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STATE OF MAINE

Citizen Trade Policy Commission

DRAFT AGENDA

Thursday, September 24, 2015 at 1 P.M.
Room 208, Burton M. Cross State Office Building
Augusta, Maine

1 PM Public Hearing called to order

- I. Welcome and introductions
- II. Testimony presented by members of the public
- III. Phone Presentation and Discussion with Michael Sinacore, Legislative Assistant (trade matters) for US Congressman Bruce Poliquin (2 PM)
- IV. Presentation from CTPC member Sharon A. Treat on the proposed Regulatory Cooperation chapter in the TTIP and on procurement
- V. Articles of interest (Lock Kiermaier, Staff)
- VI. Adjourn (3 PM)

- Government procurement- provide a balance in major contracts;
- Investor-State Dispute Settlements- come to an agreement;
- Labor and environment- the inclusion of enforceable provisions;
- Pharmaceuticals- resolving the push by large pharmaceutical companies for stronger patent protections for expensive drugs;
- Pork- resolving conflicts over the continued use of hormone-treated pork which is very important to US pork producers;
- Rice- resolving Japan's determination to retain high protection for its rice industry;
- State-owned enterprises- limit the unfair use of SOE products through the use of extensive subsidies;
- Sugar- address the relatively large governmental subsidies to sugar producers thereby opening the opportunity for more competition;
- Tobacco- determine whether a meaningful tobacco trade agreement is possible;
- Textiles and footwear- address to what extent "rules of origin" are included;

Historic trade pact could be undone by ... cheese?; (Political)
 the numerous trade issues that could derail final agreement identified by country and topic and include:

- The desire of Canada to protect its dairy and product market;
- Japan's intentions to protect its rice farmers; and
- The US being pushed by large pharmaceutical companies for stronger patent protections for expensive new drugs.

Prosperity Undermined: The Status Quo Trade Model's Zeros and Ones
Trade Deficits, Job Loss and Wage Suppression; (Public Policy)
 This lengthy paper examines the record pertaining to actual trade agreements. The conclusions include the following:

- US trade deficits have significantly increased, leading to the elimination of domestic jobs and slowing economic growth;
- US agricultural exports are diminishing while imports are increasing;
- Almost 5 million manufacturing jobs have been lost since 1980;
- The offshoring of more technical and higher paying jobs is eroding the US middle class;
- The loss of manufacturing capacity is eroding the US trade surplus and revenues;
- Some of the recent FTAs such as NAFTA have imposed higher standards for intellectual property and labor requirements;
- Middle class wages in the US have remained flat since 1980;
- Privileges accorded to foreign investors have eroded the US production capacity;

- Manufacturing jobs lost to offshoring and other trade factors have forced workers to take lower paying jobs;
- Current trade policy has effectively limited the wages of remaining jobs;
- The bargaining powers of US workers has been eroded by offshoring;
- The current trend of lower wages has outweighed any possible economic gains from access to cheaper imported goods; and
- The disparity in US income inequality has significantly increased during this time period.

Analysis of August 2015 Leaked TPP Text on Copyright, ISP and General Provisions;
(Association of Research Libraries; 8/15)- This article reviews and discusses recent leaks of the proposed TPP chapter on intellectual property. The article concludes that the current leaked text is preferable to previous versions leaked in 2014. Specific topics include:

- Copyright term- not yet agreed to with a wide range of proposals;
- Technological protection measures- a modification of previous proposals which allowed limitations and exceptions; and
- Internet service providers- current text provides more flexibilities for internet regulation.

Tobacco Opponents, Advocates Fight For USTR's Favor On TPP Carveout; (Inside US Trade; 8/6/15)- This article discusses the current fight between members of Congress regarding whether to include a significant carve-out in the TPP. Senate Majority Leader Mitch McConnell (R- Kentucky) is not in favor of such a carve-out while Senate Minority Whip Dick Durbin (D-Illinois) favors inclusion of a carve-out.

Corker Blasts State's Malaysia Trafficking Upgrade, May Seek Subpoena; (Inside US Trade; 8/6/15)- This article reports on the opposition of Senate Foreign Relations Committee Chairman Bob Corker (R- Tennessee) to the recent decision of the State Department to upgrade Malaysia's status regarding the prevalence of modern day slavery and human trafficking. The upgrading of Malaysia's status on this issue is significant in that recent fast track legislation requires that nations with a low ranking on this human rights issue will not be accorded the "privileged status" necessary to participate in a trade agreement such as the TPP.

The Trans-Pacific Partnership Agreement and Implications for Access to Essential Medicines; (Journal of the American Medical Association; 8/20/15) – This article discusses the negative implications of proposed provisions to the TPP regarding extended patent protections for certain highly needed pharmaceuticals. In brief, these proposals are likely to significantly reduce the availability of affordable drugs that are crucial to poorer countries that are TPP members.

The programmed disappearance of the family farm; (ledevoir.com; 8/24/15)- This article, translated from the original French in which it was written, reports that the current system of dairy farm management and milk production in Canada is threatened by the politics of trading off on certain issues in the TPP. The ultimate result of trade concessions to Japan and New Zealand may mean the opening of Canadian dairy markets to American dairy imports thereby imperiling the existing Canadian system.

U.S. Official Sees TPP Ministerial Within Weeks; Australian Envoy More Cautious; (Inside US Trade; 9/9/15) – This article reports on a recent statement from a high ranking US official who asserted that TPP negotiations may be finalized within the next several weeks. This prediction was somewhat contradicted by a statement from the Australian Ambassador to the US who suggested that a final TPP agreement would not be reached until November.

Malmstrom-Froman TTIP Stocktaking Set For Sept. 22 In Washington; (Inside US Trade; 9/9/15) – This article reports that EU Trade Commissioner Cecilia Malmstrom will be meeting with USTR Michael Froman on September 22 to assess the current state of negotiations on the TTIP. The reported goal of this meeting is to finalize an outline of the trade agreement by the end of 2015.

EU Proposes New Trans-Atlantic Court for Trade Disputes; (Dow Jones Business News; 9/16/15)- This article reports that the EU has proposed an alternative to ISDS for use in the TTIP to resolve trade disputes. The EU proposal for a Trans-Atlantic Court is modeled on the International Court of Justice in The Hague and would feature the appointment of permanent judges and use of an appeals system.

EU seeks to remove obstacle to trade deal; (Financial Times; 9/16/15)- This articles adds additional detail to the previous report regarding the EU proposal for a trade dispute mechanism which would replace the ISDS in the TTIP. The additional details to the EU proposal include the following:

- The investment court would be comprised of 5 judges from the US, EU and other countries;
- Cases would be heard by a panel of 3 judges representing the US and the EU;
- All court proceedings would be open to the public; and
- Case documents would be posted on-line.

International trade agreements challenge tobacco and alcohol control policies

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Abstract

This report reviews aspects of trade agreements that challenge tobacco and alcohol control policies. Trade agreements reduce barriers, increase competition, lower prices and promote consumption. Conversely, tobacco and alcohol control measures seek to reduce access and consumption, raise prices and restrict advertising and promotion in order to reduce health and social problems. However, under current and pending international agreements, negotiated by trade experts without public health input, governments and corporations may challenge these protections as constraints on trade. Advocates must recognise the inherent conflicts between free trade and public health and work to exclude alcohol and tobacco from trade agreements. The Framework Convention on Tobacco Control has potential to protect tobacco policies and serve as a model for alcohol control. [Zeigler DW. International trade agreements challenge tobacco and alcohol control policies. Drug Alcohol Rev 2006;25:567–579]

Key words: alcohol and tobacco control policy, trade, trade agreement.

Introduction

Public health measures seek to control and reduce the health and social consequences of tobacco and alcohol consumption through reduced access, limiting promotion and increasing product prices. Free trade policies have objectives that are fundamentally incompatible to these measures [1–3]. Liberalisation of alcohol and tobacco trade increases availability and access, lowers prices through reduced taxation and tariffs and increases promotion and advertising of tobacco and alcohol [4]. More challenges and uncertainty loom as business interests press through trade agreements to do what these agreements are intended to do, i.e. to ensure and maximise free movement of investments, services and goods [4–9]. Trade agreements treat alcohol and tobacco as conventional ‘goods’ and on the principle that expanding commerce in these products is beneficial and challenges, policies to control these ‘goods’ ‘appear to be well grounded in reasonable interpretations of trade agreements’ [10–12]. This paper reviews the major literature on international trade agreements as they relate to alcohol and tobacco control policies,

makes recommendations for research, and suggests policies to protect public health.

Alcohol and tobacco are not ordinary trade commodities

Alcohol use is deeply embedded in many societies. Overall, 4% of the global burden of disease is attributable to alcohol, which accounts for about as much death and disability globally as tobacco or hypertension [6]. World-wide, approximately 2 billion people drink alcohol, of whom about 76.3 million have alcohol use disorders. Alcohol, globally, contributes to 1.8 million deaths and widespread social, mental and emotional consequences [1]. Tobacco is the leading preventable cause of death and disease in the world. By 2030 it is expected to kill 10 million people each year, an epidemic particularly affecting developing countries where most of the world’s smokers live [13].

Alcohol cannot be considered an ordinary beverage or consumer commodity because it is a drug that causes substantial medical, psychological and social harm by means of physical toxicity, intoxication and dependence

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[7,14–17]. Because tobacco products are highly addictive and lethal when consumed in a ‘normal’ way, they should be treated as an exception in trade negotiations [4,8,18,19].

Background to trade agreements

According to the World Trade Organisation (WTO), liberalising trade promotes competition and efficiency, provides lower prices, better quality and wider consumer choice and increases domestic and foreign investment—all of which lead to economic growth and raises standards of living [4,20]. However, many critics see free trade agreements as ‘unhealthy and inappropriate public policy’ [3,6,12,21,22].

International trade agreements are treaties establishing rules for trade among signatory countries. In 1948, 23 nations formed the General Agreement on Tariffs and Trade (GATT) to reduce tariffs and increase trade in *goods* and products. Subsequently, trade talks led to the 1994 Uruguay Round and formation of the World Trade Organisation in 1995. The WTO Agreement includes the General Agreement on Trades and Tariffs (GATT 1994), the Technical Barriers to Trade Agreement (TBT), the General Agreement on Trade in Services (GATS) and Trade Related Aspects of Intellectual Property Rights (TRIPS). Underpinning these are dispute settlement mechanisms and trade policy reviews [20].

Nations wishing to join the WTO must describe all aspects of their trade and economic policies that have a bearing on WTO agreements [20]. A recent report for the World Bank indicated that the price of accession is rising and represents possible one-sided power plays as current WTO members ‘wring commercial advantage out of weaker economic partners’ [23]. These concessions often involve tobacco or alcohol. For example, Taiwan adopted a new tobacco and alcohol management and tax system as a condition for accession [24] and Algeria lifted a ban on alcohol imports to help negotiations for WTO membership [25].

Parties to the WTO Agreement accept it as a whole, except for the regional and bilateral agreements into which countries may enter separately. Each of the 148 WTO member countries must comply with certain requirements or ‘General Obligations’ which include:

- Most-Favored-Nation (MFN) Treatment: each country must treat products and service suppliers from all other WTO member countries equally.
- National Treatment: the country must treat foreign suppliers no less favorably than domestic suppliers.

These policies are axioms of international trade policy that mirror goals of some, if not all, developed nations

(and surely the tobacco and alcohol industries that we are addressing) to: reduce the role of government in general; restrict a government’s ability to regulate; privatise ownership and production of services and goods; reduce public funding generally and, particularly, subsidies to private corporations; and decentralise administrative and financial procedures to the state at the local level [26]. ‘Liberalisation’ is the term for removing government restrictions on cross-border commerce through trade agreements. Liberalisation opens competition, leads to decreases in prices and results in higher consumption of tobacco products [9]. Experts predict the same with alcohol products [27].

Technical Barriers to Trade Agreement (TBT)

Regulations, standards, testing and certification procedures may be considered technical barriers to trade [20]. The TBT sets a code of practice by central and local governments and non-governmental bodies related to products and processes so that barriers to trade do not occur [12]. This agreement may also cover health, safety, environmental and consumer regulations [11]. While TBT has not yet involved tobacco-related controversy among WTO members, the agreement could affect product requirements, ingredient disclosure and package labelling [10]. Philip Morris used TBT arguments to contest a Canadian ban on use of the terms ‘mild’ and ‘light’ in cigarette promotion, because the corporation said that a ban was not the least trade restrictive alternative to reduce tobacco-related problems. The same argument can affect plain packaging and labelling requirements. Indoor air smoking regulations must also comply with TBT, which forbids exceeding international standards [4,8]—depending on which standards are selected. The 2005 Secretariat of the Pacific Countries report on trade included other tobacco control measures which may fall within the scope of and could be deemed more trade restrictive than necessary by TBT: rules on tobacco product ingredients; emissions from products; ingredient disclosure on packages; information on methods of production; differential taxation; protection of health and the environment surrounding tobacco growing and processing [4]. TBT might also affect public health measures relating to alcohol production and sale, alcohol licensing restrictions and sales in stadiums or other venues [5].

Tariffs and taxation

Under GATT, from the 1940s to the formation of the WTO, trade agreements focused on trade in *goods* and, specifically, reducing tariffs and taxes [28]. In the 1990s, the EU Commission challenged the high tax policies of Britain, Ireland and Nordic countries and lower tariffs

on alcohol exports by seeking harmonisation of alcohol taxes with pressure to lower and not raise taxes [29,30]. Canada and the United States used GATT arguments to attack each other's alcohol control systems. Following a US challenge, Canada lowered minimum prices and allowed access for cheaper US-produced beer to Ontario's monopoly beer retail system [31].

- The United States, Canada, and the European Union used the leverage of national treatment rules to eliminate Japan's high taxes on imported spirits (based on alcohol concentration, ingredients and processing) versus the traditional liquor *shochu*—resulting in a drop in the price of spirits [4]. Japan thus opened its market in 1996 not only to vodka (deemed 'like' *shochu*) but also to gin, rum, brandy, whiskey and other imported spirits [32].
- Subsequently, developed countries filed complaints that the taxes in Chile and South Korea discriminated in favour of their indigenous versus imported spirits. In a 1998 Chilean case, the WTO panel ruled that spirits with a higher alcohol content could not be taxed at a higher rate because this afforded protection to the Chilean liquor *pisco* against imported spirits with higher alcohol content. Chile expressed candid exasperation and surprise in the dispute documents over WTO pressure to change its domestic regulation. 'Chile further maintains that it is likewise inconceivable that members of the WTO, particularly developing country members, thought or think that, in joining the WTO and accepting thereby the obligations of Article III:2, they were foregoing the right to use fiscal policy tools such as luxury taxes or exemptions or reduced taxes for goods purchased primarily by poor consumers, even if such policies result in higher taxes on many imports than on many like or directly competitive products' [33].

While US President Clinton's administration generally kept a promise to cease using trade threats to force open tobacco markets, the 1992 US–China bilateral market opening agreement required China to slash tariffs on imported cigarettes [8,10]. Similarly, the recently ratified US–Central American–Dominican Republic Free Trade Agreement reduced tobacco and alcohol tariffs, which the Distilled Spirits Council of the United States said 'will have a direct and immediate impact on the sale of U.S. made spirits products' [34].

The WTO conducts Trade Policy Reviews of member nations' trade which pressure for homogenisation and liberalisation of policies. For example, the 2004 report on Norway pointed out areas inconsistent with WTO goals. In recent years, cross-boarder shopping to Sweden increased due to Norway's higher

food prices and its high levels of excise duties on alcohol and tobacco. A further decrease in excise duties in Sweden, triggered by European Community rules on imports of alcohol for personal use, could further increase downward pressure on Norwegian excise duties [33].

Tariffs are one form of 'discrimination' allowed under WTO if applied fairly and uniformly. However, regional and bilateral agreements apply pressure to remove them [10]. The 2005 Secretariat of Pacific Countries trade report indicated that import tariffs tend to lessen demand and consumption in several ways: by increasing the price of imported products, may depress prices of domestic products which have less competition, may reduce the need for aggressive marketing and promotion of domestic products and, with less outside competition, producers may not be pressured to improve the quantity and variety of products. Elimination of import tariffs on tobacco and alcohol products could change the market dynamic and significantly undermine government efforts to reduce consumption levels and related harms. However, merely increasing taxes on all foreign and domestic products will not necessarily address all the market effects that come from tariff reduction. Moreover, the Pacific Countries' report expressed regret that differential taxes that might favour domestic brands with weaker strengths or ingredients that are less harmful will be challenged under national treatment provisions of trade agreements [4].

National treatment

National treatment means that each country must treat services and suppliers from other WTO countries equally. This 'golden rule of international trade law' extends the best treatment given domestically to foreign trading partners [5]. According to GATT, tax and regulatory measures apply equally. GATT applies national treatment to *services* while the North American Free Trade Agreement (NAFTA) applies it to goods, services and *investments*. However, as equal treatment may still be insufficient to achieve substantive national treatment other more favourable provisions may be required to ensure that imported products are treated no less favourably. A 1989 GATT panel required 'effective *equality of opportunities* for imported products' [emphasis added]. This 'clearly constrains government measures taken to control alcohol as a good'. For example, alcohol control strategies might seek to limit exposure to the product lest the public acquire a taste for new types of products, especially with higher alcohol content. However, what may be good health policy, from a GATT perspective, is illegal protectionism and discrimination against foreign competitors [5].

Many international taxation disputes have been based on the national treatment rule, i.e. the country must

treat foreign suppliers no less favourably than domestic interests. Disputes over what constitutes a 'like' or 'substitutable' product have been pivotal. For example, Denmark's excise duty on spirits was attacked successfully under the European Economic Community Treaty because the domestically produced *aquavit* was deemed 'like' the higher taxed imported spirits. In 1983 there was a successful challenge to the United Kingdom's duties on wine and beer on the grounds that they favoured a domestic product over wine, an imported product [5].

Similarly, in 1999, the European Union was able to overturn Korea's tax system for spirits because imported spirits and the domestic *soju* were 'like' products and the differential tax violated national treatment GATT rules on internal taxation and regulation. South Korea then moved to equalise taxes on *soju* (an indigenous 25% ethanol spirit) and imported whisky (usually 40–43% ethanol) and was ordered to change its law, pay compensation or face retaliation [5].

In the 1980s the United States, supported by the European Community, seeking to open Asian markets to tobacco, filed a complaint against Thailand under GATT. Thailand had imposed a ban on imported cigarettes contending that they contained additives and chemicals that made foreign products more harmful than domestic cigarettes. Unable to prove justification for a ban on imports as part of a comprehensive tobacco policy, Thailand had to lift its import ban and to reduce tobacco excise duties [11,28]. The trade tribunal declared these measures to be unjustified based on national treatment because countries have acceptable alternatives to a ban, e.g. labelling rules, a tobacco advertising ban and domestic monopolies, as long as they did not discriminate against foreign enterprises [26]. Moreover, cigarette ingredients could be controlled by requiring ingredient disclosure and banning unhealthy substances [4,19].

The decision showed that the GATT public health exception had some meaning and could be invoked to defend some public health regulations. But it demonstrated, too, that the exception would be narrowly framed, i.e. 'necessary' was interpreted narrowly with a bias against rules that discriminate against foreign investors. Moreover, the trade panel ignored health input and dismissed arguments in support of Thailand by the WHO. Lastly, this case may not be a binding precedent because WTO rules do not require dispute panels to follow precedent [11]. While some may view the Thai case as a victory [19], the net result has been an increase in tobacco consumption in Asia [9]. Moreover, the Thai decision predates the GATS and with the overlapping authority of GATT and GATS, it is uncertain if the Thai ban on advertising could survive challenges now under GATS (see below) [2].

The General Agreement on Trade in Services (GATS)

GATS is the first and only set of multi-lateral rules governing international trade in services. The 148 WTO members account for over 90% of all world trade in services under GATS and no government action, whatever its purpose is in principle beyond the scrutiny and challenge of the GATS [35]. GATS covers all government measures taken by 'central, regional or local governments and authorities; and non-governmental bodies' in the exercise of government-related powers'.

GATS covers a broad range of service sectors: professional, health-related, educational and environmental services; research and development on natural sciences; and production, marketing, distribution and sales of products, including alcohol and tobacco [4]. For example, services might include the production, transportation of grain to the brewery or distillery, alcohol production, bottling, distribution, marketing, advertising and serving of alcohol [36].

GATS provides a framework for negotiations. A participating country can choose to open specific service sectors, specify conditions on the trade and can also request other participating countries to open trade in their service sectors.

Member countries declare their Schedules of Commitments of areas where specific foreign products or service providers will have access to their markets [4]. For GATT, these take the form of binding commitments on tariffs on *goods*. Under GATS the commitments state how much access foreign *service* providers are allowed [20]. If a country chooses to open a service sector to trade, there are 'Specific Commitments':

- Market access: the country must provide full market access. The country may not have laws, rules or regulations that restrict the *number* of service providers.
- National treatment: the country must treat foreign service suppliers no less favorably than domestic suppliers.
- Domestic regulation: if a country opens trade in a service, the country ensures that its regulations are administered objectively and impartially.

Each country can specify the level of market access and national treatment it will allow for each service sector it opens to trade. The European Union and United States seek market access on tobacco and alcohol in all countries, while Canada will not make commitments on alcohol.

GATS recognises the need for many services to remain carefully regulated to serve the public interest. The GATS distinguishes between regulations that act

as trade barriers, which distort competition and restrict access by service providers, and regulations that are necessary but not more burdensome than necessary to ensure the quality of service and protect the public interest. This vague standard invites WTO panels to review, from a strictly commercial perspective, domestic regulations that affect services [2]. Once governments agree to have a service fully governed by GATS (full market access commitment) they can no longer place limits on it. Because GATS defines trade as covering supply of services between and within countries, limits on potentially any type of advertising may be threatened [37].

Even though GATS provides governments with a certain degree of flexibility, there are serious limits which trade proponents may understate. GATS does enable governments to withdraw from previously made commitments as long as they are prepared to compensate other governments whose suppliers are allegedly adversely affected. Because GATS also covers investments, services provided through commercial presence, the Agreement goes beyond previous GATT rules [35].

Experts claim that GATS may be used to challenge government attempts to regulate cigarette advertising, impose licensing requirements for tobacco wholesalers and retailers, to ban sales to children and to require minimum package sizes. Because service sectors overlap, it may not be possible to insulate tobacco control from challenges, e.g. tobacco-branded services like Benson & Hedges Cafes or Salem Cool Planet may fit within classifications of advertising, retail, entertainment or food services. GATS could affect banning smoking in public places such as restaurants and bars and restrictions on distribution outlets for tobacco products [2,11].

Quantitative restrictions

GATS Article XVI (market access) prohibits limitations on the number of service suppliers. Consequently, signatories to GATS with commitments under 'distribution services' will probably have restrictions on regulatory measures to limit alcohol supply and limiting retail outlets, total volume or total sales. GATS completely prohibits these 'quantity-based restrictions' even when they are applied equally to domestic and foreign products [5,36].

Germany had minimum alcohol content rules designed to prevent proliferation of beverages with low alcohol content. This was challenged successfully under Article 30 of the 1979 European Economic Community Treaty. Quantitative restriction considerations were also used against the Netherlands' minimum prices for gin, and in 1987 against Germany's prohibition of sale of beers not in compliance with the country's purity requirements [5].

Antigua challenged the US prohibition on cross-border (internet) gambling. The WTO Appellate Body found that the United States violated GATS market access with a quantitative restriction, its zero quota. Regardless of the US intention not to include gambling as a service, the WTO panel said that gambling came under 'recreational services' which the United States had committed to open trade. Now an array of US gambling regulations are subject to challenge under GATS, e.g. number of casinos or state monopoly lotteries. According to Lori Wallach's testimony at the EU Parliament's Committee on International Trade, this decision has significant implications for domestic policies, even those with flat bans on certain 'pernicious' activities or 'undesirable behaviors' in covered sectors of trade agreements [38,39].

WTO Director-General in 1998, Renato Ruggiero, predicted controversy. '[T]he GATS provides guarantees over a much wider field of regulation and law than the GATT;... in all relevant areas of domestic regulation... into areas never before recognized as trade policy. I suspect that neither governments nor industries have yet appreciated the full scope of these guarantees or the full value of existing commitments' [35].

Impact on state monopolies

There has been a world-wide shift towards privatisation of state-owned enterprises, opening markets to global competition and consolidation by multi-national corporations [28]. Proponents of WTO agreements state that government services are carved out and that nothing in GATS forces privatisation of publicly held companies. However, critics see great pressure in trade agreements to privatise government and other not-for-profit monopolies as incompatible with national treatment and market access principles of GATS [4,10,35]. The alcohol monopoly systems in Finland, Norway, Sweden and Canada are based on a common objective to reduce individual and social harm as a result of alcohol consumption by reducing opportunities for private enterprises [40]. European integration led to unprecedented and sustained pressure against off-premise retail monopolies, greater scrutiny of the import, export and wholesale monopoly functions and broad challenges to the price and taxation systems. While allowed under trade agreements, the EU forced privatisation of wholesale and product monopolies [27] which deprived governments of revenue while raising problems associated with increased consumption [5].

Finland joined the European Economic Area Agreement and applied for European Union membership in 1992. Subsequently, a 1994 European free trade agreement ruling favoured market considerations over alcohol policy restrictions and the entire Nordic alcohol control model has had to change dramatically [5,31]. Consistent

with a common liberalisation theme in WTO Trade Policy Reviews, the report on Norway and the status of its trade barriers indicated that 'Arcus Produkter had the exclusive right to produce spirituous beverages and to sell and distribute spirits for technical and medical purposes in Norway. The company was privatized between 2001 and 2003, and the monopoly for the production of spirits in Norway was abolished' in 2002 [41].

According to the European Union (EU) request of Canada, 'EU equates the Canadian Liquor Boards with monopolies, and perceives these monopolies as imposing restrictions on European imports' [42]. The 2003 WTO Trade Policy Review pressured Canada to liberalise by pointing out that '[f]ederal and provincial government-owned enterprises with special or exclusive privileges are involved in alcoholic beverages and wheat trade' [43]. There has also been pressure on China and Taiwan during negotiations to join WTO to privatise their state tobacco monopolies [2].

Thirty years ago, state-owned tobacco companies were common throughout Latin America, Asia and Europe. Most have been privatised (for economic and not health reasons). However, from a public health perspective, the goal should be to utilise all policy options to reduce tobacco use. These measures include maintaining state-owned tobacco companies or alcohol distribution networks if doing so is likely to lower rates of consumption [28,44].

Finally, pertinent to GATS, negotiations to open specific service sectors to trade are ongoing under the WTO with a unofficial deadline of January, 2007 [38]. The final Declaration of the December 2005 WTO Hong Kong Ministerial meeting indicated that members 'must intensify their efforts to conclude the negotiations on rule-making' under GATS. 'Members shall consider proposals and the illustrative list of possible elements' referred to in a single footnote referring to the November, 2005 Report of the Working Party on Domestic Regulation. The new trade 'disciplines' on domestic regulation would require governments to take the least-burdensome approach when regulating services and constrain both the content and process for democratic lawmaking. Secondly, the 'disciplines' would limit the range of legitimate objectives to ensure the quality of a service. Proposing 'use of relevant international standards' would empower national governments to preempt local standards and would increase the threat of trade disputes if national and sub-national standards are more burdensome than international standards [45-49].

Trade-Related Aspects of Intellectual Property Rights (TRIPS)

TRIPS was the first multi-lateral agreement on intellectual property rights. Relevant to alcohol and

tobacco, portions of TRIPS cover trademarks, product logos, brand names, trade secrets and geographic indications with special provisions for wines and spirits, e.g. Champagne and Scotch protect their geographic designations [20]. TRIPS could affect trademark protection and disclosure of product information considered confidential by producers [4,10,12].

Tobacco companies invoked intellectual property arguments to challenge Canada, Brazil and Thailand, which require plain cigarette packaging and larger health warnings, alleging that these measures encumbered use and function of their valuable and well-known trademarks [11]. Moreover, Thailand and others violated intellectual property agreements by requiring listing of cigarette ingredients. However, the Australian and South African large health warnings have not yet been challenged [9].

McGrady's recent review of TRIPS and trademark issues related to tobacco called for renegotiation of the agreement in order to clarify its scope and principles [50].

General Agreement on Agriculture

The WHO/WTO joint report on trade and health cautioned that the Agreement on Agriculture could affect government support for tobacco products [12]. The Agriculture Agreement might also undercut national government programmes to provide incentives for tobacco growers and related businesses to diversify away from tobacco [4]. This reviewer believes that in the context of current disputes between developed and developing countries over agricultural subsidies, issues could also arise over government assistance to wine producers.

International trade agreements procedure and process

Trade agreements are negotiated by government representatives. For example, the US Trade Representative is authorised to negotiate trade agreements on behalf of the United States.

Negotiations on trade agreements are not open to the public or the press. However, many countries, including the United States, publish their initial positions, and some publish their ongoing negotiating 'offers' and 'requests' on trade issues. Requests from some countries are not disclosed to the public. As a general rule, even less information is publicly available on the positions and negotiations of regional and bilateral agreements [51].

Federal law requires the US government to consult with the private sector in the development of trade negotiation proposals. Both the Department of Commerce and the US Trade Representative have

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established formal private sector advisory committees. The US trade advisory committees have no public health representation and are, instead, led by industry representatives, e.g. tobacco, alcohol, fast-food and pharmaceutical interests. Texts of the trade agreements are published for public comment *following* completion of negotiations. Agreements require 'fast-track' Congressional approval, which means voting on each final agreement as a whole, without opportunity for amendment [51].

Enforcement of trade agreements

Trade agreements are made and enforced and bind national governments but not corporations [36]. Previously, only national governments could bring legal actions to enforce the provisions of trade agreements but under recent regional treaties investors can bring suit against a government. While trading members are urged to resolve disputes through consultation, WTO rules establishes tribunals (panels) of trade experts who have no background in public health to decide controversy [10,11,51]. If found contrary to WTO rules, a government must either change its laws or face trade sanctions or fines equal to the amount of harm to other countries based on lost market opportunities [11].

GATS, signed in 1995, has far-reaching implications for alcohol policy. Relating to trade in all services, GATS is also 'the world's first multilateral agreement on investments and covers cross-border trade and every possible means of supplying a service, including the right to set up commercial presence in the export market' [52].

Because the purpose of trade agreements is expansion of trade, agreements can only constrain or proscribe—rather than strengthen—government regulation of alcohol advertising and, in the past decade, targets even even-handed non-discriminatory policies [37].

One of the most significant features of GATS is to develop new restrictions on 'domestic regulation'. When challenged, a government must demonstrate that even non-discriminatory regulations are 'necessary' and that no less commercially restrictive alternative measure was possible. This is a potent provision affecting potentially all public regulations.

Regional and bilateral free trade agreements

There is a growing trend, due largely to the European Union and United States, for nations to negotiate regional and bilateral free trade agreements. There will be approximately 300 regional and bilateral trade agreements world-wide by the end of 2005, a sixfold rise in two decades. Bypassing the WTO, these offer flexibility to pursue 'trade-expanding policies not addressed well in global trading rules' [53]. Bilateral

and regional agreements can only be stronger than WTO rules which imposes minimum obligations on all members. Therefore, these bilateral and regionals may cut tariffs below but not above WTO levels, have stronger intellectual property or investment provisions but not weaker. The United States hopes to have so many of these agreements covering enough of the globe to have changed international norms [11]. The US–Singapore trade agreement eliminated tobacco tariffs and contained provisions that investors can challenge government regulations.

Investment protection

While WTO rules have relatively weak protections for investors, new regional agreements contain greater enforcement provisions [26]. The North American Free Trade Agreement (NAFTA), between Canada, United States and Mexico, included the first investor rights clause in regional trade agreements and contains very strong investment provisions [11].

NAFTA has a broad definitions of 'investment', 'investor' and 'enterprise' and makes no distinction between socially beneficial and socially harmful investments. Moreover, it has a broad meaning for expropriation with mandatory compensation at fair market value. Determining expropriation and compensation are appropriate roles for government. However, NAFTA prohibits not only direct but indirect expropriation and 'measure[s] tantamount to... expropriation'. In one of the first NAFTA investor vs. state disputes, US-based Ethyl Corporation challenged Canadian pollution control legislation that banned a gasoline additive from import and inter-provincial trade. Ethyl Corporation alleged that the legislation was 'tantamount to expropriation'. Assuming defeat, Canada paid Ethyl \$US13 million, issued an apology, and rescinded the ban on the gasoline additive.

Rather than basing compensation on 'out-of-pocket expenses' NAFTA uses 'fair market value', which enables compensation for loss of *anticipated* profits from non-discriminatory regulatory measures. In 1999, US-based Sun Belt Water submitted a claim against Canada for 'permanent lost business opportunity' of \$US 1.5–10.5 billion for action by the Province of British Columbia action to end removal of bulk water by tankers [36].

Most trade agreements enable only governments to bring challenges against other governments (state-to-state) [11]. However, an important feature of several current trade agreements is to allow foreign investors to directly challenge a government for alleged breaches of the treaty [9]. The investor–state dispute mechanism bypasses domestic laws and juridical authority and short-cuts ways that governments normally resolve disputes between themselves. Investor rights provisions

have been proposed or adopted in US bilateral or regional agreements [35].

Tobacco companies used NAFTA, not TRIPS, which does not allow investor standing, to challenge Canada's regulations requiring plain cigarette packaging as expropriation of intellectual property—even though the packaging requirement was to apply equally to domestic and foreign products. US firms contended that these tobacco control measures constituted an expropriation of property rights requiring compensation of hundreds of millions of dollars. The threat of an investor vs. state dispute from US tobacco interests convinced Canada to back down from instituting plain packaging with health warnings for cigarettes [11,26,37].

A number of NAFTA panel decisions suggest that companies may have exaggerated claims of property loss. Nevertheless, the treaty expropriation provision creates uncertainty, has a chilling effect on health legislation, and contributes to a rise in investor nuisance complaints [37].

A small Canadian tobacco firm, Grand River Enterprises Six Nations, is using NAFTA to challenge the 1998 Master Settlement Agreement between 46 States and four major tobacco firms in the United States. As part of the settlement, States decided to make the provisions of the agreement applicable to *all* tobacco companies, including non-defendant companies, such as Grand River, which must contribute a percentage of their sales to escrow accounts set up in each State [54].

Grand River filed an investor-state claim in 2004, seeking US\$ 340 million in compensation for alleged violations of NAFTA Chapter 11. Specifically, the petitioners are arguing that the requirement to make payments into State escrow accounts constitutes an expropriation in violation of NAFTA because their cigarettes cannot be sold in states where the firm does not comply with state escrow laws. Grand River also argues that it is being discriminated against in violation of NAFTA because domestic firms that participated in the settlement are operating in the United States without contributing to an escrow fund. Lastly, Grand River claims that the United States has violated most favoured nation provision because other non-tobacco foreign firms are not required to maintain an escrow account while doing business in the United States [54].

The 46 affected American States have no standing in NAFTA investor-state disputes and depend on the US Trade Representative to defend their interests. A tribunal decision in favour of Grand River would give Mexican and Canadian tobacco firms a back door out of the 1998 master agreement and undermine the entire multi-billion dollar settlement [26,53,55]. This case is before the NAFTA tribunal.

Not only are many non-governmental, public health and anti-globalisation groups concerned about the

rapid development of and innovations in regional and bilateral agreements. The World Trade Organisation itself set up a special Committee on Regional Trade Agreements as early as 1996 to monitor and assess whether regional trade agreements help or hinder the overall WTO [20]. A 2005 WTO Discussion Paper (no. 8) reviewed what were perceived as challenges to WTO members and the entire multi-lateral trading system from the 'irreversible' changing landscape of RTAs. Of concern were the 'regulatory regimes which increasingly touch upon policy areas uncharted by multilateral trade agreements [which] may place developing countries, in particular, in a weaker position than under the multilateral [i.e. WTO] framework'. As for the entire multi-lateral trading system, the proliferation of RTAs is 'already undermining transparency and predictability in international trade relations, which are the pillars of the WTO system'. The report's tone was very negative about exercising 'better control of RTAs dynamics', minimising 'the risks related to the proliferation of RTAs' or dealing with 'troublesome discrepancies between existing WTO rules and those contained in some existing RTAs'. The report ended with hope but not much confidence that WTO Members can address these thorny issues [56].

Advertising restrictions

Restrictions on advertising are important components of tobacco and alcohol policy. There have been several examples of advertising bans being upheld by trade panels. One is the 1980s Thai challenge by the United States, in which the GATT tribunal declared that Thailand could ban tobacco advertising because it was non-discriminatory [19]. More recently, the European Court ruled that even though the French Loi Evin alcohol advertising ban constituted a restriction on services, it was justified to protect public health [57]. There may be an interesting dual jeopardy—advertising is a good under GATT and a service under GATS. Because a prohibition on advertising is the strictest possible limitation on trade in advertising services, it would be the hardest to justify as 'necessary'. Probably, a local ban on outdoor alcohol advertising could be countered by industry self-regulation as a suitable alternative. Alcohol awareness or media 'drink responsibly' campaigns could be ruled reasonable alternatives to total advertising bans [33,37].

While advertising challenges have not come to the WTO, a Swedish court applying EU law ruled against a Swedish alcohol advertising ban brought by the European Commission after a complaint by a Swedish food magazine. The court ruled that the ban discriminates against imports because domestic brands are *already familiar to the public*, i.e. that it was *de facto* discrimination [37]—a possible precedent for other

advertising regulations on health issues or professional services. Due to potential threats of a WTO challenge using new provisions in the GATS [12], it will become much harder for consumer groups to convince regulators that outright bans or strong restrictions are the approach to take [30,58]. Not surprisingly, the World Spirits Alliance sees opportunities in trade agreements to liberalise restrictions on distribution and advertising [37].

Anti-smuggling measures

Smuggling has been an issue in tobacco control and measures to deal with it are incorporated into the Framework Convention on Tobacco Control. However, a 2004 WTO panel, basing its decision on GATT national treatment rules, found that measures which the Dominican Republic imposed to restrict cigarette smuggling had the effect of modifying conditions of competition to the detriment of imports, even though the measures applied equally to domestic and foreign cigarettes [4,9].

Agreement on the application of Sanitary and Phytosanitary Measures (SPS)

SPS is a separate WTO agreement on food safety and animal and plant health standards. While alcohol beverage disputes have come out of provisions in GATT, TRIPS and TBT agreements, the SPS agreement could affect issues related to additives, contaminants or toxins in beverages in future disputes. This is problematic, as SPS takes precedence over weak health exemptions in GATT [4].

Health exemptions

The preponderance of researchers on trade and public health are very sceptical about the exemptions in trade agreements and whether they are adequate or weak, at best [8,10,26,32]. However, Bettcher and Shapiro [18,19] expressed less concern, arguing that health exemptions present governments with significant protection and flexibility. Shapiro contends that the problem is not the WTO rules but rather the lethal tobacco product and that governments can implement comprehensive tobacco control measures [18].

Both the 1994 General Agreement on Tariffs and Trade (GATT Article XX-b) and the General Agreement on Trade in Services (GATS Article XIV-b) provide a limited exception to trade rules in order to protect human, animal or plant life or health. However, this exception is subject to several tests which have been difficult to meet. To withstand a challenge, a government measure that protects life or health must be neither 'arbitrary or unjustifiable discrimination', a

disguised restriction on trade in service, or more trade-restrictive than 'necessary'—'formidable hurdles' [26,35]. To establish that a measure is 'necessary', a nation must also show that it is effective and that no other alternative policy is available that would be less restrictive to trade [10,12]. Moreover, GATS Article VI.4 requires that a measure must be 'actually necessary to achieve the *specified legitimate objective*' [emphasis added]. Because there is almost always an alternative to a policy, regardless of whether the alternative is effective or politically and financially feasible, necessity has been difficult to prove conclusively. Consequently, Article XX is an ineffective exclusion [11,36].

Only one regulatory measure has ever been saved based on GATT Article XX—a French ban on asbestos products in a case brought by a Canadian company. France won the dispute because its ban prevents catastrophic rates of death from asbestos exposure [4,8]. The WTO Appellate Body ruled that a regulation that violates trade commitments and severely restricts trade is justifiable if the 'value pursued is both vital and important in the highest degree' [30].

Such reservations are interpreted narrowly under international law and apply only once, i.e. they protect existing measures against specific provisions of a particular agreement and do not create binding precedent [10]. Thus limited, reservations do not assure future policy flexibility. Moreover, NAFTA includes a preemption 'standstill' which prohibits introduction of new or more restrictive measures or exceptions. Many agreements also require a 'rollback' to reduce or eliminate non-conforming measures. Therefore, the only way to permanently protect measures to protect public health is for treaties to explicitly protect them from challenge [32].

GATS Article XIV has not been involved in WTO disputes but is likely to provide problems because its language is more narrow than GATT Article XX, which only reliably makes exception for national security measures [35]. Moreover, the health exception in TRIPS is largely negated by the qualification that public health and nutrition measures 'be consistent with the agreement' [2].

While countries can limit market access to 'sensitive products', the European Community seeks to eliminate alcohol and tobacco, exempting only arms, ammunition and explosives, and thus making health claims even more difficult to withstand challenge [30,42].

Framework Convention on Tobacco Control (FCTC)

The WHO endorsed the first global health treaty, the FCTC, in 2003 [59], to facilitate international co-operation and action to reduce tobacco supply and

demand. Its preamble declares that parties are '[d]etermined to give priority to their right to protect public health' [60]. The FCTC became international law in February 2005.

Even though advocates were unable to include language in the final treaty giving priority of the FCTC over trade agreements [10,26], the Convention provides encouragement for positive and proactive tobacco control measures and serves as a counterweight and an alternative to trade agreements [10]. Provisions of the FCTC will provide more latitude for countries to protect health than without the treaty. Packaging and labelling rules of FCTC strengthen the defence against intellectual property claims [11]. Moreover, the FCTC may be able to take advantage of the Technical Barriers of Trade which permits countries to enact technical regulations to protect human health provided, in part, the international standards exist now or soon will be adopted. The FCTC should establish a body to set minimum standards without serving as a ceiling [10]. Moreover, Article 2 encourages Parties to 'implement measures beyond those required by this Convention and its protocols, and nothing in these instruments shall prevent a Party from imposing stricter requirements' [59].

Will the FCTC take precedent over other treaties? Standard rules of treaty interpretation usually dictate that the most recent treaty prevails in the event of a conflict. While the FCTC is a recent treaty, others are being adopted and will then be 'later in time'. A factor in favour of the Convention is that treaty interpretation suggests that the more specific agreements prevail in a conflict. However, the TRIPS agreement may be considered more specific than FCTC on trademark protection [11]. Consequently, significant uncertainty will continue to create a chilling effect as disputes will probably be interpreted in light of trade and not sound health policy [26].

The Secretariat of Pacific Countries suggests that the principles of the FCTC should guide signatories in trade negotiations but that they should not assume that the FCTC will legally protect from consequences of breaching trade obligations. Therefore, they should avoid entering into agreements that restrict nations' ability to pursue the objectives of the FCTC. Similarly the Pacific Islands recommended that all work to assure that trade agreements do not limit nations' capacities to 'utilize taxation or other policy measures to prevent the public health and social disorder consequences of alcohol' [4].

General recommendations

Nations should adopt trade policies to reduce tobacco and alcohol use or, which based on evaluation by public health and economic experts, will not stimulate consumption [28]. The joint WHO/WTO trade report

advised addressing potential conflicts between WTO, regional trade rules and the FCTC. Because trade agreements are reviewed regularly, governments should involve health professionals to assure that national and international health objectives are taken into account in any changes [12]. The expropriation provision should be removed from NAFTA and other trade agreements and nations should make no advertising commitments [37]. There needs to be coherence between health and trade policies, an example of which is the Canadian government's collaboration between health and trade ministries. According to the Center for Policy Analysis on Trade and Health (CPATH), the situation is very different in the United States, where the US Trade Representative has no public health (and only corporate) representation on its advisory committees. Instead, health experts should be named to trade teams, e.g. the US Trade Representative should appoint a deputy director for public health [51].

Exclude tobacco and alcohol from trade agreements

The international community would achieve the greatest health benefit and avoid trade disputes by merely excluding tobacco and alcohol products and related services from trade agreements.

Weissman suggested a simple solution: 'tobacco products should be excluded from their purview' or 'nothing in the Agreement shall be construed to apply in any way to tobacco products' [11]. If these were excluded, governments would not need to ensure that health measures are consistent with trade rules and tobacco companies could not sue over government control policies that contravene investment guarantees. Countries could raise tariffs and restrict market competition and implement the Framework Convention on Tobacco Control [4]. Precedent exists for surgical, diagnostic and therapeutic methods, military products and fissionable materials [10]. Moreover, the US-Vietnam and US-Jordan free trade agreements excluded tobacco from tariff regulation.

The recently adopted World Medical Association Statement on Reducing the Global Impact of Alcohol on Health and Society, introduced by the American Medical Association, calls for excluding alcohol from trade agreements. In order to protect current and future alcohol control measures, the statement urges national medical associations to advocate for consideration of alcohol as an extra-ordinary commodity and that measures affecting the supply, distribution, sale, advertising, promotion or investment in alcoholic beverages be excluded from international trade agreements [16].

The Secretariat of Pacific Countries recommends that if Pacific countries do not exclude tobacco and alcohol

from trade agreements, they should use domestic taxes to ensure that tobacco and alcohol prices do not fall when tariffs are reduced or eliminated. It is also essential to intensify efforts to exercise additional forms of regulatory control in a targeted manner to counteract the negative public health effects of liberal trade [4]. According to the joint WHO/WTO 2002 report, even though trade agreements seek to reduce tariffs and non-tariff barriers to trade, governments can still apply non-discriminatory internal taxes and certain other measures to protect health [12]. And while disagreeing on the impact of trade agreements, in the 2001 debate in the journal *Tobacco Control* [8,19], both sides agreed on excluding tobacco from trade treaties.

Framework Convention on Alcohol Control

Increasingly, health policy advocates are calling for a global Framework Convention on Alcohol Control based on the model of the Framework Convention on Tobacco Control. A Framework Convention (or treaty) on Alcohol Control could be an international legal instrument to reduce the global spread of harm done by alcohol and help protect national and local measures. Article XIX of the WHO constitution allows for such a convention [6,7,16,37,57,61].

Final remarks

Trade agreements are indeed complex and have macro-level ramifications on health policy, not the least of which relate to tobacco and alcohol control [62]. The Finnish researcher Mika Alavaikko observed that 'trade policy occupies the heart of day-to-day nation-state-level policy-making. The social and health policy aspects of public policy making are the passive, defensive factors in the process' [4,10]. This must change or many of our public health labors will have been in vain, as trade negotiations and liberalisation of policies will probably continue in some form. This reviewer has great concern about the potential negative impacts of trade agreements and calls on tobacco and alcohol control advocates to vigorously maintain the right to health and the 'ascendancy of health over trade' [26]. Medical and other non-governmental organisations need to advocate for health impact assessments of trade and trade impact assessments of health regulations in advance of their nations' concluding treaties. If in doubt, make sure that trade negotiators have input from public health experts and take actions least likely to stimulate alcohol or tobacco use. We must have research on the developing Framework Convention on Tobacco Control and its relationship to trade agreements. Ultimately, we need to exclude alcohol and tobacco from trade agreements and have functioning Framework Conventions to deal with these important

health issues. Hopefully, too, the report called for by the 2005 World Health Assembly resolution will address alcohol and trade agreements and provide a background for a Framework Convention on Alcohol Control [63].

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<http://legislature.maine.gov/legis/opla/citpolsums.htm>

PREEMPTING THE PUBLIC INTEREST

How TTIP Will Limit US States' Public Health and Environmental Protections

Executive Summary

The proposed chapter on Regulatory Cooperation in the Trans-Atlantic Trade and Investment Partnership (TTIP) Agreement, the largest bilateral trade agreement in history, threatens the authority and independence of US state governors, legislators, and executive agencies, and would fundamentally alter how environmental policy is developed, enacted, and implemented in the United States.

TTIP's regulatory cooperation provisions are intended to reduce the cost of doing business by minimizing regulation, promoting convergence of regulatory standards, and defaulting to international standards developed with significant involvement of the regulated industries. These goals can only be achieved by preventing US states from adopting health and environmental regulations that go beyond US federal standards.

This regulatory agenda is being pushed by the largest chemical and manufacturing corporations on both sides of the Atlantic. Largely frustrated in their past attempts to have the US Congress preempt US state standards that go beyond federal minimums, these corporations have now turned to international trade agreements, including TTIP, to undermine state regulations by other means. In the absence of comprehensive federal standards, state legislatures have become the primary vehicle for much of the United States' chemical regulation. Interference with state regulatory authority will have major implications on public health, safety, and welfare in the US.

During the past three decades, while the federal Toxic Substance Control Act (TSCA) has proven egregiously ineffective, US states have adopted more than 250 laws and regulations protecting humans and the environment from exposure to toxic chemicals, and they have taken the lead in enforcing stricter pesticide standards. California is one of several states to design chemical policies to protect con-

sumers from potentially hazardous products. Likewise, as the US federal government has failed to respond to fracking concerns, states have filled the regulatory void; in 2015 alone, 226 bills addressing hydraulic fracturing were proposed in 33 states.

US states have also extended regulatory authority over pesticides, implementing bans, overseeing registrations and labels, and imposing restrictive use standards. The US Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) is actually designed to promote co-regulation between the federal and state governments, yet states are the predominant regulator under this Act. This often leads to stricter standards and more stringent protocols at the state level. New York and California have banned several pesticide products deemed acceptable by the EPA, and Kansas and Iowa are among many states that require more rigorous registration, application, and use standards than those federally required.

TTIP's Regulatory Cooperation chapter threatens to undermine these protections to public health, welfare, and safety by explicitly targeting US state laws and regulations throughout. The US has not publicly responded to these detrimental impacts, nor addressed several of TTIP's ambiguities that require clarification. For example, it remains unclear whether Investor-State Dispute Settlement (ISDS) arbitration will serve as an avenue for recourse for non-compliance claims.

Although there have been limited efforts to promote "good regulatory practices" and international cooperation in prior US trade and investment agreements, the US regulatory framework has never before faced the unexpected and novel challenges that TTIP presents. The proposals for regulatory cooperation and coherence in TTIP delve deeply into the internal legislative and regulatory decisions and choices of US states, as well as the federal government. They do so in ways not an-

ticipated by the US Constitution, and in the process pose significant risks not only to our capacity to regulate to protect public health and environment, but also to our democratic institutions.

The Regulatory Cooperation chapter not only disrupts the US legislative pathways by weakening state regulatory authority, but it will also threaten the independence of state agencies and regulatory bodies. The chapter would institutionalize new avenues for private interests to seek to influence decision-making before legislation is introduced and to suppress laws and regulations before they are enacted. Industries will no longer be limited by the democratic process of a legislature with public hearings and opportunities to provide testimony, but can instead influence an unelected, unaccountable, and currently ill-defined international trade oversight body.

As proposed by the EU, an "early warning" system will inject additional, behind-the-scenes industry influence that will promote newly required alternatives and trade impact analyses and drive a race to the bottom based on preferred "least trade restrictive" policies. In addition to "paralysis by analysis," these harmonization requirements could also lead to a freeze on future protections as US states seek to avoid legal challenges by transnational corporations seeking millions of dollars in compensation in special arbitration proceedings.

The ultimate outcome of these provisions will dramatically impair health and environmental protections across the US, and erode the authority of US states to regulate in the public interest. Not only is this result contrary to the historic role of states as the frontline protectors of public health and safety, it will halt the innovation and responsiveness of state policy-makers to emerging technologies and health threats, leaving millions of Americans at risk.

Key Messages and Recommendations

- The TTIP Regulatory Cooperation chapter proposed by the EU will comprehensively apply to both US state and EU Member State legislative and regulatory measures, and new procedural requirements will apply to legislative bodies as well as executive agencies.
- The scope of any US regulatory proposal in TTIP is unknown, because the US refuses to publicly release any text. The United States Trade Representative (USTR) has yet to publicly address the details of the EU text or similar industry-drafted regulatory cooperation proposals that seek to prevent US states and EU Member States from implementing regulatory standards that exceed federal or central government minimum standards.
- US states have wide latitude to regulate to protect public health, safety, and welfare under the US Constitution and federal environmental laws, most of which institutionalize a strong role for states as co-regulator. With federal regulation of chemical hazards lax, slow, or simply broken, many states have assumed primary responsibility for developing regulations to protect the public and the environment, including restrictions on the use of certain toxic chemicals in consumer products, labeling for increased consumer awareness, tighter controls on fracking waste, and greater scrutiny in determining whether pesticides are safe.
- Viewed as a whole, the EU's Regulatory Cooperation chapter has the potential to negate important existing and future

protections from toxic chemicals in the United States. The sweeping scope of covered laws and regulations, the failure to preserve any right to regulate outside of the federal government, and the avowed goal of achieving "regulatory compatibility" between the EU and US central governments all threaten the continuing viability of US state laws and regulations that are more protective than federal standards.

- The impact of the Regulatory Cooperation provisions will extend well beyond encouraging good governance and voluntary transatlantic cooperation. The chapter will impose multiple procedural mandates – from an early warning system to regulatory exchanges to the trade and cost-benefit impact assessments – that will lead to a regulatory chill caused by delay, increased costs for government, fear of legal challenges, and heightened industry influence and conflicts of interest.

- To an unprecedented degree, US federal agency bureaucrats will become involved in state legislative and executive branch procedures and policies. In addition, the concerns of foreign governments will be inserted into US state domestic policy decisions.

- It is imperative that state government officials and civil society act promptly to expose the details of TTIP proposals and to speak out in opposition in light of the fast pace of TTIP negotiations, the limits placed on Congressional oversight following approval of "fast track" review, the failure of the USTR to operate in a transparent manner, and the absence of any public push-back by the US government against EU and industry Regulatory Cooperation proposals.



<http://www.fairwarning.org/2012/11/as-nations-try-to-snuff-out-smoking-cigarette-makers-use-trade-treaties-to-fire-up-legal-challenges/>

As Nations Try to Snuff Out Smoking, Cigarette Makers Use Trade Treaties to Fire Up Legal Challenges

Marlboro, the world's top-selling brand, packaged under labeling laws of (clockwise) the U.S., Egypt, Djibouti, Hungary/Photos of non-U.S. packs, Canadian Cancer Society

Andriy Skipalskyi was feeling proud, even triumphant, when he arrived last March at the World Conference on Tobacco or Health in Singapore.

Ukraine's parliament had just voted to approve a public smoking ban, and its president had just signed a bill to outlaw tobacco advertising and promotion. These were revolutionary steps in chain-smoking Eastern Europe.

But Skipalskyi, a leading Ukrainian anti-smoking activist, heard little praise for his country from other delegates. As he told FairWarning: "Everyone was talking about Ukraine as the bad actor in the international arena in tobacco control."

The reason was a bewildering move by Ukraine's trade ministry. Within hours of the historic steps to curb smoking at home, the ministry, prodded by the tobacco industry, contested a tough anti-smoking law half a world away in Australia.

In a complaint to the World Trade Organization, Ukraine challenged the law, due to take effect December 1, that will ban distinctive logos and colors and require cigarettes to be sold in plain packs. Despite Ukraine having no tobacco exports to Australia—and therefore no clear economic interest—the trade ministry branded the law a violation of intellectual property rights under trade agreements Australia had signed.

Following Ukraine's lead, Honduras and the Dominican Republic soon joined the attack on Australia, filing similar complaints with the WTO. Tobacco industry officials have acknowledged that they are paying legal fees for the three countries.

The case, which will be decided by an arbitration panel, signals an emerging pattern in the global tobacco wars. As top cigarette makers lose clout with national governments, countries around the world are adopting increasingly stringent rules to combat the public health burdens of smoking. To strike back, tobacco companies are

increasingly invoking long-standing trade agreements to try to thwart some of the toughest laws.

The WTO case is only part of a three-pronged legal assault on Australia, aimed both at reversing the plain packaging law and warning other countries of what they might face if they follow its lead.

Public health advocates fear the legal attacks will deter other countries from passing strong anti-smoking measures. The “cost of defending this case, and the risk of being held liable, would intimidate all but the most wealthy, sophisticated countries into inaction,” said Matthew L. Myers, president of the Campaign for Tobacco-Free Kids in Washington D.C.

The dispute underlines broader concerns about trade provisions that enable foreign companies to challenge health, labor and environmental standards. Once a country ratifies a trade agreement, its terms supersede domestic laws. If a country’s regulations are found to impose unreasonable restrictions on trade, it must amend the rules or compensate the nation or foreign corporation that brought the complaint.

Advocates say countries should be free to decide how best to protect public health, without being second-guessed by unelected trade panels. Moreover, they argue, tobacco products, which kill when used as intended, should not be afforded the trade protections of other goods and services.

Worldwide, nearly 6 million people a year die of smoking-related causes, according to the World Health Organization, which says the toll could top 8 million by 2030. With fewer people lighting up in wealthy nations, nearly 80 percent of the world’s 1 billion smokers live in low-and middle-income countries.

Trade agreements are the “ticking time bomb for this century as governments tackle problems like tobacco, the environment, obesity, access to essential medicines.”

—Matthew L. Myers, president of the Campaign for Tobacco-Free Kids.

Countries have been emboldened to pass more stringent measures by the Framework Convention on Tobacco Control. In effect since 2005, the treaty has committed about 175 nations to pursue such measures as higher cigarette taxes, public smoking bans, prohibitions on tobacco advertising, and graphic warning labels with grisly images such as diseased lungs and rotting teeth. (The U.S. has signed the treaty, but the Senate has not ratified it. The U.S. Food and Drug Administration has ordered graphic warnings for cigarette packs, but an industry court challenge on 1st Amendment grounds has stalled the rule.)

Line in the Sand

Cigarette makers say they acknowledge the hazards and the need for regulations. "We actually support the vast majority of them," said Peter Nixon, vice president of communications for Philip Morris International, which has its headquarters in New York, its operations center in Switzerland, and is the biggest multinational cigarette maker with 16 percent of global sales.

But the industry has watched with growing concern as more than 35 countries have adopted total or near-total bans on cigarette advertising. Its big profits depend on consumer recognition of its leading brands. Yet in many countries, the once-ubiquitous logos and imagery are receding, leaving the cigarette pack as a last refuge against invisibility.

Now the pack, too, is under attack. Along with plain packaging laws such as Australia's, countries are weighing retail display bans that keep cigarette packs out of view of consumers, and graphic health warnings so large that there is barely room for trademarks. Tobacco companies contend that countries enforcing such rules are effectively confiscating their intellectual property and must pay damages.

The industry also claims that measures like plain packaging are counterproductive. "We see no evidence—none at all—that this will be effective in reducing smoking," Nixon of Philip Morris International said in an interview. In fact, he said, generic packaging likely will increase sales of cheap, untaxed counterfeit smokes, thus increasing consumption.

Louis C. Camilleri, chairman and CEO of Philip Morris International, drew a line in the sand in remarks to Wall Street analysts in November, 2010. The company would use "all necessary resources and...where necessary litigation, to actively challenge unreasonable regulatory proposals," Camilleri said, specifically mentioning plain packaging and display bans.

Up to now, tobacco-related trade disputes have mostly involved quotas or tariffs meant to protect domestic producers from foreign competition. In the 1980s and '90s, for example, the Office of the U.S. Trade Representative successfully challenged such barriers in Taiwan, Japan, South Korea and Thailand, boosting sales for U.S. cigarette makers R.J. Reynolds and Philip Morris.

The U.S. got a taste of its own medicine when a WTO panel in April upheld a ruling that the U.S. had discriminated against Indonesia by enforcing a ban on flavored cigarettes that exempted menthol but included Indonesian clove cigarettes. The U.S. has until next July to amend the law by treating all flavorings the same or to reach an agreement with Indonesia on compensation.

Ticking Time Bomb

The key issue now, though, isn't traditional barriers but whether health regulations unduly restrict the movement of goods. In challenging anti-smoking rules, the industry has drawn on global treaties, such as the 1994 pact known as TRIPS (the Agreement on Trade Related Aspects of International Property Rights), that include broad protections for intellectual property and foreign investment.

"We will continue to use all necessary resources...and where necessary litigation, to actively challenge unreasonable regulatory proposals."

—Louis Camilleri, chairman and CEO of Philip Morris International.

In the hands of aggressive corporations, such provisions have become "the ticking time bomb for this century as governments tackle problems like tobacco, the environment, obesity, access to essential medicines," said Myers of the Campaign for Tobacco-Free Kids.

Events in the southern African nation of Namibia reflect the debate. In November, 2011, Namibian officials proposed to require graphic warnings on at least 60 percent of cigarette packs. The tobacco industry argued in written comments that such large warnings weren't justified and, in the words of British American Tobacco, would "impose a very significant barrier to trade." Namibia should pursue public health goals "in a manner that is respectful of its international obligations," the company said.

The proposal is still pending, but Stanley Mungambwa, a senior health official in Namibia, sounded a defiant note in an email to FairWarning. "Namibia is a country that loves its people," he said. "Money obtained from coffins is not what Namibia's trade obligations is all about."

"Namibia is a country that loves its people. Money obtained from coffins is not what Namibia's trade obligations is all about."

—Stanley Mungambwa, a senior health official in Namibia.

Canada provided an early example of the possible chilling effects of industry threats. Though considered a leader in tobacco control, Canada in the mid-1990s withdrew a proposed plain packaging rule under legal pressure from the industry, which raised the issue of Canada's trade obligations.

That happened even though internal documents produced later in tobacco litigation showed that industry officials, despite their public stance, feared their legal position was weak. As a 1994 memo from British American put it, "current conventions & treaties offer little protection" against plain packaging rules.

No Slam Dunks

Two recent legal decisions confirmed that such cases are no slam dunk for the industry. In September, a court in Oslo, Norway, rejected a lawsuit by Philip Morris Norway AS that challenged the country's retail display ban. The company had claimed that in enforcing the ban, Norway had violated the European Economic Agreement by failing to use the least trade-restrictive measures to achieve its public health goals.

The court, siding with Norway's government, found that other measures would not be as effective in insuring that "as few as possible youngsters begin to smoke, to prevent them from developing tobacco dependency."

The second example was Australia's victory in the first phase of its legal defense of plain packaging. Rejecting a lawsuit by the four top global companies—Japan Tobacco Inc. and Imperial Tobacco, along with British American and Philip Morris International—Australia's High Court upheld the law as legal and constitutional.

The law requires that all cigarettes be sold in drab olive-brown packs, with pictorial warnings covering 75 percent of the front and 90 percent of the back.

The goal is to reduce "the attractiveness and appeal of tobacco products to consumers, particularly young people," a spokeswoman for Australia's Department of Health and Ageing said in an email to FairWarning.

But two major challenges remain.

In one, Philip Morris Asia has accused Australia of violating a 1993 bilateral trade pact between Hong Kong and Australia. Such agreements, known as investor-state treaties, allow a foreign investor by itself to bring damage claims against a country.

Lawyers for Australia contend the claim should be tossed out, citing a nimble asset-shuffling move by Philip Morris. To create grounds for the claim, they say, the company transferred its Australian operations to Hong Kong-based Philip Morris Asia after the plain packaging plan was announced.

The shares were transferred "for the very purpose of claiming a loss," said Benn McGrady, an adjunct professor of law at Georgetown University and expert on global trade and health. This, he said, should be "virtually terminal in terms of the merits of their claim."

Nixon of Philip Morris said the transfer should have no impact on the outcome. The case is before an arbitration panel of the United Nations Commission on International Trade Law.

Heavyweight Law Firms

And the WTO cases also remain alive. Cigarette makers are paying for heavyweight lawyers to represent Ukraine, Honduras and the Dominican Republic and press ahead with the challenges.

As company representatives have told FairWarning, Philip Morris International is paying the firm of Sidley Austin to represent the Dominican Republic, while British American is picking up legal expenses for Ukraine and Honduras.

“We are happy to support countries who, like us, feel plain packaging could adversely affect trade,” said British American spokesman Jem Maidment.

It’s not unusual in trade disputes for corporations to give legal assistance to governments with mutual interests. In this case, however, the three countries appear to have little direct stake in Australia’s tobacco control policies.

Tobacco exports from Ukraine to Australia are nonexistent, according to figures from Australia’s Department of Foreign Affairs and Trade. During the last three years, tobacco exports from Honduras and Dominican Republic have averaged \$60,000 (U.S.) and \$806,000, respectively.

Responding in April to an inquiry from Ukrainian journalists, the country’s Ministry of Economic Development and Trade said it had “a policy of supporting Ukrainian producers and protecting their interests in the internal and external markets.” In this case, the ministry said, it had “received concerns” about the plain packaging law from the Ukrainian Association of Tobacco Producers, made up of the top tobacco multinationals, and from the Union of Wholesalers and Producers of Alcohol and Tobacco Association.

Seeking to reverse Ukraine’s action, Andriy Skipalskyi, the 38-year old chairman of a Ukrainian public health group called the Regional Advocacy Center LIFE, collected hundreds of petition signatures at the Singapore conference asking his nation’s authorities to withdraw the challenge. The government ignored the request, and Honduras and Dominican Republic soon followed with complaints of their own.

Konstantin Krasovksy, a tobacco control official in Ukraine’s Ministry of Health, told FairWarning the countries had allowed themselves to be used. “Honduras, Dominican Republic and Ukraine agreed to be a prostitute,” he said.

Honduran officials, in an April press release, said Australia's law "contravenes several WTO obligations on intellectual property rights." It noted that the tobacco industry "employs several hundred thousand people directly and indirectly throughout the supply chain in Honduras."

The Dominican Republic, a major cigar exporter, also said plain packaging "will have a significant impact on our economy." In a written statement to FairWarning, Katrina Naut, director general for foreign trade with the country's Ministry of Industry and Commerce, said that if other countries join Australia in adopting plain packaging, it will lead to falling prices for name-brand tobacco products and "an increase—rather than a decrease—in consumption and illicit trade."

Battle in Uruguay

Among supporters of Australia, none is more vociferous than the government of Uruguay. It recently told the WTO's Dispute Settlement Body that the global trading system "should not force its Members to allow that a product that kills its citizens in unacceptable and alarming proportions continues to be sold wrapped as candy to attract new victims."

The stance reflects Uruguay's own high-stakes battle with Philip Morris.

The company has challenged Uruguay's requirement of graphic warnings on 80 percent of cigarette packs. Philip Morris is also fighting a rule that limits cigarette marketers to a single style per brand, making it illegal to sell Marlboro Gold and Green along with Marlboro Red.

The challenge by Swiss units of Philip Morris cites a 1991 bilateral treaty between Switzerland and Uruguay. Since filing the complaint in 2010, the tobacco company has also closed its only cigarette factory in Uruguay.

The regulations "are extreme, have not been proven to be effective, have seriously harmed the company's investments in Uruguay," according to a statement by Philip Morris International.

Uruguay, with a population of less than 3.5 million and an annual gross domestic product of about \$50 billion, seems a poor match for the tobacco giant, which recorded \$77 billion in sales in 2011.

Amid reports that government officials were seeking a face-saving settlement, Bloomberg Philanthropies announced in late 2010 that it would fund the legal defense of Uruguay's anti-smoking laws. New York Mayor and businessman Michael R. Bloomberg, an ardent tobacco foe, affirmed the support of his namesake charity in a call to Uruguayan president Jose Mujica.

Advocates fear other countries may have a harder time standing their ground. "Bloomberg has been very generous, but his resources are not unlimited and he can't pay to defend every tobacco regulation in every country," said Chris Bostic, deputy director for policy for the group Action on Smoking and Health.

The Uruguay case could be pivotal, said Dr. Eduardo Bianco, president of the Tobacco Epidemic Research Centre in Uruguay. "If they [Philip Morris International] succeed with Uruguay they would send a clear message to the rest of the developing countries: 'take care about us, you can be next.'"

A rallying cry for a better trade system

Posted July 23, 2015 by Sharon Treat

TradeTTIPFree trade agreements

“What is *your* chlorine chicken?” was the question, midway through our five-day, nonstop tour of seven European cities to talk about the Transatlantic Trade and Investment Partnership (TTIP), the largest bilateral trade agreement in history, currently being negotiated between the United States and the European Union. The very public European rallying cry “no chlorine chicken” not only sums up fundamentally different food safety and agricultural practices in the EU and U.S., but also the possibility that TTIP will dilute the precautionary principle that guides EU environmental and health policies, ultimately compromising small-scale farms and diminishing quality of life.

It was a good question and worth some thought. Is there an issue or catch-phrase that sums up American views on TTIP? After all, I was in Europe on a TTIP speaking tour (organized by the Greens and European Free Alliance of the European Parliament), along with Thea Lee, AFL-CIO economist and deputy chief staff, and Melinda St. Louis, Director of International Campaigns for Public Citizen’s Global Trade Watch, to talk specifically about the American point of view.

What we discovered on our tour is that the concerns of American and European families, workers and communities are similar. Ordinary people on both sides of the Atlantic do not favor a corporate-driven food and agriculture agenda, nor a race-to-the-bottom harmonizing of environmental laws that wipes out important protections from toxic chemicals and pesticides. Our whirlwind visit was just one step towards building a transatlantic understanding between workers, farmers, environmental activists and elected officials in national and regional parliaments.

We started our tour in Paris where we participated in a public forum in the French Senate moderated by Yannick Jodot, Green/EFA member of the European Parliament and Vice-President of the Commission on International Trade of the European Parliament, and Andre Gattolin, Green/EFA Senator de Hauts-de-Seine (Paris) and a leader of the successful effort by the French Senate in adopting a resolution opposing investor-state corporate arbitration provisions (ISDS) in TTIP.

Climate policy was foremost on the minds of many in the Paris forum with the United Nations COP 21 talks coming up at the end of November. “Are Americans fighting hard to address climate change? What about the impact TTIP will have rolling back climate targets through expanded fossil fuel exports?” asked Ameélie Canonne of Attac France and Aitec. People in the U.S. care about global warming, too, we responded. Don’t listen only to climate change deniers in Congress, look at the actions of the National Caucus of Environmental Legislators who are

leading the efforts to shift to renewable energy, and who have called for a study of TTIP climate impacts. Consider the fracking ban in Vermont, and moratoria in Maryland, California and dozens of New York counties and municipalities.

While Thea went to Madrid, Melinda and I flew on to Barcelona. Tapas at midnight, a few hours' sleep and then six different meetings during a heat wave! How to sum up in a few sentences? Perhaps most surprising and rewarding was our meeting with the Círculo de Economía, a civic association of nearly 50 years' standing. Time and again during our two-hour discussion, these leaders of the Barcelona business community raised concerns that TTIP will exacerbate income inequality, lower standards and, through secrecy and regulatory cooperation initiatives, undermine the continued development of democratic institutions – concerns not uppermost in the agendas of the large multinational U.S. businesses supporting TTIP. What could TTIP look like if it were actually designed to reduce income inequality and to strengthen democracy, I wondered?

From the Círculo de Economía we sped across town to the Catalan Parliament, housed in a repurposed and spectacular royal palace, to meet first with parliamentarians from across the political spectrum, and then with activists, who told us that 50,000 people marched in Barcelona on the April 18th day of action protesting TTIP – an expression of free speech threatened by a draconian gag law passed by the Spanish government that went into effect while we were there.

After a meet and greet with Argentina-born deputy mayor Gerardo Pisarello and another public forum, we were off again to Brussels for a major TTIP conference in the European Parliament the following day.

There, Thea got to debate Peter Chase of the U.S. Chamber of Commerce about whether TTIP is good for jobs, and Hans-Jürgen Volz of the German Federal Association of Medium-Sized Enterprises raised concerns that, contrary to talking points of USTR and EU trade negotiators, small and medium businesses averaging 25 employees won't benefit either from lowering standards through "regulatory cooperation" or from an Investor-State Dispute Settlement (ISDS) system that costs millions to participate in. Respected economist and former Deputy Director-General for Trade, Pierre Defraigne spoke passionately about his concerns with TTIP, which he said regulates capitalism in a regressive way, and Melinda made a strong case for why the ISDS system is both unnecessary and destructive.

I spoke about the goal of TTIP to "harmonize" standards, potentially wiping out consumer and environmental protections adopted by U.S. states that go beyond weak US federal laws on chemicals, pesticides and food safety. My concerns were validated by experts Chiara Giovannini, of the European Consumer Voice in Standardization, and Sanya Reid Smith of the Third World Network. Chiara questioned whether a "technical" standard is ever a neutral standard without consequences for consumers, and stated that the presumption of conformity proposed for TTIP, which could mutually recognize as equivalent EU and U.S. consumer standards such as those applicable to children's toys, would necessarily weaken standards in the European Union. Sanya gave examples of weakened standards resulting from other trade agreements similar to TTIP, such as Chile being forced by the U.S. to change its nutrition labeling on prepackaged food.

Then, it was on to Berlin, arriving on a balmy night in time to sample the local Kolsch beer at a canal-side cafe. The next day we'd have a whirlwind schedule – including breakfast with journalists, a public forum, lunch with labor leaders, meetings with members of the Bundestag and then with TTIP activists.

Both the public forum moderated by Green/EFA European Parliament member Ska Keller and the Bundestag meeting raised the same issues: the secrecy surrounding negotiations, especially on the U.S. side; the threat to EU food standards and the influence of U.S. agribusiness on the negotiations; whether controls on fracking will be undermined by ISDS; and the worry that less robust workplace benefits and collective bargaining protections in the U.S. could lead to a race to the bottom for all workers. As a member of Maine's Citizen Trade Policy Commission, I spoke to findings in our report on how TTIP could undermine our local food policy initiatives, and discussed interests in common with people in Germany: the fact that Farm to School programs have strong support all across the U.S., and that the vast majority of Americans also want healthier food and labeling of GMO foods.

Then it was back to the Berlin airport. Arriving in Vienna that night, we set out to explore local cafes, knowing that the next day, the final day of our tour, we would be participating in events in both Vienna and Budapest. Both Austria and Hungary are GMO-free countries, and there was a lot of interest in the fact that Vermont is in a legal battle with Monsanto to protect its GMO labeling law and that even if Vermont wins its domestic lawsuit, Monsanto wants to use TTIP to negate these and other states' standards. Our meeting with Austrian journalists was particularly well-attended. In competition with the mega-story of the week – “deal or no deal” between the EU and Greece – we nonetheless received extensive media coverage in Austria, including in Kronen Zeitung, the paper with the widest circulation in Austria, which has editorialized in opposition to TTIP.

After meeting with conservative, as well as progressive members of the Austrian Parliament skeptical of TTIP, we traveled by train to Budapest for our final forum. The well-attended event staged above a restaurant in a hip part of town was billed as “Fifty Shades of Trade.” Although briefly tempted to incorporate themes from the bestselling novel into our presentations, Thea, Melinda and I stuck to our talking points. László György, an economist and professor at Budapest University of Technology and Economics, joined our panel and reinforced one of Thea's themes based on the AFL-CIO experience: that *none* of the rosy economic projections supporting past U.S. trade agreements, including NAFTA and the Korea Free Trade Agreement, have proven the least bit accurate. In fact, independent projections for TTIP are for significant job losses in Europe.

The organizers of the Budapest event repeatedly told us how important it was for Americans such as ourselves to travel to Hungary to share our perspectives, and the audience stuck around on a sweltering Friday evening to pepper us with questions. It was a wonderful and somewhat quirky event with which to end our tour. I don't yet know the “chlorine chicken” issue that will easily explain TTIP to American audiences. I do know that short as it was, I returned home from the European Union trip convinced we have values in common and parallel goals for our societies – and that to influence the outcome of TTIP, we must act without delay and act together.

Sharon Treat, who served in the Maine legislature for 22 years, is working with IATP on the risks of TTIP proposals for innovative state and local legislation on food and farm systems.

- See more at: <http://www.iatp.org/blog/201507/a-rallying-cry-for-a-better-trade-system#sthash.rtE1rjJ0.dpuf>

POLITICO

The TPP issues in-depth

By Doug Palmer

7/24/15 1:49 PM EDT

There are hundreds if not thousands of issues to resolve within the nearly 30 chapters of the proposed Trans-Pacific Partnership pact, which would cover more than 40 percent of world economic output. Here are some that have received the most attention:

Autos — The United States has a 2.5 percent tariff on cars and 25 percent tariff on trucks; Japan has no tariffs on vehicles. However, the American Automobile Policy Council, which represents Ford, General Motors and Fiat Chrysler, says regulatory and tax hurdles effectively make Japan the most protected and closed automotive market in the world. U.S. negotiators have secured a commitment to phase out the 25 percent tariff on trucks over the longest period allowed for any product in the TPP — a way to counter any move by Japan to put long phase-outs of import tariffs on sensitive agricultural products. But for the past two years they have also been engaged in a negotiation aimed at dismantling “non-tariff barriers” that Japan has erected to U.S. auto exports. Japanese automakers produce all of the trucks and 71 percent of the vehicles they sell in the United States at their plants in North America. They argue Detroit-based automakers only have themselves to blame for their lack of success in Japan by offering cars larger than most Japanese consumers prefer. Meanwhile, both U.S. and Japanese automakers have interests in Malaysia, a booming auto market with significant restrictions on imports.

Currency — The White House beat back an effort in Congress to put a provision to require enforceable rules against currency manipulation in a bill to fast-track the passage of trade agreements. Still, the legislation makes addressing the concern a principal U.S. negotiating objective — the first time that has been done. If the TPP fails to include a meaningful currency provision, the pact could be subject to a disapproval resolution stripping away its fast-track protections, making it open for amendment and subject to filibuster in the Senate. Ohio Sens. Rob Portman, a Republican, and Sherrod Brown, a Democrat, have been out front in calling for enforceable currency rules, as have Democratic lawmakers from Michigan such as Rep. Sander Levin and Sen. Debbie Stabenow.

Dairy — A complicated four-way dance is going on in the dairy negotiations, and right now everyone is waiting for Canada to make its move. U.S. dairy producers were opposed to the agreement when it only included New Zealand, the world’s largest dairy producer, but came around when Canada and Japan, two substantial dairy markets, joined the negotiations. Now, as trade officials head to Maui, it looks like Japan is prepared to strike a deal on dairy products, although some concerns over access to its butter market remain. But so far, Canada has not put a meaningful dairy market offer on the table, leaving U.S. producers to fear they could lose more from the final agreement than they gain. That’s a problem for congressional approval because, as one lobbyist observed, “every senator has a cow in their state.”

Geographical indications — Many common names for cheese, such as parmesan and asiago, originated in Europe, and in recent free trade agreements, the European Union has tried to lock up rights to use the names for its own producers. The U.S. dairy industry fears that could hurt its exports and wants safeguards against that practice in the TPP. However, some countries such as

Canada, which is currently part of the TPP talks, and South Korea, which could join in a second tranche, have already signed free trade pacts with the EU that contain protections for geographic indications.

Government procurement — Many countries restrict access to their public works contracts, reasoning that domestic firms should be the main beneficiaries of taxpayer-funded projects. The United States allows some “Buy American” preferences for its own companies but generally has an open market and has pushed for more access to foreign government procurement through its free trade agreements. The issue is a sensitive one for Malaysia, which has had government procurement preferences to help ethnic Malays since 1969 and previously walked away from free trade talks with the United States over the issue. Many members of Congress from steel-producing states do not want to see any weakening of Buy American provisions under TPP, while Canada has sought more access to U.S. state and municipal projects funded by federal dollars.

Investor-State Dispute Settlement — Opponents of free trade agreements often point to the investor-state dispute settlement mechanism as one of their concerns. The provisions allows companies to sue host governments for actions that damage their investment. Critics say it undermines the right of governments to regulate in the public interest, while proponents say it is a necessary protection against discriminatory and arbitrary government action. Australia refused to include an ISDS provision its 2005 free trade pact with the United States, possibly because the United States refused to provide more access for Australian sugar. Australia more recently said it would consider the issue on a case-by-case basis and included ISDS in its free trade pact with South Korea but not with Japan, both of which it concluded in 2014. The United State has ISDS in all of its free trade pacts except the one with Australia.

Labor and environment — Labor groups have been some of the harshest critics of free trade agreements, arguing they keep wages low in the United States by encouraging companies to move production overseas in search of a cheaper workforce. Environmental advocates worry about damage to critical natural resources as result of increased trade. Neither group has been assuaged by the administration’s promises that the TPP will be the “most progressive” trade agreement in history. While final details are still secret, the pact is expected to contain enforceable labor and environmental provisions. However, some lawmakers have urged that countries such as Vietnam be required to comply with labor and environmental provisions of the pact before receiving any of its market access benefits.

Pharmaceuticals — This issue pits Washington’s desire to provide profit incentives for American pharmaceutical companies to develop new drugs against critics who say overly restrictive patent and clinical test data protections drive up the price of generic medicines and potentially limit the ability of countries to define their own national intellectual property standards. Recent U.S. free trade agreements with Colombia, Peru, Panama and South Korea have provided five years of “data exclusivity” for patent holders. Another protection, known as patent linkage, was made voluntary for the three Latin American countries but mandatory for South Korea. It requires regulators to check for potential patent violations before approving a new generic drug for manufacturing. The United States has been pushing for 12 years of data protection for “biologic” drugs, the same as contained in the 2010 Affordable Care Act, but is alone on that position. Both Canada and Japan provide eight years of data protection for biologics in their own laws while five years is the norm for many other countries. The advocacy

group Doctors Without Borders has warned 12 years of data exclusivity for biologics would “limit access to medicines for at least half a billion people,” but Senate Finance Committee Chairman Orrin Hatch has pushed hard for the lengthy term.

Pork — When Japan sought to exclude a long list of “sacrosanct” agricultural commodities from complete tariff elimination under the pact, no one screamed their opposition louder than the National Pork Producers Council. A year later, the group’s efforts seem to have worked, and the pork industry appears largely satisfied with the Japanese market access package as final negotiations near, although officials have some remaining concerns that they say need to be addressed in Maui. U.S. pork producers are also excited about the deal with Vietnam, a fast-growing country of 90 million people where rising incomes are expected to boost meat consumption in future years. Iowa and North Carolina are the top pork-producing states, but production is spread throughout the Midwest and reaches as far south as Texas.

Rice — Japanese consumers eat more than 130 pounds of rice each year, about four times U.S. levels, but very little comes from outside the country. Because rice cultivation is so closely associated with the national identity, the government uses a combination of strict quotas and high tariffs to ensure picturesque rice paddies remain in the Japanese landscape. U.S. rice producers still hope for expanded export opportunities, but if the United States is stingy with Australia on sugar it’s harder to press Japan on rice. Arkansas is the biggest rice producing state, with sizeable production in Louisiana, Texas and California.

State-owned enterprises — Companies directly or indirectly owned by governments play an increasingly large role in international trade and often are dominant players in their own markets. Japan Post, a state-owned conglomerate that operates a wide variety of businesses, including post offices, banks and an insurance division, ranks 23rd on Fortune magazine’s list of the 500 largest companies in the world. SOEs are responsible for an estimated 40 percent of Vietnam’s economic output and also play major roles in Malaysia and Singapore’s economies. TPP countries appeared to have largely agreed on a set of rules to “level the playing field” between state-owned and private firms, but a debate continues over which SOEs would be excluded from the disciplines.

Sugar — The U.S. government supports domestic sugar prices by restricting imports but typically has given free-trade partners some additional access to the United States. Not so with Australia, which got nothing on sugar in the free trade deal it struck in 2004. U.S. Trade Representative Michael Froman has hinted the U.S. would provide some additional access this time around but in a way that would not jeopardize the sugar program, which benefits sugarcane farmers in Florida and Louisiana and sugarbeet growers in Michigan, Wisconsin, North Dakota, Nebraska, Montana, Wyoming, Idaho and Washington.

Tobacco — With U.S. cigarette consumption continuing to fall, American tobacco companies are eager for new markets to sell their products. Many anti-smoking groups argue tobacco should not even be included in free trade agreements, while farm and business groups counter that excluding any legal product sets a bad precedent. The issue gained prominence after Philip Morris used a bilateral investment treaty between Hong Kong and Australia to sue for damages stemming from Australia’s “plain packaging” law, which replaced familiar cigarette trademarks with graphic images of cancer victims. U.S. trade officials proposed to address the issue within the TPP by agreeing that measures taken to protect human, animal or plant life or health would

not violate the agreement as long as they not disguised trade barriers. Washington also proposed requiring any TPP country to first consult with its TPP partners before challenging any tobacco control measure as a violation of the trade pact. Neither anti-smoking nor business groups were happy with the compromise. Malaysia countered with a proposal that would exempt tobacco-control measures from being challenged under TPP.

Textiles and footwear — The United States imported \$82 billion worth of apparel in 2014, including about \$30 billion from China. Vietnam was second with more than \$9 billion in sales to the United States and would be in a good position to grab market share from China under TPP pact because of tariff elimination. However, strict “rules-of-origin” are expected to limit Vietnam’s gains by requiring that any clothing be wholly assembled within the TPP countries to qualify for duty-free treatment under that pact. That means Vietnam could not import fabric from a third country, such as China, and use it to make clothing that qualifies for duty-free treatment. Some exceptions to that rule, in terms of a list of apparel products that are in “short supply” in the United States, are expected. Still, a significant loosening of the “yarn forward” rule of origin poses problems for clothing manufacturers in TPP countries Peru and Mexico, who have adapted to the standard.

Historic trade pact could be undone by ... cheese?

Top trade officials from 12 countries scattered around the Asia-Pacific region will descend on the island of Maui for a week of meetings starting Friday.

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By Stan Collender

The Obama administration is closer than ever on a breakthrough on the biggest trade deal in world history. But years of delicate negotiating could be undone by Canadian milk. Or Japanese rice. Or U.S. pharmaceutical patents.

Top trade officials from 12 countries scattered around the Asia-Pacific region descended on the island of Maui on Friday for a week of meetings, where they will sit in hotel conference rooms negotiating a free trade zone that would cover about 40 percent of world economic output.

And while they could leave with a breakthrough deal, the talks could just as easily be blown up by petty and not-so-petty grievances over everything from cheese labels to auto tariffs.

The administration sees the Trans Pacific Partnership as a major part of President Barack Obama's legacy, and his top trade representative, Michael Froman has visited four countries and met with most of the others in Washington, D.C., over the past several weeks urging them to be prepared to close the deal. The Republican Congress has already given Obama special trade promotion authority, which would allow him to push through the deal with a simple majority vote.

But time is short, and there's no guarantee of an agreement.

Canada wants to protect its dairy and poultry producers and Japan, its rice farmers. American drug companies want other countries to adopt strong U.S. protections on a blockbuster new class of medicines called biologics, and U.S. automakers oppose giving Japan more market access. Canada and Malaysia are particular concerns because of difficult domestic politics that could make it more difficult for them to close in Maui, even if other countries are ready.

If talks slip into next year, election-year politics could destroy any momentum and relegate the pact to another administration.

"I think there's limited time to try to conclude a deal," said Tami Overby, senior vice president for Asia at the U.S. Chamber of Commerce. "I think there is a political drop-dead date. I don't know what that date is and I won't speculate on it. ... But I do think there is one out there, and I think probably the administration is very focused on that and has worked backward."

The breathless pace is possible only because of the so-called "fast-track" bill, strongly opposed by most Democrats, labor, environmental and health-care activists who are critical of the trade deal.

"The administration has indicated they want to wrap up negotiations in this round," Rep. Rosa DeLauro, a staunch opponent of the agreement, told reporters. "My colleagues and I are here to say that is altogether too fast a schedule. ... The agreement itself is riddled with problems. Congress, industry, advocates still have enormous concerns which the administration has done little or nothing to resolve."

Timelines built into the new trade promotion authority law require Obama to give Congress 90 days' notice before signing any trade deal and to make the agreement public 60 days before signing. So the transpacific pact must be completed soon for Congress to vote on it before Christmas, the administration's best-case scenario.

Still, U.S. trade officials have never closed a deal quite as complex as the TPP, which aims to establish the rules of trade for the 21st century and anchor the United States securely in the fastest-growing economic region of the world rather than cede it to an ever-more-dominant China.

"It's going to be some of the most interesting negotiations in diplomatic history," said John Corrigan, who tracks the talks for the U.S.-ASEAN Business Council, a group of companies active in the Southeast Asia region. "Certainly the most important trade deal in global commercial history, the most complex and the most forward-looking."

The proposed pact would update the North American Free Trade Agreement between the United States, Canada and Mexico and expand it to nine other countries that range widely in terms of economic development and political systems but share a desire for closer trade ties: These include two that fought bitter wars against the United States in the 20th century — Japan and Vietnam — as well as Australia, New Zealand, Chile, Peru, Malaysia, Singapore and Brunei.

Even before the deal's details have been released, the TPP has stirred NAFTA-sized opposition, with labor, environmental and other activist groups preparing to fight the agreement, which could be headed to Congress for a straight up-or-down vote by the end of this year or early 2016 — just as the presidential primary season is getting underway.

Obama has promised the TPP will be the "most progressive trade deal in history" in terms of raising labor and environmental standards, especially in less-developed TPP countries like Malaysia, Vietnam and Mexico. But opponents are skeptical it will make much of difference in those areas and say it will simply encourage more jobs to move overseas.

"The 'most progressive trade agreement' isn't much of a standard in our point of view," AFL-CIO President Richard Trumka told POLITICO this week. "It can be better than the others, but still not good enough. ... Bad trade agreements lower wages. Bad trade agreements take jobs away."

Meanwhile, Congress is closely watching the final negotiations, demanding a pact that opens markets and expands protections for U.S. intellectual property while not harming politically important constituencies.

"I think [Froman] understands the hot spots for the people who support opening up markets and where he needs to go in order to get votes," Rep. Pat Tiberi, chairman of the House Ways and Means Committee's Trade Subcommittee. "I think he clearly understands that he can't just come back with whatever" and win congressional approval.

The final agreement could have 30 chapters covering an almost uncountable number of issues in areas including tariffs on farm products and manufactured goods, barriers to cross-border services trade, labor and environmental protections and the controversial intersection of drug patents and access to medicines. That's bigger and more comprehensive than NAFTA, which had 22 chapters, and the more recent U.S.-South Korea pact, which had 24.

New areas include an attempt to promote trade by reducing differences in government regulations, a focus on helping small- and medium-sized companies take better advantage of the agreement and other initiatives aimed at promoting regional supply chains and improving economic development and governance in the pact's poorer countries.

Much of the tough bargaining in Maui will be over market access for agricultural and manufactured goods, with Japanese and Canadian import barriers in the spotlight, although the United States has sensitive sectors — such as sugar, autos, apparel and footwear — that it's under pressure to shield.

Heading into the meeting, Japan was offering only minimal new market access for rice — a commodity closely associated with the Japanese national identity — but has come a long way towards satisfying the demands of U.S. dairy, beef and pork producers to open its heavily protected market to those products.

That has shifted the attention to Canada, which supports its dairy and poultry producers through a supply-management program that restricts imports — a system left untouched by both the 1989 U.S.-Canada Free Trade Agreement and the NAFTA pact, which took effect in January 1994.

Now, Canada's reluctance to open its dairy market is causing heartburn for U.S. dairy producers, who say they can't support the TPP agreement unless they get greater sales opportunities in Canada and Japan than the deal would require them to give up to New Zealand, the world's largest dairy exporter.

"We understand the difficulties of Canada, but we have expressed very clearly that we need to see meaningful access from Canada, otherwise it's going to be very difficult for us to support an

agreement,” said Jaime Castaneda, senior vice president for trade at the National Milk Producers Federation.

The hard political situation facing Canadian Prime Minister Stephen Harper, who is up for re-election in October, has prompted speculation that Canadian negotiators may not be part of any deal reached in Maui and could wait until a later date to sign onto the pact. However, U.S. officials have indicated they would like to close the agreement with the United States’ biggest trade partner still on board.

Meanwhile, Malaysian Prime Minister Najib Razak faces accusations of possible corruption stemming from his government’s control of a sovereign wealth fund, which has weakened his political standing just as TPP negotiators are striving to reach a deal.

Malaysia is being asked to make a number of difficult reforms to state-owned enterprises, its financial services sector and government procurement, where ethnic Malays known as the bumiputera or “sons of the land,” have enjoyed preferential access to public works contracts since 1969.

“Right now, [Najib’s] fighting for his political survival, which is probably going to make it difficult for him to agree with the terms of the TPP if it goes through very quickly in Hawaii,” said Murray Hiebert, a senior fellow at the Center for Strategic and International Studies, a foreign policy think tank.

Malaysia could take a pause in the negotiations and try to close at a later date as part of a second tranche of countries, which could include South Korea, the Philippines and Taiwan, he said.

Another Southeast nation, Vietnam, appears prepared to strike the deal and take on tough reforms of its labor regime and state-run economy, assuming it gets enough additional access in the United States for its clothing and shoe exports. Big U.S. retailers are in Vietnam’s camp. But the White House has to walk a fine line with U.S. textile producers, who are wary of the increased competition and continue to have strong support in Congress despite their diminished number.

“We’re going to this TPP round to support what we think is the most logical approach to this,” said Augustine Tantillo, president of the National Council of Textile Organizations. “That is to come out with an agreement that fairly balances the interests of all parties, including manufacturers and workers, and not get caught in how much more money can a retailer glean out of this by squeezing the production and manufacturing segment of the industry.”

The U.S. is also in a defensive crouch when it comes to autos, where Detroit-based manufacturers like Ford and General Motors worry about losing more market share to Japanese brands if the United States sheds its 2.5 percent tariff on cars and 25 percent tariff on pickup trucks. The U.S. companies say they could oppose TPP unless it includes rules against currency manipulation and forces Japan to dismantle “non-tariff barriers” that block American vehicle sales there.

“Clearly, we see Japan as a closed automotive market with sort of a symbiotic relationship between government and industry that results in policies that make it difficult for us to sell in Japanese markets,” said Matt Blunt, president of the American Automotive Policy Council. “We’ve yet to really see anything that indicates there is a commercially meaningful breakthrough on any of the technical barriers that exist in Japan.”

In another sensitive area, Australia is pushing for more access to the U.S. sugar market, and the White House is weighing how much it can give in that sector versus how many votes it will lose in Congress if it offers too much.

“They’re doing that calculation on everything,” the Chamber’s Overby said. “And with this chessboard being as complicated as it is, there are probably two or three people in USTR and the White House who know those moving parts and make those decisions.”

CTPC Staff Note: This executive summary was excerpted from a more than 50 page report produced by Public Citizen's Global Trade Watch. The entire report can be viewed at the CTPC website:

<http://legislature.maine.gov/legis/opla/citpolsumis.htm>

Prosperity Undermined

The Status Quo Trade Model's 21-Year Record of Massive U.S. Trade Deficits, Job Loss and Wage Suppression

www.tradewatch.org

August 2015

Public Citizen's Global Trade Watch

Executive Summary

Trade Deficits Surge, Good U.S. Jobs Destroyed

○ **U.S. trade deficits have surged under the status quo trade policy model, costing U.S. jobs and diminishing U.S. economic growth.** Since establishment of NAFTA and the WTO, the U.S. goods trade deficit has more than quadrupled, from \$218 billion (in today's dollars) to \$917 billion – an increase from two percent to more than five percent of national income.³³ Standard macroeconomics shows that a burgeoning U.S. trade deficit costs U.S. jobs and puts a damper on U.S. economic growth when the U.S. economy is not at full employment (as it has not been since the 2007-2008 financial crisis).³⁴ In addition, economists – from Federal Reserve officials to Nobel laureates – widely agree that this huge trade deficit is unsustainable: unless the United States implements policies to shrink it, the U.S. and global economies are exposed to risk of crisis and instability.³⁵ Status quo trade policy has only exacerbated these problems. The aggregate U.S. goods trade deficit with the 20 U.S. FTA partners is now \$178 billion – more than five times as high as before the deals went into effect. Since China entered the WTO with Congress' approval in 2001, the U.S. goods trade deficit with China has surged from \$112 billion to \$350 billion.³⁶ And in the first three years of the 2012 FTA with Korea, the U.S. template for the TPP, the U.S. goods trade deficit with Korea swelled 90 percent as U.S. exports to Korea fell and imports ballooned.³⁷ The 90 percent trade deficit increase under the Korea FTA's first three years starkly contrasts with the 2 percent *decrease* in the global U.S. goods trade deficit during the same period.³⁸

○ **U.S. agricultural exports are lagging under U.S. trade deals while agricultural imports are surging, belying empty promises used to sell the deals to farmers and ranchers.** NAFTA and WTO supporters told U.S. farmers that the pacts would increase exports and thus provide a new path for struggling farmers to succeed economically.³⁹ But data from the U.S. Department of Agriculture show that the volume of U.S. food exports to all FTA partners has risen just 1 percent since 2008 while rising 24 percent to the rest of the world.⁴⁰ In the first three years of the 2012 Korea FTA, total U.S. agricultural exports to Korea *have fallen* 5 percent, while rising 4 percent to the rest of the world.⁴¹ Meanwhile, agricultural imports from FTA countries have surged. In 2014, the 20 U.S. FTA partners were the source of 71 percent of all U.S. food imports, but were the destination of just 35 percent of all U.S. food exports (by volume).⁴² Due to stagnant U.S. food exports to FTA countries and a surge in food imports from those countries, the U.S. food trade balance with FTA countries has fallen 13 percent since 2011, the year before the most recent FTAs took effect. In contrast, the U.S. food trade surplus with the rest of the world has *risen* 23 percent since 2011.⁴³ The disparity owes in part to the fact that the U.S. agricultural trade balance with NAFTA partners has fallen from a \$2.5 billion trade *surplus* in the year before NAFTA to a \$1.1 billion trade *deficit* in 2014 – the largest NAFTA agricultural trade deficit to date.⁴⁴ Smaller-scale U.S. family farms have been hardest hit by such unbalanced agricultural trade under deals like NAFTA and the WTO. Nearly 180,000 small U.S. family farms – one out of 10 – have gone under since NAFTA and the WTO took effect.⁴⁵ Status quo U.S. trade policy also poses

serious risks to food safety, as our current trade agreements both increase imports *and* set limits on the safety standards and inspection rates for imported foods.⁴⁶ WTO and NAFTA required the United States to replace its long-standing requirement that only meat and poultry meeting U.S. safety standards could be imported. Under this standard, only meat from plants specifically approved by U.S. Department of Agriculture inspectors could be imported. But WTO and NAFTA – and the FTAs that followed – required the United States to accept meat and poultry from all facilities in a trade partner country if that country’s system was found to be “equivalent,” even if core aspects of U.S. food safety requirements, such as continuous inspection or the use of government (not company-paid) inspectors, were not met.⁴⁷

○ **Nearly 5 million U.S. manufacturing jobs – one out of four – have been lost in the era of NAFTA, the WTO and NAFTA expansion deals.**⁴⁸ The U.S. manufacturing sector has long been a source of innovation, productivity, growth and good jobs.⁴⁹ By 2014, the United States had just 12 million manufacturing jobs left, with less than 9 percent of the U.S. workforce in manufacturing for the first time in modern history.⁵⁰ The U.S. Department of Labor lists millions of workers as losing jobs to trade since NAFTA and the WTO were established – and that is under just one narrow program that excludes many whose job loss is trade-related.⁵¹ The Economic Policy Institute (EPI) estimates that the ballooning trade deficit with Mexico alone under NAFTA resulted in the *net* loss of about 700,000 U.S. jobs by 2010,⁵² and that the massive increase in the U.S.-China trade deficit since China’s entry into the WTO has cost an estimated 3.2 million U.S. jobs, including 2.4 million manufacturing jobs.⁵³ In addition, the 90 percent increase in the U.S. goods trade deficit with Korea in the first three years of the Korea FTA equates to the loss of more than 90,000 U.S. jobs, counting both exports and imports, according to the trade-jobs ratio that the Obama administration used to project job *gains* from the deal.⁵⁴ Analysts and policymakers of diverse political stripes believe that the rebuilding of the manufacturing sector is important to U.S. security and economic well-being.⁵⁵ Some argue that technology-related efficiency gains also spur U.S. manufacturing job loss in attempt to diminish the role of trade policy.⁵⁶ But an oft-cited 2013 National Bureau of Economic Research study on the job impacts of both technology and trade found “no net employment decline” from technological change from 1990 to 2007 while finding a strong correlation between increasing import competition from China and “significant falls in employment, particularly in manufacturing and among non-college workers.”⁵⁷ In any case, Congress actually has a say over trade policy. Why would we not push for a new trade policy that fosters rather than erodes our manufacturing base?

○ **Offshoring of U.S. jobs is moving rapidly up the income and skills ladder.** Alan S. Blinder, a former Federal Reserve vice chairman, Princeton economics professor, and NAFTA-WTO supporter, says that one out of every four U.S. jobs could be offshored in the foreseeable future.⁵⁸ In a study Blinder conducted with Alan Krueger, fellow Princeton economist and former Chairman of President Obama’s Council of Economic Advisers, the economists found the most offshorable industry to be finance, not manufacturing (with information and professional services also showing high offshoring propensity).⁵⁹ Indeed, according to their data, U.S. workers with a four-year college degree and with annual salaries above \$75,000 are those most vulnerable to having their jobs offshored, meaning the United States could see its best remaining jobs moving abroad.⁶⁰

○ **Devastation of U.S. manufacturing is eroding the tax base that supports U.S. schools, hospitals and the construction of such facilities, highways and other essential infrastructure.** The erosion of manufacturing employment means there are fewer firms and well-paid workers to contribute to local tax bases. Research shows that a broader manufacturing base contributes to a wider local tax base and offering of social services.⁶¹ With the loss of manufacturing, tax revenue that could have expanded social services or funded local infrastructure projects has declined,⁶² while displaced workers have turned to welfare programs that are ever-shrinking.⁶³ This has resulted in the virtual collapse of some local governments.⁶⁴ Building trade and construction workers have also been directly hit both by shrinking government funds for infrastructure projects and declining demand for maintenance of manufacturing firms. Meanwhile, more-of-the-same trade agreements could also undermine our access to essential services, given that they contain provisions that limit the policies federal and state governments can use to regulate service sectors.⁶⁵

○ **The WTO, NAFTA and NAFTA expansion agreements ban Buy American preferences and forbid federal and many state governments from requiring that U.S. workers perform the jobs created by the outsourcing of government work.** “Anti-offshoring” and Buy American requirements, which reinvest our tax dollars in our local communities to create jobs here, are prohibited under NAFTA-style trade agreements’ procurement rules.⁶⁶ These rules require that all firms operating in trade-pact partner countries be treated as if they were domestic firms when bidding on U.S. government contracts to supply goods or services.⁶⁷ Complying with this requirement means gutting existing Buy American or Buy Local procurement preferences that require U.S. taxpayer-funded government purchases to prioritize U.S.-made goods, or rules that require outsourced government work to be performed by U.S

workers. By expanding past trade deals' procurement restrictions, the TPP would promote further offshoring of our tax dollars.⁶⁸ Trade pacts' limits on domestic procurement policies could also subject prevailing wage laws – ensuring fair wages for non-offshorable construction work – to challenge in foreign tribunals.⁶⁹

U.S. Wages Stagnate, Despite Doubled Worker Productivity

○ **U.S. middle-class wages have remained flat in real terms since the 1970s, even as U.S. worker productivity has doubled.** In 1979, the median weekly wage for U.S. workers in today's dollars was about \$749. In 2014, it had increased just four dollars to \$753 per week. Over the same period, U.S. workers' productivity doubled.⁷⁰ Economists now widely name "increased globalization and trade openness" as a key explanation for the unprecedented failure of wages to keep pace with productivity, as noted in recent Federal Reserve Bank research.⁷¹ Even economists who defend status-quo trade policies attribute much of the wage-productivity disconnect to a form of "labor arbitrage" that allows multinational firms to continually offshore jobs to lower-wage countries.⁷²

○ **Trade agreement foreign investor privileges promote offshoring of production from the United States to low-wage nations.** Trade competition has traditionally come from imports of products made by foreign companies operating in their home countries. But today's "trade" agreements also contain extraordinary foreign investor privileges that reduce many of the risks and costs associated with relocating production from developed countries to low-wage developing countries. Due in part to such offshoring incentives, many imports now entering the United States come from companies originally located in the United States and other wealthy countries that have moved production to low-wage countries. For instance, nearly half of China's exports are now produced by foreign enterprises, not Chinese firms.⁷³ Underlying this trend is what the Horizon Project called the "growing divergence between the national interests of the United States and the interests of many U.S. multinational corporations which, if given their druthers, seem tempted to offshore almost everything but consumption."⁷⁴ U.S. workers effectively are now competing in a globalized labor market where some poor nations' workers earn less than 10 cents per hour.⁷⁵

○ **Manufacturing workers displaced by trade have taken significant pay cuts.** Trade affects the *composition* of jobs available in an economy. As mentioned, trade deficits also inhibit the overall *number* of jobs available when the economy is not at full employment. But even when unemployment is low and the overall *quantity* of jobs is largely stable, trade policy impacts the *quality* of jobs available. In the two decades of NAFTA-style deals, the United States has lost higher-paying manufacturing jobs even in years when unemployment has remained low, as new lower-paying service sector jobs have been created.⁷⁶ The result has been downward pressure on U.S. middle-class wages. A recent National Bureau of Economic Research study concludes, "offshoring to low wage countries and imports [are] both associated with wage declines for US workers. We present evidence that globalization has led to the reallocation of workers away from high wage manufacturing jobs into other sectors and other occupations, with large declines in wages among workers who switch..."⁷⁷ Indeed, according to the U.S. Bureau of Labor Statistics, about three out of every five displaced manufacturing workers who were rehired in 2014 experienced a wage reduction. About one out of every three displaced manufacturing workers took a pay cut of greater than 20 percent.⁷⁸ For the median manufacturing worker earning more than \$38,000 per year, this meant an annual loss of at least \$7,600.⁷⁹

○ **Trade policy holds back wages even of jobs that can't be offshored.** Economists have known for more than 70 years that *all* middle-class workers – not just manufacturing workers – in developed countries like the United States could face downward wage pressure from free trade.⁸⁰ NAFTA-style deals only exacerbate this inequality-spurring effect by creating a selective form of "free trade" in goods that non-professional workers produce while extending monopoly protections – the opposite of free trade – for certain multinational firms (e.g. patent protections for pharmaceutical corporations).⁸¹ When manufacturing workers are displaced by offshoring or imports and seek new jobs, they add to the supply of U.S. workers available for non-offshorable, non-professional jobs in hospitality, retail, health care and more. But as increasing numbers of U.S. workers, displaced from better-paying jobs, have joined the glut of workers competing for these non-offshorable jobs, real wages have actually been declining in these growing sectors.⁸² Thus, proposals to retool U.S. programs that retrain workers who lose their jobs to trade, while welcome, do not address much of the impact of status quo U.S. trade policies. The damage is not just to those workers who actually lose jobs, but to the majority of U.S. workers who see their wages stagnate.

○ **The bargaining power of U.S. workers has been eroded by threats of offshoring.** In the past, U.S. workers represented by unions were able to bargain for their fair share of economic gains generated by productivity increases.⁸³ But the foreign investor protections in today's "trade" agreements, by facilitating the offshoring of production, alter the power dynamic between workers and their employers. NAFTA-style deals boost firms' ability to suppress workers' requests for wage increases with credible threats to offshore their jobs. For instance, a study for the North American Commission on Labor Cooperation – the body established in the labor side agreement of

NAFTA – showed that after passage of NAFTA, as many as 62 percent of U.S. union drives faced employer threats to relocate abroad. After NAFTA took effect, the factory shut-down rate following successful union certifications tripled.⁸⁴

- **The current trade model's downward pressure on wages outweighs the gains of access to cheaper imported goods, making most U.S. workers net losers.** Trade theory states that while workers may lose their jobs or endure downward wage pressure under trade “liberalization,” they also gain from greater access to cheaper imported goods. When the non-partisan Center for Economic and Policy Research (CEPR) applied the actual data to the trade theory, they discovered that when you compare the lower prices of cheaper goods to the income lost from low-wage competition under status quo trade policies, the trade-related wage losses outweigh the gains in cheaper goods for the majority of U.S. workers.⁸⁵ The CEPR study found that U.S. workers without college degrees (61 percent of the workforce)⁸⁶ have lost an amount equal to about 10 percent of their wages, even after accounting for the benefits of cheaper goods.⁸⁷ That means a net loss of more than \$3,500 per year for a worker earning the median annual wage of \$35,540.⁸⁸

- **Powerful sectors obtained protection in NAFTA and WTO-style pacts, raising consumer prices.** While agreements like NAFTA and the WTO contribute to downward pressure on U.S. wages, they also include special industry protections that, beyond being antithetical to “free trade,” directly increase the prices of key consumer products, further reducing workers’ buying power. For instance, special protections for pharmaceutical companies included in the WTO required signatory governments, including the U.S. government, to change domestic laws so as to provide the corporations longer monopoly patent protections for medicines.⁸⁹ The University of Minnesota found that extending U.S. monopoly patent terms by three years as required by the WTO increased the prices that U.S. consumers paid for medicine by more than \$8.7 billion in today’s dollars.⁹⁰ That figure only covers medicines that were under patent in 1994 (when WTO membership was approved by Congress), so the total cost to us today is much higher.

U.S. Income Inequality Increases

- **The inequality between the rich and the rest of us in the United States has jumped to levels not seen since the pre-depression 1920s.** The richest 10 percent in the United States are now taking half of the economic pie, while the top 1 percent is taking more than one fifth. Wealthy individuals’ share of national income was stable for the first several decades after World War II, but started increasing in the early 1980s, and then shot up even faster in the era of NAFTA, the WTO and NAFTA expansion pacts. From 1981 until the establishment of NAFTA and the WTO, the income share of the richest 10 percent increased 1.3 percent each year. In the first six years of NAFTA and the WTO, this inequality increase rate doubled, with the top 10 percent gaining 2.6 percent more of the national income share each year (from 1994 through 2000). Since then, the income disparity has increased even further.⁹¹ Is there a connection to trade policy?

- **Longstanding economic theory states that trade will likely increase income inequality in developed countries like the United States.** As competition with low-wage labor abroad puts downward pressure on middle-class wages while boosting the profits of multinational firms, the gap between the rich and everyone else widens. In the 1990s a spate of economic studies put the theory to the test, resulting in an academic consensus that trade flows had indeed contributed to rising U.S. income inequality.⁹² The pro-“free trade” Peterson Institute for International Economics, for example, found that 39 percent of the increase in U.S. wage inequality was attributable to U.S. trade flows.⁹³ In 2013, when EPI updated an oft-cited 1990s model estimate of trade’s impact on U.S. income inequality, it found that using the model’s own conservative assumptions, trade with low-wage countries played a much larger role in spurring U.S. income inequality in the last two decades. EPI found that trade flows, according to the well-known model, accounted for 93 percent of the increase in U.S. income inequality from 1995-2011 – an era marked by the establishment of NAFTA, the WTO and NAFTA expansion pacts.⁹⁴ Expressed in dollar terms, EPI estimated that trade’s inequality-exacerbating impact spelled a \$1,761 loss in wages in 2011 for the average full-time U.S. worker without a college degree.⁹⁵

- **The TPP’s expansion of status quo trade policy would result in pay cuts for all but the richest 10 percent of U.S. workers.** In 2013 economists at CEPR dug into the results of a study done by the pro-TPP Peterson Institute for International Economics that, despite using overoptimistic assumptions, projected the TPP would result in tiny economic gains in 2025. CEPR assessed whether those projected gains would counterbalance increased downward

pressure on middle-class wages from the TPP, applying the empirical evidence on how recent trade flows have contributed to growing U.S. income inequality. Even with the most conservative estimate from the economic literature of trade's contribution to inequality (that trade is responsible for just 10 percent of the recent rise in income inequality), they found that the losses from projected TPP-produced inequality would wipe out the tiny projected gains for the median U.S. worker. With the still-conservative estimate that trade is responsible for just 15 percent of the recent rise in U.S. income inequality, the CEPR study found that the TPP would mean wage losses for all but the richest 10 percent of U.S. workers.⁹⁶ That is, for any workers making less than \$90,060 per year (the current 90th percentile wage), the TPP would mean a pay cut.⁹⁷

○ **Technological changes or education levels do not fully account for U.S. wage pressures.** Some have argued that advances in computer technology explain why less technologically-literate U.S. workers have been left behind, asserting that more education – rather than a different trade policy – is how the United States will prosper in the future.⁹⁸ While more education and skills are desirable for many reasons, these goals alone will not solve the problems of growing inequality. First, recent studies indicate that the role of technological progress has been overstated. For example, Federal Reserve economists found “limited support” in a 2013 study for the notion that technological change explained U.S. workers’ declining share of national income, while identifying increasing import competition and offshoring as “a leading potential explanation.”⁹⁹ Second, even college-educated workers have seen wage growth stagnate, such as in technologically sophisticated fields like engineering, as offshoring has moved up the income ladder.¹⁰⁰ Thus, addressing trade policy, not only better educating U.S. workers, is an essential part of tackling rising income inequality.

○ **Is it even possible to compensate those losing under status quo trade policy, rather than change the policy?** To compensate the “losers” from our trade policy – the majority of U.S. workers facing downward wage pressures – CEPR finds that the government would have to annually tax the incomes of the limited number of “winners” more than \$50 billion and redistribute this sum to middle-class families.¹⁰¹ In contrast, the main compensating program – TAA – was allocated less than \$2 billion in FY2010, its highest funding year ever. Since then, its funding has been slashed 67 percent, falling below \$0.7 billion in FY2015.¹⁰² The \$50 billion needed to compensate wage losers would thus be more than 27 times the highest-ever level of funding for the program. Would the tax hike needed to cover such costs be politically feasible? Even if so, would its economic distortions outweigh supposed “efficiency gains” from existing trade deals?

Small Businesses' Exports and Export Shares Decline

○ **U.S. small businesses have endured lagging exports under NAFTA and falling exports under the Korea FTA.** In effort to sell controversial FTAs to Congress and the U.S. public, corporate and government officials typically promise that small businesses would be major winners from the deals. But U.S. Census Bureau data reveal that small firms endured an even steeper decline in exports to Korea than large firms in the Korea FTA's first two years (the latest available data separated by firm size). Firms with fewer than 100 employees saw exports to Korea drop 19 percent while firms with more than 500 employees saw exports decline 3 percent.¹⁰³ Meanwhile, small businesses' exports have lagged under NAFTA. Growth of U.S. small businesses' exports to all *non-NAFTA* countries was *nearly twice as high* as the growth of their exports to NAFTA partners Canada and Mexico from 1996 to 2013 (the earliest and latest years of available data separated by firm size).¹⁰⁴ During the same NAFTA timeframe, small firms' exports to Mexico and Canada grew less than half as much as large firms' exports (39 percent vs. 93 percent). As a result, U.S. small businesses' share of total U.S. exports to Mexico and Canada has fallen under NAFTA, from 14 to 10 percent. Had U.S. small firms not lost their share of exports to Canada and Mexico under NAFTA, they would be exporting \$18.6 billion more to those nations today.¹⁰⁵

○ **Most U.S. small and medium businesses do not benefit from NAFTA-style deals.** The Obama administration has claimed that the NAFTA-expanding TPP would be a boon to small and medium enterprises (SMEs) on the basis that small and medium firms comprise most U.S. exporters. First, government data show that FTAs have failed to increase export growth for U.S. firms overall – growth of U.S. exports to FTA partners actually has been 20 percent lower than U.S. export growth to the rest of the world over the last decade.¹⁰⁶ Second, SMEs comprise most U.S. exporting firms simply because they constitute 99.7 percent of U.S. firms overall.¹⁰⁷ The more relevant question is what share of SMEs actually depend on exports for their success. Only 3 percent of U.S. SMEs (firms with fewer than 500 employees) export any good to any country. In contrast, 38 percent of large U.S. firms (with more than 500 employees) are exporters.¹⁰⁸ Indeed, after two decades of NAFTA, just 0.6 percent and 1.1 percent of U.S. small businesses export to Mexico and Canada, respectively, compared to 19 percent and 26 percent of large firms.¹⁰⁹ Even if FTAs actually succeeded in boosting exports, exporting is primarily the domain of large firms, not small ones.

ARL Policy Notes

A blog of the Association of Research Libraries Influencing Public Policies strategic direction.

Analysis of August 2015 Leaked TPP Text on Copyright, ISP and General Provisions

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The United States is currently negotiating a large, regional free trade agreement with eleven other countries: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam. On August 5, 2015, Knowledge Ecology International published a new leak of the Trans-Pacific Partnership Agreement's (TPP) negotiating text for the intellectual property chapter. This text, dated May 11, 2015 reflects the state of the negotiations prior to the recent Ministerial meeting in Hawaii (and new agreements may have been made during the recent TPP meeting). This latest leak reveals some substantial changes from last year's October leak of the text by WikiLeaks (which revealed the state of negotiations as of May 14, 2014).

In general, the more recent text shows some improvement over last year's text, although serious problems remain.

Copyright

Copyright Term

The copyright term has not yet been agreed to, and it has widely been considered to be a political decision to be determined by the trade ministers. Currently, there is a wide range of proposals available for copyright term, ranging from life plus 50 years, to life plus 70 years, to life plus 100 years when based on the life of an author. For corporate works, there are four proposed terms of 50, 70, 75 or 95 years. These are wide ranging proposals and longer copyright terms exacerbate the orphan works problem and hamper the public domain. The potential for excessively long copyright terms that far exceed international standards is one of the largest remaining flaws in the agreement from the perspective of access to knowledge and information. Countries should resist copyright term extension, particularly given the lack of evidence supporting these extensive copyright terms.

Japan's proposal, which appeared in the previous leak, similar to the Berne rule of shorter term remains. This rule would essentially allow parties to limit the term of protection provided to authors of another party to the term provided under that party's legislation. For example, if the final TPP text required a period of copyright protection of life plus fifty years, the United States would not be required to provide its period of life plus seventy years to authors in New Zealand,

if New Zealand continued to provide a term of life plus fifty years. The United States does not currently implement the Berne rule of shorter term.

Formalities

In last year's leaked text, Article QQ.G.X appeared for the first time and was unbracketed, signaling agreement by the TPP negotiating parties. This provision read, "No Party may subject the enjoyment and exercise of the rights of authors, performers and producers of phonograms provided for in this Chapter to any formality." As noted in last year's analysis by ARI, the language was potentially problematic for countries wanting to re-introduce formalities for copyright protections granted that go beyond minimum international standards. The Register of Copyrights Maria Pallante, for example, proposed the re-introduction of formalities for the last twenty years of copyright protection in the United States, which would have violated the TPP if a period of life plus seventy years was also agreed to.

Although this provision was unbracketed in the 2014 text, it appears from the current leak that this ban on formalities has been removed. The removal of this language is significant as it would not only permit the reintroduction of formalities for the last twenty years of copyright term in the United States, but also allows for formalities in other areas. For example, formalities can be required in order to be eligible for certain remedies for copyright infringement. It could be used to address the orphan works problem by establishing registries in order to receive damages or an injunction for works that are still protected under copyright in the United States, but go beyond the terms required by international law. Footnote 160 in the current leak appears to allow such arrangements, providing that "For greater certainty, in implementing QQ.G.6, nothing prevents a Party from promoting certainty for the legitimate use and exploitation of works, performances and phonograms during their terms of protection, consistent with QQ.G.16 [limitations and exceptions] and that Party's international obligations."

Limitations and Exceptions

The language from the previous leak on limitations and exceptions, including a reference to the Marrakesh Treaty, remains in the text and is particularly welcome, given that it has not been included in previous US free trade agreements. The language provides that

Each Party shall endeavor to achieve an appropriate balance in its copyright and related rights system inter alia by means of limitations or exceptions that are consistent with Article QQ.G.16.1, including those for the digital environment, giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.[164] [165]

[164] As recognized by the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who are Blind, Visually Impaired or Otherwise Print Disabled (June 27, 2013). The Parties recognize that some Parties facilitate the availability of works in accessible formats for beneficiaries beyond the requirements of the Marrakesh Treaty.

[165] For purposes of greater clarity, a use that has commercial aspects may in appropriate circumstances be considered to have a legitimate purpose under Article QQ.G.16.3

Footnote 164, which references the Marrakesh Treaty, now includes an additional sentence that recognizes that some parties provide for limitations and exceptions for beneficiaries that go beyond the requirements of the Marrakesh Treaty. Currently, ten parties have ratified the Marrakesh Treaty and an additional ten are required for entry into force. Singapore and Mexico, both negotiating parties to the TPP, have already ratified the Marrakesh Treaty, and Canada has introduced a bill paving the way for implementation of the Treaty. A number of other TPP negotiating parties have signed the treaty, signaling an intention to ratify, including Australia, Chile, Peru, and the United States.

While inclusion of language on limitations and exceptions is a welcome addition to the agreement, this provision should be strengthened by making mandatory the obligation to achieve balance rather than using the term “shall endeavor,” as the Library Copyright Alliance pointed out in an August 2012 letter to the United States Trade Representative.

Technological Protection Measures

Last year’s leak revealed language that permits parties to provide limitations and exceptions to technological protection measures “in order to enable non-infringing uses where there is an actual or likely adverse impact of those measures on non-infringing uses.” The leak also revealed that the three-year rulemaking process to create these limitations and exceptions, as earlier proposed by the United States, was removed. The current leak maintains this language, but drops the reference to the three-step test (though the language on limitations and exceptions remains the same) and also eliminates Chile’s proposal that the process for establishing limitations and exceptions requires consideration of “evidence presented by beneficiaries with respect to the necessity of the creation of such exception and limitation.”

Overall, this language is an improvement over the United States’ initial proposal from 2011 regarding technological protection measures, which only allowed for a closed list of specific limitations and exceptions while others could be added through a three-year rulemaking process, because it would allow for new permanent limitations and exceptions to allow for circumvention of TPMs. Such permanent limitations and exceptions could be granted for cell-phone unlocking. However, the language does assume that parties need to provide for limitations and exceptions, even for non-infringing uses.

Article QQ.G.10(c) maintains the unfortunate language that “a violation of a measure implementing this paragraph is independent of any infringement that might occur under the Party’s law on copyright and related rights.” Establishing that the circumvention of a technological protection measure is independent of any copyright infringement negatively impacts legitimate, non-infringing circumvention. It is unfortunate that this language not only remains in the text, but is unbracketed, meaning that countries have agreed to this flawed provision.

Internet Service Providers

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The text on Internet Service Providers appears in an addendum and contains important caveats that the text is “Without Prejudice” and “Parties are still considering this proposal and reserve their position on the entire section.” Thus, even where language is unbracketed, it does not necessarily reflect agreement.

The current leak reveals that the text contains significant flexibilities that did not previously exist. For example, the United States and Canada have proposed language that would continue to allow Canada’s notice-and-notice system, rather than require the United States notice-and-takedown system. It appears to protect Canada’s system as one that “forward[s] notices of alleged infringement” but requires that the system exist in the Party “upon the date of entry into force of this Agreement.” If this language is agreed to, it could therefore be conceivable that other parties to the TPP could implement systems of notice-and-notice, provided that they do so before entry into force of the TPP. Similarly, footnote 299 appears to allow Japan to maintain its safe harbor framework.

In last year’s leak, Peru had proposed a footnote that now appears in the general text of the section on ISPs. This paragraph now reads, “It is understood that the failure of an Internet service provider to qualify for the limitations in paragraph 1 does not itself result in liability. Moreover, this article is without prejudice to the availability of other limitations and exceptions to copyright, or any other defences under a Party’s legal system.” This language provides a helpful clarification and clearly establishes the language as a safe harbor, not as a direct creation of liability where an ISP does not qualify for the limitations set forth under the agreement.

General Provisions

In addition to improvements in the copyright section, there appears to be agreement on positive language regarding general provisions. Many of the positive proposals regarding general provisions in last year’s leak were bracketed and not yet agreed to.

The objectives now read:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

Additionally, principles that had previously been agreed to by six parties now appear unbracketed and specifically reference the public interest and address the need to prevent abuse of intellectual property rights by right holders:

1. Parties may, in formulating or amending their laws and regulations, adopt measures necessary to protect health and nutrition, and to promote the public interest in sectors of vital importance to their socioeconomics and technological development, provided that such measures are consistent with the provisions of this Chapter.

2. *Appropriate measures, provided that they are consistent with the provisions of this Chapter, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.*

There is also new language, which appears to be mostly agreed to, that promotes the dissemination of knowledge and information. In addition, Chile and Canada have proposed language, which the United States and Japan oppose, emphasizing the importance of the public domain. This article, "Understandings in respect of this Chapter" reads:

Having regard to the underlying public policy objectives of national systems, the Parties recognise the need to:

- *promote innovation and creativity;*
- *facilitate the diffusion of information, knowledge, technology, culture and the arts; and*
- *foster competition and open and efficient markets;*

through their intellectual property systems, while respecting the principles of transparency and due process, and taking into account the interests of relevant stakeholders, including rights holders, service providers, users and the public [CL/CA propose; US/JP oppose; and acknowledging the importance of preserving the public domain.]

It is disappointing that the United States would oppose language acknowledging the importance of preserving the public domain, which provides a storehouse of raw materials from which individuals can draw from to learn and create new ideas or works. The public domain is essential in fostering new creativity and advancing knowledge.

Proportionality in Enforcement

While this analysis does not cover the section on enforcement in detail, there is one significant positive improvement from previous texts. Under the general enforcement provisions, there is new text that appears to be agreed to language that is replicated from the text of the Anti-Counterfeiting Trade Agreement (ACTA) and would require parties to "take into account the need for proportionality between the seriousness of the intellectual property infringement, and the applicable remedies and penalties, as well as the interests of third parties." Inclusion of this language is a welcome improvement to the text of the enforcement section.

Conclusion

Overall, the text of the copyright section as well as some other key provisions reflect improvements over the initial intellectual property chapter proposed by the United States in February 2011. The section on technological protection measures no longer limits the limitations and exceptions to a closed list and does not impose a three-year rulemaking process. It would allow for permanent limitations and exceptions to anti-circumvention provisions. Additionally, the text shows greater flexibility with respect to ISPs and appears much less complicated than it initially did. Furthermore, the current text reflects agreement on positive language with respect to

limitations and exceptions and a reference to the Marrakesh Treaty has been included. The removal of the formalities language that appeared in last year's text is also a welcome improvement. General provisions and enforcement language has also seen improvements.

While there have been improvements in the text, there are still concerning elements, the biggest of which is the potential for locking-in current lengthy and excessive copyright terms as well as the possibility of even requiring further extension to life plus 100 years. Additionally, the requirement that circumvention of a technological protection measure be independent from copyright infringement is illogical and prevents circumvention for legitimate, non-infringing purposes. Finally, the obligation to achieve balance through exceptions and limitations should be made mandatory.

Inside U.S. Trade - 08/07/2015

Tobacco Opponents, Advocates Fight For USTR's Favor On TPP Carveout

Posted: August 06, 2015

Senate Majority Leader Mitch McConnell (R-KY) late last week joined other law makers urging the Obama administration to refrain from pushing a tobacco-specific "carveout" from investor-state dispute settlement (ISDS) in the Trans-Pacific Partnership (TPP), as anti-tobacco advocates similarly ratcheted up their lobbying in favor of such a measure including Senate Minority Whip Dick Durbin (D-IL).

McConnell's July 30 letter to U.S. Trade Representative Michael Froman opposing the carveout was sent alongside a similar letter from U.S. business and agricultural groups, including the American Farm Bureau Federation, which was sent on July 31. The business and farm groups said that it is "imperative" that all parties recognize that carving out particular products would set a bad precedent for future trade deals.

Pushing against these industry demands also on July 31 were Durbin, Sens. Richard Blumenthal (D-CT) and Sherrod Brown (D-OH), who reiterated their backing for a tobacco-specific carveout from ISDS. They also blasted the opposition it has received from the tobacco industry.

The letters continued a flurry of Congressional opposition to a tobacco carveout in TPP, which lawmakers have characterized as exempting public health measures against smoking and tobacco from challenges under the deal's investor-state dispute settlement (ISDS) mechanism.

Both of North Carolina's Republican senators, Thom Tillis and Richard Burr, last week opposed the carveout in a letter to Froman. In a July 30 floor speech, Tillis said a carveout would be unfair to a major U.S. export important to his and other states and would cause him to withhold support from a TPP deal that includes such measures. They were joined by 34 House members, including Ways & Means trade subcommittee Chairman Pat Tiberi (R-OH) in a separate letter to USTR (*Inside U.S. Trade*, July 31).

On July 24, all 15 Democrats on Ways & Means also urged Froman to push for a tobacco carveout in a letter, saying this is necessary to protect the sovereign rights of TPP countries to adopt legitimate policies to reduce tobacco consumption from "tobacco industry subversion" in the TPP.

Their letter said a carveout is necessary to protect the sovereign rights of TPP countries to adopt legitimate policies to reduce tobacco consumption from "tobacco industry subversion" in the TPP.

This is critical for the health of the citizens of all TPP countries, including the United States, the letter said. "Tobacco is projected to kill one billion people globally this century unless countries take action to reduce the consumption of tobacco products," according to the letter. It noted that

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all countries participating in TPP other than the United States are parties to the Framework Convention for Tobacco Control aimed at curbing the use of tobacco.

The letter asked USTR to ensure that TPP is "consistent with the letter and spirit" of a provision in U.S. law championed by Rep. Lloyd Doggett (D-TX). The so-called Doggett amendment prohibits the U.S. from promoting tobacco exports.

Specifically, the letter said TPP should include a "strong safeguard that, beyond clarifying language in previous trade agreements, clearly protects legitimate public health measures relating to tobacco from unwarranted challenges under the agreement."

"Failing to do so, especially if combined with lower tariffs, would lead to increased consumption of tobacco products, particularly in developing countries," the letter said. The letter asked for a commitment from USTR that it will pursue this issue, but a Democratic Ways & Means spokeswoman said USTR had not yet responded to the letter.

In a related development, Acting Deputy USTR Wendy Cutler sidestepped a question from a business representative on the status of carveouts in the investment chapter during a July 31 call with stakeholders following the TPP ministerial in Hawaii, according to informed sources. Cutler merely responded that TPP countries are making great progress on the investment chapter, they said.

McConnell as well as the business and farm groups both warned Froman that creating a carveout for a specific product would set a bad precedent for future trade agreements. But the majority leader also made the case more explicitly that doing so in TPP would be bad for Kentucky tobacco farmers.

"It is essential as you work to finalize the TPP, you allow Kentucky tobacco to realize the same economic benefits and export potential other U.S. agricultural commodities will enjoy with a successful agreement," McConnell says in his letter, which notes that he has raised the issue with the USTR in person.

Neither letter, however, went so far as to say that including a tobacco-specific carveout in a TPP deal would cause them to oppose a final agreement. In addition to the Farm Bureau, the signatories to the July 31 letter are the Emergency Committee for American Trade, National Association of Manufacturers, National Foreign Trade Council, and United States Council for International Business. These groups have previously expressed opposition to a tobacco carveout.

In response to a question from *Inside U.S. Trade* on whether the U.S. is negotiating a tobacco carveout, a USTR spokesman said U.S. negotiators "are working proactively to promote the interests of American farmers and preventing discrimination against them, while ensuring that the [U.S. Food & Drug Administration] and health authorities of other countries can implement tobacco regulations to protect public health" (*Inside U.S. Trade*, July 31).

Some of the anti-carveout statements and letters hinted that officials could oppose a final TPP deal that contained it, since it would be creating an exception for one specific agricultural commodity and that could then have a precedent for another.

In a July 31 statement, Campaign for Tobacco-Free Kids President Matthew Myers took issue with this argument, and claimed the industry is attempting to shield itself from the carveout by "claiming it would harm tobacco farmers."

"With TPP negotiations in the final stages this week in Maui, the tobacco industry and its political allies have stepped up their fight against any safeguard for tobacco control measures by claiming it would harm tobacco farmers," Myers said.

He noted that the proposed TPP provision is focused on preventing tobacco manufacturers from abusing the international trade system, addressing the actions of cigarette manufacturers rather than growers, and would not impact trade of tobacco leaf in any way.

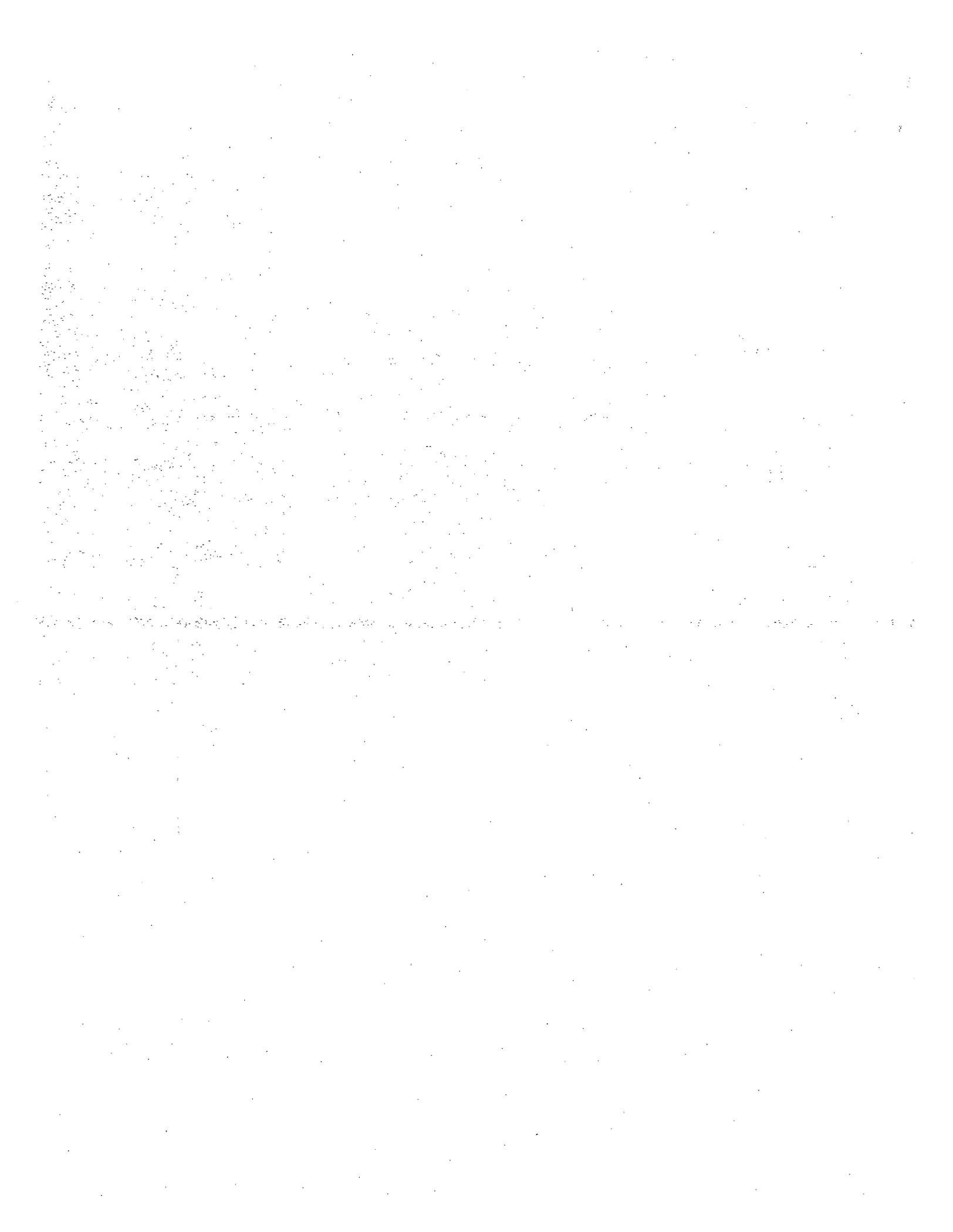
"It is truly shameful that tobacco companies are hiding behind tobacco growers to disguise their own wrongful and abusive behavior," Myers said.

However, tobacco farmers have expressed opposition to the carveout through the Farm Bureau and the Tobacco Growers Association of North Carolina (TGANC). In a July 29 statement, the TGANC said that singling out tobacco in TPP is "blatant discrimination" against a legal and legitimate agricultural commodity. It will not ensure prevention of any risk associated with the use of tobacco-related products. "Such products will still be available for purchase and consumption in the nations that are party to the TPP, the real impact is that they would be void of U.S. grown leaf," the statement said.

Durbin, Blumenthal and Brown in their July 31 statement pushed back against the political pressure from the industry, while also implicitly criticizing the ISDS mechanism itself.

"We are greatly disturbed by reports that tobacco companies are applying political pressure to ensure that the [TPP] agreement protects their ability to use an extra-judicial legal process to circumvent public health regulations in countries around the world," the senators said. They did not specifically cite the opposition to a carveout expressed by McConnell and other members of the Senate.

"We strongly support the Administration's efforts to prevent tobacco companies from utilizing the [ISDS] mechanism to combat plain-packing regulations, anti-smoking warnings, and other common-sense measures that have been proven to reduce tobacco-related deaths and diseases," they said.



Inside U.S. Trade - 08/07/2015

Corker Blasts State's Malaysia Trafficking Upgrade, May Seek Subpoena

Posted: August 06, 2015

Senate Foreign Relations Committee Chairman Bob Corker (R-TN) on Thursday (Aug. 6) blasted a State Department decision to upgrade Malaysia's status in its annual report on the global fight against modern-day slavery and warned, with Sen. Robert Menendez (D-NJ), that he could subpoena the documents and communications underlying the report.

He and Menendez made the subpoena threat in a hearing on this year's Trafficking in Persons (TIP) report. State upgraded Malaysia from "Tier III" - its category for the governments that most egregiously fail to prevent trafficking - to the so-called "Tier II Watch List."

Malaysia's ranking is relevant for a potential TPP deal because the fast-track law contains a provision that would remove the privileged process from trade agreements with countries that are classified as Tier III in the State Department report.

This language was championed by Menendez in the April markup of the Trade Promotion Authority (TPA) bill in the Finance Committee. He later agreed to weaken that provision by allowing State to file a waiver saying a Tier III country has made significant progress toward improving its fight against trafficking, which would mean the underlying provision would not apply.

However, that fix is not part of the TPA law yet because it is in a separate customs bill that is still winding its way through Congress.

At the hearing, Under Secretary of State for Civilian Security, Democracy, and Human Rights Sarah Sewall testified that Malaysia's improved ranking was not politically motivated to make TPP negotiations easier and refused to address reports that political appointees at State had reversed the rating that bureaucrats had assigned to Malaysia.

She said that State does not comment on its internal deliberations in such matters, only to have Corker call her testimony "an embarrassment" for the United States.

"This [testimony] is obviously not something that reflects the great nation that we are," Corker said. "I don't think anybody listening to this could think that America is really serious, at least at the State Department level, regarding trafficking in persons."

When asked if his criticism of the Malaysia's upgrade will lead him to take legislative action in the context of TPP, Corker signaled he wants to act to restore integrity to the human trafficking fight. "I am open to considering actions - I don't want to overreact," he said. "We knew there were issues, but I think anyone watching this hearing would understand that this has run amok."

He did not expressly say he would oppose TPP or Malaysia's participation in the agreement. But Corker's comments appear to be the first time that a Republican senator has so strongly charged that the administration gave Kuala Lumpur a better rating on its human trafficking fight for politically expedient reasons.

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Menendez blasted the administration last month following reports, which ended up coming true, of Malaysia's upgrade. He threatened to ask Corker for congressional hearings investigating the possibility of political involvement in the upgrade and raised the possibility of requesting an investigation by State's inspector general.

Corker was also non-committal when pressed if he would advocate for changes to the Menendez compromise language in the customs bill. "I need to look at that language," he said. "I can assure after this hearing I'm going to be a lot more in tuned in paying a lot more attention to this. I think this was an embarrassment for our country."

In a related development, Ranking Member Ben Cardin (D-MD), who was also critical of Sewall's testimony, did not threaten to oppose the TPP. Instead, he said, he will look at a potential TPP deal as a whole.

Rep. Chris Smith (R-NJ) has also criticized State's decision, but is not considered likely to support TPP because he voted against TPA earlier this summer. Foreign Relations member Sen. Marco Rubio (R-FL) criticized the report's upgrade of Cuba in a July 27 statement, but did not mention Malaysia or TPP.

Sewall was pressed by Menendez, Corker and Cardin for nearly the entire duration of the sparsely attended hearing about the decision to upgrade Malaysia. In defending the department's decision, she noted that decisions on tier rankings are made by Secretary of State John Kerry, and that to her knowledge the White House and the Office of the U.S. Trade Representative did not attempt to influence Kerry's decision.

Kerry also emphatically denied that USTR or the White House influenced his final decision on tier rankings at an Aug. 6 press conference on the sidelines of the annual Association of Southeast Asian Nations meeting of foreign ministers in Kuala Lumpur.

"[I] had zero conversation with anybody in the Administration about the Trans-Pacific Partnership relative to this decision - zero," Kerry said. "[I'm] confident it was the right decision and I can guarantee you it was made without regard to any other issue."

Kerry and Sewall also both rattled off a number of improvements they believed Malaysia had made in the TIP reporting period, which concluded at the end of March. These included then-pending amendments to the country's existing anti-trafficking law which were passed in June; a pilot program which allows detained victims of trafficking to leave their detention facilities; and an improved record of prosecuting violators of trafficking laws.

At the hearing, however, senators noted that only four trafficking victims are included in the pilot program, and that convictions of trafficking offenders actually decreased from seven to three from the 2014 to 2015 reporting period. Sewall consistently argued that State was aware of these problems and addressed them in the report, but said that the tier rankings reflect the efforts countries are taking to combat trafficking, and not the prevalence of trafficking itself in a given country. She said that the department "pulled no punches" in its evaluation of Malaysia's compliance with the minimum international standard of actions necessary to prevent trafficking.

She said the narrative report on each country's efforts "informs," but does not determine, the secretary's decision on tier rankings. Instead, the tier determinations are subject to separate

criteria which "further includes contextual factors, such as the severity of the problem and the feasibility of further progress, given available resources and capacity," Sewall said.

Kerry at the press conference indicated that the administration is also planning to work more closely with the Malaysian government to improve its trafficking record, especially on prosecutions. He noted that the administration will enlist the FBI and other government agencies to help Malaysian authorities develop greater evidence-gathering capacity in order to increase the rate of convictions.

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that this is crucial for ensuring transparency and accountability in the organization's operations. The text notes that without proper record-keeping, it would be difficult to track progress, identify areas for improvement, and make informed decisions.

2. The second part of the document outlines the various methods and tools used to collect and analyze data. It mentions the use of surveys, interviews, and focus groups to gather qualitative information, as well as the use of statistical software and data visualization techniques to process and present quantitative data. The text highlights the importance of choosing the right methods and tools based on the specific needs and objectives of the study.

3. The third part of the document discusses the challenges and limitations of data collection and analysis. It notes that there can be issues with data quality, such as incomplete or inconsistent responses, and that there may be biases in the data collection process. The text also mentions the time and resource constraints that can affect the scope and depth of the analysis.

4. The fourth part of the document provides a summary of the key findings and conclusions of the study. It highlights the main trends and patterns observed in the data and discusses the implications of these findings for the organization. The text concludes by emphasizing the need for ongoing monitoring and evaluation to ensure that the organization remains effective and efficient in its operations.

5. The fifth part of the document provides a list of references and sources used in the study. It includes books, articles, and other documents that have been consulted to support the research and analysis.

6. The sixth part of the document provides a list of appendices and supplementary materials. These include additional data, charts, and tables that are not included in the main body of the document but are available for reference. The text notes that these materials are provided to support the findings and conclusions of the study.

7. The seventh part of the document provides a list of acknowledgments and thanks. It expresses gratitude to the individuals and organizations that have provided support and assistance throughout the study. The text notes that without their help, the study would not have been possible.

8. The eighth part of the document provides a list of contact information for the author and other relevant parties. This includes email addresses, phone numbers, and website URLs. The text notes that this information is provided for those who may have questions or need further information about the study.

9. The ninth part of the document provides a list of terms and conditions. It outlines the rules and regulations that apply to the use of the document and its contents. The text notes that these terms and conditions are intended to protect the rights and interests of the author and other relevant parties.

10. The tenth part of the document provides a list of other relevant information. This includes information about the author's background and qualifications, as well as information about the organization and its mission. The text notes that this information is provided to provide context and background for the study.

The Trans-Pacific Partnership Agreement and Implications for Access to Essential Medicines

Jing Luo, MD¹; Aaron S. Kesselheim, MD, JD, MPH¹

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After a difficult legislative battle, President Obama signed into law Trade Promotion Authority on June 29, 2015. The legislation allows for an up-or-down vote with no amendments in Congress for international trade agreements such as the Trans-Pacific Partnership (TPP) Agreement. The TPP Agreement includes 12 Asia-Pacific countries (United States, Canada, Mexico, Peru, Chile, Japan, Vietnam, Malaysia, Singapore, Brunei, Australia, and New Zealand) with a collective trading power amounting to 40% of the global gross domestic product. The TPP Agreement is still being negotiated; recently, in a meeting of trade ministers in Maui, Hawaii, negotiators failed to finalize the text of the Agreement due in large part to disagreement regarding intellectual property protections for pharmaceutical products.¹

Intellectual property rights, including patents, are central to the business model of brand-name pharmaceutical manufacturers. Manufacturers can charge high prices during patent-protected periods without fear of competition, earning profits that are intended to provide incentives for investment in drug innovation. However, low-income patients frequently lack access to expensive drugs, and excessive spending on pharmaceuticals can strain government budgets, leading to reductions in other health services. In addition to addressing barriers to trade, the TPP will affect the pharmaceutical market in member countries due to its intellectual property provisions.

It is critical to ensure that patents protect only innovative pharmaceutical products and for governments to balance grants of market exclusivity with other competing interests, such as the widespread availability and affordability of certain drugs. In the United States, for example, patents are supposed to be issued only to novel products that are an innovative step beyond what already exists, and patents along with a variety of regulatory and other exclusivities permit conventional drugs to receive an average time of about 13 years of market exclusivity before competing generic versions are approved.²

The 1994 Trade Related Aspects of Intellectual Property (TRIPS) Agreement, which countries must agree to as a criterion for membership into the World Trade Organization, standardized basic intellectual property protections for pharmaceutical products around the world. Before TRIPS many lower-income countries had chosen not to grant patents for pharmaceutical products, emphasizing low-cost access over contributing to incentivizing innovation; however,

the TRIPS Agreement required all signatory countries to change their policies and grant pharmaceutical patents.

In the years since, countries have implemented this requirement in different ways. Indian law, for example, required new forms of existing drugs to show significant improvements in efficacy before they can be granted a patent. This controversial provision was recently upheld in an Indian Supreme Court decision related to a new formulation of imatinib (Gleevec), a tyrosine-kinase inhibitor used to treat chronic myelogenous leukemia.³ In that decision, the Indian Supreme Court stated that the beta crystalline form of imatinib was not patentable in part because it was too similar to an older formulation discovered prior to India's enforcement of patents for pharmaceutical products under TRIPS.

The TPP may end such flexible approaches to granting patents and add a number of new requirements related to intellectual property in addition to the TRIPS measures. Even though the exact details of the TPP are not known, negotiating drafts have been leaked, with the most recent intellectual property chapter dating from May 11, 2015.⁴ This chapter includes 8 sections covering a wide range of topics including patents, trademarks, copyright, industrial designs, and geographical indications.

In the case of pharmaceuticals, the text of the draft seeks to bring international intellectual property law into closer alignment with current US standards regarding the scope of what may be patented. For example, US negotiators favor allowing patents to cover inventions in all fields of technology (including inventions derived from plants and microorganisms), despite legal systems in other countries that include a more limited scope of patentable subject matter.

The TPP also could allow new uses of a known product to be granted additional monopoly protection. This may reduce TPP countries' abilities to create patent laws that seek, as India's does, to ensure that only truly innovative and clinically important pharmaceutical products are patentable. Seeking patents for the new methods of using existing drugs is a common tactic that pharmaceutical manufacturers in the United States use to delay the generic competition. For example, Eli Lilly sued Canada for \$500 million dollars over its decision to invalidate 2 pharmaceutical use patents: the use of olanzapine (Zyprexa) in schizophrenia and atomoxetine (Strattera) in attention-deficit/hyperactivity disorder.⁵ Both drugs were previously patented in Canada for other uses, and a generic manufacturer (Novopharm) successfully challenged the validity of these patents by showing that there was insufficient evidence to support the claims at the time of filing. In the case of olanzapine, Lilly attempted to secure additional monopoly protection by restating the claims from an earlier patent while simultaneously failing to demonstrate substantial advantage over other antipsychotics for this new use, which is the current standard required under Canadian law. Under the TPP, a multinational pharmaceutical company could use the investor-state dispute settlement mechanism to challenge domestic laws like the one in Canada, which are intended to promote timely availability of generic drugs.⁶

The TPP also contains provisions that could make it more difficult to successfully challenge patents after they have been issued by shifting the burden of proof onto the challengers. This would ensure that potential generic market entrants must expend substantial resources to clear the numerous interrelated patents that innovator companies obtain on their products, increasing

the cost and time of generic entry. The TPP draft could also impose substantial civil and criminal penalties on potential generic manufacturers found to have infringed patents, increasing the business risk for these companies. Moreover, language requiring the seizure and destruction of in-transit goods for "confusingly similar" products may expand the geographic scope of the TPP to affect countries not part of the direct agreement, such as India or Brazil, which may find it more complicated to ship generic medicines that are legal under their patent regimes through TPP member states.

In addition to forcing TPP member states to adopt patent laws that closely align with that of the United States, the TPP could also require member states to adopt the US Food and Drug Administration's approach to preventing generic manufacturers from reaching the market for a minimum of 5 to 7 years after the approval of a new small-molecule drug, 3 years for new indications, and 12 years after approval of a new biologic drug.⁷ Nine TPP countries provide no guaranteed exclusivity periods for safety and efficacy data associated with biologic drugs because the complex manufacturing processes required to create these medicines naturally makes for fewer follow-on biologic competitors and fewer cost reductions arising from that competition. Notably, in the United States, the Federal Trade Commission similarly recommended no guaranteed exclusivity periods for biologics, and the Obama administration has repeatedly proposed to reduce the period of biologic exclusivity from 12 to 7 years for these same reasons. The TPP may reduce the flexibility of US policymakers to change the period of guaranteed biologic data exclusivity in the future, maintaining high biologic drug prices.

Thus, in its current form, the TPP could lower the bar for the patenting of pharmaceutical innovations and make it substantially more difficult for generic manufacturers to enter the market in TPP member countries. In addition, legal generic products could become seized during international transit. The overall effect of the TPP could be to extend the effective patent life of drugs and to decrease the availability of generic drugs or biosimilar medicines available to patients around the world.

Some economists have suggested that the intellectual property chapter of the TPP should be abandoned, because it could result in higher drug prices for patients.⁸ By contrast, industry representatives suggest that strong intellectual property protections are necessary for costly research and development, although this assertion has been disputed.⁹

It is likely that a balance between these competing objectives has not been struck by the TPP agreement in its most current form. The recent breakdown in negotiations suggest that some countries are taking a hard-liner on pharmaceutical-related provisions, so there remains hope that an agreement could be negotiated. If the United States continues down the path exposed in the leaked draft and expects other TPP countries to accept new standards for pharmaceutical intellectual property protections, it should also allow concessions that would encourage low-cost and high-quality generic drugs competition once market exclusivity ends. For example, data exclusivity for medicines should not be redundant or geographically transportable, meaning that if a 5-year exclusivity period has already expired in the United States, no additional exclusivity would be granted by regulatory authorities in other TPP member countries. In addition, meaningful technology transfer could be incorporated to promote local pharmaceutical manufacturing capacity. An innovative financing instrument, such as a nominal levy on top of

existing tariffs for nonpharmaceutical trade (eg, goods and services), could also be created to help less-wealthy, signatory countries procure medicines that will inevitably be made more expensive by the agreement.

ARTICLE INFORMATION

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CTPC Staff Note: the text of the opinion piece below has been roughly translated from the original French in which it was written.

<http://www.ledevoir.com/politique/canada/448273/parteneriat-transpacifique-la-disparition-programmee-de-la-ferme-familiale>

TPP

The programmed disappearance of the family farm

August 24, 2015 | Marc Laviolette and Pierre Dubuc - respectively president and secretary of the Free SPQ | Canada

In Quebec, the production of 6920 family farms is under supply management and represents 43.2% of total farm receipts.

In Quebec, the production of 6920 family farms is under supply management and represents 43.2% of total farm receipts.

"Long years of suffering and economic and financial difficulties and decrease in living standards," predicted the Prime Minister Couillard about the independence project, in a vain attempt to forget her skeletal "shopping list" sent to federal party leaders. This list which is conspicuously absent maintaining supply management in agriculture, yet a very topical issue.

According to the Globe and Mail, the temporary failure of the talks on the Trans-Pacific Partnership Agreement is not due to Canada's refusal to sacrifice the agricultural supply management programs, but the surprise appearance of an agreement between Japan and the United States threatening the auto industry in Canada and Mexico.

To join the free trade agreement, Japan would require a car produced in the signatory countries of the Agreement can be sold exempt from tariffs with content threshold of its components from these countries well below the norm of 62.5% currently required under NAFTA. Japanese manufacturers have used auto parts produced in low-cost countries, like Thailand, that are outside of the future free trade area.

According to the Globe and Mail, in the event of a quick agreement, always possible, representatives of the industrial and financial sectors, salivating at the opening of a free trade market representing 40% of world trade, intervene in strength in the public square for the Agreement to "forget" the transition to the trap of supply management in agriculture.

A global oversupply

In addition to Japanese requirements, the White House must take account of pressure from New Zealand for access to the US market for its dairy products. As compensation, the US President promised to US producers the opening of the Canadian market.

New Zealand, known as "the Saudi Arabia of milk", campaigning for the liberalization of world dairy market. Until recently, the country was betting all his cards on the opening of the Chinese market, but this is already saturated, as the whole world market. Since the beginning of 2014, milk prices fell by 63%, intensifying the crisis between producing countries.

Europe has abolished the month of March, the milk quota scheme and its producers are now competing fiercely. Recently, the French producers, ruined by falling prices, blocked tourist sites like the Mont Saint-Michel and intercepted at the German-French border, trucks loaded with German dairy. In disaster, the French government has provided a grant of several hundred million euro, but without appeasing their anger.

Catastrophic

The program provides the management was born in 1960 of a situation of oversupply of dairy products and anarchy of markets. The program is based on three principles: the production planning based on demand; a price determined by the cost of production; and import controls. It is administered by a federal agency, the Canadian Dairy Commission created in 1966, because agriculture is a shared jurisdiction between levels of government under the Constitution and as tariffs fall under federal jurisdiction.

The supply management also covers, in addition to milk, the production of poultry and eggs. In Quebec, the production of 6920 family farms is under supply management and represents 43.2% of total farm receipts. More than 92 000 direct and indirect jobs depend.

Its abandonment would be catastrophic for Quebec agriculture but powerful interests actively campaigning for disposal. John Manley, president of the Canadian Council of Chief Executives, the calls "last vestige of Soviet central planning to the planet."

Abolitionists argue that the opening of the Canadian market would benefit consumers because the US milk is half the price. The same pro-consumer logic should lead to salute the agreement on cars between Japan and the United States, which would significantly reduce the price of cars! It is not. This reminds us that in 2008 the federal government provided \$ 13 billion to the auto industry in Ontario to save it from bankruptcy and only a few hundred million for the forestry industry in crisis in Quebec.

Their other argument is that the abolition of protectionist measures will open the vast world markets for local producers. The Free Trade Agreement Canada-Europe has demonstrated the contrary by allowing to double imports of highly subsidized European cheeses.

According to the Globe and Mail, the Harper government would have provided a compensation program to help producers be more competitive on world markets. Such a program can only lead to the accelerated concentration of farms because Quebec family farms, with an average of 77 cows, can not compete with American holdings with more than 10 000 cows.

Family farms facing bankruptcy with the disappearance of quotas as collateral for their borrowing from financial institutions, become easy prey for companies like Pangea Charles Sirois and his partner, National Bank, looking to get their hands on the best land in Quebec.

Winners?

Some companies could benefit from the new situation. Recently, son Lino Saputo said that "Saputo could live without supply management." In recent years, the company which, by the admission of its P.-D. g, "has benefited from the supply management system" has grown in Argentina, Australia and the United States.

The United States now account for over 50% of its volume of production and sales, and Saputo could import cheap milk in the United States rather than to source in Quebec.

But Saputo remains a small player in the world face giants like Nestlé, Danone and Frontera and the current difficulties facing Bombardier Airbus and Boeing are sobering.

Small nations like Quebec Companies have certainly require access to a larger market, it is wrong to confuse with adherence to free trade agreements tailored to satisfy the voracious appetite of multinationals looking for acquisitions for the creation of mega-corporations.

The absence of any reaction from the Minister of Agriculture, Fisheries and Food Pierre Paradis to the abandonment of the supply management programs by the federal government shows submission to his government Couillard federal big brother.

The elimination of management in agriculture provides farmers Quebecois promises "long years of suffering and economic and financial difficulties and decrease in living standards."

And, yes, Mr. Couillard, we are ready to meet the challenge of a real debate on the respective merits of Canadian federalism and independence of Quebec.

INSIDE US TRADE:

U.S. Official Sees TPP Ministerial Within Weeks; Australian Envoy More Cautious

Posted: September 09, 2015

A senior White House official said Wednesday (Sept. 9) she expected the Trans-Pacific Partnership (TPP) negotiations to be wrapped up in the next several weeks, while Australia's ambassador suggested a deal might not be reached until November, saying there is no rush to complete the negotiations since the U.S. Congress will already not be able to consider a completed deal this year.

"We are committed to completing the negotiations; we expect that that will happen in the next several weeks," Deputy National Security Adviser Caroline Atkinson said at a panel discussion at the Brookings Institution on the international economic architecture for the 21st century.

She later qualified her statement by saying "we hope" that in the next several weeks there will be a ministerial to conclude the talks, and emphasizing that the substance will drive the timetable.

The latter point was highlighted by a spokesman for the Office of the U.S. Trade Representative, who sought to downplay Atkinson's comments on the timetable. "We are in the final stage of TPP negotiations, but the substance of negotiations will continue to drive the timeline," he said. "No date has been set for the next ministerial."

Atkinson and Australian Ambassador to the U.S. Kim Beazley, who also spoke at the Brookings event, agreed that the next TPP ministerial should be the last one and emphasized that it is more important to get a good deal than to get it done quickly.

Beazley argued that TPP countries "have got time to arrive at a reasonable conclusion on this" because they have already missed the window for a completed deal to be considered by Congress by the end of 2015. He also said Australia was "pretty happy with the timeline on which we're functioning."

"Better to get it done right, knowing you can't [get it to Congress until] until next year, than to put yourself under undue pressure," he told reporters after the event. For that reason, he hinted it was not necessary to complete the TPP negotiations prior to the Canadian national election on Oct. 19, when asked whether that would happen.

U.S. officials view the Canadian election as a complicating factor in the talks, given that Canada is under pressure to grant more market access in the politically sensitive sectors of dairy and poultry. One trade lobbyist said he considered it unlikely that the Prime Minister Stephen Harper would want to make politically sensitive concessions in TPP as current polls show his Conservative party trailing the two other major political parties.

Beazley said the Nov. 18-19 Asia-Pacific Economic Cooperation (APEC) leaders forum in the Philippines provides an opportunity for TPP countries to "put a seal on" an agreement, when asked whether the APEC summit represented a chance to conclude the talks. He said one idea being discussed is to have a TPP ministerial where parties would aim to reach a deal either

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before or after the APEC meeting, as opposed to actually trying to hammer out an agreement at APEC.

“It does require sitting down for a number of days in a supported negotiation. It's not quite something you could conclude round the table at APEC; it requires a process like you had [at the July TPP ministerial in] Maui to do the final conclusion,” he said. “So I don't think people are sort of seriously thinking of doing it at APEC leaders' [meeting] itself, [but maybe another meeting] either adjacent to it -- slightly before it or slightly after it.”

The ambassador downplayed the notion that a completed TPP deal would be too difficult to pass in the 2016 election year. He said that, based on his conversations with U.S. lawmakers, it would be “doable” for Congress to pass a TPP implementing bill during the first half of 2016. “They all have stories about other trade agreements that have been done in election years,” he said. Sources have pointed out that the Uruguay Round trade deal was passed during an election year.

Beazley, a former member of the Australian parliament, said the idea that an election year makes it too hard to do anything is outdated because it is implicitly based on the premise that politicians can hide their “bad behavior” during the initial part of their term and somehow paper over it during the election campaign.

“Everybody knows you can't do that anymore,” he said. “Social media is ubiquitous, public understanding very high. So the 'can't do it in election year' is a concept of diminishing saliency. And one can tell that in one's conversations with individual members of Congress.”

Beazley noted that regardless of the broader outcome in the TPP negotiations, the U.S. will likely emerge with strong bilateral agreements with Japan and Vietnam. He argued that the TPP labor rights obligations will be “transformative” in countries like Vietnam.

During the event, Atkinson repeated the truism that the most difficult issues in a negotiation are always left for the end, and said this is what U.S. negotiators are working on “bilaterally and in some cases multilaterally.” She did not identify any specific outstanding issues, although the major ones are the automotive rules of origin, dairy market access and the monopoly protection period for biologic drugs.

Negotiators from the U.S. and Japan began meeting Wednesday in Washington on the auto rules of origin, and will be joined on Thursday and Friday by officials from Canada and Mexico. The Canadian delegation is being led by chief TPP negotiator Kirsten Hillman, according to a Canadian government spokeswoman.

Inside US Trade:

Malmstrom-Froman TTIP Stocktaking Set For Sept. 22 In Washington

Posted: September 09, 2015

EU Trade Commissioner Cecilia Malmstrom is slated to meet with U.S. Trade Representative Michael Froman in Washington on Sept. 22 for a "stocktaking" of the Transatlantic Trade and Investment Partnership (TTIP) talks that the EU hopes will yield a concrete schedule for dealing with sensitive issues in the negotiations roughly one month before the next negotiating round. Malmstrom is likely to seek commitments from Froman about how the U.S. will implement the June G7 pledge to "accelerate work on all TTIP issues, ensuring progress in all the elements of the negotiations, with the goal of finalizing understandings on the outline of an agreement as soon as possible, preferably by the end of this year," according to sources familiar with the planned meeting.

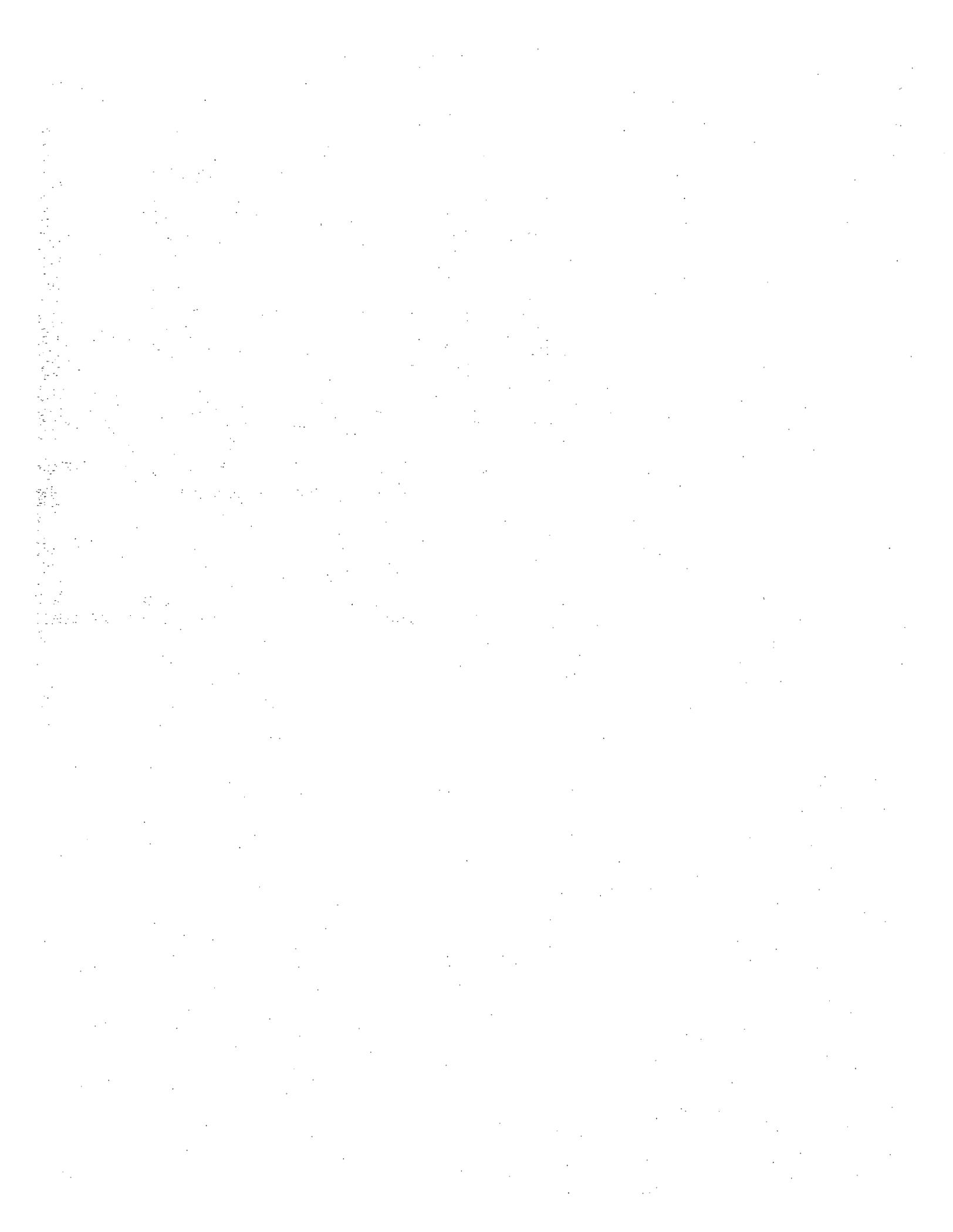
The EU is keen to set a timeline for exchanges of second tariff offers and a first offer for government procurement market access, a major priority area that has lagged, they said. But it is an open question whether the ministerial stocktaking will really yield much in the way of a concrete plan to advance the negotiations. Many observers see the conclusion of the Trans-Pacific Partnership (TPP) negotiations as a necessary first step before the U.S. can turn its focus to TTIP and be prepared to make concessions on tough areas like tariffs or public procurement.

At this time, there is no firm date for a TPP ministerial that would seek to conclude a final deal. The Froman-Malmstrom stocktaking meeting is also likely to include some discussion of the EU's forthcoming proposal on investment protection and investor-state dispute settlement (ISDS). The European Commission plans to publicly release its draft text investment proposal in the middle of next week, at the same time it proposes it to member state officials. Member states, however, will have to vet the proposal before it can become an EU negotiating document in TTIP.

The stocktaking will also follow on the heels of a meeting next week between Deputy U.S. Trade Representative Michael Punke, the political lead for the U.S. on TTIP, and Jean-Luc Demarty, the director general for the European Commission's trade division. Following the TTIP stocktaking, U.S. and EU negotiators are set to convene Oct. 19-23 in Miami for the 11th negotiating round. There are no firm plans yet to hold a 12th round before the end of 2015.

After her Sept. 22 meeting with Froman, Malmstrom is set to head to New York City for several days during which she is slated to meet with business officials and speak at a to-be-confirmed public event.

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EU Proposes New Trans-Atlantic Court for Trade Disputes -- 2nd Update Dow Jones Business News

<http://www.nasdaq.com/article/eu-proposes-new-transatlantic-court-for-trade-disputes--2nd-update-20150916-00947>

By Tom Fairless

BRUSSELS--The European Union has proposed a new international court system that would settle disputes between investors and national governments, and could help defuse tensions over a sweeping trade deal with the U.S.

The plan, anticipated by an EU concept paper in May, would replace an existing dispute-resolution mechanism that has been sharply criticized by top EU officials and threatened to undermine a planned trans-Atlantic free-trade deal. Campaigners claim that the current system constrains governments and leaves policy makers vulnerable to legal proceedings from overseas investors.

But U.S. business representatives hit back swiftly at the EU's plan, calling it "deeply flawed" and "not grounded in the facts."

Known as the investor-state dispute settlement, or ISDS, the decades-old framework offers a facility for investors to seek compensation when foreign governments seize their property, impose regulations that violate a trade agreement, or treat a company unfairly. It allows investors to apply directly to a tribunal for arbitration in disputes in which it believes governments have breached agreements.

Under the EU's plan, which must be ratified by national European governments and the European Parliament, the ISDS would be replaced by an Investment Court System modeled on other permanent international courts such as the International Court of Justice in The Hague.

"We want to establish a new system built around the elements that make citizens trust domestic or international courts," the EU's trade commissioner, Cecilia Malmstrom, said. "No one can claim it is a system of private justice."

Presently, arbitrators on ISDS tribunals are chosen by the investor and the defending state on a case-by-case basis, and the same individuals can act as lawyers in other ISDS cases. The ad hoc nature of the system raises concerns around the arbitrators' independence, and their financial incentives to multiply cases, according to the EU.

The new system aims to operate more like traditional courts, with judges appointed permanently, their qualifications matching those of national judges, and introducing an appeal system.

Ms. Malmstrom said she hoped the permanent International Investment Court would replace ISDS in all existing and future EU investment negotiations, including a putative trade deal with the U.S. known as the trans-Atlantic Trade and Investment Partnership, or TTIP. She said she hadn't yet consulted U.S. negotiators about the proposal.

The new system wouldn't, however, apply to a free-trade deal between the EU and Canada that was agreed last year. "The Canadian agreement is closed, we are not reopening that," Ms. Malmstrom said.

Emma McClarkin, a European lawmaker representing Britain's ruling Conservative party, said she hoped the EU's plan would "allay some of the legitimate concerns" around ISDS, but warned that "the devil will be in the detail."

"The elements agreed in TTIP are likely to form a gold standard for future trade agreements, so it is essential that we work on getting this right," Ms. McClarkin said.

But the U.S. Chamber of Commerce, which represents U.S. businesses, published a statement that sharply criticized the EU's plan.

"The U.S. business community cannot in any way endorse today's EU proposal," said Marjorie Chorlins, vice president for European affairs at the U.S. Chamber of Commerce. "The reforms the United States has undertaken in recent years in its own investment agreements represent a far superior starting point for these important deliberations."

Proponents say the current ISDS system is a routine part of trade deals that ensures companies or even individual investors can invest abroad without worrying about discriminatory treatment in local judicial systems.

When Yukos, Russia's largest oil company a decade ago, was hit with tens of billions of dollars in back-tax claims, its main assets were sold off to state-controlled Russian companies. Yukos shareholders sued Russia through their offshore holding companies in Europe, and last year an international arbitration panel awarded the investors \$50 billion.

But opponents warn that large U.S. companies could use the dispute-resolution mechanism to challenge European laws and regulations on labor, food and the environment.

Germany's Deputy Chancellor Sigmar Gabriel has indicated that he would reject any deal that included the ISDS clause.

In the U.S., opponents of the Trans-Pacific Partnership trade deal between the U.S., Japan and 10 other countries have expressed similar concerns, warning that the dispute-resolution provision favors corporations and undermines national sovereignty.

William Mauldin in Washington, D.C. contributed to this article.

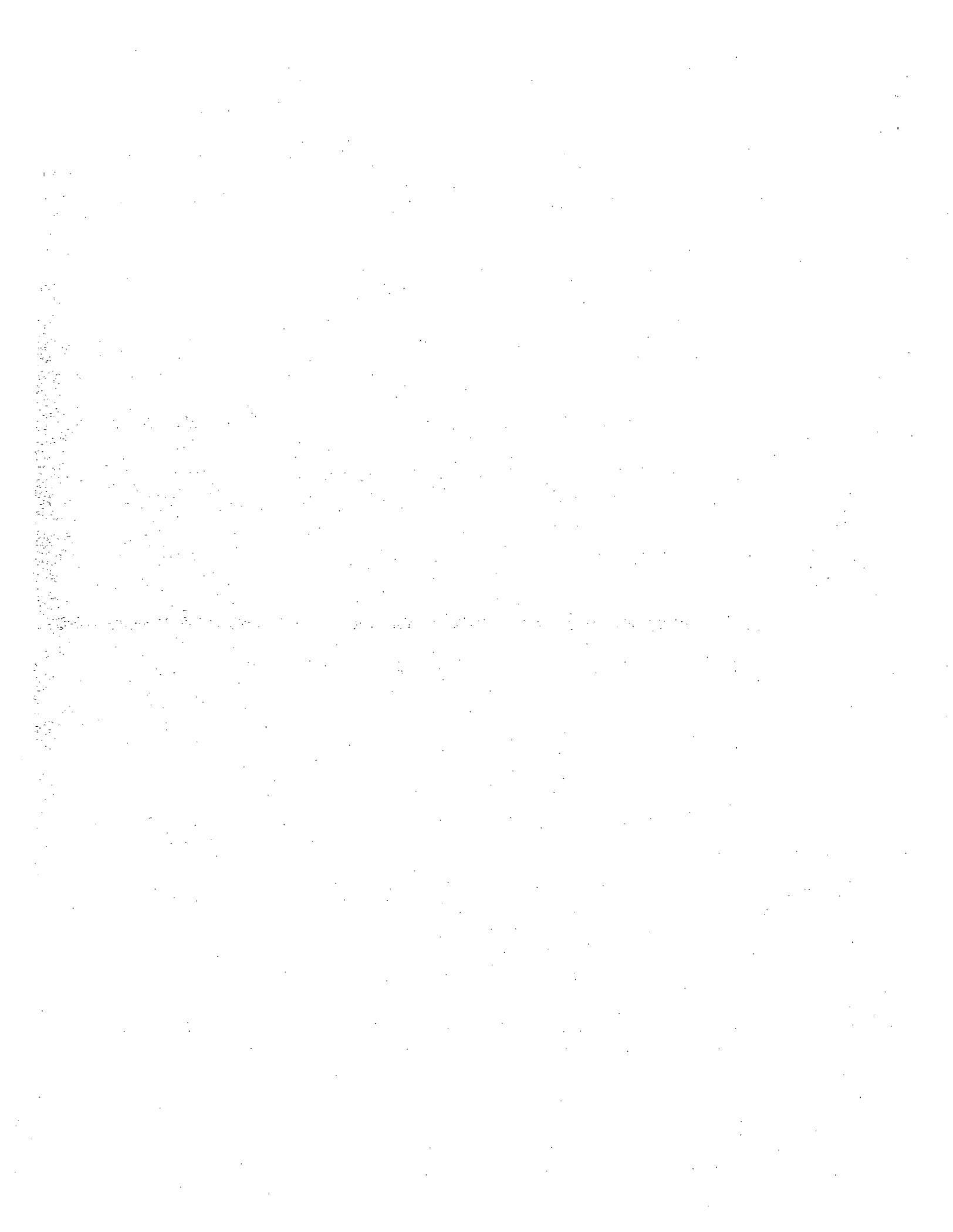
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Financial Times, Last updated: September 16, 2015 10:17 pm

EU seeks to remove obstacle to trade deal

By Christian Oliver in Brussels and Shawn Donnan in Washington

Brussels is promising more transparency in a controversial system companies use to sue governments, as it seeks to remove one of the most intractable political obstacles to a landmark EU-US trade deal.

Hopes have faded that the Transatlantic Trade and Investment Partnership, potentially the world's biggest trade deal, will be concluded this year, primarily because of opposition from politicians and campaign groups, particularly in Germany and Austria.

Among their biggest complaints is that large corporations could use provisions of the trade deal to bypass national courts and take investment disputes to international tribunals, undermining European standards in health, food and the environment.

Cecilia Malmström, EU trade commissioner, conceded on Wednesday that the so-called Investor-State Dispute Settlement system needed to be overhauled to ensure successful conclusion of the TTIP negotiations.

"It is clear from the debate that there has been a fundamental lack of trust by the public about the impartiality and fairness of the old ISDS system," she said. "European countries are the most frequent users of the current system, so it is logical that we from the EU side took the lead in . . . modernising this system."

Ms Malmström said the EU was proposing a new investment court that would comprise five judges each from the EU, US and elsewhere.

Cases would be presided over by a trio of judges representing each of the trading blocs.

Ms Malmström also insisted that all court proceedings would be open to the public and that documents would be posted online.

"Some will argue that the traditional ISDS model is a kind of private justice. What we are setting out here is a public justice system," she said.

The court would be convened only when needed and would have no specific base.

However, that proposal, first made to the European Parliament this year, has drawn a sceptical response from many in the global business community. They argue such a court exists in the form of the World Bank's International Centre for the Settlement of Investment Disputes, which has presided over such cases since 1966.

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The US, which on Wednesday said it welcomed the proposals as a way to resume negotiations on investment that have been suspended since early 2014, also appears unlikely to support the proposal, having proposed its own reforms.

The US Chamber of Commerce said it recognised “the EU has a political problem relating to future investment treaties” but rejected the new proposals, arguing that they were the response to a debate that “is not grounded in the facts”.

“The distortions in this debate cannot be allowed to trump sound policy,” the chamber said. “If the EU still regards the TTIP as a serious objective, today’s proposal is deeply flawed. Tough negotiations lie ahead, and the reforms the United States has undertaken in recent years in its own investment agreements represent a far superior starting point for these important deliberations.”

The current ISDS system emerged in the early 1960s as a result of bilateral investment treaties pushed by Germany and other western economies as a way to offer legal protections to companies doing business in the developing world.

Without ISDS, some businesses say they would not otherwise risk making sizeable investments in countries with weak judicial systems. Although US companies have been held up as the bigger threat by campaign groups opposed to TTIP, European companies have filed more ISDS cases.

While the new system has been proposed primarily for TTIP, EU officials stressed that it could be adapted for other possible trade deals, including with Japan, or even China.

Ms Malmström said that Germany had played an important role in helping to shape the EU’s proposal. The commission must now finalise it with the European Parliament and the 28 member states before presenting it to the US for discussion.

While the commission’s proposals enjoy broad support among the main political groupings in the European parliament, they still face resistance from critics of the system among groups on the left opposed to TTIP.

“Cosmetically changing the mechanism but keeping the same prerogatives for corporations is a marketing stunt, which fails to address the core problems of ISDS. We cannot allow the commission to simply put lipstick on the ISDS pig,” said Ska Keller, a green lawmaker in the European parliament.

Ms Malmström argued there was a block of antitrade activists who would continue to oppose any new framework.

“If you said ‘free ice-cream for everyone’, they would still not like the proposal,” she said.
