



**Trans-Pacific Partnership  
Paper Prepared by the Coalition of Service Industries**

**Services Trade: New Approaches for the 21<sup>st</sup> Century  
Hong Kong  
June 1-3, 2011**

**Introduction**

The Coalition of Service Industries (CSI) has thoroughly considered the potential advantages of a Trans-Pacific Partnership (TPP) Agreement. CSI's member companies are at the cutting edge of innovation and job creation and believe that a TPP Agreement could be significant if it is forward-looking with high-level commitments aimed at tackling the new challenges that the trading system will face in the next decades. This paper reflects CSI's submissions to the US Government as it has engaged in TPP negotiations.

CSI has suggested to our government that it should ultimately seek to negotiate, over the longer term, a regional trade agreement in Asia. This Free Trade Area of the Pacific has been elaborated by the Peterson Institute for International Economics and is a worthwhile goal.

CSI seeks to achieve market access in crossborder trade and investment in services in all negotiating forums. Our negotiating priorities reflect the tremendous economic importance of services in all economies. Services are essential inputs into the production of virtually all products, and should be seen as an enabler to the rest of the global economy. The price and quality of services influence costs and productivity in all other sectors of an economy, including manufacturing and agriculture. Thus, when liberalized and made more efficient, services have a strong effect on the competitiveness of an entire economy.

About eighty percent of U.S. GDP and 80% of U.S. employment are in services, and trade in services has grown substantially in recent years. Last year, U.S. services exports reached \$523 billion, up from \$483 billion in 2009, and \$517 billion in 2008. The U.S. enjoyed a services trade surplus of \$164 billion last year, its largest surplus ever.

The Trans-Pacific Partnership Agreement provides an excellent opportunity to achieve greater market access for services by maintaining and building on the high standards of previous U.S. free trade agreements. It will catalyze interest on the part of other countries, as demonstrated by the intentions of Australia, Peru and Vietnam to join the negotiations. It could thus provide the core for building a larger trade bloc in the Asia Pacific region, and CSI supports the expansion of these negotiations in the future to include other important markets in the region.

In addition, the TPP is a much-needed response to the proliferation of preferential trade agreements in the Asia Pacific that do not include the United States. The completion of the EU-Korea free trade agreement, the ASEAN-Australia-New Zealand free trade agreement, and the China-New Zealand free trade agreement are just three examples. Perhaps even more important are recently completed agreements between ASEAN and China and ASEAN and India, reflecting the deepening of commercial ties between key emerging markets partners across Asia. These developments leave the U.S. at risk of being excluded from these vital growth markets. It should be noted that these agreements fall far short of ideal with regard to services liberalization commitments and investment protections. A high standard TPP would create the basis for further agreements with these key trading partners at some future date.

In this context, CSI has suggested to the U.S. government that it look carefully at the broader implications of the preferential agreements with TPP partners and potential partners in Asia, where the US is not engaged in terms of the effect of these agreements on sourcing decisions and supply chain management.

In order for the TPP to support U.S. services interests, the financial services and investment chapters that are to be negotiated must reflect the high standards of those in the most recent U.S. free trade agreements. Moreover, the services and intellectual property chapters in the existing agreement upon which the Trans-Pacific Partnership is based should be expanded, strengthened, and improved, so that those chapters too reflect the high standards of the most recent U.S. free trade agreements in a way that ensures the provisions are not obsolete before they are implemented.

Looking beyond this, however, the TPP negotiations offer an opportunity to harmonize and better align the existing U.S. free trade agreements with TPP countries, and ensure that additional commitments and disciplines are based on the most recent U.S. FTAs, particularly that with Korea. There is also an opportunity to take advantage of the work already completed in APEC, including, for example, the pathfinders for technology choice or the work on digital prosperity.

A TPP agreement that reflects the highest standards, with innovations that address the disparate regulatory regimes and commitments among the member countries, would be a powerful catalyst to greater trade and investment flows among its members. Such flows, in turn, will be important in generating American jobs and supporting economic recovery.

## **THE TPP MARKETS**

The countries included in the envisaged agreement are a very significant market for U.S. services suppliers and their networks of partners and customers, many of which are small and medium-sized businesses. The initial P-4 members, plus the three additional countries that have announced their intent to join negotiations - Australia, Peru, and Vietnam - collectively have a population of 160 million, with a GDP of \$1.7 trillion.<sup>1</sup> The service sector is a major share of those economies, all of which are substantial services traders. Taken together, their services

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<sup>1</sup> World Bank, World Development Indicators Database, October 2009

imports totaled \$134 billion in 2007, while their services exports were slightly higher, reaching \$137 billion the same year.<sup>2</sup>

### Crossborder Trade & Sales through Affiliates

U.S. crossborder exports of services to the TPP countries were \$24.5 billion in 2008, while imports were \$12.9 billion, netting a U.S. services trade surplus of over \$11.5 billion. By way of comparison, U.S. crossborder services exports to the TPP countries far exceed those to China, which were \$15.8 billion the same year.<sup>3</sup>

Sales of services to foreigners by majority-owned U.S. affiliates in those countries in 2007 (the latest data available) were \$78.4 billion.<sup>4</sup> That figure exceeds sales by U.S. affiliates in Japan and China *combined*.

US Crossborder Trade with TPP Countries, 2007: (US\$ millions)			Sales of Services by US affiliates in TPP Countries, 2006: (US\$ millions)	
Country	US exports	US imports	Country	US Affiliate sales
Australia	11,826	6,077	Australia	36,566
Chile	1,943	1,034	Chile	7,213
New Zealand	1,787	1,705	New Zealand	3,308
Singapore	9,011	4,168	Singapore	31,394
<b>TOTAL</b>	<b>24,567</b>	<b>12,984</b>	<b>TOTAL</b>	<b>78,481</b>

### HORIZONTAL ISSUES

The Trans-Pacific Partnership should focus on the broad elements that the services industry considers essential for all free trade agreements, and on which our support for such agreements is based. These include well-established principles such as comprehensive market access for both crossborder trade and direct investment, investor protections, and regulatory transparency.

The services commitments in the existing U.S. free trade agreements with Australia, Chile, Peru, and Singapore vary. The TPP negotiations offer an opportunity not only to better align those commitments, but also to look at updating and strengthening in the areas of regulation, transparency, standards, trade facilitation, IPR and E-commerce, and other areas.

### Market access

<sup>2</sup> Source: UNCTAD Handbook of Statistics Online

<sup>3</sup> Source: Bureau of Economic Analysis, Survey of Current Business, October 2009. Figures do not include Brunei, Peru, or Vietnam, as services trade data with these countries is not available.

<sup>4</sup> Ibid.

Broad market access is the first of the essential elements for the service industry. The agreement should cover all services, with a minimum of exceptions. Two main types of services market access are of most interest. The first is crossborder supply, where services are supplied electronically, or by people who travel to the country in which the service is produced or consumed.

The second type of market access concerns direct and portfolio investment, which have been addressed in the investment chapters of recent agreements. The sales of services via direct investments in foreign markets in fact represent the largest portion of U.S. sales of services. In 2007, the sales of services by majority-owned foreign affiliates of U.S. companies totaled slightly over \$1 trillion, well in excess of U.S. cross-border service exports the same year.<sup>5</sup> Sales by these foreign affiliates are one of the principal means by which U.S. companies compete in the global marketplace. This is why obtaining the right to establish enterprises, to own controlling interests in them, and to structure them in the way most appropriate for a given market, is so very important.

### **The negative list**

As has been in the case with all recent U.S. free trade agreements, market access for services trade and investment should be based on a negative list approach, which ensures comprehensive coverage, and is a proven model. It is essential that this approach be maintained in the TPP negotiations.

### **Investor protections**

The investment provisions of U.S. trade agreements have significant impact on US service suppliers. Sufficient investor protections are crucial for investor confidence, and in creating a climate in the host country in which high-quality, long-term investment can be attracted. TPP countries have benefited tremendously from such investment.

Among the most important elements of a sound investment regime is the investor-state arbitration mechanism.

With the exception of the U.S.-Australia and Bahrain FTAs (investment issues were covered by a separate, pre-existing Bilateral Investment Treaty in the latter case), all recent U.S. FTAs have included investor-state provisions. This standard should be maintained in the TPP.

CSI has asked U.S. negotiators to observe several other characteristics of a sound investment chapter. These include a broad definition of “investment,” which includes portfolio investment, not solely cross-border investments with long-term aims. Appropriate protections against expropriation are central to an FTA investment chapter, and investors should also have the ability to transfer all payments related to an investment. Finally, the application of the

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<sup>5</sup> Bureau of Economic Analysis, Survey of Current Business, October 2009. The figure cited is the latest available.

investment chapter of the agreement should be retrospective; that is to say, the new protections should apply to pre-existing investments, as has been in the case in our earlier bilateral investment treaties.

## **21<sup>st</sup> Century Issues**

The US Trade Representative has rightly looked at the TPP as an opportunity to examine “21<sup>st</sup> Century” trade issues, such as the supply chain, SMEs, regulatory coherence, and others. With this in mind, CSI views several such issues as needing attention and priority in the context of the TPP.

**Crossborder transfer of information.** Financial institutions rely heavily on gathering, processing, and analyzing customer information in order to provide financial services tailored to client needs. Data processing operations therefore are a critical component of financial services providers’ information technology environment.

For effective risk management, data processing facilities are often operated on a regional basis through data hubs that depend on cross-border data flows. The economies of scale that exist in data hubs yield cost savings that allow firms to purchase and employ state-of-the-art technology to protect the integrity, security, and confidentiality of data. Regional data centers improve service quality and allow financial services providers to maintain consistent processes across regions and worldwide. Such centers provide an “end-to-end” view of data, improving the quality and timeliness of service.

A sophisticated skill set is required to administer this technology and functionality, and workers with the requisite skill set exist in some—but not all—countries.

Moreover, the data hub approach allows firms to better comply with legal and regulatory requirements because of the “end-to-end” view of their data. Firms can concentrate to a higher degree on recruiting and training anti-money laundering and anti-fraud professionals, a human resource infrastructure which is difficult to replicate in every country.

In sum, firms’ ability to centralize data processing functions in regional hubs increases data security, enhances global risk management, facilitates legal and regulatory compliance, and promotes stability and cost effectiveness for financial services firms, their clients, and the financial sector overall.

**Regulatory Coherence.** We support the inclusion of a regulatory coherence chapter in the TPP, as it would reflect the stronger political commitment and emphasis negotiators have appropriately placed on achieving it. The overarching goal of this effort is to facilitate the movement of goods and services among the TPP countries by ensuring that they maintain transparent, effective, enforceable and mutually coherent regulatory systems which are both risk and science based, adhere to international best practices, and assure high levels of collaboration among TPP governments and their stakeholders.

A regulatory coherence chapter should contain the following elements:

- Regulatory coherence principles, which should guarantee the independence and impartiality of regulators, and ensure all market participants are subject to the same regulatory scrutiny and controls.
- Best practices to advance both internal and external coherence. *Internal coherence* includes capacity building, institutional development, government effectiveness and efficiency, as well as internal communication and organization. *External coherence* provides transparency and understanding to those domestic and foreign stakeholders impacted by regulatory action.
- Meaningful engagement and consultation with stakeholders.

**State-owned / state-assisted enterprises.** There is a growing trend in an increasing number of countries to use state-owned enterprises (SOEs) and favored treatment for privately owned or quasi-government national companies (state-assisted enterprises or SAEs) to limit market access and distort competition. Government action to steer purchasing decisions to SOEs and SAEs, financing on non-market terms, and permitting self-regulation or special exemptions in highly regulated industries are among the practices that severely distort fair competition and create significant market distortions. These types of practices harm local consumers, stifle innovation and growth, and undermine the ability of U.S. and foreign companies to compete in services sectors in which state-owned or assisted enterprises enjoy unique advantages.

In its most recent report, *Global Trends 2025: A Transformed World*, The National Intelligence Council recognized the rise of “state capitalism” and the expansion of SOEs and SAEs: “In the early 1990s, many economists predicted that SOEs would be a relic of the 20<sup>th</sup> century. They were wrong. SOEs are far from extinction, are thriving, and in many cases seek to expand beyond their own borders....”

Under these circumstances and because several of the TPP participants already have extensive state-owned and assisted enterprises, it is appropriate and essential for the TPP to focus on this issue and to develop modern, comprehensive rules to ensure that these enterprises operate in a manner that ensures open and fair competition. If the TPP does not effectively address this issue, it will fall short of its goal to be a 21<sup>st</sup> century agreement.

**Local Content.** The proliferation of harmful and unreasonable local content and domestic personnel requirements is a growing concern for services companies in a number of important markets. These measures can be a serious threat to U.S. companies exporting and investing abroad.

We have seen examples of this in other markets such as Nigeria, Brazil, and Indonesia. The TPP should provide safeguards against the enactment of such unreasonable and burdensome domestic content requirements.

## OBJECTIVES BY SECTOR

The following section discusses the basic principles that should be observed, by industry sector, in these negotiations.

### **Express Delivery Services**

Express Delivery companies and other transportation and logistics companies provide critical services that enhance the movement of goods and services across borders. To realize the full potential of a regional trade agreement in the Asia-Pacific, the Trans-Pacific Partnership should enhance trade facilitation and harmonize and simplify customs procedures on the basis of the WCO Revised Kyoto Convention. Encouraging investment and treating Express Delivery companies fairly will enhance the competitiveness and productivity of all the TPP countries.

In addition, high-standard customs modernization, adoption of regulatory best practices, open and transparent law-making and rule-making, and a commitment to the expedited movement of goods and services will further integrate and expand supply chains across the TPP region.

To realize the maximum benefit from the agreement, TPP negotiators must commit to establish regulatory and investment regimes that complement the agreement's market access and investment protections. We strongly support using TPP as platform to bring in additional countries in the region – towards eventual Free Trade Area of the Asia Pacific (FTAAP). The benefits of a regional agreement will best be achieved through the harmonization and simplification of customs procedures and other trade facilitation regulatory reforms across the TPP countries.

CSI's General Priorities for Express Delivery Services in the TPP include:

- Agreement on the highest possible market access, investment protection, regulatory best practices, and other standards with TPP partners.
- Elimination of restrictions that inhibit Express Delivery companies from investing, owning, and controlling operations in each TPP country.
- Enhanced customs clearance provisions that improve the speed and reliability of Express Delivery services throughout the TPP region.
- Transparency provisions, including notice and comment opportunities for all laws and regulations affecting the Express Delivery business in all TPP countries.
- A level playing field for foreign and domestic Express Delivery carriers throughout the TPP region.

- Building upon the best provisions in current and pending FTAs affecting Express Delivery companies, as a platform upon which to develop new provisions and stronger market openings and protections.
- Simplification of Rules of Origin across the TPP region.
- Commitments not to rollback any existing market access for Express Delivery companies at the time of implementation.
- Where a monopoly supplier of postal services also competes with Express Delivery companies, the monopoly supplier will not abuse its monopoly position outside the scope of its monopoly rights inconsistent with National Treatment or Most-Favored-Nation Treatment.

CSI's regional and horizontal priorities include the following:

- Trade Facilitation reforms adopted across all TPP countries.
  - Adoption of compatible expedited clearance processes.
  - Adoption of electronic submission of export and import information.
  - Implementation of pre-arrival clearance.
  - Adoption of compatible customs modernization best practices.
  - Adoption of customs modernization cooperation, training and capacity building across the TPP countries, including regular technical and policy meetings between the Customs and other regulatory authorities that impact the movement of goods and services across borders.
  - Harmonization of electronic data requirements.
  - Agreement to utilize standard risk management procedures and minimize physical inspections.
  - Commitment to reduce trade transaction costs.
  - Improvement of transportation networks throughout TPP region.
  - Encouragement of competition in logistics and delivery services throughout TPP region.
- Agreement by the TPP countries to clearly define each country's postal monopoly in a manner that will encourage regional economic integration.
- Elimination of investment and national treatment restrictions impacting Express Delivery and other transportation and logistics companies in the TPP region.
- Improvement of supply chain efficiency across the TPP region.
  - Increased connectivity of infrastructure and electronic integration.
  - Reform of regulations to make it easier to do business.
  - Consistency in rule making.
- Harmonization of standard-setting systems across TPP countries.



CSI's specific priorities include the following:

- An appropriate definition of express delivery services (building on the Korea FTA model), ensuring that its provisions apply to both private and public sector providers of the service.
- Pre-arrival clearance for most express goods, regardless of value and size.
  - Target window of no more than two hours to clear express shipments that are not pre-cleared (for inspection or other reasons).
  - Clarification that records may be retained electronically.
- Single electronic window for all regulatory approvals required for imports and exports.
- Any regulator of Express Delivery companies should be independent of government entities that compete with such companies.
- Application by each country of a de minimis regime that allows dutiable goods, the value of which does not exceed a certain amount, to be exempted from duties and taxes and cleared on a consolidated basis, based on at least the level of that which the United States that provides.
- Implementation of a consolidated, simplified clearance procedure for low-value shipments that are not subject to de-minimis.
- Separation by each country of the physical release of goods from the fiscal control.
- Agreement that advance regulatory information requirements for exports harmonize with import requirements so that information is required no earlier than 30 minutes before take-off.
- National treatment and a level playing field for Express Delivery companies at least as strong as that provided by the Korea FTA regarding:
  - Removal of equity caps or other investment restrictions including limitations or conditions on establishment, operation, and sale.
  - Guarantee of fair and equitable treatment for U.S. Express Delivery companies.
  - Application of the same regulations and procedures for U.S. Express Delivery companies as domestic companies (including competitive services of the postal monopoly) regarding:
    - Customs clearance.
    - Duties, taxes, charges.
    - Transportation regulation and enforcement.
- Inclusion of Investor-State dispute resolution and investment protections.
- Prohibition of anticompetitive business conduct by market dominant providers and constraints on monopoly activities.

- Prohibition of cross-subsidization by postal entities that provide competitive and monopoly services.
- Adoption of automated risk management systems.
- Adoption of WCO Revised Kyoto Protocol and WCO Immediate Release Guidelines.

### **Retail and Distribution Services**

CSI supports full tariff elimination across all products and sectors and favorable rules for foreign direct investment in retail and distribution. Overall goals for retail and distribution in the TPP include:

- A comprehensive agreement with no product or sector exclusions.
- A common set of rules of origin that allows for trade between and among all TPP partners.
- A high standards investment agreement that provides market access and protection for retail and distribution rights.

The TPP agreement should encourage retailers to invest in the region. Therefore, negotiators should secure liberal rules for retail and distribution rights, with no limits on size, geographic location, or merchandise assortment.

Further, the agreement must ensure that all forms of distribution are granted national and most favored nation treatment, and that there are no performance requirements or requirements for foreign ownership. In addition, the investment chapter should provide for timely and impartial resolution of disputes through robust investor-state dispute resolution procedures.

### **Financial Services**

The TPP agreement should include the following provisions pertaining to financial services:

- Permit foreign financial services firms to establish a new commercial presence or acquire an existing commercial presence.
- Permit 100% ownership, as well as the right to establish in the corporate form of choice.
- Provide national treatment (i.e., treat foreign financial sector participants and investors on the same basis as domestic investors for regulatory and other purposes).
- Allow foreign financial services firms to provide services cross-border to sophisticated clients (i.e., “qualified investors”) without establishing a commercial presence and without

being subject to separate licensing and approval requirements of the type that generally apply to firms commercially present in a market.

- Permit consumers to travel outside their territories to obtain any capital markets-related service.
- Commit to procedural aspects of regulatory transparency, including prior comment, to allow both suppliers and consumers of capital markets-related services to know what the rules are and to have confidence that the rules will be applied consistently and fairly.
- Eliminate economic needs tests.
- Permit dissemination and processing (within country and cross-border) of financial information to provide clients with services necessary for the conduct of ordinary business.

In developing a 21<sup>st</sup> century agreement, the Administration should build on “best of breed” provisions from recent agreements, such as those in the U.S.-Korea Free Trade Agreement, rather than simply inventorying provisions from existing FTAs with TPP countries. For example, the U.S.-Korea FTA includes specific commitments allowing U.S. financial institutions with operations in Korea to transfer information out of Korea for processing. The FTA also allows financial institutions to perform certain functions, such as trade and transaction processing, in their home office rather than requiring that those activities be conducted by a local affiliate.

While these provisions provide important building blocks, the Administration should not be constrained by what has been done in the past. Financial services firms are frequently confronted with non-tariff barriers in the form of regulatory restrictions, lack of regulatory coherence, and poor transparency in the development, implementation, and application of regulations. These barriers can prevent access in much the same way as tariffs, but unlike tariffs, no quantitative mechanism exists to reduce them. As the Administration develops its blueprint for a 21<sup>st</sup> century agreement, careful consideration should be given to developing innovative mechanisms for addressing these less traditional barriers to trade.

**Promoting Regulatory Coherence.** We believe that the TPP provides a unique opportunity to develop mechanisms that will provide a more coherent and consistent regulatory framework. In particular, negotiators should explore ways of incorporating the regulatory reform principles articulated by the G20 into the TPP. The inclusion of such principles would benefit regulators, investors, and other market participants by strengthening compliance, reducing regulatory complexity, and reducing opportunities for regulatory arbitrage. Greater coordination would positively affect the ability of firms to achieve intended levels of internal control and compliance.

In light of the cutting-edge nature of such discussions, we encourage regulators to develop greater regulatory coherence by addressing duplicative and conflicting regulations through TPP mechanisms on convergence and mutual recognition. At present, the regulatory frameworks of

members of the TPP are largely geographically based and do not take into account the global nature of providing financial services and products to meet customer demands.

Specifically, we believe progress can be made in modernizing the regulatory structure of TPP members through:

- Wider acceptance of regulatory recognition (whether unilateral, bilateral or multilateral) as accepted international regulatory policy based on a common set of regulatory values and shared outputs.
- Identification and promoting of “targeted” rules’ standardization where such standardization can deliver tangible benefits for the providers and consumers of financial services.
- Submission of domestic regulatory regimes to peer review by other members of the TPP and international regulatory bodies, such as IOSCO or the FSB.

In this regard, we note that U.S. and Australian regulatory authorities have entered into a mutual recognition arrangement, which may serve as a platform from which the TPP participants can discuss and promote increased cross-border trade in financial services.

**Protecting U.S. Investors.** Investment in global markets by U.S. financial services firms plays a key role in sustaining U.S. economic growth and global competitiveness. The TPP negotiations provide an important opportunity to further liberalize trade and investment regimes and encourage cross-border investment. As U.S. companies invest in these markets, strong protections for their investments must be ensured. These protections include non-discrimination, fair and equitable treatment, free transfers of profits and capital, protection from expropriation, and the ability to use international arbitration to resolve disputes.

The Administration should ensure that the TPP includes access to investor-state arbitration for U.S. investors in financial services. Such protections help to guard against discriminatory actions by host governments, and encourage U.S. investment abroad. The Administration should build upon the commitments made in the Rwanda BIT, which provide financial institutions with the same access to investor-state dispute settlement for discrimination claims as other U.S. investors. Without robust investment protections, U.S. investors in the financial services sector would be exposed to the vagaries of domestic legal systems with varying degrees of independence and soundness. Existing investment would be placed at risk, and future investment could be discouraged.

## **Insurance**

The TPP should have the highest possible standards for the insurance sector, using the U.S.-Korea FTA as a model. The U.S. insurance industry’s market access and national treatment priorities for the TPP are based on the insurance model schedule. The commitments should be clear as to how they will impact each market, and the implementing measures should be reviewed in consultation with industry. The TPP should include the following specific disciplines:

**Government Affiliated Service Providers:** The TPP should include clear and definitive disciplines to level the playing field between government affiliated insurance entities and the private market, within a reasonable time frame, and by a date certain. The TPP should include removal of any tax advantage, subsidy or other governmental commercial economic advantages, the removal of any government-advantaged guarantee, and/or the transition to regulation and supervision by the same regulatory authority as private companies.

**Independent and Accountable Authorities:** The TPP should include clear and definitive protections against improper delegation of regulatory authority to non-governmental groups that dilute confidentiality and process protections accorded through governmental administrative procedures.

**Support for International Regulatory Standards:** The TPP should include specific reference and affirmation for international regulatory standards developed by the International Association of Insurance Supervisors and other international standards setters.

**Regular Implementation Dialogues for Insurance:** In the firm belief that no agreement is self-enforcing and that U.S. Government representatives need more tools at their disposal, we urge the creation of a regular annual insurance dialogue on implementation, either at a bilateral or TPP level. Similar dialogues in Japan, Korea, and NAFTA have proven useful to all parties and served national interests.

**Full Market Access and Product Offering Rights:** The TPP should require regulatory and supervisory bodies to allow full market access and national treatment for all lines of insurance, personal and commercial, as this maximizes the potential societal value from insurance in terms of loss reduction, compensation and infrastructure investment.

**Modern and Transparent Regulatory Procedures:** The TPP should require regulatory and supervisory bodies to follow the recommendations, guidance and checklist for effective and efficient regulation issued by the OECD in December 2009.

**Regulatory Functions Performed by Self-Regulatory Organizations (SROs):** All regulatory functions, regardless of the entity carrying them out, should be subject to national treatment and the same regulatory procedures as applicable to government if it had performed the functions directly.

**Protection for Investment:** As discussed above, the TPP should include robust investment protections, including access to investor-state dispute settlement.

**Cross Border Business for Global Commercial Customers:** The TPP should achieve mutual recognition for regulation by the home of the insurance company, or other appropriate regulator, writing a policy for a multinational commercial customer.

**National Treatment to Avoid Circumvention of Regulations:** Domestic insurance regulation should be made applicable to all companies equally in a given market, regardless of nationality.

Currently, in practice, local companies are often allowed to circumvent such regulations, while foreign companies are “forced” to follow all regulations strictly, thus providing an unfair competitive advantage to local companies. Similarly, in current practice, foreign companies must often go through complicated application processes just to open additional branches, while domestic companies can avoid such processes altogether. This makes it difficult for foreign insurance companies to expand geographically and increase market access at a similar rate as their domestic counterparts. Indeed, such practices are prevalent in countries such as Vietnam.

### **Electronic Payment Systems**

The Trans-Pacific Partnership presents a new opportunity to ensure that the electronic payments industry receives even greater attention and protection in upcoming trade negotiations and international trade agreements. Identifying and closing existing gaps in coverage through the negotiation of the TPP would help create a more open and secure business climate and regulatory environment for the U.S. industry. Three specific objectives for the industry are to ensure the electronic payments industry’s access to foreign markets, to ensure that foreign governments maintain a competitive marketplace through transparent regulation, and to ensure that electronic payments providers maintain control over, and are able to freely move, information cross-border.

**Enhance Access to Markets:** The Trans-Pacific Partnership should explicitly secure full national treatment and most favored nation treatment for the U.S. electronic payments industry.

There should be no requirement that payment cards be co-branded or co-processed with a local or domestic entity as a condition to market entry. This should include a prohibition on requirements to process all or any part of an electronic payment system transaction within the territory of a Party to the Agreement or through a national of a Party to the Agreement.

There should be no restrictions with respect to the type of legal entity or joint venture required for participation in the industry.

If governments establish or maintain a state-owned enterprise to compete in the electronic payment systems market, those entities should operate in a commercial manner consistent with general principles of non-discriminatory treatment.

**Create Competitive Markets through Transparent Regulation:** The electronic payments industry needs an affirmative right to determine who may have access to their network to prevent governments from mandating compulsory access for competitors, including any government entities. This should specifically include individual operator’s rights to freely select all participants in and members and customers of the operator’s electronic payment system and to set requirements for access.

Transparency provisions should apply to all electronic payments industry services, regardless of whether they are provided cross-border. They should also apply to informal regulatory processes which are common and can create problems in some countries.

**Cross-Border Processing of Electronic Payment System Transactions:** Industry needs the ability to process a transaction, i.e. the authorization, clearing and settlement steps which require the transmission of financial information, outside of the country where a transaction originates.

### **E-Commerce and Information Technology Services**

The E-Commerce provisions in existing U.S. FTAs, particularly that with Korea, should be the starting point for high degrees of commitments to be adopted in the TPP. Electronically delivered goods and services should receive no less favorable treatment under trade rules and commitments than like products delivered in physical form. Trade classification should ensure the most liberal treatment possible. Software and other digital products should be duty free, consistent with the existing WTO moratorium agreed in 1998.

Looking ahead, this is an area of services trade which is rapidly changing and will require a forward-looking approach by negotiators. This was recognized at the Global Services Summit, where many questions were raised about the role of trade agreements in dealing with pressing issues related to privacy and security and the sharing of data across borders. Cloud computing offers users—including governments and enterprises—the opportunity to pay only for the computing they use rather than maintaining all their computing needs and resources themselves. Cloud computing also allows users to scale their IT capacity up or down almost instantaneously as circumstances dictate. With cloud computing, users have the flexibility and choice to rely on the cloud for as much or as little of their IT needs as they want, whether for infrastructure, an operating system, storage, or applications.

The TPP may offer an opportunity to engage on possible approaches to a number of these issues creatively, either as part of the overall TPP, or with a subset of likeminded TPP members. Internationally, the lack of universally agreed upon rules governing law enforcement access to data in different jurisdictions subjects cloud service providers to divergent and at times conflicting rules. As the U.S. government begins to consider possible approaches in this area it will be important to ensure that the commercial aspects of the frameworks are taken into account as discussions move forward to reconcile these different rules and promote greater clarity and consistency in data protection and access laws.

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Governments are among the world's biggest consumers of business software, and are not immune to unauthorized installation and use. The U.S. Government has issued an executive order that requires federal agencies to put the necessary controls in place to ensure that all software use is authorized, and other countries have issued similar decrees. The TPP should require the parties to have such orders or decrees in place to ensure that governments set a positive example for the private sector.

The cross-border data processing commitments in the Financial Services chapters of existing FTAs should be extended to the other countries as part of the TPP.

## **Telecommunications**

The proposed TPP trade agreement provides an important opportunity to encourage increased investment, trade and competition in telecommunications and other electronic communications services that will benefit consumers and suppliers in all these countries and the United States.

It is widely recognized that telecommunications is not only a very important economic sector in its own right, but is also a critical driver in developing an information economy and in stimulating broader economic growth. CSI therefore emphasizes the importance of achieving through the TPP negotiations the removal of remaining market access barriers that are not addressed by existing trade commitments. While most TPP countries have opened their telecom markets as the result of the WTO Basic Telecom Agreement and U.S. Free Trade Agreements, barriers to telecommunications trade and investment still remain in some instances. To remove these barriers, all countries should allow full market access for all services, including the provision of services both over owned-facilities and through resale, with 100 percent foreign capital investment and control. All countries should also adhere to the regulatory principles included in the WTO Reference Paper and U.S. Free Trade Agreements.

A key priority should be to encourage the removal of remaining restrictions on foreign direct investment (FDI) in telecommunications. FDI restrictions raise the cost of capital for incumbents and new entrants alike, and impede competitive market entry and efficient management. If a country maintains FDI restrictions for an incumbent operator, it still can obtain significant competitive benefits and provide important market entry opportunities by removing FDI restrictions for non-incumbents. A country can also effectively overcome the drawbacks of limitations on direct foreign ownership of telecom suppliers by removing restrictions on indirect foreign ownership and control.

All countries should also remove other market entry and licensing barriers that limit competition and growth in telecommunications. Registered capital requirements restricting market entry should be removed or limited to a minimal level that allows new entrants the flexibility to choose any relevant business model. Restrictions on the choice of joint venture partners also cause significant strategic and financial inefficiencies and should similarly be removed. In addition, countries should develop streamlined licensing procedures allowing market entry with a minimum of delay, particularly for the provision of telecom services provided to enterprise customers. For example, the replacement of service-specific licensing with more objective and transparent Type I (facilities-based) and Type II (non-facilities-based) licenses would allow companies to innovate and provide new services as technology evolves.

All the existing TPP negotiating partners have already made commitments to adhere to the full WTO Reference Paper, which reflects a global consensus on a set of regulatory principles relating to competitive safeguards, interconnection, universal service, independent regulation, licensing procedures and the allocation of scarce resources to encourage the development of



competitive telecommunications markets. All countries should also be encouraged to adhere to the telecom regulatory principles included in recent U.S. Free Trade Agreements, which include additional provisions concerning the removal of limitations on the resale of public telecommunications services, access to submarine cable systems, and other matters. CSI suggests that the U.S.-Korea Free Trade Agreement be used as a “baseline” for this purpose. Importantly, however, the scope and extent of regulation should adapt as market conditions evolve. Where competition is not developed or well-established, regulatory oversight and intervention is necessary to remove barriers to entry. As market forces become effective, regulators should allow competition rather than regulation to discipline pricing and service quality in order to create the proper investment incentives to encourage long-term, sustainable competition. Additionally, new entrants should be allowed the flexibility to innovate and compete and should not be subject to the full panoply of traditional telecommunications regulation.

Additionally, the TPP negotiating partners should be encouraged to adopt the policies outlined in the APEC Digital Prosperity Checklist to promote the development of information and communication technologies to foster economic growth and development. Those policies address requirements for infrastructure development, investment, innovation, intellectual capital, privacy and security, and trade.

### **Audiovisual Services**

The agreement should include full market access and national treatment for production, distribution, and projection services (including cinema theater ownership and management) for motion pictures and sound recordings.

It should provide for full market access and national treatment for radio and television services and transmission services.

It should contain strong E-commerce provisions, consistent with the existing FTAs.

Regarding customs valuation, tariffs should be set at zero, or should be based on the carrier medium.

### **Intellectual Property**

The TPP agreement should include measures to ensure IP protection and strengthen enforcement. Since piracy in both hard goods and digital format continues to be rampant in TPP member countries, the agreement should make parties to the agreement comply with "TRIPs plus," ratify and implement WIPO Internet Treaties, include provisions for anti-camcording and optical disc regulations, and provide for incentives to facilitate cross-industry cooperation to combat piracy.

### **Energy Services**

Both market access and regulatory issues should be addressed in the TPP negotiations. The agreement on energy services should ensure the broadest possible market access commitments. Energy services providers should have the opportunity to distribute their services both crossborder, and through direct investment. The TPP should cover the full array of commercial activities to encompass new energy activities and technologies.

To ensure that energy services providers can use the best available technology, market access should be allowed without regard for the technology used to provide the energy services. Energy services providers should also be allowed to import, on a temporary duty-free basis, tools of the trade and equipment essential to the provision of those services.

Energy services companies should also have the right to the temporary entry of essential personnel with highly specialized skills necessary to provide a covered service.

Regulatory systems should provide:

- transparency in the formulation, promulgation and implementation of rules, regulations, licenses, technical standards, and arbitration and judicial review;
- non-discriminatory third-party access to and interconnection with energy networks and grids;
- an independent regulatory authority separate from and not accountable to any supplier of energy services; and
- transparent, objective and timely procedures for the allocation of scarce network resources, such as transmission capacity and rights of way.

## CONCLUSION

The TPP is an important avenue for the liberalization of services trade, particularly in light of the challenges facing the Doha Round. We are encouraged by the progress that the U.S. government has made in the negotiations to date with our TPP partners, and we hope that all of our services coalition counterparts will continue to work with us to take a great step forward in services trade and investment liberalization. Moreover, we look forward to expanding this agreement to embrace more economies in the region.