

Submission 11 – Melville Miranda

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Subject: Submissions opposing the Trans-Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile , Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, The United States of America and Vietnam

National Security Exception Weakened, No New Safeguards for Environmental, Health and Human Rights Policies.

- The final text reveals a significant roll back of the standard Security Exception that has been part of the U.S. trade agreements over the past decade. (Article 29.2). Following a major port security concern relating to the US-Oman Free Trade Agreement , U.S. trade pacts since have included a footnote making explicit that a country raising a national security defense for a policy that otherwise violates a trade pact obligation is empowered to determine in its sole discretion what are its security interests. While the language of the Security Exception in the TPP is otherwise identical to past U.S. pacts, the footnote has been eliminated. Yet the footnote was inserted in past pacts to ensure that trade pacts tribunals could not substitute their judgement for that of governments with respect to what policies were deemed “necessary” for the fulfilment of its obligations with respect to the maintenance or restoration of international peace and security, or the protection of its own essential security interests.” The footnote missing in the TPP text required : “ For greater certainty , if a Party invokes Article 23.2 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 exception applies.”
- The language touted as an “exception” to defend countries’ health, environmental, and other public interest safeguards from TPP challenges is nothing more than a carbon copy of past U.S. free trade agreement language that “reads in” to the TPP several WTO provisions that have already proven *ineffective* in more than 97 per cent of its attempted uses in the past 20 years to defend policies challenged at the WTO.

- In two decades of WTO rulings , Article XX of the WTO’s General Agreement on Tariffs and Trade (GATT) and Article XIV of the WTO’s General Agreement on Trad Services (GATS) have only been successfully employed to defend a challenged measure in one of the 44 attempts . Incorporating the GATT/GATS “general exception” means TPP governments must clear the list of high hurdles to successfully use the “exception” to defend a challenged measure.
- This ineffective general exception does not even apply in the case of Investor-State challenges. Indeed, the General Exception explicitly does not apply to the entire Investment chapter of the TPP. Many other TPP countries demanded that the exception apply to ISDS cases, and leaked drafts of TPP text included such proposals. The U.S. government strenuously opposed such reforms. The exception language included in the investment chapter is circular, applying only to countries whose policies do not conflict with other rules of the agreement.

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