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TPP vs. May 10 Agreement: Access to Medicines

On May 10, 2007, Democratic leaders in the U.S. House of Representatives brokered a deal with the George W. Bush Administration designed to reduce the negative consequences of U.S. trade agreements for global access to medicines. The May 10 Agreement placed limits on the new monopoly powers that would be granted to pharmaceutical companies in trade agreements, including those with Peru and Panama. This would facilitate the continued generic competition on which many people depend for access to affordable medicine.

U.S. trade policy under May 10 made patent linkage¹ and patent term extensions optional for pharmaceuticals and provided important limitations on data exclusivity rules for developing countries. There were no transition periods by which developing countries were expected to adopt more pro-monopolistic rules.

From early on in the TPP negotiations it became apparent that the U.S. Trade Representative was abandoning the May 10 template. USTR told stakeholders on a conference call that “2007 was 2007, this is 2011.” Early leaks showed extreme USTR intellectual property demands far beyond the bounds of May 10. USTR argued, to much criticism from health organizations, that TPP should be judged not by negotiating documents, but rather by the final agreement.

Today WikiLeaks published that final agreement. It does not conform to May 10, and it will harm access to medicines in developing countries. TPP provides transition periods to some developing countries to adjust to TPP rules. The periods are short and apply to few rules. Some countries have negotiated exemptions from one or two TPP rules. But again, the rules are beyond the limits of May 10, and will apply to the rest of the TPP parties, including developing countries that may join this aspired “living agreement” in the future.

¹ Though the U.S.-Peru FTA does not require patent linkage *per se*, it does require certain administrative rules to be in place.

Analysis: TPP Final Text vs. May 10

Exclusivity: Marketing and data exclusivity rules delay generic drug registration for a specified period of time by limiting the ability of generics manufacturers and regulatory authorities to make use of an originator company's data.

- **May 10th standard:** Exclusivity normally runs for a five-year concurrent period, meaning that the clock runs on exclusivity from the date of first marketing in the United States or agreement territory. This expedites generic entry.
- **TPP rule:** Exclusivity runs for a minimum five years. Countries must choose between offering an extra three years exclusivity for new uses, forms and methods of administering products, or five years exclusivity for new combination products. Only Peru may run the exclusivity clock by the concurrent period measurement. Other countries must provide at least five years exclusivity from date of marketing approval in their country, which may be considerably later than the first marketing approval, including cases that are purely a result of the pharmaceutical company moving slow to register a product in a developing country. Biologics exclusivity includes USTR insistence that countries adopt "other measures" toward providing a market outcome comparable to (presumably) eight years. A TPP Commission shall review the biologics exclusivity period, under presumable industry pressure to lengthen it.
 - Malaysia and Brunei will have an "access window," allowing them to foreclose marketing exclusivity if a company waits more than eighteen months to begin product registration.

Patent Term Extensions: Patent term adjustments (typically called extensions) significantly delay market entry of generic medicines and restrict access to affordable medicines. While they are allocated ostensibly for "delays" in regulatory review or patent prosecution, variance in review periods is a normal part of each system, and patent terms are not shortened when review proceeds more quickly than usual.

- **May 10th standard:** Patent extensions are optional. Countries may choose whether or not to make available patent term extensions for pharmaceuticals.

- **TPP rule:** Patent extensions are required for regulatory review periods or patent prosecution periods deemed “unreasonable,” in the first instance, or beyond a period of years in the second.

Patent Linkage: TPP’s patent linkage provisions may be considered broadly comparable to May 10 standards.

Additional Rules: While the May 10 Agreement did not make express reference to patent evergreening or other intellectual property rules that can compromise access to medicines, many health advocates take the content of the U.S.-Peru Trade Promotion Agreement as the standard. That agreement did not, for example, require the grant of patents for new uses of old medicines. TPP does.

For more information on these and other rules, see Public Citizen’s analyses of the final TPP text at www.citizen.org/tppa.

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