TRANS-PACIFIC PARTNERSHIP
"FREE TRADE" AGREEMENT

TPP: Final Trans-Pacific Partnership Text Reveals Unexpected Threats to U.S. National Security

Trade debates often begin with economic arguments. But when those prove unconvincing, proponents invariably resort to geopolitical claims, arguing "this deal is critical for U.S. national security and foreign policy interests." The same arguments used over the past 20 years now feature heavily in efforts to promote the Trans-Pacific Partnership (TPP). We are warned that failure to pass a trade deal will benefit whatever nation is considered a threat to U.S. economic or foreign policy dominance from "Japan" in the 1990s to "Asia and Europe" to "Latin American anti-U.S. populists," and now, China. The pitch is typically accompanied by dire predictions about waning U.S. influence, rising regional insecurity (whatever region the pact involves) and specific bad outcomes for prospective trade partner countries. Time and again, Congress has passed a trade deal only to find that some predictions came true in spite of (and sometimes because of) the pact's enactment and others prove entirely unfounded. In the case of the TPP, claims it would benefit national security are particularly cynical.

Release of the final TPP text after more than seven years of secretive talks revealed two surprising ways the agreement could undermine U.S. national security interests:

- **The TPP eliminates language included in past U.S. trade pacts that explicitly authorized the United States to take action to protect its own national security interests regardless of whether any such action or policy violated trade pact rules and to do so without facing trade sanctions.**

- **While other TPP nations safeguarded their domestic national security review processes for foreign investors, the United States did not take an exception to TPP rules that grant foreign investors new rights to acquire land, firms, natural resource concessions, infrastructure or other investments and operate them. Thus, even if the Committee on Foreign Investment in the United States (CFIUS) opposed on national security grounds a U.S. acquisition by a firm also operating in a TPP country, if that investment was stopped the firm could drag the U.S. government before an extrajudicial investor-state tribunal and demand taxpayer compensation.**

The final TPP text reveals a significant weakening of the "Essential Security" exception that has been part of U.S. trade agreements over the past decade:

Since the mid-2000s, all U.S. trade pacts have included language explicitly stating that when a country raises a national security defense for a policy that otherwise violates a trade pact obligation, the country is empowered to determine in its sole discretion what are its essential security interests. Inexplicably, this language was eliminated from the final TPP text.

The provision was added after the Dubai Ports World (DPW) dispute. DPW, a state owned enterprise of the United Arab Emirates, sought to acquire the rights to run six major U.S. ports. Congress intervened to try to block the sale after Coast Guard officials raised the possibility of significant security risks. The incident coincided with the congressional debate over the U.S.-Oman Free Trade Agreement (FTA). Like the TPP, the pact included expansive foreign investor rights to acquire and operate U.S. businesses. The pact's "Essential Security" exception allowed a trade pact dispute tribunal to substitute its judgement for that of the government with respect to what would be considered an essential security interest of that nation. There also was ambiguity about whether the provision applied to investor-state disputes, or only to state-state disputes. To shut down tribunals' second guessing of U.S. security interests and make clear the exception applied to all disputes, the new language was added in a footnote to all U.S. trade agreements following the Oman FTA.

The TPP's "Security Exceptions" language is otherwise identical to past U.S. pacts, except the critical footnote language was eliminated. The text missing from the TPP reads: " For greater certainty, if a Party invokes Article [the security exception] in an arbitral proceeding initiated under Chapter Eleven (Investment) or Chapter Twenty-Two (Institutional Provisions and Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies."

The TPP would subject a U.S. President's decision to forbid an investment on national security grounds to investor-state challenge, even if based on a recommendation of CFIUS:

TPP rules grant foreign investors new rights to acquire land, manufacturing and service sector firms, natural resource concessions, infrastructure or other investments and operate them. The TPP includes an Annex (9-H) in which signatory countries limited those rights by conditioning them on domestic national security and national interest review processes. The annex states that a government's decision on whether to approve a given foreign investment in its territory, taken in accordance with the domestic laws each TPP country had the opportunity to list, is not subject to investor-state challenges. While Australia, Canada, Mexico and New Zealand listed their relevant foreign investment review laws, the United States failed to do so.

In the United States, CFIUS reviews planned foreign investments to determine whether they pose threats to national security. CFIUS has the authority to recommend to the president that investments deemed as threatening be halted. If an investment by a firm operating in a TPP country were denied under this process, the foreign firm – for instance one of the many Chinese state owned enterprises operating in Vietnam - could retaliate by dragging the U.S. government to a foreign tribunal to seek taxpayer compensation. Thanks to the weakened TPP security exception, the three private sector lawyers on an ISDS tribunal would have the discretion to whether to allow the use of the exception. The ISDS tribunal would be empowered to second-guess the U.S. government with respect to what constitutes an essential security interest of the United States and order compensation with U.S. taxpayers' money to the foreign firm whose prospective investment was halted, even if this was the result of a negative CFIUS review.

TPP would mean more U.S. jobs offshored, lower wages & national security undermined:

The most important question is what the TPP would mean for America's domestic producers and workers. Would the pact create jobs and raise wages? Some politicians and pundits hope to activate Americans' anxieties about national security and/or a rising China to distract from the real issue: the TPP would make it easier for corporations to send American jobs overseas and would lower U.S. wages by forcing Americans to compete with Vietnamese workers making less than 56 cents an hour. ***And, claims that the TPP would somehow improve U.S. national security are belied by the actual text of the pact.***

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