chapter do meet these objectives, and that TPP goes further than any other major trade agreement to address environmental concerns.

Under TPP, parties would agree to enforce the obligations of the Environment chapter through the same dispute settlement process used for the commercial obligations of the treaty; enforce their own environmental laws; take measures to combat illegal trade in wild flora and fauna; combat illegal, unreported, and unregulated (IUU) fishing practices; operate fisheries management systems in a sustainable manner; promote conservation of endangered marine creatures; and eliminate certain fishing subsidies.¹¹²⁹ However, some observers remain concerned that the provisions of the chapter may not be adequately funded or effectively enforced. Others have voiced concerns that the ISDS provisions of the Investment chapter will

¹¹²⁶ USITC, hearing transcript, January 13, 2016, 716–17 (testimony of Stephen Lamar, American Apparel and Footwear Association), 174 (testimony of Bruce Olsson, International Association of Machinists and Aerospace Workers), 235 (testimony of Celeste Drake, AFL-CIO).

¹¹²⁷ USITC, hearing transcript, January 15, 2016, 716–17 (testimony of Stephen Lamar, American Apparel and Footwear Association), 157–62 (testimony of Josh Nassar, (UAW), 163–69 (testimony of Leo W. Gerard, United Steel Workers), 169–75 (testimony of Bruce Olsson, International Association of Machinists and Aerospace Workers).

¹¹²⁸ Discussions of ISDS and state-owned enterprises can be found in prior sections of this chapter of the report. Currency issues are discussed in chapter 1 of the report, and rules of origin are discussed in chapter 4.

¹¹²⁹ Provisions of the TPP Environment chapter; World Wildlife Fund-US, written testimony to the House Ways and Means Committee, November 17, 2015, 2–3.

have an adverse impact on the environment and on environmental regulations in TPP countries.¹¹³⁰

The TPP environmental commitments would represent a significant change for Malaysia, where many environmental regulations fall under the state governments and are often not effectively enforced.¹¹³¹ As part of TPP, in a side agreement with the United States, Malaysia lays out its plans to create a central coordinating committee for its sub-central governments, aimed at effectively implementing the Environment chapter of TPP.¹¹³²

The commitments under the Environment chapter do not represent significant changes for existing U.S. FTA partners, with the notable exception of the commitments related to marine fisheries subsidies, as summarized below. Other provisions that are new to TPP's Environment chapter, compared with other U.S. bilateral FTAs, include those related to transitioning to a low-emissions environment, language related to removing barriers to environmental goods and services, and language linking the Environment chapter to the SPS chapter (Chapter 7) in the effort to combat invasive alien species.¹¹³³

Summary of Provisions

The TPP Environment chapter (Chapter 20) would commit all parties to recognize the importance of trade and environmental policies and practices to improve environmental protection towards sustainable development; to recognize the right of each Party to establish its own level of environmental protections, and corresponding laws and policies; to strive to provide high levels of environmental protection, and continue to improve; to not fail to effectively enforce its own environmental laws; to recognize that each party retains the right to exercise discretion over enforcement of its environmental laws and allocation of environmental resources. Each party would agree not to waive its environmental laws in order to encourage trade or investment between the parties (Article 20.3). Each party would commit to implement the multilateral environmental agreements (MEAs) to which it is a party (Article 20.4).¹¹³⁴

Each party would also agree to promote public awareness of its environmental laws, and to ensure that domestic procedures are in place to enforce them. Such proceedings would be

¹¹³⁰ TEPAC, *The U.S.-Trans-Pacific Partnership Free Trade Agreement*, December 3, 2015, 2–3; World Wildlife Fund-US, written testimony to the House Ways and Means Committee, November 17, 2015, 3–4; Sierra Club, written submission to the USITC, February 12, 2016, 5–6; NGO representative, interview by USITC staff, Washington, DC, February 3, 2016.

¹¹³¹ Memon, “Devolution of Environmental Regulation,” n.d., 47–48 (accessed March 18, 2016).

¹¹³² U.S.-Malaysia Agreement on Committee to Coordinate Implementation of Environment Chapter.

¹¹³³ The SPS Chapter is summarized in more detail earlier in this chapter.

¹¹³⁴ Unlike other U.S. FTAs, there is no general list of MEAs provided, although three specific MEAs are mentioned in later articles of the chapter.

required to be fair, transparent, and equitable, to comply with due process of law, and to provide access to persons with recognizable legal interests (Article 20.7). Each party would permit public participation in implementing the Environment chapter, in a transparent way that is open to review by other parties to the FTA (Articles 20.8 and 20.9).

Each party would commit to encourage enterprises operating within its territory to voluntarily adopt principles of corporate social responsibility, and to promote voluntary mechanisms to enhance environmental performance (Articles 20.10 and 20.11).

The Environment chapter addresses several specific environmental issues:

- *Protection of the ozone layer:* Each party would commit to take measures to control substances that harm the ozone layer, and to implement its obligations under the Montreal Protocol (Article 20.5).¹¹³⁵
- *Protection of the marine environment from ship pollution:* Each party would commit to take measures to prevent the pollution of the marine environment from ships (Article 20.6).¹¹³⁶
- *Trade and biodiversity:* Each party would recognize the importance of conservation and sustainable use of biological diversity and commit to cooperating to address matters of mutual interest (Article 20.13).
- *Invasive alien species:* Each party would recognize the problems posed by invasive alien species and commit to coordinating with the Committee on Sanitary and Phytosanitary (SPS) Measures to identify avenues for cooperation in dealing with such species (Article 20.14).
- *Transition to a low emissions and resilient economy:* Each party would agree to cooperate to address matters of joint or common interest, reflecting domestic circumstances and capabilities, including cooperative and capacity-building activities (Article 20.15).
- *Marine capture fisheries:* Each party would commit to operating a fisheries management system that would regulate marine wild-capture fishing. The system would be designed to prevent overfishing, reduce fish bycatch, and promote the recovery of overfished stocks in all fisheries in which that party's persons conduct fishing activities. In addition, each party would commit to promote the long-term conservation of sharks, marine turtles, seabirds, and marine mammals, and would commit to eliminate certain subsidies that negatively affect fish stocks (Article 20.16).¹¹³⁷

¹¹³⁵ Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, September 16, 1987.

¹¹³⁶ As defined by the International Convention for the Prevention of Pollution from Ships, London, November 2, 1973, and as amended (MARPOL).

¹¹³⁷ See below for a more detailed discussion of TPP's marine fisheries provisions.

- *Conservation and trade:* Each party would commit to fulfilling its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Convention¹¹³⁸ through exchange of information and joint activities on issues of mutual interest, to take domestic conservation measures, and maintain or strengthen government capacity related to conservation. Parties would also commit to take measures to combat the illegal take of wild flora and fauna taken in violation of that party's law, as well as trade in and transshipment of wild flora and fauna through its territory (Article 20.17) (box 6.4).
- *Environmental goods and services:* Each party would endeavor to reduce potential barriers to trade in environmental goods and services (Article 20.18).

Box 6.4: Illegal Logging and the TPP Agreement

In TPP, illegal logging is covered under Article 20.17 (Conservation and Trade) of the Environment chapter. TPP parties would agree to take measures to fulfill their obligations under the CITES Convention, to combat the illegal take of, and illegal trade in, wild fauna and flora. To do so, TPP parties would commit to exchange information and experiences on combating illegal logging and associated illegal trade, and promote legal trade in associated products. TPP parties also would commit to strengthening government capacity to promote sustainable forest management and to identifying opportunities to enhance law enforcement cooperation and information sharing.

A number of TPP parties have significant trade in wood products, including the United States, Canada, Japan, Malaysia, Peru, and Vietnam. In 2014, TPP countries accounted for 38 percent of the value of global trade in wood products, making illegal logging a concern in the region.^a Despite recent efforts to combat illegal logging, it continues to account for a sizable portion of many countries' total log harvest, with studies showing millions of cubic meters of timber illegally logged around the world in recent years.^b Illegally sourced logs are frequently exported to other countries for processing into finished wood products, then exported again for final sale, often commingled with legally sourced logs along the supply chain, making it difficult for the final consumer to verify the source of the logs.^c

The Environment chapter of the TPP Agreement would represent an expansion of provisions with respect to illegal logging, compared to existing U.S. FTAs and particularly to NAFTA. Under NAFTA, environmental provisions were not included in the main body of the text; rather, they were included as a side agreement, which committed the parties only to effectively enforce their own environmental laws. Unlike the TPP Agreement, NAFTA parties did not agree to take measures to fulfill their obligations under CITES.^d TPP commitments on illegal logging are not as far-reaching as those included in the U.S.-Peru TPA, which included a unique Annex on Forest Sector Governance under which Peru committed to undertake a series of binding obligations to combat illegal logging and illegal trade in timber and to promote sustainable forest management practices.^e Under the TPP Agreement, Peru's commitments with respect to the Annex on Forest Sector Governance would remain in place, but other TPP parties would not assume similar commitments.

The Environment chapter of TPP would provide a strong basis for these countries to cooperate in combating illegal logging and associated trade, and in promoting sustainable forest management.

¹¹³⁸ Convention on International Trade in Endangered Species of Wild Fauna and Flora.

Nonetheless, observers have called on U.S. trade agencies to carefully monitor TPP parties' implementation and enforcement of the chapter's provisions.^f U.S. assistance in building capacity for TPP parties to implement and enforce the chapter's provisions, including providing resources, may be a critical factor in determining whether TPP succeeds in mitigating illegal logging in the region.^g According to another observer, although much of the world's illegal logging occurs in countries not party to TPP, the large number and economic size of TPP parties may act to limit global market opportunities for illegally sourced logs.^h

^a GTIS, Global Trade Atlas database (accessed February 18, 2016).

^b See, e.g., Hoare, "Tackling Illegal Logging and the Related Trade," July 2015, viii.

^c Industry representative, interview by USITC staff, Washington, DC, February 3, 2016.

^d USTR and USDOS, "Standing Up for the Environment," May 2015, 3, 8–9.

^e USTR and USDOS, "Standing Up for the Environment," May 2015, 49.

^f ITAC-7, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 7.

^g TEPAAC, *The U.S.-Trans-Pacific Partnership Free Trade Agreement*, December 3, 2015, 2.

^h NGO representative, telephone interview by USITC staff, January 29, 2016.

An Environment Committee and contact points would be established to oversee implementation of the chapter (Article 20.19). The chapter also outlines the process for consultations between parties on the interpretation and application of the chapter, and procedures for resolving disputes (Article 20.20).

The TPP Environment chapter would follow the model of the May 10, 2007, agreement between the U.S. Congress and the Executive Branch, under which all FTA environmental obligations would be enforced on the same bases as the commercial provisions of the agreement, and would be subject to the same remedies, procedures, and sanctions.¹¹³⁹ Specific dispute settlement procedures are established in Article 20.23.

Four side agreements are relevant to the Environment chapter:

- In a bilateral understanding, the United States and Chile would agree that notwithstanding the chapter's prohibitions on certain fisheries subsidies, a party may grant time-limited subsidies to assist its fishermen to recover from a natural disaster, such as a tsunami or an earthquake.¹¹⁴⁰

The United States and Malaysia agreed that Malaysia would establish a "National Committee to Coordinate the Implementation of Environment Chapters under our Free Trade Agreements," including the TPP Agreement. In addition, the two governments noted their shared understanding that access to traditional knowledge, and the sharing

¹¹³⁹ USTR, "Chapter 20, Environment: Chapter Summary," November 5, 2015; USTR, "Standing Up for the Environment," May 2015, 3–4. For additional information on such remedies, procedures, and sanctions, see the section on dispute settlement in this chapter, or Chapter 28 of the TPP Agreement.

¹¹⁴⁰ Bilateral Understanding between the U.S. and Chile on Fisheries Subsidies and Natural Disasters.

of benefits resulting from that knowledge, can be adequately addressed through contracts that reflect mutually agreed terms between users and providers.¹¹⁴¹

- The United States and Peru reached a similar understanding concerning biodiversity and traditional knowledge.¹¹⁴²
- The United States and Peru reached an understanding, consistent with Article 20.17.5 (Environment Chapter, Conservation and Trade), in which the parties would agree to address illegal trade in wild fauna and flora. The understanding recognizes that Peru's Forest and Wildlife Law requires proof of legal origin for wild fauna and flora, and that failure to provide such proof is subject to legal penalties. The understanding further notes that each party retains the right to determine what constitutes "credible evidence" under the law.¹¹⁴³

Marine Fisheries Provisions

The environment chapter contains several provisions related to marine fisheries, all of which are contained in Article 20.16:

- Parties would agree to operate a fisheries management system that regulates catch at sustainable levels;
- Parties would agree to take conservation measures to protect sharks, turtles, seabirds, and marine mammals;
- Parties would be prohibited from providing fishing subsidies to vessels that engage in overfishing or illegal fishing, and would agree to refrain from introducing new fishing subsidies and to report on the subsidies they provide;
- Parties would agree on certain cooperative measures designed to reduce IUU fishing.

The TPP's marine fisheries provisions are more specific than those included in the environment chapters of other FTAs. In particular, it is significant that TPP includes a binding commitment on fishing subsidies, as this had not appeared in prior FTAs; TPP represents the first time that a trade agreement would make fishing subsidy guidelines enforceable. Views of interested parties on the subsidy provisions are included in the section below.

¹¹⁴¹ U.S.-Malaysia Agreement on Committee to Coordinate Implementation of Environment Chapter. Under Malaysia's constitution, many environmental matters fall under the jurisdiction of the state governments. Therefore, a committee comprising all federal and state government representatives is required to coordinate and oversee the implementation of Malaysia's obligations under the Environment chapter, such as commitments to address illegal logging, fishing, and wildlife trafficking. See Memon, "Devolution of Environmental Regulation," 2003.

¹¹⁴² Bilateral Understanding between the U.S. and Peru on Biodiversity and Traditional Knowledge.

¹¹⁴³ Bilateral Understanding between the U.S. and Peru on Conservation and Trade.

The marine fisheries provisions may necessitate changes in countries' fisheries management systems, subsidy programs (discussed below), or systems in place to address IUU fishing. TPP-related changes to fisheries management systems are likely to affect Vietnam, because that country does not have any such comprehensive system in place at present, as acknowledged in the TPP Agreement. Vietnam was granted an additional 2 years to comply with the fisheries subsidy provisions in the chapter because it is in the process of completing a stock assessment to evaluate the populations of fish in its waters, which must be done before a management system can be put in place (Article 20.16, n. 18).¹¹⁴⁴

One change that the United States has made that is linked to the fisheries provisions in Environment chapter is its February 2016 ratification of the Port State Measures Agreement (PSMA). This is an agreement under the Food and Agriculture Organization of the United Nations designed to curtail IUU fishing. While enforcement of IUU prohibitions has usually been taken against vessels by the countries issuing their flags, the PSMA shifts some of the responsibility to the country in which the vessels land. By inspecting these vessels more closely in their ports and preventing any IUU fish that are found from entering commercial channels, PSMA-party countries seek to reduce IUU. TPP would require parties to implement port state measures, though it does not specify that they must join PSMA.

Summary of Views of Interested Parties

With regard to the Environment chapter as a whole, observers are split in their opinions. On one side, some observers have expressed satisfaction that the chapter breaks substantial new ground for an Environment chapter in trade agreements, addressing topics such as environmental conservation and marine fisheries subsidies (box 6.5) that have not been previously addressed in U.S. trade agreements. Observers caution that the effectiveness of the new provisions will depend on their implementation, and that the United States needs to help other TPP parties build enforcement capacity, particularly with respect to the new fisheries and biodiversity provisions.¹¹⁴⁵

¹¹⁴⁴ While fisheries management programs can significantly affect a country's production levels and the mix of species harvested in its waters, such changes would be unlikely to have a major effect on Vietnam's seafood exports to the United States, because most of those exports are the products of aquaculture rather than wild-capture fisheries.

¹¹⁴⁵ TEPAC, *The U.S.-Trans-Pacific Partnership Free Trade Agreement*, December 3, 2015, 2; World Wildlife Fund-US, Written Testimony for the House Ways and Means committee, November 17, 2015, 2–4; NGO representative, interview with USITC staff, Washington, DC, February 9, 2016.

Box 6.5: Interested Parties' Views on Fishing Subsidy Provisions

Many observers pointed to the binding, enforceable provisions prohibiting subsidies to fishing vessels that engage in overfishing or IUU fishing as a major accomplishment of the environment chapter, though views were mixed about how much change could reasonably be expected from those provisions. According to the Trade and Environment Policy Advisory Committee (TEPAC), obtaining a binding commitment on fishing subsidies was a significant step forward. But TEPAC contended that in the future, the United States should seek to expand the scope of such provisions to include prohibitions on subsidies that damage stocks before a species is designated as overfished.^a

Other interested parties agreed with TEPAC, emphasizing that TPP sets an important precedent and may lead to additional commitments in the future.^b One observer was particularly pleased that the TPP subsidy prohibition would discourage countries from starting new fishing subsidy programs.^c Another said that much depends on how the subsidy prohibitions are implemented. For example, according to this observer, it is unclear exactly how a subsidy that contributes to overfishing (prohibited under TPP rules) will be defined.^d

Most observers agreed that there are no immediately apparent changes to countries' laws that will be made as a result of the subsidy provisions. For example, one Canadian observer said that approximately 30 percent of the world's fisheries subsidies are given by TPP countries, and Japan is the single largest provider of them, and said that it is not clear what share of these would be eliminated under TPP.^e

^a TEPAC *The U.S.-Trans-Pacific Partnership Free Trade Agreement*, December 3, 2015, 12.

^b NGO representatives, interviews by USITC staff, Washington, DC, February 3 and 9, 2016.

^c NGO representative, interview by USITC staff, Washington, DC, February 9, 2016.

^d *Ibid.*, February 3, 2016.

^e Canadian academic representative, telephone interview with USITC staff, March 3, 2016.

In contrast, others have expressed disappointment that much of this new language is not enforceable under the agreement, and is largely characterized by parties' agreements to "encourage" or "promote" higher environmental standards.¹¹⁴⁶ The Trade and Environment Policy Advisory Committee (TEPAC) specifically pointed to the provisions addressing marine fisheries management and illegal trade in wild flora and fauna in this regard.¹¹⁴⁷

Another point of disagreement lies with the potential for enforcement of the chapter under TPP's dispute settlement process (Chapter 28 of the agreement). The chapter meets the standard developed under the May 10, 2007, executive-congressional agreement to make the environment provisions fully enforceable under the agreement's dispute settlement process. In

¹¹⁴⁶ Center for International Environmental Law, "The Trans-Pacific Partnership and the Environment," November 2015, 2; NGO representative, interview by USITC staff, Washington, DC, February 3, 2016; NGO representative, telephone interview by USITC staff, February 3, 2016.

¹¹⁴⁷ TEPAC, *The U.S.-Trans-Pacific Partnership Free Trade Agreement*, December 3, 2015, 3.

addition, the new public submissions process will permit environmental NGOs to become involved in enforcing the agreement's Environment chapter.¹¹⁴⁸

However, a number of groups have argued that the dispute settlement process is unlikely to be an effective means of safeguarding the environment in TPP parties. For example, in a written submission to the Commission, the Sierra Club noted that the state-to-state dispute settlement process requires the U.S. government or another party to bring the dispute to a formal dispute settlement panel, and that this is unlikely to happen, as demonstrated by past experience.¹¹⁴⁹ Furthermore, several organizations have pointed out that even if states were persuaded to bring environmental concerns to dispute settlement, the process is more onerous for the environment chapter, as it requires three rounds of consultations before a formal dispute settlement panel can be formed, compared with one round for disputes in most other areas.¹¹⁵⁰

The AFL-CIO expressed concerns that the Environment chapter does not specifically call out all seven of the May 10 global conventions, and that it does not sufficiently address climate change.¹¹⁵¹ TEPAC stated that TPP's commitments to address climate change should have been much stronger, and that this was an area that might profit from capacity-building efforts. However, in a dissent to the majority report, Frances B. Smith of the Competitive Enterprise Institute stated that climate change should not be addressed in TPP at all, and is better addressed in other international forums.¹¹⁵² A majority of the TEPAC also welcomed the Environment chapter's commitment to transparency and public participation at a number of places within the Chapter.¹¹⁵³

Finally, outside of the provisions of the Environment chapter, many organizations have raised concerns about the impact of the ISDS process on the environment.¹¹⁵⁴ Concerns center around the potential of ISDS arbitration to cause a rollback of environmental laws, or to create a "chilling" effect, whereby parties to investment agreements that include ISDS decline to impose environmental regulations out of concern about being sued, leading to required compensation

¹¹⁴⁸ NGO representative, interview by USITC staff, Washington, DC, February 9, 2016; NGO representative, telephone interview by USITC staff, February 3, 2016.

¹¹⁴⁹ Sierra Club, written submission to the USITC, February 12, 2016, 8. See also, Center for International Environmental Law, "The Trans-Pacific Partnership and the Environment," November 2015, 1, 3–5.

¹¹⁵⁰ AFL-CIO, written testimony to the USITC, December 29, 2015, 48–9.

¹¹⁵¹ AFL-CIO, written testimony to the USITC, December 29, 2015, 48–50; Center for International Environmental Law, "The Trans-Pacific Partnership and the Environment," November 2015, 2; Sierra Club, "TPP Text Analysis," n.d., 2–3 (accessed March 14, 2016).

¹¹⁵² TEPAC, *The U.S.-Trans-Pacific Partnership Free Trade Agreement*, December 3, 2015, 15.

¹¹⁵³ TEPAC, *The U.S.-Trans-Pacific Partnership Free Trade Agreement*, December 3, 2015, 17–18.

¹¹⁵⁴ The ISDS process is outlined in TPP's Investment chapter (chapter 9); it is described earlier in this chapter, in the section on investment.

payments to foreign investors.¹¹⁵⁵ The impact of ISDS on public regulations is a subject of heated dispute, with proponents of the mechanism arguing that public environmental, health, and safety regulations are not subject to changes as a result of ISDS arbitration,¹¹⁵⁶ and opponents countering that the provisions of the Investment chapter do permit investors to challenge such regulations under ISDS.¹¹⁵⁷ In its report, the TEPAC noted that some members were concerned about ISDS, while others supported it. The majority of the committee stated that TPP addressed some of the concerns raised about ISDS more clearly in TPP than in past U.S. FTAs.¹¹⁵⁸

Cooperation and Capacity Building

Assessment

The Cooperation and Capacity Building chapter (TPP Chapter 21) recognizes that the parties may cooperate to enhance each party's ability to implement the TPP Agreement, take advantage of the economic opportunities created by TPP, and promote and facilitate trade and investment between the parties. The chapter offers several examples of areas open to cooperation and capacity-building activities, including the agricultural, industrial and services sectors; promotion of education, culture and gender equality; and disaster risk management. The chapter would also establish a TPP Cooperation and Capacity Building Committee that would meet regularly to promote capacity building among all TPP parties. TPP is the first U.S. free trade agreement to include such a chapter. This chapter is unlikely to have a direct impact on the U.S. economy or U.S. consumers.

Summary of Provisions

Under TPP Chapter 21, the parties would acknowledge the importance of cooperation and capacity building activities and agree to undertake such activities, which may involve two or more TPP partners, on a mutually agreed basis. The parties would recognize that the involvement of the private sector is an important part of these activities, and that SMEs in particular may need assistance in participating in global markets (Article 21.1).

¹¹⁵⁵ Center for International Environmental Law, "The Trans-Pacific Partnership and the Environment," November 2015, 9–12; NGO representative, telephone interview by USITC staff, February 3, 2016; Mann, "The TPP Part 1," January 2016, 3. USITC, hearing transcript, January 13, 2016, 246-47 (testimony of Roger Johnson, National Farmers Union).

¹¹⁵⁶ USITC, hearing transcript, January 13, 2016, 245–46 (testimony of Alan Wolff, National Foreign Trade Council).

¹¹⁵⁷ USITC, hearing transcript, January 13, 2016, 244 (testimony of Celeste Drake, AFL-CIO).

¹¹⁵⁸ TEPAC, *The U.S.-Trans-Pacific Partnership Free Trade Agreement*, December 3, 2015, 20–21.

The Cooperation and Capacity Building Committee established under this chapter would meet regularly to promote cooperation and capacity-building activities among the TPP parties. The committee would help the parties exchange information about lessons learned; provide a forum for considering proposals for future cooperation and capacity building activities; assist with donor coordination and development of public-private partnerships for these activities; work with international donor institutions, private sector entities, non-governmental organizations, or other relevant institutions, to help develop and implement the activities; and coordinate with other bodies established under TPP in support of the development and implementation of these activities to benefit all TPP parties (Article 21.4).

The parties would work to provide the appropriate financial or in-kind resources for cooperation and capacity-building activities, subject to the availability of resources and differences among parties' capabilities (Article 21.5). Nothing in the chapter would be subject to Dispute Settlement under TPP Chapter 28 (Article 21.6).

Summary of Views of Interested Parties

Linda Schmid, in testimony before the Commission, highlighted the possibility of parties' pursuing gender equality activities under this chapter, explaining that "the U.S. and TPP members will . . . gain from deepening women's engagement in the economy."¹¹⁵⁹ Luis Castilla, also in testimony before the Commission, called capacity building "a key area for [TPP members] to work upon, because the enforcement and implementation mechanisms of these trade agreements are critical."¹¹⁶⁰

Competitiveness and Business Facilitation

Assessment

Chapter 22 would establish a new Committee on Competitiveness and Business Facilitation, which would be composed of representatives of each party. The committee would focus on trade facilitation within the free trade area, including the development and strengthening of supply chains. According to USTR, this chapter draws from experience with APEC initiatives on regional competitiveness and supply chain development, and TPP is the first U.S. FTA to include new stand-alone commitments promoting the development and strengthening of supply chains among its members.¹¹⁶¹ Interested parties expressed the view that the chapter will be

¹¹⁵⁹ USITC, hearing transcript, January 15, 2016, 835 (testimony of Linda Schmid, Trade in Services International).

¹¹⁶⁰ USITC, hearing transcript, January 13, 2016, 78 (testimony of Luis Miguel Castilla, Ambassador of Peru).

¹¹⁶¹ USTR, Chapter 22, "Competitiveness and Business Facilitation: Chapter Summary," November 5, 2015.

beneficial in promoting regional competitiveness, including through the development of supply chains.

Summary of Provisions

This is a relatively short chapter with only five articles. The principal purpose of the chapter, as set out in Article 22.2.1–2, is to establish a Committee on Competitiveness and Business Facilitation, which would be composed of government representatives of each party. The committee would be expected to discuss effective approaches and develop information-sharing activities to support efforts to establish a competitive environment that is conducive to the establishment of businesses, facilitates trade and investment between the parties, and promotes economic integration and development within the free trade area. The committee would therefore explore ways to take advantage of the trade and investment opportunities that this TPP creates; give the Trans-Pacific Partnership Commission advice and recommendations on ways to bolster the competitiveness of the parties’ economies, including through enhancing the participation of SMEs in regional supply chains; explore ways to promote the development and strengthening of supply chains within the free trade area in accordance with Article 22.3 (supply chains); and engage in other activities as the parties may decide (Article 22.2.3).

As set out in Article 22.3, a principal function of the committee would be to explore how the agreement may be implemented so as to promote the development and strengthening of supply chains in order to integrate production, facilitate trade, and reduce the costs of doing business within the free trade area. The committee would also be required to develop recommendations and promote seminars, workshops, or other capacity-building activities with appropriate experts, including private sector and international donor organizations, to help SMEs take part in supply chains in the free trade area. The committee would be expected to work with other committees, working groups, and any other subsidiary body established under TPP, including through joint meetings, to identify and discuss measures affecting the development and strengthening of supply chains (Article 22.3). The term “supply chain” is defined in Article 22.1. No TPP party would have recourse to dispute settlement under TPP Chapter 28 for any matter arising under the chapter (Article 22.5).

Summary of Views of Interested Parties

At the Commission hearing, Singapore’s ambassador, Ashok Kumar Mirpuri, stated that “supply chains will be critical” to his country as well as to the United States, “not just for large multinationals, but also small and medium-sized enterprises who are quite excited about the

new opportunities that [TPP] will present to them.”¹¹⁶² On its website, the US-ASEAN Business Council expressed the view that the chapter “will enhance the domestic and regional competitiveness of each TPP country’s economy and promote economic integration and jobs in the region, including through the development of regional production and supply chains.”¹¹⁶³

Development

Assessment

The Development chapter affirms the parties’ goal of improving economic opportunities in support of development, inclusive growth, and regional economic integration. It identifies three specific areas to be considered for collaborative work once TPP enters into force, including (1) broad-based economic growth, (2) women and economic growth, and (3) education, science and technology, and research and innovation. The chapter also establishes a TPP Development Committee that will meet regularly to promote voluntary cooperative work to identify and potentially support ways for TPP’s developing economies to tap new opportunities. According to USTR, TPP is the first U.S. agreement to include such a chapter.¹¹⁶⁴

Summary of Provisions

The chapter contains nine articles. In Article 23.1–2 the parties affirm their commitment to promote and strengthen an open trade and investment environment that seeks to improve welfare, reduce poverty, raise living standards, and create new employment opportunities in support of development, among other goals. They acknowledge the importance of development in promoting inclusive economic growth, as well as the key role of each party’s leadership in carrying out development objectives. In Articles 23.3–23.5 the parties set out certain acknowledgements and objectives relating to broad-based economic growth, women and economic growth, and education, science and technology, and research and innovation.

Articles 23.7 provides for the establishment of a Committee on Development, to be composed of government representatives of each party, that will (a) facilitate the exchange of information on parties’ experiences regarding the formulation and implementation of national policies intended to derive the greatest possible benefits from TPP; (b) facilitate the exchange of information on parties’ experiences and lessons learned through joint development activities undertaken under Article 23.6; (c) discuss any proposals for future joint development activities supporting development policies related to trade and investment; (d) invite, as appropriate,

¹¹⁶² USITC, hearing transcript, January 13, 2016, 39.

¹¹⁶³ US-ASEAN Business Council, <https://www.usasean.org/regions/tpp/about> (accessed March 9, 2016).

¹¹⁶⁴ USTR, “Chapter 23, Development: Chapter Summary,” November 5, 2015.

international donor institutions, private sector entities, NGOs, or other relevant institutions to assist in developing and implementing such activities; (e) carry out other functions as the parties may decide; and (f) consider issues associated with the implementation and operation of the chapter. No party under the agreement would have recourse to dispute settlement under TPP's Chapter 28 for any matter arising under the chapter (Article 23.9).

Summary of Views of Interested Parties

In testimony at the Commission hearing, Linda Schmid, international trade and development advisor for Trade in Services International, expressed the view that the TPP Development chapter will encourage parties to “work to strengthen women’s leadership networks” which will “help expand female labor force participation rates in each TPP country.”¹¹⁶⁵

Small and Medium-Sized Enterprises

Assessment

Chapter 24 consists of two principal articles. The first relates to information sharing and requires that each party establish a website containing information that would help facilitate trade. The second requires that a Committee on Small and Medium-Sized Enterprises be established and that it be composed of representatives of TPP parties. According to USTR, TPP is the first U.S. free trade agreement to include a separate chapter focusing on issues specific to SMEs.¹¹⁶⁶ It should also be noted that matters relating to SMEs are also addressed in other TPP chapters, including the chapters on Customs Administration and Trade Facilitation (Article 5.7), Electronic Commerce (Article 14.15), Labour (Article 19.10), Development (Article 23.3), Regulatory Coherence (Article 25.5), and Transparency and Anti-Corruption (Article 26.1).

Summary of Provisions

Article 24.1 relates to information sharing. It requires that each party establish or maintain its own publicly accessible website containing information regarding the TPP Agreement, including certain specified types of information about the agreement designed for SMEs. It also requires that each party include on its website links to (a) the equivalent websites of the other parties; and (b) the websites of its government agencies and other appropriate entities that provide information the party considers useful to any person interested in trading, investing, or doing business in that party’s territory. Examples of such information may include customs regulations and procedures; regulations and procedures concerning IPRs; technical regulations,

¹¹⁶⁵ USITC, hearing transcript, January 15, 2016, 838.

¹¹⁶⁶ USTR, “Chapter 24, Small and Medium-sized Businesses: Chapter Summary,” November 5, 2015.

standards, and SPS measures relating to importation and exportation; foreign investment regulations; business registration procedures; employment regulations; and taxation information (Article 24.1).

Article 24.2 provides the establishment of a Committee on SMEs that would be composed of government representatives of each party. Among other things, the committee would be required to (a) identify ways to help SMEs of the parties take advantage of the commercial opportunities under TPP; (b) exchange and discuss each party's experiences and best practices in supporting and assisting SME exporters with respect to training programs, trade education, trade finance, finding commercial partners in other parties, establishing good business credentials, and more; (c) develop and promote relevant seminars, workshops, or other activities; (d) explore opportunities for capacity building; (e) recommend additional information that a party may include on the information-sharing website referred to in Article 24.1; and (f) review and coordinate the Committee's work program with those of other committees, working groups, and any subsidiary body established under TPP, as well as those of other relevant international bodies. Other required functions would include submitting a report on its activities and making appropriate recommendations to the Trans-Pacific Partnership Commission.

Article 24.3 provides that no party under the agreement would have recourse to dispute settlement under TPP's Chapter 28 for any matter arising under the chapter.

Summary of Views of Interested Parties

According to written submissions and witness testimony before the Commission, SMEs face particular burdens with regard to international trade. In her written submission, Laura Lane, representing UPS, said that onerous customs procedures have a disproportionate effect on small businesses. She added that reductions in tariff rates, the removal of customs barriers, the liberalization of express delivery and e-payment services, and guarantees of free data flows resulting from TPP would further enable e-commerce and unlock opportunities from which small businesses will benefit.¹¹⁶⁷

Ambassador Mirpuri of Singapore stated that the enterprises of developing countries are composed in large part of SMEs, so any features of TPP that benefit SMEs will be of particular importance to developing countries.¹¹⁶⁸ He noted that SMEs are important to developed countries as well, and said that of 300,000 exporters in the United States, 98 percent are SMEs,

¹¹⁶⁷ Lane, written testimony to the USITC, December 29, 2015, 3.

¹¹⁶⁸ USITC, hearing transcript, January 13, 2016, 33, 56 (testimony of Ashok Kumar Mirpuri, Ambassador of the Republic of Singapore).

adding that SMEs account for 35 percent of U.S. export revenue.¹¹⁶⁹ Ambassador Castilla of Peru noted the importance of TPP to Peruvian SMEs, which he said would benefit from the rules of origin mechanism allowing them to insert the value of their production into global supply chains.¹¹⁷⁰ According to George Judd of Cask LLC, the transparency in foreign markets that would result from TPP would be of particular value to U.S. SMEs trying to conduct business in developing Asian countries.¹¹⁷¹

In a written statement, Peter Allgeier, representing the Coalition of Services Industries, highlighted the value to SMEs of a single web portal for accessing information on the agreement, as outlined in Chapter 24 of TPP.¹¹⁷² In another written statement, John Murphy of the U.S. Chamber of Commerce noted that more than 96 percent of the over 3 million Chamber members had less than 100 employees. He said that by opening up government procurement markets and by making the bidding process more transparent, TPP will benefit SMEs in particular. Murphy stated that the cost of nontariff barriers that could more readily be borne by large enterprises might be prohibitive to SMEs, and he said that TPP would benefit SMEs by reducing or eliminating some of these barriers.¹¹⁷³ Edward Gerwin of the Progressive Policy Institute (PPI) expressed views similar to those of the Chamber in his written statement.¹¹⁷⁴

In its written report to the USTR, the Industry Trade Advisory Committee on Small and Minority Business generally supported TPP, but provided multiple comments on potential improvements.¹¹⁷⁵ The committee expressed concerns about specific provisions, “including the complexity of, and some inconsistency in, the Rules of Origin as well as the allowance of increased non-originating content; provisions in the Environmental Chapter that may create trade barriers; ambiguous text on the Scope of Covered Regulatory Measures; and the inclusion of a product-specific exemption pertaining to public health measures in the Investment Chapter.”¹¹⁷⁶

¹¹⁶⁹ Citing USITC, *Small and Medium-Sized Enterprises*, 2010, 2-1 to 2-7.

¹¹⁷⁰ USITC, hearing transcript, January 13, 2016, 72 (testimony of Luis Miguel Castilla, Ambassador of Peru).

¹¹⁷¹ USITC, hearing transcript, January 13, 2016, 345.

¹¹⁷² Allgeier, written testimony to the USITC, January 11, 2016, 10.

¹¹⁷³ Murphy, written testimony to the USITC, January 13, 2016, 4-5, 11, 15.

¹¹⁷⁴ PPI, written submission to the USITC, January 5, 2016, 1-2, 4, 8.

¹¹⁷⁵ ITAC-11, *The Trans-Pacific Partnership (TPP)*, December 1, 2015, 4-10.

¹¹⁷⁶ *Ibid.*, 2.

Regulatory Coherence

Assessment

TPP is the first U.S. FTA to include a chapter on regulatory coherence. The chapter encourages the use of good regulatory practices in developing and implementing domestic regulatory measures, and seeks to foster an open, fair, and predictable regulatory environment in the TPP region (Article 25.2). According to USTR, the chapter's provisions would benefit service providers, goods manufacturers, and agricultural exporters, and would not affect the rights of the United States or other TPP parties to regulate for public health and safety, worker and environmental protections, security, financial stability, or other public interest reasons, nor would anything in it require changes to U.S. regulations or U.S. regulatory procedures.¹¹⁷⁷

Interested parties indicate that the Regulatory Coherence chapter would likely have a positive impact on U.S. companies investing in and exporting to TPP countries,¹¹⁷⁸ but the effects would be limited. There would be no recourse to TPP's dispute settlement process for matters arising under the chapter. The chapter's transparency and notification provisions would be more limited than many industry representatives would prefer, with much of the impact of the provisions determined by the level of political support for them in TPP countries.¹¹⁷⁹

Summary of Provisions

Article 25.2 of Chapter 25 defines regulatory coherence as referring "to the use of good regulatory practices in the process of planning, designing, issuing, implementing and reviewing regulatory measures to facilitate achievement of domestic policy objectives, and in efforts across governments to enhance regulatory cooperation in order to further those objectives and promote international trade and investment, economic growth and employment." Article 25.2 also states, among other things, that the parties affirm the importance of "each Party's sovereign right to identify its regulatory priorities and establish and implement regulatory measures to address these priorities, at the levels that the Party considers appropriate."

¹¹⁷⁷ USTR, "Chapter 25, Regulatory Coherence: Chapter Summary," November 5, 2015.

¹¹⁷⁸ ITAC-4, *The Trans-Pacific Partnership*, December 3, 2015, 6; ITAC-5, *The Trans-Pacific Partnership Trade Agreement*, November 25, 2015, 10; PCI, written submission to the USITC, February 12, 2016, 2; PPI, written submission to the USITC, January 5, 2016, 9; GE, written submission to the USITC, January 28, 2016, 1,3; Schmid, written testimony to the USITC, January 15, 2016, 1, 4.

¹¹⁷⁹ ITAC-16, *The Trans-Pacific Partnership Trade Agreement*, December 2, 2015, 11; TEPAC, *The U.S.-Trans-Pacific Partnership Free Trade Agreement*, December 3, 2015, 19-20; ITAC-5, *The Trans-Pacific Partnership Trade Agreement*, November 25, 2015, 10; ITAC-3, *The Trans-Pacific Partnership Trade Agreement*, December 2, 2015, 14; ITAC-2, *Trans-Pacific Partnership Agreement*, December 2, 2015, 13-14; ITAC-7, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 9.

Article 25.3 would require each party promptly, and no later than one year after entry into force of the Agreement, to determine and make publicly available the scope of its covered regulatory measures. The Chapter aims to facilitate regulatory coherence in each TPP country by promoting mechanisms for effective interagency consultation and coordination (Article 25.4). It also encourages implementation of a core group of good regulatory practices, including regulatory impact assessments that assess the need for a regulatory proposal, examine feasible alternatives, explain the grounds for concluding that the selected alternative achieves the policy objective in an efficient manner, and rely on the best reasonably obtainable existing information, including relevant scientific, technical, economic, or other information. Each party would be encouraged to provide an annual public notice of all regulatory measures it expects to take (Article 25.5).

Article 25.6 provides for the establishment of a Committee on Regulatory Coherence, composed of government representatives of the parties. The Committee would be expected to consider issues associated with the implementation and operation of the chapter and also identify future priorities. The Committee would also be required, at least once every five years after the date of entry into force of the Agreement, to consider developments in the area of good regulatory practices and in best practices in maintaining processes or mechanisms as well as the parties' experiences in implementing the chapter, with a view to making recommendations to the Commission for improving the provisions of this Chapter so as to further enhance the benefits of this Agreement.

The chapter also calls upon the parties to cooperate in order to facilitate the implementation of the chapter through information exchanges, dialogues, and meetings (Article 25.7), and to engage with interested persons of the parties to provide input on matters relevant to enhancing regulatory coherence (Article 25.8). It also requires parties to make periodic notifications to the Committee of steps it has taken to implement the chapter and to improve its adherence to it (Article 25.9). Article 25.11 states that no party would have recourse to dispute settlement under Chapter 28 of the Agreement for any matter arising under the chapter.

Summary of Views of Interested Parties

In public reports and statements to the Commission, a number of interested parties expressed strong support for chapter provisions that would encourage parties to streamline their regulations and encourage the implementation of regulatory best practices similar to U.S. practices. They stated that improved regulatory systems would help to make U.S. firms more

competitive and bring down barriers to trade and investment.¹¹⁸⁰ Stakeholders said that commitments to transparency and fairness of regulatory procedures help to strengthen the rule of law and are among the most important provisions in any trade agreement.¹¹⁸¹

At the same time, many stakeholders also qualified their support by noting that the benefits of the chapter would depend on the extent to which parties chose to implement the provisions.¹¹⁸² ITAC-2 (Automotive Equipment and Capital Goods) stated in its report that auto industry firms currently face an “overlapping web of incompatible foreign motor vehicle regulations” that serve as a major obstacle to U.S. car and truck exports, but said that the Regulatory Coherence chapter would not be particularly helpful in solving the problem, as it does not obligate parties “to do much more than talk.”¹¹⁸³

Several observers said that the chapter would significantly help SMEs,¹¹⁸⁴ although others disagreed on this point.¹¹⁸⁵ Members of several advisory committees also noted that TPP does not require regulatory agencies to consider the impact on small businesses.¹¹⁸⁶ TEPAC noted that the chapter does not explicitly call out the need for environmental impact analysis, and does not apply to voluntary guidance documents or to regulatory matters that are not of general application, such as the issuance of specific licenses or permits.¹¹⁸⁷

The American Chemistry Council (ACC) testified that it “strongly supports the objective of pursuing closer regulatory cooperation between the U.S. and TPP countries,” and that a trend toward less regulatory coherence in the chemicals industry is increasing trade costs for chemicals companies.¹¹⁸⁸ According to the Dow Chemical Company, the chapter would help industry deal with regulatory market access barriers by engaging directly with government agencies. Dow sees the Regulatory Coherence chapter as a model for countries to pursue

¹¹⁸⁰ ITAC-4, *The Trans-Pacific Partnership*, December 3, 2015, 6; ITAC-5, *The Trans-Pacific Partnership Trade Agreement*, November 25, 2015, 10; PCI, written submission to the USITC, February 12, 2016, 2; PPI, written submission to the USITC, January 5, 2016, 9; GE, written submission to the USITC, January 28, 2016, 1,3; Schmid, written testimony to the USITC, January 15, 2016, 1, 4.

¹¹⁸¹ USITC, hearing transcript, January 13, 2016, 8 (testimony of Peter Allgeier, Coalition of Service Industries).

¹¹⁸² ITAC-16, *The Trans-Pacific Partnership Trade Agreement*, December 2, 2015, 11; TEPAC, *The U.S.-Trans-Pacific Partnership Free Trade Agreement*, December 3, 2015, 19–20; ITAC-5, *The Trans-Pacific Partnership Trade Agreement*, November 25, 2015, 10; ITAC-3, *The Trans-Pacific Partnership Trade Agreement*, December 2, 2015, 14; ITAC-2, *Trans-Pacific Partnership Agreement*, December 2, 2015, 13–14; ITAC-7, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 9.

¹¹⁸³ ITAC-2, *Trans-Pacific Partnership Agreement*, December 2, 2015, 13–14.

¹¹⁸⁴ ITAC-16, *The Trans-Pacific Partnership Trade Agreement*, December 2, 2015, 10; TEPAC, *The U.S.-Trans-Pacific Partnership Free Trade Agreement*, December 3, 2015, 19–20; ECAT, written submission to the USITC, December 18, 2015, 8; industry representative, interview by USITC staff, Washington, DC, February 23, 2016.

¹¹⁸⁵ ITAC-11, *The Trans-Pacific Partnership (TPP)*, December 1, 2015, 10.

¹¹⁸⁶ ITAC-7, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 9; TEPAC, *The U.S.-Trans-Pacific Partnership Free Trade Agreement*, December 3, 2015, 19–20.

¹¹⁸⁷ TEPAC, *The U.S.-Trans-Pacific Partnership Free Trade Agreement*, December 3, 2015, 19–20.

¹¹⁸⁸ Skelton, written testimony to the USITC, December 29, 2015, 2–3.

“transparent regulatory drafting processes, meaningful consultation with industry, and regulatory rigor based on sound science and risk.”¹¹⁸⁹

Several services sector representatives also stated that they support the Regulatory Coherence provisions, particularly efforts aimed at improving transparency about the role of local versus national regulators.¹¹⁹⁰ Another U.S. service provider, however, stated that the regulatory coherence provisions would likely be helpful only in the long run, as they set expectations for good regulatory practice. In the near term, the chapter would likely have only minimal impact.¹¹⁹¹ In a written statement, Trade in Services International stated that the chapter supports Malaysia’s 2013 national policy to ensure that the public sector adheres to certain rules and procedures in the creation of regulations that influence business, trade, and investment.¹¹⁹²

One advisory committee urged the U.S. government and NGOs to provide resources for training and other capacity development to TPP parties in this area.¹¹⁹³ ITAC-5 cautioned that U.S. companies might use the Regulatory Coherence Committee to seek the revision of U.S. regulations.¹¹⁹⁴

Transparency and Anticorruption

Assessment

TPP’s transparency provisions cover investment and trade in both goods and services, and would likely improve the overall business environment for U.S. firms in the region. This is particularly true for U.S. firms operating in Brunei, Japan, Malaysia, New Zealand, and Vietnam, where the United States does not have an existing FTA. However, the overall level of transparency commitments is not expected to change significantly for existing U.S. FTA partners (Australia, Canada, Chile, Mexico, Peru, and Singapore). The anticorruption section of the chapter includes dedicated provisions, not found in existing U.S. FTAs, to combat tax evasion and raise the standards for bookkeeping in the private sector.¹¹⁹⁵ Most of the provisions in this section are subject to a modified TPP dispute resolution process; along with the anticorruption requirements, the chapter aims to help TPP parties to combat corruption within their borders.

¹¹⁸⁹ Dow Chemical Company, written submission to the USITC, February 15, 2016, 2.

¹¹⁹⁰ Industry representative, telephone interview with USITC staff, February 24, 2016; industry representative, interview by USITC staff, Washington, DC, February 2, 2016.

¹¹⁹¹ Industry representative, interview by USITC staff, Washington, DC, February 23, 2016.

¹¹⁹² TISI, written submission to the USITC, December 26, 2015, 4.

¹¹⁹³ ITAC-8, *The Trans-Pacific Partnership Trade Agreement*, December 3, 2015, 4.

¹¹⁹⁴ ITAC-5, *The Trans-Pacific Partnership Trade Agreement*, November 25, 2015, 10.

¹¹⁹⁵ TPP, Art. 26.7(4)–(5).

Summary of Provisions

The chapter consists of three sections. Section A defines terms used in the chapter, Section B contains provisions related to transparency, and Section C contains provisions related to anticorruption. Under Section B, TPP parties would ensure that their laws, regulations, and administrative rulings of general application with respect to any matter covered by TPP are publicly available (Article 26.2). To the extent possible, regulations that are likely to affect trade or investment between the parties should be subject to notice and comment. Publication of proposed regulations should occur in a single official journal (preferably online), with sufficient time for public comment, and should include an explanation of the purpose and rationale of the regulation. Publication of final regulations also should occur in a single official journal, and parties should consider comments received and explain revisions, preferably on an official website or online journal.¹¹⁹⁶

Section B also provides for administrative proceedings' transparency. Under Section B, parties would ensure, whenever possible, that persons directly affected by a proceeding are given reasonable notice of when that proceeding is initiated, and are permitted to present facts in support of their position (Article 26.3). Parties must establish or maintain tribunals or procedures for the prompt review and, if warranted, correction of a final administrative action with respect to any matter covered by the agreement. Such tribunals must be impartial and independent of the office or authority entrusted with administrative enforcement and must not have any substantial interest in the outcome of the matter. Parties to a proceeding should have the right to defend their positions, and a decision should be based on the evidence, submissions of record or, where required by law, the record compiled by the relevant authority (Article 26.4).

The provisions of Section C seek to eliminate bribery and corruption in international trade, similar to existing U.S. FTAs. TPP would require all parties to ratify or accede to the UN Convention Against Corruption (Article 26.6), and each party would be required to establish, as a criminal offense under its domestic law, a list of acts enumerated in the chapter. These acts would include promising to a public official, directly or indirectly, undue advantages in exchange for promises to act or to refrain from acting in the performance of their official duties, and solicitation or acceptance by a public official of such an undue advantage (Article 26.7).

¹¹⁹⁶ TPP's Article 26.2 offers two options regarding the period of time in which publication of proposed regulations should occur. TPP Article 26.2(4) states that parties should try to provide 60 days for the submission of comments, but also gives the option of publishing within an unspecified period of time. The Technical Barriers to Trade chapter (TPP Chapter 8) calls for parties to allow 60 days for comment on proposed regulations (Article 8.7).

Further, parties would agree to consider a number of policy proposals to promote integrity among public officials via training, codes of conduct, and disciplinary actions (Article 26.8). While making explicit each party’s right to enforce its laws and to make its own decisions about allocating its resources, this section requires that no party must fail to effectively enforce its anticorruption laws (Article 26.9). Finally, this section requires parties to take appropriate measures to promote the active participation of individuals and groups outside the public sector in the fight against corruption, including individuals, enterprises, civil society, NGOs, and community-based organizations (Article 26.10). TPP Chapter 28 (Dispute Settlement) would apply to Section C of the Transparency and Anti-Corruption chapter, as specified in the chapter (Article 26.12).

Summary of Views of Interested Parties

The National Association of Manufacturers and several ITAC committees stated their support for the chapter, saying that the provisions would strengthen overall good governance in the TPP region. ITAC-11 particularly expressed support for measures to increase transparency through online publication of regulations.¹¹⁹⁷ ITAC-3 stated in its report that it was disappointed that the transparency rules were not binding on TPP parties.¹¹⁹⁸ Trade in Services International (TiSI) cited the transparency provisions contained in Chapter 26 as supportive of domestic initiatives already underway in Malaysia, Mexico, Vietnam, and Peru.¹¹⁹⁹ The Property Casualty Insurers Association of America said that transparency regulations such as regulatory notice and comment procedures “are important for regulated entities to assure that regulation is fact-based and not unduly influenced against our companies.”¹²⁰⁰

In testimony before Commission, Linda Schmid of Trade in Services International lauded TPP members for “[agreeing] to combat corruption, promote integrity among public officials and strengthen enforcement of anti-corruption laws,” adding that “the TPP sets the standard for trade rules . . . on anti-corruption.”¹²⁰¹

¹¹⁹⁷ ITAC-2, *Trans-Pacific Partnership Agreement*, December 2, 2015, 14; ITAC-3, *The Trans-Pacific Partnership Trade Agreement*, December 2, 2015, 14; ITAC-11, *The Trans-Pacific Partnership (TPP)*, December 2, 2015, 10; NAM, written submission to the USITC, January 15, 2016, 5–6.

¹¹⁹⁸ ITAC-3, *The Trans-Pacific Partnership Trade Agreement*, December 2, 2015, 14.

¹¹⁹⁹ TiSI, written testimony to the USITC, January 15, 2016, 2015, 4.

¹²⁰⁰ Property Casualty Insurers Association, written submission to the USITC, February 12, 2016, 2.

¹²⁰¹ USITC, hearing transcript, January 15, 2016, 838–39.

Dispute Settlement

Summary of Provisions

Under Article 28.3, the TPP dispute settlement mechanism applies to disputes across TPP, except as otherwise provided, including the Labor, Environment, and State-Owned Enterprises chapters and a number of additional chapters. Articles 28.2, 28.4, and 28.5 provide for consultations among TPP parties, the option for undertaking alternative methods of dispute resolution, and a rule regarding choice of forum. Articles 28.7, 28.8, 28.9, 28.11, and 28.12 set forth procedures for establishing a panel as well as the terms of reference, functions, and rules of procedure for such panels. Articles 28.16 and 28.17 set forth timeframes for consultations, for the establishment and composition of panels, for panel reports, and for party submissions.

Articles 28.9.9 and 28.10.1(d) provide for the establishment of a code of conduct for panelists and rules of procedures for panels. Article 28.9 includes a lengthy description of panel composition procedures. Article 28.12 also provides additional transparency for disputes than currently provided for under the WTO Dispute Settlement Understanding, such as the requirement that parties release relevant documents as soon as possible after filing or at least by the time the final panel report is issued.¹²⁰²

Summary of Views of Interested Parties

Several hearing participants expressed their general support for the TPP dispute settlement mechanism. The time-limited and binding characteristics were seen as benefits,¹²⁰³ as were the consultations and alternative dispute resolution mechanisms available before formal dispute settlement is initiated. They also voiced support for the ability of the public to access submissions, hearings, and final reports of disputes.¹²⁰⁴

Several hearing participants commented on the issue of enforceability. Cargill said that it supported TPP in part because of its “enforceable WTO-plus provisions.”¹²⁰⁵ The International Intellectual Property Alliance said that TPP’s value depends on how well it is implemented and

¹²⁰² For example, compare TPP Article 28.16 with, e.g., WTO DSU Article 20.

¹²⁰³ USITC, hearing transcript, January 14, 2016, 514, 559–60 (testimony of Linda Dempsey, National Association of Manufacturers); National Association of Manufacturers, post-hearing submission to the Commission, 6.

¹²⁰⁴ U.S. Chamber of Commerce, written testimony to the Commission, January 13, 2016, 11.

¹²⁰⁵ Cargill’s prehearing statement Commerce, written testimony to the USITC, January, 2.

enforced,¹²⁰⁶ and the Personal Care Products Association emphasized the need for the U.S. government to allocate resources to enforcement.¹²⁰⁷

Writing for a publication of the Peterson Institute for International Economics, Jennifer Hillman observed that the TPP dispute settlement mechanism is “designed to be broader, deeper, faster, and more transparent than either the WTO’s Dispute Settlement Understanding or any prior bilateral or regional free trade agreement. It covers more chapters and issues than prior dispute settlement systems (including systems on labor, the environment, cross-border data flows, and state-owned enterprises) but leaves out some key issues, including the side agreement on currency manipulation, trade remedies, and many of the new issues included in TPP itself, such as capacity building, competitiveness and business facilitation, and regulatory coherence.”¹²⁰⁸ In its report, the Industry Trade Advisory Committee on Steel observed that TPP’s dispute settlement provisions would likely promote U.S. economic interests by providing effective, timely, and transparent dispute settlement.

The Commission received diverging views on the efficacy of the Chapter 28 mechanism to enforce specific categories of TPP provisions. For example, the Outdoor Industry Association and Third Way said that they support TPP in part due to its enforceable environmental provisions.¹²⁰⁹ The United Steelworkers said the TPP enforcement provisions are inadequate to deal with state-owned enterprises and the excess capacity that other countries regularly direct to the United States. Moreover, it said, if there were no TPP, then the United States would be able to require countries or companies that desire access to the U.S. market to meet certain standards.¹²¹⁰

As discussed in the labor section earlier in this chapter, several organizations disagreed about the utility of the TPP dispute settlement mechanism to enforce labor provisions. Labor groups contended that enforcement of TPP’s labor provisions remains wholly discretionary. They maintained that there is a fundamental difference between the private right of action for the business community under the TPP ISDS mechanism and the “ineffective” mechanism that provides the labor community with “no private right of action to complain against a

¹²⁰⁶ USITC, hearing transcript, January 13, 2015, 287–88, 342–43 (testimony of Steven Metalitz, International Intellectual Property Alliance).

¹²⁰⁷ USITC, hearing transcript, January 15, 2016, 762 (testimony of Francine Lamoriello, Personal Care Products Council).

¹²⁰⁸ Hillman, “Dispute Settlement Mechanism,” March 2016.

¹²⁰⁹ Third Way, written testimony to the USITC, January 13, 2016, 2; Outdoor Industry Association, written testimony to the USITC, January 13, 2016, 6–7; USITC, hearing transcript, January 15, 2016, 739–40 (testimony of Rich Harper, Outdoor Industry Association).

¹²¹⁰ USITC, hearing transcript, January 13, 2015, 166, 215, 237–38 (testimony of Leo Gerard, USW).

government, particularly an undeveloped government with horrendous labor rights.”¹²¹¹ In contrast, other organizations applauded the TPP’s enforceable labor commitments.¹²¹²

Initial Provisions, Administrative and Institutional Provisions, Exceptions, and Final Provisions

Summary of Provisions

Initial Provisions and General Definitions

The Initial Provisions and General Definitions chapter (TPP Chapter1) establishes a free trade agreement and defines terms used in more than one chapter of the TPP Agreement. Article 1.2 affirms the parties’ existing rights and obligations with respect to each other in relation to existing international agreements and in relation to existing international agreements to which two or more TPP parties are party.

Administrative and Institutional Provisions

The agreement establishes a TPP Commission composed of Ministers or senior officials designated by the parties (Article 27.1). The TPP Commission would take all decisions by consensus, except as otherwise provided; be chaired successively by each party; and meet within one year of the agreement’s EIF and thereafter as the parties may decide (Articles 27.3, 27.4). Article 27.7 establishes mechanisms for individual parties to report to the TPP Commission on their plans for and progress towards implementing each of their obligations with specific transition periods. The TPP Commission’s other functions include considering any matter relating to the implementation or operation of the agreement, considering any proposal to amend or modify it, supervising the work of all committees and working groups, and performing certain functions related to dispute settlement (Articles 27.2, 27.6).

¹²¹¹ USITC, hearing transcript, January 13, 2015, 154–55, 234–35, 248–50 (AFL-CIO), testimony of Celeste Drake; USITC, hearing transcript, January 13, 2015, 170, 201, 205 (testimony of Bruce Olsson, International Association of Machinists and Aerospace Workers); USITC, hearing transcript, January 13, 2016, 166, 215, 237–38 (testimony of Leo Gerard, United Steelworkers).

¹²¹² Third Way, written testimony to the USITC, January 13, 2016, 2; Outdoor Industry Association, written testimony to the USITC, January 13, 2016, 6–7; USITC, hearing transcript, January 15, 2016; 739–40 (testimony of Rich Harper, Outdoor Industry Association).

Exceptions Chapter

The Exceptions chapter lists exceptions to the TPP obligations and contains certain general provisions. The agreement incorporates Article XX of GATT 1994 and its interpretive notes and makes them part of the TPP Agreement for purposes of certain listed TPP chapters (Article 29.1). For general exceptions, Articles 29.1.2 and 29.1.3 incorporate the GATT Article XX provisions related to “goods trade” and the GATS Article XIV provisions related to “services trade”, consistent with other U.S. FTAs. Articles 29.2, 29.4 and 29.6 describe exceptions for essential security interests, taxation, and certain measures adopted by New Zealand to accord more favorable treatment to the Maori under the Treaty of Waitangi. Article 29.4 also defines the circumstances and conditions under which a party may impose temporary safeguard measures restricting certain transfers related to covered investments.

Nothing in the agreement may be construed to prevent a Party from taking action that is authorized by the World Trade Organization (WTO) Dispute Settlement Body or is taken as a result of a decision by a dispute settlement panel under an FTA to which the party taking the action and the party against which the action is taken are a party (Article 29.1). Article 29.5 and n.13 also permit a party to elect to deny the benefits of the TPP Chapter 9 investor state dispute settlement (ISDS) mechanism for certain types of tobacco control measure claims.

The chapter contains two general provisions. Article 29.7 emphasizes that nothing in the TPP Agreement shall be construed to require a party to furnish or allow access to information when disclosing the information would be contrary to its law, would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private. The other provision (Article 29.8), not included in existing U.S. FTAs, provides that, subject to each party’s international obligations, each party may establish appropriate measures to respect, preserve, and promote traditional knowledge and traditional cultural expressions.

Final Provisions Chapter

The Final Provisions chapter provides that the TPP Agreement will enter into force 60 days after the date on which all original signatories have notified New Zealand, as the TPP’s official Depository, in writing of the completion of their applicable legal procedures (Article 30.5).¹²¹³ Article 30.2 describes the procedures for amending the agreement. The agreement is open to accession by any state or separate customs territory that is a member of the Asia-Pacific

¹²¹³ Article 30.5 also provides procedures in the event that not all original signatories have notified the Depository in writing that they have completed their applicable legal procedures.

Economic Forum¹²¹⁴ and other states as agreed by the parties (Article 30.4). Article 30.6 describes the procedures and effect of any party's notification of its decision to withdraw from the agreement. Articles 30.1, 30.6, and 30.7 include provisions indicating that the annexes, appendixes, and footnotes to the agreement shall constitute an integral part of the agreement; affirming that the English, Spanish, and French texts of the agreement are equally authentic, and that in the event of any divergence, the English text shall prevail; and designating the functions of New Zealand as the agreement's Depository.

Summary of Views of Interested Parties

Exceptions Chapter

As described above in the Investment section of this chapter of the report, in written submissions to the Commission or advisory reports to USTR, several organizations expressed frustration that Article 29.5 of the Exceptions chapter permits a party to elect to deny the benefits of the chapter 9 ISDS mechanism with respect to certain tobacco control measures. Some said that by singling out a single product, this provision alters the effectiveness of a "rule of law" approach to trade regulation and sets a dangerous precedent by denying ISDS to firms that are economically harmed by violations of the agreement. They expressed concerns that the provision would allow other parties to use health or other non-science- and non-evidence-based reasons to restrict access for other U.S. agricultural or non-agricultural products in an unfair and discriminatory way without any requirement that the actions are necessary or promote public welfare. Some indicated that the provision would harm growers, tobacco companies, and tobacco product marketing and potentially risk exports and foreign investment by other industries.¹²¹⁵

Final Provisions Chapter

Some of the hearing participants expressed concerns about the so-called "docking" provisions that permit additional countries to accede to TPP in the future. Some expressed reservations

¹²¹⁴ APEC members that did not participate in the TPP negotiations included China, Hong Kong (China), Indonesia, South Korea, Papua New Guinea, Russia, Taiwan, and Thailand. See <http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx>.

¹²¹⁵ American Farm Bureau Federation, written submission to the USITC, February 26, 2016, 25; Universal Leaf Tobacco, written submission to the USITC, February 12, 2016, 3; ECAT, written submission to the USITC, December 28, 2015, 6; NFTC, written submission to the USITC, January 15, 2016, 2; USITC, hearing transcript, January 13, 2016, 126–27 (testimony of John Murphy, U.S. Chamber of Commerce), 140–41 (testimony of Vanessa Sciarra, Emergency Committee for American Trade), 145–46 and 259–60 (testimony of Alan Wolff, National Foreign Trade Council); USITC, hearing transcript, January 14, 2016, 513–14 (testimony of Linda Dempsey, National Association of Manufacturers); ATAC for Trade in Tobacco, Cotton, and Peanuts, *The Trans-Pacific Partnership Trade Agreement*, November 25, 2015, 2-9; ATAC for Trade in Processed Foods, *The Trans-Pacific Partnership (TPP) Agreement*, December 3, 2015, 10.

that the docking provisions will allow others who “are not yet ready,” including additional “currency manipulators” (such as South Korea, Taiwan, and China) to join. They contended that such developments would expand TPP benefits to other countries, including Indonesia, Thailand, South Korea, and China, while multiplying TPP's negative effects.¹²¹⁶ Some questioned the extent to which Congress would be consulted about modifications of the agreement and expansion of its membership.¹²¹⁷ The United Steelworkers and the UAW said that the docking clause will make it difficult to analyze the likely effects of the agreement, asking the Commission to evaluate its impact on TPP countries and potential future TPP partners, especially China.¹²¹⁸ According to Richard Cunningham, a specialist in international trade law, large emerging markets like China, India, and Russia are unlikely to join TPP. He asserted that TPP has the potential to forestall future multilateral trade negotiations in the WTO and to perpetuate, maybe aggravate, the gap between developing countries that want a development agenda and developed countries that want a trade liberalization agenda.¹²¹⁹

Other participants in the hearing expressed the view that the TPP's negotiators had always intended to include additional signatories to TPP; they viewed the docking provisions as making the benefits of TPP even more meaningful and impactful as membership expanded, and as a “springboard” to engage other Asian economies.¹²²⁰ Ambassador Castilla from Peru observed that Colombia is considering joining APEC in order to join TPP.¹²²¹ Ambassador Sasai from Japan reported that the ability to bring others into the TPP Agreement will have an effect on standards in other regional agreements that are envisioned and under negotiation.¹²²²

¹²¹⁶ USITC, hearing transcript, January 15, 2016, 840 (testimony of Robert Scott, Economic Policy Institute); USITC, hearing transcript, January 14, 2015, 492 (testimony of Thomas Suber, U.S. Dairy Export Council); Teamsters, written submission to the USITC, December 29, 2015, 3; Nassar, written testimony to the USITC, December 23, 2015; USITC, hearing transcript, January 13, 2015, 162, 260–61 (testimony of Josh Nassar, UAW).

¹²¹⁷ USITC, hearing transcript January 13, 2016, 162 (testimony of Josh Nassar, UAW), 260–61 (also observing that a possible vote on lowering tariffs once a deal has already been reached is woefully insufficient for working families) (testimony of Josh Nassar, UAW), 636 (testimony of Jesse Richman, Ideal Taxes Association); Teamsters, written submission to the USITC, December 29, 2015, 3; Nassar, written testimony to the USITC, December 23, 2015, 2.

¹²¹⁸ Gerard, written submission to the USITC, December 29, 2015 7–8; hearing transcript, 166–67 (testimony of Leo Gerard, United Steelworkers); Nassar, written testimony to the USITC, December 23, 2015, 2; USITC, hearing transcript, January 13, 2015, 162, 260–61 (testimony of Josh Nassar, UAW).

¹²¹⁹ USITC, hearing transcript, January 14, 2016, 627 (testimony of Richard Cunningham); Cunningham, written submission to the USITC, February 12, 2016, 1–2.

¹²²⁰ USITC, hearing transcript, January 13–15, 2016, 271 (testimony of Stephen Simchak, American Insurance Association), 285 (testimony of Christopher Padilla, IBM), 341–42 (IBM), 518 (testimony of C. Devi Keller, Semiconductor Industry Association), 643 (testimony of Bob Vastine, Georgetown Center for Business and Public Policy), 817 (testimony of Francine Lamoriello, Personal Products Council); IBM, written testimony to the USITC, January 13, 2016, 3; American Insurance Association, written testimony to the USITC, January 13, 2016, 1–2; National Foreign Trade Council, written testimony to the USITC, January 13, 2016, 3; National Potato Council, written testimony to the USITC, December 23, 2015, 2.

¹²²¹ USITC, hearing transcript, January 13, 2016, 81–82 (testimony of Luis Miguel Castilla, Ambassador of Peru).

¹²²² USITC, hearing transcript, January 13, 2016, 66–68 (testimony of Kenichiro Sasae, Ambassador of Japan).

Ambassador Mirpuri of Singapore stated that TPP establishes a way forward for other countries that intend to join and is not meant to contain or exclude anyone.¹²²³

Several participants in the Commission’s hearing embraced the expansion of TPP to additional signatories, but cautioned that new entrants must be held to the highest standards and must have few or narrowly tailored nonconforming measures before they are admitted.¹²²⁴ The National Foreign Trade Council expressed the view that it is important for the United States to participate, given TPP’s “open architecture.”¹²²⁵ Walmart said that TPP’s investment rules that remove restrictions on retail and distribution services serve as a template for new entrants to TPP and a benchmark for other services negotiations.¹²²⁶

¹²²³ USITC, hearing transcript, January 13, 2016, 48–53 (testimony of Ashok Kumar Mirpuri, Ambassador of Singapore).

¹²²⁴ USITC, hearing transcript, January 13, 2016, 271, 285, 341–42 (testimony of Christopher Padilla, IBM); American Insurance Association, written testimony to the USITC, January 13, 2016, 1–2; IBM, written testimony to the USITC, January 13, 2016, 3; Pet Food Institute, written testimony to the USITC, December 29, 2015, 2–3.

¹²²⁵ National Foreign Trade Council, written testimony to the USITC, January 13, 2016, 3.

¹²²⁶ Walmart Stores, Inc., written testimony to the USITC, December 29, 2015, 1.

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