

May 9, 2012

Ambassador Ron Kirk

Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508
Fax: 202-395-4549
contactustr@ustr.eop.gov
rkirk@ustr.eop.gov

Dear Ambassador Kirk:

We write as legal academics from the US and current or potential future Trans-Pacific Partnership Agreement (TPP) member countries to express our profound concern and disappointment at the lack of public participation, transparency and open government processes in the negotiation of the intellectual property chapter of the Trans-Pacific Partnership Agreement (TPP). We are particularly and specifically concerned that the United States Trade Representative (USTR) took the opportunity of its hosting of the latest round of negotiations in Dallas, Texas, to begin this week, to further restrict public involvement in the negotiations by eliminating the full-day stakeholder forums that have been hosted at other rounds. We call on the USTR and all TPP negotiating countries to reverse course and work instead to expand, rather than contract, the opportunities for public engagement in the formation of the TPP's intellectual property chapter.

At a time when the last international intellectual property law to be negotiated under a similar process, the Anti-Counterfeiting Trade Agreement, teeters on the edge of rejection by the European Parliament in large part because of the loss of faith in its secretive process demonstrated by hundreds of thousands of marchers across Europe, the move to scale back participation in the TPP appears highly unwise and counterproductive. The functional and theoretical impact of the lack of transparency and accountability in the TPP and other trade negotiations institutionalizes the kind of process that the late Senator Daniel Patrick Moynihan criticized as policy making through "ignorant armies clash[ing] by night." This is no way to build support for a broad reaching new international law that will constrain democratic law making over intellectual property matters in the US and abroad, particularly in an era of massive and rapid technological change that is testing the bounds of our current policy framework.

Our first and most important suggestion is to immediately begin a policy of releasing to the public the kind of reports on US positions and proposals on intellectual property matters that are currently given only to Industry Trade Advisory Committee members under confidentiality agreements. The USTR has previously refused to share its own proposals with its own citizenry claiming that, under the Freedom of Information Act (FOIA), to do so would damage the national security of the United States. While we are sympathetic to the need for some confidentiality in the negotiation of international agreements, just as there is in domestic law making, there can be no national security justification, much less one sounding in good

governance concerns, for preventing the United States public from seeing its own government's proposals to restrain its own domestic legislation.

Indeed, there are many examples where the US engages in precisely the kind of information sharing about its proposals for international law making we request here. If, for example, this negotiation was happening in the World Intellectual Property Organization or World Trade Organization, all country proposals would be released to the public as a formal part of the negotiation process. This is, of course, also the process followed in a Congressional Committee mark up of a bill. And just last month USTR released to the public a 2012 revised model bilateral investment treaty (BIT), which one must assume reflects its positions in the TPP negotiation on the same titled chapter.

Our concerns flow from the now-established observation that "trade" agreements no longer focus exclusively, or perhaps even predominantly, on the regulation of trade. Rather, the agreements increasingly propose international law standards that bind the legislative branch to change, or lock in place, domestic regulatory decisions. Democratic values demand that, at minimum, the promulgation of such restrictions on domestic law making processes afford the full range of participatory inputs as similar initiatives at the domestic level.

Unfortunately, there is little about the TPP negotiating process that is open to the broad range of inputs that would be reflected in domestic policy making. There has been no publicly released text of what USTR is demanding in these negotiations, as there would be in policy making by regulation, in Congress or in multilateral forums. Reviews of leaked proposals show that the US is pushing numerous standards that are beyond those included in any past (i.e. publicly released) agreement and that could require changes in current US statutory law. Reviews also show that the US proposal is manifestly unbalanced – it predominantly proposes increases in proprietor rights, with no effort to expand the limitations and exceptions to such rights that are needed in the US and abroad to serve the public interest. Yet, we only know these things because the highly secretive law making process USTR established, including a ban on the release of all negotiation proposals until four years AFTER the conclusion of the agreement, has failed to prevent the US proposals from leaking to the public.

The unbalanced product results from an unbalanced process. The only private individuals in the US who have ongoing access to the US proposals on intellectual property matters are on an Industry Trade Advisory Committee (ITAC) which is dominated by brand name pharmaceutical manufacturers and the Hollywood entertainment industry. There is no representation on this committee for consumers, libraries, students, health advocacy or patient groups, or others users of intellectual property, and minimal representation of other affected businesses, such as generic drug manufacturers or internet service providers. We would never create US law or regulation through such a biased and closed process.

All of the above makes the most recent further withdrawal from the TPP negotiation of a limited participation venue particularly disturbing. If there was one small albeit inadequate bright spot among this shower of democratic governance transgressions, it was the effort of the TPP negotiating parties to host open stakeholder forums where members of the public could apply to give presentations to other stakeholders and those negotiators that wished to attend. Although

with limited information built largely on leaks and speculation, consumer, public health, and Internet user groups, as well as academics and others, still availed themselves of the only avenue possible to offer any real-time input to the negotiators. Locked out of any opportunity for meaningful participation in their own country, many US consumer groups and affected businesses have flown half way around the world at their own expense for their 15-minute opportunities to address negotiators in-person and out loud. While far from ideal for all involved, including the USTR and its ITAC advisors, this mechanism at least allowed for some exchange, even if that exchange was fundamentally flawed and artificially limited in value because of the information-disparity problems discussed above. In the place of these full day open forums in Dallas, USTR has channeled stakeholder input into a 4-hour mid-day (10:30am-2:30pm, i.e. over the lunch hour) exhibit hall for stakeholder tables. There will be no opportunity, as in the past, to speak to assembled negotiators through presentations. Despite the label given to this reduction of stakeholder input as a “Direct Stakeholder Engagement event,” we take this for what it is – a further decrease in amount, variety and effectiveness of means for the public to speak to negotiators on matters of broad public concern.

Now is (indeed, yesterday was) the time to ramp up participation mechanisms that might bolster the agreement’s legitimacy and fairness, not dial them back – if the goal is to create balanced law that stands the test of modern democratic theories and practices of public transparency, accountability and input. Please restore the stakeholder sessions and release negotiating texts now.

You may address any reply or correspondence to the organizers of this letter: David Levine (dlevine3@elon.edu), Christopher Jon Sprigman (Sprigman@virginia.edu) and Sean Flynn (sflynn@wcl.american.edu).

Very truly yours,

David S. Levine, Elon University School of Law

Christopher Jon Sprigman, Virginia Law

Sean Flynn, American University Washington College of Law

Brook Baker, Northeastern University Law School

Michael Geist, University of Ottawa

Kevin Outterson, Boston University

Frank A. Pasquale, Seton Hall Law School

Pam Samuelson, Berkeley Law

Susan Sell, George Washington University

David G. Post, Professor of Law, Temple University

Ira Steven Nathenson, St. Thomas University School of Law

Kenneth L. Port, William Mitchell College of Law

Peter Jaszi, American University Washington College of Law

Deborah Tussey, Oklahoma City University School of Law

Rebecca Tushnet, Georgetown Law

Irene Calboli, Marquette University Law School

Jessica Silbey, Suffolk University Law School Rita Heimes, University of Maine School of Law

Shubha Ghosh, University of Wisconsin Law School

Jason Shultz, Berkeley Law

Hannibal Travis, Florida International University

Aaron Perzanowski, Wayne State University Law School

Laura Bradford, George Mason University Law School

Cynthia M. Ho, Loyola University Chicago School of Law

Peter Yu, Drake University School of Law

Annemarie Bridy, University of Idaho and Princeton University

Robert A. Heverly, Albany Law School of Union University

Mark McKenna, Notre Dame Law School

Andrew Chin, University of North Carolina School of Law

Paul Edward Geller, General Editor, International Copyright Law and Practice

David Fewer, University of Ottawa

Dr. Samuel E. Trosow, University of Western Ontario

Alberto Cerda, University of Chile

Renata Avila Pinto, Universidad Francisco Marroquin

Dr. Hong Xue Beijing Normal University

León Felipe Sánchez Ambía, Universidad Nacional Autónoma de México

Matthew Rimmer, ANU College of Law, Australia