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## The Pacific Century



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# THE TRANS-PACIFIC PARTNERSHIP AGREEMENT AND NEW GOVERNANCE ON INTERNATIONAL TRADE

By Alberto J. Cerda Silva

**T**he Trans-Pacific Partnership Agreement (TPP), if successfully negotiated, will be the world's most ambitious free trade agreement. It would include some of the leading economies of the Asia-Pacific area, including Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. While the negotiation was launched only in 2008, the initiative takes advantage of a long-term process initiated by the Asia-Pacific Economic Cooperation (APEC), a more modest trade treaty known as P4, and the tangled net of bilateral trade agreements among its members.

The TPP could be evaluated from several viewpoints. It may contribute to a harmonious legal environment for businesses by opening markets within emerging economies for goods and services, especially for the US information sector. It may challenge the increasing influence of newly industrialized countries in the Pacific, particularly China and India, which are not part of the negotiations. The TPP may also reverse the failure of the recent Anti-Counterfeiting Trade Agreement (ACTA), which covers the core of ongoing negotiations and was rejected already by two key signatories, the European Union and Mexico.

A less explored potential effect of the TPP is its impact on international trade governance at both global and local levels.

## A LESS EXPLORED POTENTIAL EFFECT OF THE TPP IS ITS IMPACT ON INTERNATIONAL TRADE GOVERNANCE AT BOTH GLOBAL AND LOCAL LEVELS.

The TPP challenges the leadership of the World Trade Organization (WTO) in international trade governance by adopting new and binding commitments on a broad range of matters, with higher standards than those enforced by the WTO. These include institutional arrangements and enforcement mechanisms between a subset of countries, whose economies represent over 40% of global trade. In practice, this will move the gravitational center from an established international organization to a new multilateral forum, a setting that

would reduce interference by developing and newly industrialized countries. If the TPP succeeds, relevant and emergent issues would be discussed there, rather than at the WTO.

The TPP may also affect the local governance of countries involved in negotiations, particularly those with democratically elected governments. Unlike some other international forums, the negotiations of the TPP are not transparent. Texts under consideration are kept secret, critics are silenced, and civil society is excluded, except for a limited number of business advisers. This eliminates public deliberation of proposals and increases misunderstandings, particularly by governments that lack technical expertise. Some consumer protection advocates say this qualifies as a policy laundry practice, in which trade agencies push for higher standards in international forums in order to extort lawmakers for implementation into domestic law. Ultimately, countries would be forced to endorse the TPP "as is," leaving almost no room for deliberation within domestic forums, an unacceptable outcome for democratic societies.

Most of the TPP's texts remain secret, except some brief and cryptic governmental statements and a few leaked texts on the intellectual property and investment chapters. Government officials have neither confirmed nor denied the authenticity of any of the leaks, but all of them gratefully accept suggestions based on those texts. Moreover, leading proposals were tabled by the United States, replicating the model language propelled by American negotiators in other forums, a fact admitted by negotiators. The content of these chapters confirms the aforementioned concerns on how the TPP may challenge current rules of international trade governance.

Intellectual property is probably the most contested issue included in the TPP negotiations. From the rights holders' point of view, adopting and enforcing high standards of protection for intellectual property are essential. For its detractors, higher standards are an obstacle to development, blocking access to affordable medicines and knowledge, diminishing consumers' protection, and compromising human rights. The latter view has been made concrete in several initiatives before the WTO and the World Intellectual Property Organization (WIPO), the specialized agency of the United Nations, including a proposal to extend the deadline for achieving full compli-

ance with international standards on intellectual property to less developed countries, and a treaty proposal to grant access to copyrighted material to people with disabilities, among others. This is an attempt to subvert international forums through having an agenda more flexible than that of the TPP.

The TPP promises to raise the bar for protection and enforcement of those rights, without proper consideration to public interest concerns. On one hand, it requires adopting substantive protections higher than those in place by other international instruments, for instance, by providing protection to trademarks and copyright online. On the other hand, the TPP demands enforcement mechanisms before both domestic and international forums. At the domestic level, the TPP confers ex-officio power to customs authorities, requires companies that provide access to Internet to enforce copyright rules against online infringers and criminalizes copyright infringement, among other relevant issues. At the international level, the TPP aims to facilitate private enforcement of this agreement through the investment statute by allowing not only other governments but also private actors to sue states that fail to provide the prescribed protection.

The TPP's emphasis on strong protection for intellectual property primarily reflects the concerns of the information, entertainment, and pharmaceutical industries that are advising on the process. Neither consumers nor civil society organizations have had a real chance to take part in it. Not even elected officials at the US Congress have achieved access to negotiations, in spite of their insistence. Lack of transparency, public deliberation, and political accountability on the form and content of the TPP agenda on intellectual property undermines the democratic process and places an obstacle to achieving any proper balance.

The TPP may succeed in opening some markets to free trade, but along the way, it circumvents the international agenda by considering only private interests, disempowering international organizations already in place, diminishing public participation, and eroding the democratic lawmaking process. No wonder previous analogous attempts through ACTA failed when tabled at domestic forums in the European Union and Mexico. In spite of critics who say otherwise, the TPP has more chance of success than ACTA. This is due to the absence of balancing power between negotiators, lack of technical expertise by some countries, the secrecy of the process, training acquired by negotiators when dealing with ACTA and, unlike this ACTA's sole purpose as an intellectual property enforcement agreement, the TPP is a comprehensive trade agreement, with potential benefits for industries other

than those related to intellectual property. But the TPP's success will challenge and change global and local governance on international trade. 

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