

25 August 2017

Dear TPP11 Ministers,

Subject: Concerns over proposed next steps in the TPP11 regarding e-commerce

Since US President Trump indicated his intent not to ratify the Trans-Pacific Partnership Agreement (TPP)¹ and it cannot therefore come into force as signed,² we understand that the remaining TPP countries (TPP11)³ have been assessing the options to bring the TPP into force among themselves.⁴

According to news reports, the options you have been discussing seem to be:

1. Only changing the entry into force provisions so that the remaining 11 countries can bring it into force without the US.⁵
2. Freezing controversial provisions pending the US rejoining the TPP, in addition to amending the entry into force provisions.⁶
3. Re-writing certain TPP provisions in light of the US' absence, in addition to amending the entry into force provisions.⁷

Whichever of the three current options you choose for the way forward with a TPP11, it will have serious consequences for the protection of individual's privacy and security in our countries. It is imperative that you make the options public and that before deciding on them you consult stakeholders regarding both the options and the choices within each of them, such as which provisions to freeze or renegotiate.

The TPP's e-commerce chapter provisions will impact negatively on countries' flexibility to robustly protect individual privacy and security (for example the restrictions on access to source code increases vulnerability to hacking) and establish legitimate safeguards.

Given they were imposed by the USA and the USA is no longer in the TPP, it makes no sense for you to keep those provisions, particularly without the projected gains from access to US markets. The beneficiaries of the TPP's e-commerce rules will be the major US technology companies, and possibly those from China (neither of whom have to provide market access in return in the TPP11). For example, the chapter requires your governments to allow cross-border data flows and severely restricts your ability to require local data storage and use of local servers. The privacy exceptions that purport to balance these obligations are seriously deficient in ways that restrict your ability to

¹ http://www.rieti.go.jp/en/columns/a01_0468.html

² Since Article 30.5 <https://www.tpp.mfat.govt.nz/text> requires ratification by countries accounting for at least 85% of the GDP of the original signatories which requires the USA to ratify it.

³ Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Viet Nam

⁴ <https://www.tpp.mfat.govt.nz/>

⁵ Bloomberg, 'Australia Meeting Could Test Support for Pacific-Trade Pact', also in Spanish at <http://gestion.pe/economia/tpp-reunion-australia-pondra-prueba-apoyo-al-pacto-comercial-2197512>.

⁶ Bloomberg, 'Australia Meeting Could Test Support for Pacific-Trade Pact', also in Spanish at <http://gestion.pe/economia/tpp-reunion-australia-pondra-prueba-apoyo-al-pacto-comercial-2197512>.

⁷ <https://www.ictsd.org/bridges-news/bridges/news/tpp-11-negotiators-examine-options-for-advancing-deal-without-us>

establish privacy safeguards.⁸ Equivalent provisions in the Trade In Services Agreement being negotiated⁹ have caused the European Union to insist on better privacy exceptions.¹⁰

Therefore, if you decide that a free trade agreement (FTA) between the TPP11 countries should occur, we call on you to renegotiate it from first principles with provisions that suit the remaining TPP11 countries.

If you intend to proceed with what appear to be the three current options, it is clear that Option 1 makes no sense.

If Option 2 is chosen, expert analyses of the text show that *at a minimum* the implementation of the entire e-commerce chapter should be frozen. In addition, it should be made clear that commitments on cross-border services are not technologically neutral, so governments are not bound to allow the digital supply of services that they have not anticipated.

If Option 3 is chosen, *at a minimum* the above provisions should be renegotiated, including an open and informed discussion of whether a secretly negotiated trade and investment agreement is an appropriate avenue for determining rules on Internet governance and the protection of individual privacy and security

As noted above, the only truly acceptable approach to ensure sufficient protection of privacy and address the other concerns raised by the ecommerce chapter is to renegotiate the whole TPP. We the undersigned civil society organisations from the TPP11 countries urge you to do so.

Yours sincerely,

Organisation	Country
Asia Pacific Forum on Women, Law & Development (APWLD)	Regional
Asian-Pacific Resource and Research Centre for Women	Regional
Civil Liberties Australia	Australia
Council of Canadians	Canada
Derechos Digitales	Regional
Electronic Frontiers Australia	Australia
Fundacion Chile Sustentable	Chile
Fundación Equidad Chile	Chile
Hiperderecho	Peru
It's Our Future	New Zealand
Malaysian AIDS Council	Malaysia
Malaysian Council for Tobacco Control (MCTC)	Malaysia
Moana Nui	Regional
OpenMedia	Global
Pacific Asia Resource Center(PARC)	Japan
People Over Profit	Global

⁸ See for example <http://www.michaelgeist.ca/2016/01/the-trouble-with-the-tpp-day-12-restrictions-on-data-localization-requirements/> and <http://www.michaelgeist.ca/2016/01/the-trouble-with-the-tpp-day-14-no-u-s-assurances-for-canada-on-privacy/>.

⁹ <http://bilaterals.org/?tisa-draft-annex-on-electronic-32465>

¹⁰ Eg see <https://edri.org/corporate-sponsored-privacy-confusion-eu-trade-data-protection/>.

Organisation	Country
People's Action against TPP	Japan
People's Coalition on Food Sovereignty	Global
Persatuan Kesedaran Komuniti Selangor	Malaysia
Public Interest Advocacy Centre	Canada
Red Peruana por una Globalización con Equidad (RedGE)	Perú
Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC)	Canada
Sinar Project	Malaysia
SonTusDatos (Artículo 12, A.C.)	Mexico
Third World Network	Global