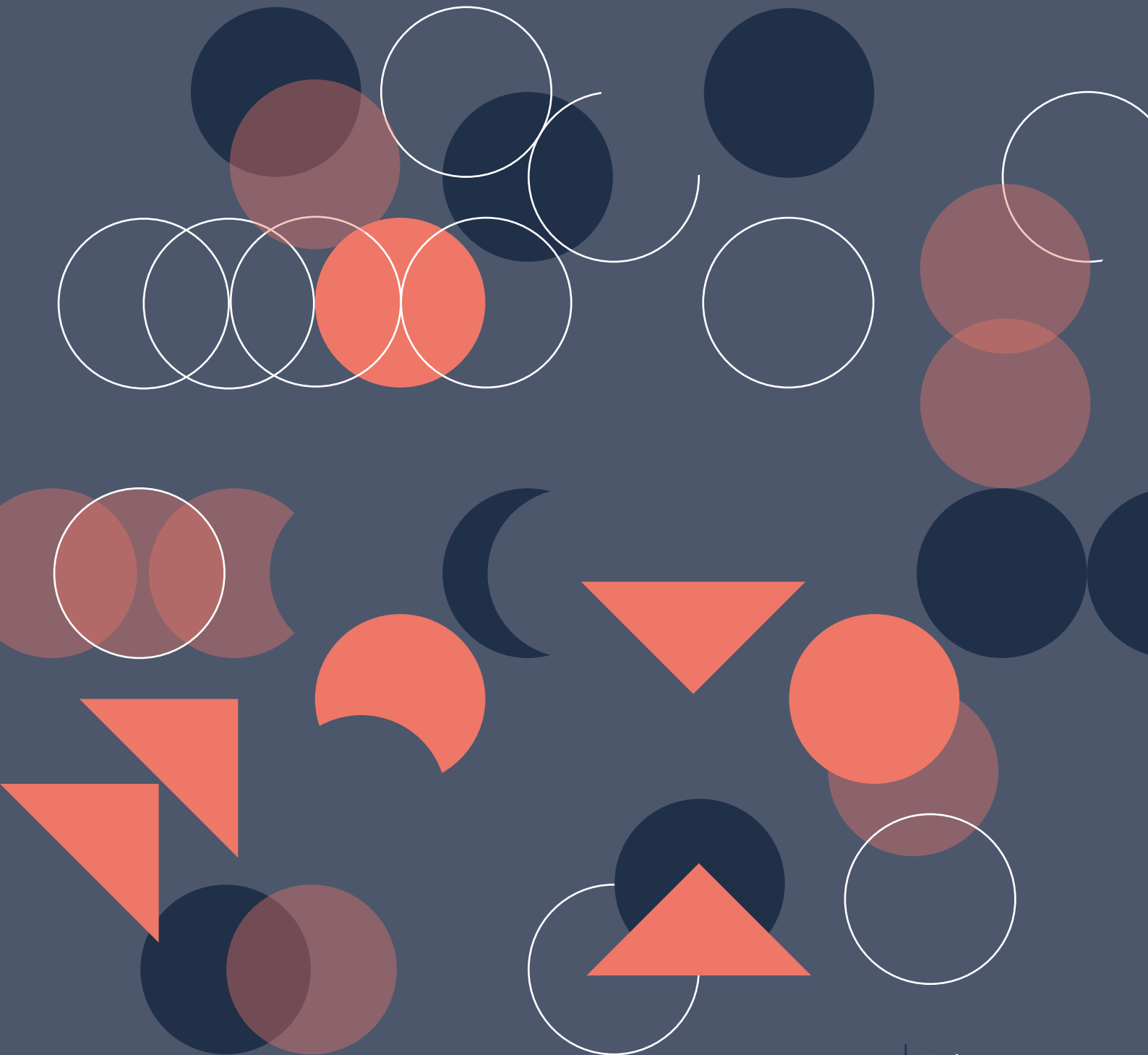


# Advocacy Bytes

| The Trans-Pacific Partnership



## A note on the text

*In January 2017, the United States pulled out of negotiations for the Trans-Pacific Partnership (TPP). Without its involvement, it is highly unlikely – perhaps impossible – that the agreement will come to fruition in any recognisable form.*

*In spite of this, we think the below case study, examining the experience of digital rights groups engaging in the TPP negotiations, still offers valuable guidance and insight for human rights defenders interested in getting involved in future trade agreements, as well as other Internet-related public policy debates.*

# 1 Snapshot

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## Dates covered by this case study

The Trans Pacific Partnership (TPP) negotiations began on 15 March 2010 and concluded on 5 October 2015. During this time there were 19 formal negotiation rounds and over 20 issue-specific meetings of ministers and chief negotiators.

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## Type of mechanism

The TPP process would have been the largest plurilateral trade agreement in history outside of the World Trade Organization (WTO). Because of its inclusion of rules on e-commerce, it was characterised as a '21st Century trade agreement'.

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## Background

The TPP was framed as a means of increasing trade liberalisation, following the failure of the Doha round of the WTO negotiations.

In 2005, Brunei, Chile, New Zealand and Singapore (the Pacific 4 or P4) signed a free trade agreement called the Trans-Pacific Strategic Economic Partnership Agreement. In 2008, the US began talks of trade liberalisation with the P4 countries; Australia, Peru and Vietnam soon followed suit, initiating negotiations around what was now called the Trans Pacific Partnership (TPP). Malaysia, Canada, Mexico and ultimately Japan joined at different stages of the process.

The agreement was highly controversial from its inception. The wide scope of its provisions, covering everything from labour rights to intellectual property, mobilised human rights defenders from a range of communities – including those working on digital rights.

## Structure and decisionmaking processes

Unlike the WTO, the TPP process had no central body. Most of the negotiations between the 12 member countries took place in 'negotiation rooms', corresponding to specific issue areas. Advisory committees – 28 in total – advised the US Trade Representative (USTR) on issues relevant to their area of expertise. In most cases, negotiations were based on a draft chapter provided by the United States; though on some occasions, other parties tabled part of a chapter as an alternative to a US proposal.

Each chapter of the treaty was negotiated individually by negotiators with specific expertise on the issue area in question. Due to the complexity of the issues under negotiation, negotiators often consulted with their staff advisors, as well as informally with members of the public and advocacy networks. Each country had its own process for engaging with members of civil society and the private sector. Only advisors who were registered with the country's government by signing non-disclosure agreements could access the text to provide advice. The agreement was designed as an "all or nothing", single undertaking; in other words, "nothing agreed until everything is agreed".

Negotiations took place entirely behind closed doors. Country positions and intentions were not initially released formally to the public, although some parties – including the US Trade Representative – started to release their positions in later stages of the negotiations.

## Remit

The TPP set out to establish a free-trade zone between its 12 signatory parties, by establishing binding agreements on a range of trade and more loosely defined "trade-related issues" – including trade in goods, customs, sanitation, investment, e-commerce, intellectual property, labour, the environment, exceptions, dispute settlement and barriers to trade.

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## 2 What was at stake

The TPP negotiations were marked by sustained opposition from human rights defenders working across a wide range of policy areas. From a digital rights perspective, the key areas of concern included:

- **Intellectual property.** The chapter on intellectual property chapter was identified as particularly problematic, because it would have enacted longer copyright terms for some of the states party to the agreement, and introduced intermediary liability rules which could have made it easier for private stakeholders with rights to protected copyright, trademark or patent (or 'rights holders') to remove content from the Internet. This was flagged as a potential risk for freedom of speech.
- **Rules around trade secrets.** Also of concern were new, expansive rules on trade secrets, which could have criminalised mere unauthorised access to confidential information through a computer system – potentially enabling the prosecution of whistleblowers, journalists, and others.
- **Investor-state disputes.** Another concern broadly shared by opponents of the TPP related to the investment chapter, which proposed to grant private companies the right to bring lawsuits against a government for adopting rules or policies that detracted

from the expected value of the company's investments. These so-called investor-state disputes (ISDs) would be heard by a body of international arbitrators, whose decisions could overrule the highest courts of signatory countries. Many criticised this for being undemocratic, and for bestowing excessive power on private companies.

- **Broader struggles for transparency and participation.** Some critics argued that countries party to the TPP were seeking to use the agreement to rush through measures that had been stalled in more inclusive, democratic forums. In this respect, the TPP was seen as symbolic of a broader democratic deficit and lack of transparency in political systems and structures around the world.
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### 3 Challenges for civil society engagement

- **High cost of participation.** The negotiation process consisted of around 40 meetings spanning almost all of the 12 member countries, with dates and locations provided at very short notice. This – combined with the need for sustained advocacy through several rounds of negotiations, and the complexity of the structures and issues involved in the negotiations – put direct engagement in TPP out of the reach of most civil society organisations.
- **Limited opportunities for input.** For those civil society actors who could attend, little time was allotted for direct engagement with negotiators. Some advocates spent much of the five years of TPP negotiations waiting in lobbies for the chance to speak to negotiators during their coffee or lunch breaks.
- **Secretive nature of negotiations.** For those rare human rights defenders with the resources to attend negotiation rounds, the required knowledge and expertise to establish a meaningful rapport with negotiators, and the good fortune to actually gain a hearing, a further challenge presented itself: secrecy. Because civil society actors were not allowed to know anything whatsoever about the draft text of the agreement, they were often unable to offer useful, relevant information to negotiators, even on issues where they had expertise. This was heavily criticised by advocacy groups, who pointed to forums such as the World Intellectual Property Organization (WIPO), where treaties are negotiated with more transparency. Many advocacy groups, such as Derechos Digitales in Chile, filed formal requests to their governments seeking access to the text, and were denied.