STATE OF MAINE

Citizen Trade Policy Commission

DRAFT AGENDA

Tuesday, May 5, 2015 at 8:30 A.M.
Room 208, Burton M. Cross State Office Building
Augusta, Maine

8:30 AM Meeting called to order

I. Welcome and introductions
a. distribute contact sheet

II. Review of CTPC statutes (Lock Kiermaier, Staff)

III. Basic Review of free trade agreement concepts (Lock Kiermaier, Staff):
a. Overview of free trade agreements and required congressional approval
b. Current FTA's under negotiation
   i. Trans Pacific Partnership (TPP)
   ii. TransAtlantic Trade and Investment Partnership (TTIP)
   iii. Trade in Services Agreement
c. Description of Fast Track Authority
d. Description of Investor-State Dispute Resolution mechanisms

IV. **Briefing from Chris Rector, Regional Representative, Senator Angus King:** update on current Fast Track Authority proposal

V. **Briefing from CTPC member Sharon Anglin Treat:** Update on status of TTIP including issues of most concern to European legislators, and issues discussed at recently concluded round 9 negotiations, especially the leaked EU regulatory cooperation chapter and its potential impact on Maine legislators and executive branch agencies if adopted.

VI. **Briefing from Attorney General Janet Mills:** update on her recent meeting with USTR

VII. **Possible invitations to members of Maine's Congressional Delegation:** Senator Susan Collins, Senator Angus King, Representative Chellie Pingree, Representative Bruce Poloquin

VIII. Articles of interest (Lock Kiermaier, Staff)

IX. Discussion of next meeting date

Adjourn

§11. MAINE JOBS, TRADE AND DEMOCRACY ACT

1. Short title. This section may be known and cited as "the Maine Jobs, Trade and Democracy Act."

[2003, c. 699, §2 (NEW) .]

2. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Commission" means the Citizen Trade Policy Commission established in Title 5, section 12004-I, subsection 79-A. [2003, c. 699, §2 (NEW).]

B. "Trade agreement" means any agreement reached between the United States Government and any other country, countries or other international political entity or entities that proposes to regulate trade among the parties to the agreement. "Trade agreement" includes, but is not limited to, the North American Free Trade Agreement, agreements with the World Trade Organization and the proposed Free Trade Area of the Americas. [2003, c. 699, §2 (NEW).]

[2003, c. 699, §2 (NEW) .]

3. Purposes. The commission is established to assess and monitor the legal and economic impacts of trade agreements on state and local laws, working conditions and the business environment; to provide a mechanism for citizens and Legislators to voice their concerns and recommendations; and to make policy recommendations designed to protect Maine's jobs, business environment and laws from any negative impact of trade agreements.

[2003, c. 699, §2 (NEW) .]

4. Membership. The commission consists of the following members:

A. The following 17 voting members:

(1) Three Senators representing at least 2 political parties, appointed by the President of the Senate;

(2) Three members of the House of Representatives representing at least 2 political parties, appointed by the Speaker of the House;

(3) The Attorney General or the Attorney General's designee;

(4) Four members of the public, appointed by the Governor as follows:

(a) A small business person;

(b) A small farmer;

(c) A representative of a nonprofit organization that promotes fair trade policies; and

(d) A representative of a Maine-based corporation that is active in international trade;

(5) Three members of the public appointed by the President of the Senate as follows:

(a) A health care professional;

(b) A representative of a Maine-based manufacturing business with 25 or more employees; and

(c) A representative of an economic development organization; and

(6) Three members of the public appointed by the Speaker of the House as follows:

(a) A person who is active in the organized labor community;

(b) A member of a nonprofit human rights organization; and

(c) A member of a nonprofit environmental organization.

In making appointments of members of the public, the appointing authorities shall make every effort to appoint representatives of generally recognized and organized constituencies of the interest groups mentioned in subparagraphs (4), (5) and (6); and [2003, c. 699, §2 (NEW).]

B. The following 4 commissioners or the commissioners' designees of the following 4 departments and the president or the president's designee of the Maine International Trade Center who serve as ex officio, nonvoting members:

(1) Department of Labor;

(3) Department of Environmental Protection;

(4) Department of Agriculture, Conservation and Forestry; and

(5) Department of Health and Human Services. [2003, c. 689, Pt. B, §6 (REV); 2007, c. 266, §1 (AMD); 2011, c. 657, Pt. W, §5 (REV).]

[2003, c. 689, Pt. B, §6 (REV); 2007, c. 266, §1 (AMD); 2011, c. 657, Pt. W, §5 (REV) .]

5. Terms; vacancies; limits. Except for Legislators, commissioners and the Attorney General, who serve terms coincident with their elective or appointed terms, all members are appointed for 3-year terms. A vacancy must be filled by the same appointing authority that made the original appointment. Appointed members may not serve more than 2 terms. Members may continue to serve until their replacements are designated. A member may designate an alternate to serve on a temporary basis.

[2003, c. 699, §2 (NEW) .]

6. Chair; officers; rules. The first-named Senate member and the first-named House of Representatives member are cochairs of the commission. The commission shall appoint other officers as necessary and make rules for orderly procedure.

[2003, c. 699, §2 (NEW) .]

7. Compensation. Legislators who are members of the commission are entitled to receive the legislative per diem and expenses as defined in Title 3, section 2 for their attendance to their duties under this chapter. Other members are entitled to receive reimbursement of necessary expenses if they are not otherwise reimbursed by their employers or others whom they represent.

[2003, c. 699, §2 (NEW) .]

8. Staff. The Legislature, through the commission, shall contract for staff support for the commission, which, to the extent funding permits, must be year-round staff support. In the event funding does not permit adequate staff support, the commission may request staff support from the Legislative Council, except that Legislative Council staff support is not authorized when the Legislature is in regular or special session.

[2013, c. 427, §1 (RPR) .]

9. Powers and duties. The commission:

A. Shall meet at least twice annually; [2003, c. 699, §2 (NEW).]

B. Shall hear public testimony and recommendations from the people of the State and qualified experts when appropriate at no fewer than 2 locations throughout the State each year on the actual and potential social, environmental, economic and legal impacts of international trade agreements and negotiations on the State; [2003, c. 699, §2 (NEW).]

C. Shall every 2 years conduct an assessment of the impacts of international trade agreements on Maine's state laws, municipal laws, working conditions and business environment. The assessment must be submitted and made available to the public as provided for in the annual report in paragraph D; [2007, c. 266, §2 (AMD).]

D. Shall maintain active communications with and submit an annual report to the Governor, the Legislature, the Attorney General, municipalities, Maine's congressional delegation, the Maine International Trade Center, the Maine Municipal Association, the United States Trade Representative's Office, the National Conference of State Legislatures and the National Association of Attorneys General or the successor organization of any of these groups. The commission shall make the report easily accessible to the public by way of a publicly accessible site on the Internet maintained by the State. The report must contain information acquired pursuant to activities under paragraph B and may contain information acquired pursuant to activities under paragraph C; [2007, c. 266, §3 (AMD).]

E. Shall maintain active communications with any entity the commission determines appropriate regarding ongoing developments in international trade agreements and policy; [2003, c. 699, §2 (NEW).]

F. May recommend or submit legislation to the Legislature; [2003, c. 699, §2 (NEW).]

G. May recommend that the State support, or withhold its support from, future trade negotiations or agreements; and [2003, c. 699, §2 (NEW).]

H. May examine any aspects of international trade, international economic integration and trade agreements that the members of the commission consider appropriate. [2003, c. 699, §2 (NEW).]

[2007, c. 266, §§2, 3 (AMD) .]

10. Accounting; outside funding. All funds appropriated, allocated or otherwise provided to the commission must be deposited in an account separate from all other funds of the Legislature and are nonlapsing. Funds in the account may be used only for the purposes of the commission. The commission may seek and accept outside funding to fulfill commission duties. Prompt notice of solicitation and acceptance of funds must be sent to the Legislative Council. All funds accepted must be forwarded to the Executive Director of the Legislative Council, along with an accounting that includes the amount received, the date that amount was received, from whom that amount was received, the purpose of the donation and any limitation on use of the funds. The executive director shall administer all funds received in accordance with this section. At the beginning of each fiscal year, and at any other time at the request of the cochairs of the commission, the executive director shall provide to the commission an accounting of all funds available to the commission, including funds available for staff support.

[2013, c. 427, §2 (AMD) .]

11. Evaluation. By December 31, 2009, the commission shall conduct an evaluation of its activities and recommend to the Legislature whether to continue, alter or cease the commission's activities.

[2003, c. 699, §2 (NEW) .]

SECTION HISTORY
2003, c. 689, Pt. B, §6 (REV). 2003, c. 699, §2 (NEW). 2007, c. 266, §§1-3 (AMD). 2011, c. 657, Pt. W, §5 (REV). 2013, c. 427, §§1, 2 (AMD).

§12. QUORUM

For purposes of holding a meeting, a quorum is 11 members. A quorum must be present to start a meeting but not to continue or adjourn a meeting. For purposes of voting, a quorum is 9 voting members. [2007, c. 266, §4 (NEW).]

SECTION HISTORY
2007, c. 266, §4 (NEW).

§13. LEGISLATIVE APPROVAL OF TRADE AGREEMENTS

1. **Definitions.** As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Commission" means the Citizen Trade Policy Commission established in Title 5, section 12004-I, subsection 79-A. [2009, c. 385, §1 (NEW).]

B. "Trade agreement" means an agreement reached between the United States Government and any other country, countries or other international political entity or entities that proposes to regulate trade, procurement, services or investment among the parties to the agreement. "Trade agreement" includes, but is not limited to, any agreements under the auspices of the World Trade Organization, all regional free trade agreements, including the North American Free Trade Agreement and the Central America Free Trade Agreement and all bilateral agreements entered into by the United States, as well as requests for binding agreement received from the United States Trade Representative. [2009, c. 385, §1 (NEW).]

[2009, c. 385, §1 (NEW) .]

2. **State official prohibited from binding the State.** If the United States Government provides the State with the opportunity to consent to or reject binding the State to a trade agreement, or a provision within a trade agreement, then an official of the State, including but not limited to the Governor, may not bind the State or give consent to the United States Government to bind the State in those circumstances, except as provided in this section.

[2009, c. 385, §1 (NEW) .]

3. **Receipt of request for trade agreement.** When a communication from the United States Trade Representative concerning a trade agreement provision is received by the State, the Governor shall submit a copy of the communication and the proposed trade agreement, or relevant provisions of the trade agreement, to the chairs of the commission, the President of the Senate, the Speaker of the House of Representatives, the Maine International Trade Center and the joint standing committees of the Legislature having jurisdiction over state and local government matters and business, research and economic development matters.

[2009, c. 385, §1 (NEW) .]

4. **Review by commission.** The commission, in consultation with the Maine International Trade Center, shall review and analyze the trade agreement and issue a report on the potential impact on the State of agreeing to be bound by the trade agreement, including any necessary implementing legislation, to the Legislature and the Governor.

[2009, c. 385, §1 (NEW) .]

5. Legislative approval of trade agreement required. Unless the Legislature by proper enactment of a law authorizes the Governor or another official of the State to enter into the specific proposed trade agreement, the State may not be bound by that trade agreement.

[2009, c. 385, §1 (NEW) .]

SECTION HISTORY
2009, c. 385, §1 (NEW).

http://www.abc.net.au/news/2014-04-07/free-trade-agreement-explained-bilateral-fta-tpp/5371314

Free trade agreements: What is an FTA and what are the benefits?

By Matthew Grimson

Updated 7 Apr 2014, 6:36pm

After seven years of negotiations Australia has signed a free trade agreement (FTA) with Japan, but what exactly is an FTA?

Essentially, FTAs are designed to reduce the barriers to trade between two or more countries, which are in place to help protect local markets and industries.

Trade barriers typically come in the form of tariffs and trade quotas. One such example is Japan's tariff on Australian beef, which under the new deal will be cut from 38.5 per cent to 19.5 per cent over 18 years.

FTAs also cover areas such as government procurement, intellectual property rights, and competition policy.

Lowering trade barriers helps industries access new markets, boosting their reach and the number of people they can sell their products to.

FTAs are also ultimately designed to benefit consumers. In theory, increased competition means more products on the shelves and lower prices.

Japanese exporters will see Australian tariffs lowered on electronics, whitegoods and cars, and Australian consumers will see prices lowered as a result.

Australian car buyers will be paying about $1,500 less for Japanese vehicles.

Prime Minister Tony Abbott said in January that Australia's year-long G20 presidency, which culminates with the November summit in Brisbane, would make "freer trade" one of its priorities.

Are there downsides to free trade agreements?

One of the downsides of FTAs are the ability of powerful economies to impose their will over smaller, developing economies.

Most often, this comes in the form of a smaller economy making more concessions than are beneficial in the long term, while the larger economy keeps its trade restrictions in place.

Accusations have also been made in the past that FTAs have been enacted for foreign policy purposes, rather than bilateral economic benefit.

Critics also argue that FTAs do not encourage trade liberalisation as effectively as multilateral agreements.

Furthermore, critics argue that FTAs simply promote large, competitive trading blocs that could create economic instability.

Legal nuances a factor in negotiations

Agreements are notoriously difficult to negotiate, and often call for laws in two different jurisdictions to align.

Investor-state dispute settlement (ISDS) provisions give investors the ability to take governments to an international tribunal if they think there has been a breach in an FTA.

Australia has ISDS provisions in four of its FTAs, and 21 of its investment protection and promotion agreements (IPPAs).

Critics argue that such provisions may allow multinational corporations to sue Australian governments for compensation if they introduce laws or take actions that negatively affect the company's profitability.

Areas of particular concern to FTA critics include environmental and health regulations.

However, these ISDS provisions have so far only been used once against Australia.

In 2011 tobacco company Philip Morris used the ISDS provisions in the IPPA with Hong Kong in an attempt to overturn Australia's plain packaging laws. The case is still ongoing.

The Department of Foreign Affairs and Trade (DFAT) says the Government considers ISDS provisions on a "case-by-case basis".

"The Australian Government, however, is opposed to signing up to international agreements that would restrict Australia's capacity to govern in the public interest - including in areas such as public health, the environment or any other area of the economy," DFAT says on its website.

The Pharmaceutical Benefits Scheme (PBS), which gives Australians cheaper access to pharmaceuticals, is one area the Government says it is determined to protect.

http://en.wikipedia.org/wiki/Trans-Pacific_Partnership

Trans-Pacific Partnership

From Wikipedia, the free encyclopedia

The **Trans-Pacific Partnership** (**TPP**) is a proposed regional regulatory and investment treaty. As of 2014, twelve countries throughout the Asia-Pacific region have participated in negotiations on the TPP: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam.

The proposed agreement began in 2005 as the Trans-Pacific Strategic Economic Partnership Agreement (TPSEP or P4). Participating countries set the goal of wrapping up negotiations in 2012, but contentious issues such as agriculture, intellectual property, and services and investments have caused negotiations to continue into the present,[7] with the last round meeting in Ottawa from 3–12 July 2014.[8][9] Implementation of the TPP is one of the primary goals of the trade agenda of the Obama administration in the United States of America.

On 12 November 2011, the nine Trans-Pacific Partnership countries announced that the TPP intended to "enhance trade and investment among the TPP partner countries, to promote innovation, economic growth and development, and to support the creation and retention of jobs."[10] Some global health professionals, internet freedom activists, environmentalists, organised labour, advocacy groups, and elected officials have criticised and protested the negotiations, in large part because of the proceedings' secrecy, the agreement's expansive scope, and controversial clauses in drafts leaked to the public.[11][12][13][14] Wikileaks has published several documents since 2013.

Membership

There are twelve countries which are participating in negotiations for the Trans-Pacific partnership. Four of these have already ratified the *Trans-Pacific Strategic Economic Partnership Agreement* in 2006, while eight more have joined negotiations for the Trans-Pacific Partnership, whose text has not yet been finalized.

Currently in negotiations
Announced interest in joining

Potential future members

Country/Region	Status	Date
Brunei	Original Signatory	June 2005
Chile	Original Signatory	June 2005
New Zealand	Original Signatory	June 2005
Singapore	Original Signatory	June 2005
United States	Negotiating	February 2008
Australia	Negotiating	November 2008
Peru	Negotiating	November 2008
Vietnam	Negotiating	November 2008
Malaysia	Negotiating	October 2010
Mexico	Negotiating	October 2012
Canada[15]	Negotiating	October 2012
Japan	Negotiating	March 2013
Taiwan	Announced Interest	September 2013
South Korea	Announced Interest	November 2013

Potential members

South Korea was interested in joining in November 2010,[16] and was invited to the TPP negotiating rounds by the US after the successful conclusion of its Free trade agreement between the United States of America and the Republic of Korea in late December.[17] South Korea already has bilateral trade agreements with some TPP members, but areas such as vehicle manufacturing and agriculture still need to be agreed upon, making further multilateral TPP negotiations somewhat complicated.[18]

Other countries interested in TPP membership include Taiwan,[19] the Philippines,[20] Laos,[21] Colombia,[22] and Indonesia.[23] Cambodia,[24] Bangladesh[25] and India have also been mentioned as possible candidates.[26] Despite initial opposition, China is interested in joining the TPP eventually.[27]

On 20 November 2012 during a visit by President of the United States Barack Obama, Thailand's government announced its wish to join the TPP negotiations. Expecting Thailand to join after the process is finalised for Canada and Mexico, law professor Jane Kelsey said that it "will be in the extraordinary position of having to accept any existing agreed text, sight unseen."[28]

The most notable country not involved in the negotiations is China. According to the Brookings Institute, the most fundamental challenge for the TPP project regarding China is that "it may not constitute a powerful enough enticement to propel China to sign on to these new standards on trade and investment. China so far has reacted by accelerating its own trade initiatives in Asia."[29]

History

Trans-Pacific Strategic Economic Partnership Agreement

During the 2002 Asia-Pacific Economic Cooperation Leaders' Meeting in Los Cabos, Mexico, Prime Ministers Helen Clark of New Zealand, Goh Chok Tong of Singapore and Chilean President Ricardo Lagos began negotiations on the *Pacific Three Closer Economic Partnership* (P3-CEP). Brunei first took part as a full negotiating party in April 2005 before the fifth, and final round of talks.[30] Subsequently, the agreement was renamed to TPSEP (Trans-Pacific Strategic Economic Partnership agreement or Pacific-4). Negotiations on the Trans-Pacific Strategic Economic Partnership Agreement (TPSEP or P4) were concluded by Brunei, Chile, New Zealand and Singapore on 3 June 2005,[2] and entered into force on 28 May 2006 for New Zealand and Singapore, 12 July 2006 for Brunei, and 8 November 2006 for Chile.[31]

The original TPSEP agreement contains an accession clause and affirms the members' "commitment to encourage the accession to this Agreement by other economies".[30][32] It is a comprehensive agreement, affecting trade in goods, rules of origin, trade remedies, sanitary and phytosanitary measures, technical barriers to trade, trade in services, intellectual property, government procurement and competition policy. Among other things, it called for reduction by 90 percent of all tariffs between member countries by 1 January 2006, and reduction of all trade tariffs to zero by the year 2015.[33]

Although original and negotiating parties are members of the Asia-Pacific Economic Cooperation (APEC), the TPSEP (and the TPP it grew into) are not APEC initiatives. However, the TPP is considered to be a pathfinder for the proposed Free Trade Area of the Asia Pacific (FTAAP), an APEC initiative.

Trans-Pacific Partnership

In January 2008, the US agreed to enter into talks with the Pacific 4 (P4) members regarding trade liberalisation in financial services.[34] On 22 September 2008, under president George W Bush, US Trade Representative Susan C. Schwab announced that the US would be the first country to begin negotiations with the P4 countries to join the TPP, with the first round of talks in early 2009.[35][36]

In November 2008, Australia, Vietnam, and Peru announced that they would join the P4 trade bloc.[37][38] In October 2010, Malaysia announced that it had also joined the TPP negotiations.[39][40][41]

After the inauguration of Barack Obama in January 2009, the anticipated March 2009 negotiations were postponed. However, in his first trip to Asia in November 2009, president Obama reaffirmed the US's commitment to the TPP, and on 14 December 2009, new US Trade Representative Ron Kirk notified Congress that President Obama planned to enter TPP negotiations "with the objective of shaping a high-standard, broad-based regional pact".[42]

On the last day of the 2010 APEC summit, leaders of the nine negotiating countries endorsed the proposal advanced by US President Barack Obama that set a target for settlement of negotiations by the next APEC summit in November 2011.[43] However, negotiations have continued through 2012, 2013 and 2014.

In 2010, Canada had become an observer in the TPP talks, and expressed interest in officially joining,[44] but was not committed to join, purportedly because the US and New Zealand blocked it due to concerns over Canadian agricultural policy (i.e. supply management)—specifically dairy—and intellectual property-rights protection.[45][46] Several pro-business and internationalist Canadian media outlets raised concerns about this as a missed opportunity. In a feature in the *Financial Post*, former Canadian trade-negotiator Peter Clark claimed that the US Obama Administration had strategically outmaneuvered the Canadian Harper Government. Wendy Dobson and Diana Kuzmanovic for The School of Public Policy, University of Calgary, argued for the economic necessity of the TPP to Canada.[47] *Embassy* warned that Canada's position in APEC could be compromised by being excluded from both the US-oriented TPP and the proposed China-oriented ASEAN +3 trade agreement (or the broader Comprehensive Economic Partnership for East Asia).[40][41][48]

In June 2012, Canada and Mexico announced that they were joining the TPP negotiations.[49][50][51][52] Mexico's interest in joining was initially met with concern among TPP negotiators about its customs policies.[45]

Canada and Mexico formally became TPP negotiating participants in October 2012, following completion of the domestic consultation periods of the other nine members.[53][54][55]

Japan officially joined the TPP negotiations on 23 July 2013. According to the Brookings Institution, Prime Minister Abe's decision to commit Japan to joining the TPP should be understood as a necessary complement to his efforts to stimulate the Japanese economy with monetary easing and the related depreciation of the Yen. These efforts alone, without the type of economic reform the TPP will lead to, are unlikely to produce long-term improvements in Japan's growth prospects.[56]

In April 2013 APEC members proposed, along with setting a possible target for settlement of the TPP by the 2013 APEC summit, that World Trade Organisation (WTO) members set a target for settlement of the Doha Round mini-package by the ninth WTO ministerial conference (MC9), also to be held around the same time in Bali.[57]

This call for inclusion and co-operation between the WTO and Economic Partnership Agreements (also termed regional trade agreements) like the TPP comes after the statement by Pierre Lellouche who described the sentiment of the Doha round negotiations; "Although no one wants to say it, we must call a cat a cat...".[58]

A leaked set of draft documents indicated that public concern had little impact on the negotiations.[59] They also indicated there are strong disagreements between the US and negotiating parties regarding intellectual property, agricultural subsidies, and financial services.[60]

Causes of delays

Wikileaks' exposure of the Intellectual Property Rights and Environmental chapters of the TPP revealed "just how far apart the US is from the other nations involved in the treaty, with 19 points of disagreement in the area of intellectual property alone. One of the documents speaks of 'great pressure' being applied by the US." Australia in particular opposes the US's proposals for copyright protection and an element supported by all other nations involved to "limit the liability of ISPs for copyright infringement by their users." Another sticking point lies with Japan's reluctance to open up its agricultural markets.[72]

Political difficulties, particularly those related to the passage of a Trade Promotion Authority (TPA) by Congress, within the US present another cause of delay for the TPP negotiations. Receiving TPA from Congress is looking especially difficult for Obama since members of his own Democratic Party are against them, while Republicans generally support the trade talks. "The TPP and TPA pose a chicken-and-egg situation for Washington. Congress needs to pass TPA to bring the TPP negotiations to fruition, but the Obama administration must win favorable terms in the TPP to pull TPA legislation through Congress. Simply put, the administration cannot make Congress happy, unless it can report on the excellent terms that it has coaxed out of Japan."[73]

US Trade Representative's summary

According to the website of the Office of the United States Trade Representative, TPP chapters include: competition, co-operation and capacity building, cross-border services, customs, e-commerce, environment, financial services, government procurement, intellectual property, investment, labour, legal issues, market access for goods, rules of origin, sanitary and phytosanitary standards, technical barriers to trade, telecommunications, temporary entry, textiles and apparel, trade remedies.[74]

Also according to the USTR, the contents of the TPP seek to address issues that promote:

- Comprehensive market access by eliminating tariffs and other barriers to goods and services trade and investment, so as to create new opportunities for our workers and businesses and immediate benefits for our consumers.
- A fully regional agreement by facilitating the development of production and supply chains among TPP members, which will support the goals of job creation, improving living standards and welfare, and promoting sustainable growth among member countries.
- Cross-cutting trade issues by building on work being done in APEC and other fora by incorporating four new cross-cutting issues in the TPP. These issues are:

1. Regulatory coherence: Commitments will promote trade between the countries by making trade among them more seamless and efficient.
2. Competitiveness and business facilitation: Commitments will enhance the domestic and regional competitiveness of each member country's economy and promote economic

integration and jobs in the region, including through the development of regional production and supply chains.

3. Small- and Medium-Sized Enterprises: Commitments will address concerns small- and medium-sized businesses have raised about the difficulty in understanding and using trade agreements, encouraging these sized enterprises to trade internationally.
4. Development: Comprehensive and robust market liberalisation, improvements in trade and investment enhancing disciplines, and other commitments will serve to strengthen institutions important for economic development and governance and thereby contribute significantly to advancing TPP countries' respective economic development priorities.

- New trade challenges by promoting trade and investment in innovative products and services, including the digital economy and green technologies, and to ensure a competitive business environment across the TPP region.
- Living agreement by enabling the updating of the agreement when needed to address trade issues that materialise in the future as well as new issues that arise with the expansion of the agreement to include new countries.[75]

United States

The majority of United States free trade agreements are implemented as congressional-executive agreements.[86] Unlike treaties, such agreements require a majority of the House and Senate to pass.[86] Under "Trade Promotion Authority" (TPA), established by the Trade Act of 1974, Congress authorises the President to negotiate "free trade agreements... if they are approved by both houses in a bill enacted into public law and other statutory conditions are met."[86] In early 2012, the Obama administration indicated that a requirement for the conclusion of TPP negotiations is the renewal of "fast track" Trade Promotion Authority.[87] This would require the United States Congress to introduce and vote on an administration-authored bill for implementing the TPP with minimal debate and no amendments, with the entire process taking no more than 90 days.[88] Fast-track legislation was introduced in Congress in mid-April 2015.[89]

http://en.wikipedia.org/wiki/Transatlantic_Trade_and_Investment_Partnership

Transatlantic Trade and Investment Partnership

From Wikipedia, the free encyclopedia

The EU (green) and the USA (orange) shown on a world map

The **Transatlantic Trade and Investment Partnership** (**TTIP**) is a proposed free trade agreement between the European Union and the United States. Proponents say the agreement would result in multilateral economic growth,[1] while critics say it would increase corporate power and make it more difficult for governments to regulate markets for public benefit.[2] The American government considers the TTIP a companion agreement to the Trans-Pacific Partnership.[3] After a proposed draft was leaked in March 2014,[4] the European Commission launched a public consultation on a limited set of clauses and in January 2015 published parts of an overview.[5]

An agreement is not expected to be finalized before 2016.[6]

Background

Economic barriers between the EU and the United States are relatively low, not only due to long-standing membership in the World Trade Organization (WTO) but recent agreements such as the EU–U.S. Open Skies Agreement and work by the Transatlantic Economic Council. The European Commission claims that passage of a trans-Atlantic trade pact could boost overall trade between the respective blocs by as much as 50%.[7] However, economic relations are tense and there are frequent trade disputes between the two economies, many of which end up before the World Trade Organization. Economic gains from a Trade Treaty were predicted in the joint report issued by the White House and the European Commission.[8]

Some form of Transatlantic Free Trade Area had been proposed in the 1990s and later in 2006 by German Chancellor Angela Merkel in reaction to the collapse of the Doha world trade talks. However, protectionism on both sides may be a barrier to any future agreement.[9][10] It was first initiated in 1990, when, shortly after the end of the Cold War, with the world no longer divided into two blocs, the European Community (12 countries) and the US signed a "Transatlantic Declaration". This called for the continued existence of the North Atlantic Treaty Organization, as well as for yearly summits, biennial meetings between ministers of State, and more frequent encounters between political figures and senior officials.

Subsequent initiatives taken by the European deciders and the U.S. government included: in 1995, the creation of a pressure group of business people, the Transatlantic Business Dialogue (TABD) by public authorities on both sides of the Atlantic; in 1998, the creation of an advisory committee, the Transatlantic Economic Partnership; in 2007, the creation of the Transatlantic Economic Council, in which representatives from firms operating on both sides of the Atlantic meet to advise the European Commission and the U.S. government – and finally, in 2011, the creation of a group of high-level experts whose conclusions, submitted on February 11, 2013, recommended the launching of negotiations for a wide-ranging free-trade agreement. On February 12, 2013, President Barack Obama called in his annual State of the Union address for such an agreement.[11] The following day, EU Commission President Jose Manuel Barroso announced that talks would take place to negotiate the agreement.[12][13]

The United States and European Union together represent 60% of global GDP, 33% of world trade in goods and 42% of world trade in services. There are a number of trade conflicts between the two powers, but both depend on the other's economic market and disputes only affect 2% of total trade. A free trade area between the two would represent potentially the largest regional free-trade agreement in history, covering 46% of world GDP.[14][15]

Trade between the EU and the US (in € bn.)

Direction	Goods	Services	Investment	Total
EU to US	288	159	1655	2102
US to EU	196	146	1536	1878

U.S. investment in the EU is three times greater than U.S. investment in the whole of Asia and EU investment in the United States is eight times that of EU investment in India and China combined. Intra-company transfers are estimated to constitute a third of all transatlantic trade. The United States and EU are the largest trading partners of most other countries in the world and account for a third of world trade flows. Given the already low tariff barriers (under 3%), to make the deal a success the aim is to remove non-tariff barriers.[16]

Proposed contents

Documents released by the European Commission in July 2014 group the topics under discussion into three broad areas: Market access; Specific regulation; and broader rules and principles and modes of co-operation.[17][18]

Negotiations

Negotiations are held in week-long cycles alternating between Brussels and Washington. The negotiators hope to conclude their work by the end of 2015. The ninth round of negotiations will take place on 20-24 April 2015 in New York.

The 28 governments will then have to approve or reject the negotiated agreement in the EU Council of Ministers, at which point the European Parliament will also be asked for its endorsement. The EU Parliament is empowered to approve or reject the agreement. Different countries have different rules on approving and ratifying the document. For example, Article 53 of the French Constitution states, "trade treaties can only be ratified by a law". In the United States, both houses of the U.S. Congress would have to ratify it.

The TTIP Agreement texts are being developed by 24 joint EU-US working groups, each considering a separate aspect of the agreement. Development typically progresses through a number of phases. Broad *position papers* are first exchanged, introducing each side's aims and ambitions for each aspect. These are followed by *textual proposals* from each side, accompanied (in areas such as tariffs, and market access) by each side's "initial offer." These negotiations and draft documents can evolve (change) through the various stages of their development. When both sides are ready, a *consolidated text* is prepared, with remaining differences for discussion expressed in square brackets. These texts are then provisionally closed topic by topic as a working consensus is reached. However the agreement is negotiated as a whole, so no topic's text is finalised until full consensus is reached.[43]

In November 2014 Bulgarian government announced that it will not ratify the agreement unless the United States lifted visa requirements for Bulgarian citizens.[44]

Proposed benefits

TTIP aims for a formal agreement that shall "liberalise one-third of global trade", which they argue will create millions of new paid jobs.[45] "With tariffs between the United States and the EU already low, the United Kingdom's Centre for Economic Policy Research estimates that 80 percent of the potential economic gains from the TTIP agreement depend on reducing the conflicts of duplication between EU and U.S. rules on those and other regulatory issues, ranging from food safety to automobile parts."[45] A successful strategy (according to Thomas Bollyky at the Council on Foreign Relations and Anu Bradford of Columbia Law School) will focus on business sectors for which transatlantic trade laws and local regulations can often overlap, e.g., pharmaceutical, agricultural, and financial trading.[45] This will ensure that the United States and Europe remain "standard makers, rather than standard takers", in the global economy, subsequently ensuring that producers worldwide continue to gravitate toward joint U.S.-EU standards.[45]

A March 2013 economic assessment by the European Centre for Economic Policy Research estimates that such a comprehensive agreement would result in annual GDP growth of 68-119 billion euros by 2027 and annual GDP growth of 50-95 billion euros in the United States in the

same time frame. The 2013 report also estimates that a limited agreement focused only on tariffs would yield annual EU GDP growth of 24 billion euros by 2027 and annual growth of 9 billion euros in the United States. If shared equally among the affected people, the most optimistic GDP growth estimates would translate into "additional annual disposable income for a family of four" of "545 euros in the EU" and "655 euros in the US", respectively.[46]

In a *Wall Street Journal* article, the CEO of Siemens GmBH (with its workforce located 70% in Europe and 30% in the United States) claimed that the TTIP would strengthen United States and EU global competitiveness by reducing trade barriers, by improving intellectual property protections, and by establishing new international "rules of the road".[47]

The European Commission says that the TTIP would boost the EU's economy by €120 billion, the U.S. economy by €90 billion and the rest of the world by €100 billion.[48] Talks began in July 2013 and reached the third round of negotiations by the end of that year.[48]

In a *Guardian* article of 15 July 2013, Dean Baker of the United States' Center for Economic and Policy Research observed that with conventional trade barriers between the US and the EU already low, the deal would focus on non-conventional barriers such as overriding national regulations regarding fracking, GMOs and finance and tightening laws on copyright. He goes on to assert that with less ambitious projections the economic benefits per household are mediocre "If we apply the projected income gain of 0.21% to the projected median personal income in 2027, it comes to a bit more than $50 a year. That's a little less than 15 cents a day. Don't spend it all in one place".[49]

An October 2014 study by Jeronim Capaldo of the Tufts University indicates that there will be losses in terms of net exports, net losses in terms of GDP, loss of labor income, job losses, reduction of the labor share, loss of government revenue and higher financial instability among European countries.[50]

Controversy

The proposed agreement has attracted criticism from a wide variety of NGOs and activists, particularly in Europe. [51]

Activism

In March 2013, a coalition of digital rights organisations and other groups issued a declaration[52] in which they called on the negotiating partners to have TAFTA "debated in the U.S. Congress, the European Parliament, national parliaments, and other transparent forums" instead of conducting "closed negotiations that give privileged access to corporate insiders", and to leave intellectual property out of the agreement.

The Electronic Frontier Foundation and its German counterpart, FFII, in particular, compared TAFTA to the Anti-Counterfeiting Trade Agreement (ACTA),[53][54] signed by the United States, the European Union and 22 of its 27 member states.[55] An online consultation conducted by the

European Commission received 150,000 responses. According to the commission, 97% of the responses were pre-defined, negative answers provided by activists.[56][57]

National sovereignty and Investor State Dispute Settlements (ISDS)

Investor-state dispute settlement (ISDS) is an instrument that allows an investor to bring a case directly against the country hosting its investment, without the intervention of the government of the investor's country of origin.[58] From the late 1980s, certain Trade Treaties have included provisions for Investor-state dispute settlement, which allowed Foreign Investors who had been disadvantaged by actions of a Signatory State to sue for damages in a Tribunal of Arbitration. More recently such claims have increased in number and value, [59] and some states have become increasingly resistant to such clauses.[60]

In December 2013, a coalition of over 200 environmentalists, labor unions and consumer advocacy organizations on both sides of the Atlantic sent a letter to the USTR and European Commission demanding the investor-state dispute settlement be dropped from the trade talks, claiming that ISDS was "a one-way street by which corporations can challenge government policies, but neither governments nor individuals are granted any comparable rights to hold corporations accountable".[61][62] Some point out the "potential for abuse" that may be inherent in the trade agreement due to its clauses relating to investor protection.[63][64]

In December 2013, Martti Koskenniemi, Professor of International Law at the University of Helsinki, warned that the planned foreign investor protection scheme within the treaty, similar to World Bank Group's International Centre for Settlement of Investment Disputes (ICSID), would endanger the sovereignty of the signatory states by allowing for a small circle of legal experts sitting in a foreign court of arbitration an unprecedented power to interpret and void the signatory states' legislation.[65]

National objections

From both the European and American sides of the agreement, there are issues which are seen as essential if an accord is to be reached. According to Leif Johan Eliasson of Saarland University, "For the EU these include greater access to the American public procurement market, retained bans on imports of Genetically Modified Organisms (GMO) crops and hormone treated beef, and recognition of geographic trademarks on food products. For the United States they include greater access for American dairy and other agricultural products (including scientific studies as the only accepted criteria for SPS policies)". He observes that measures like the EU ban on hormone treated beef (based as they are on the Precautionary Principle) are not considered by the WTO to be based on scientific studies. He further cites as US objectives, "tariff-free motor vehicle exports, and retained bans on foreign contractors in several areas, such as domestic shipping".[66] Already, some U.S. producers are concerned by EU proposals to restrict their use of "particular designations" (also known as PDO or GI/geographical indications) that the EU considers location-specific, such as Feta and Parmesan cheeses and possibly Budweiser beer.[67][68] This has provoked debate between European politicians such as Renate Künast and Christian Schmidt over the value of the designations.[69]

At French insistence, trade in audio-visual services was excluded from the EU negotiating mandate.[70] The European side has been pressing for the agreement to include a chapter on the regulation of financial services; but this is being resisted by the American side, which has recently passed the Dodd-Frank Act in this field.[71] U.S. Ambassador Anthony Gardner has denied any linkage between the two issues.[72]

European negotiators are also pressing the United States to loosen its restrictions on the export of crude oil and natural gas, to help the EU reduce its dependence on energy from Russia. The United States has so far reserved its position.[73]

http://en.wikipedia.org/wiki/Trade_in_Services_Agreement

Trade in Services Agreement

From Wikipedia, the free encyclopedia

The **Trade in Services Agreement** (**TiSA**) is a proposed international trade treaty between 23 Parties, including the European Union and the United States. The agreement aims at liberalizing the worldwide trade of services such as banking, health care and transport.[1] Criticism about the secrecy of the agreement arose after WikiLeaks released in June 2014 a classified draft of the proposal's financial services annex, dated the previous April.[2]

Origin

Parties to Trade in Services Agreement (TiSA)

The process was an initiative of the United States. It was proposed to a group of countries meeting in Geneva and called the "Really Good Friends". All negotiating meetings take place in Geneva. The EU and the US are the main proponents of the agreement, and the authors of most joint changes. The participating countries started crafting the proposed agreement in February 2012[3] and presented initial offers at the end of 2013.[4]

Proposed Agreement

The agreement covers about 70% of the global services economy. Its aim is liberalizing the worldwide trade of services such as banking, healthcare and transport.[1][5] Services comprise 75% of American economic output; in EU states, almost 75% of its employment and gross domestic product.[6]

Once a particular trade barrier has unilaterally been removed, it can not be reintroduced. This proposal is known as the 'ratchet clause'.[7]

European Union

The EU has stated that companies outside of its borders will not be allowed to provide *publicly funded* healthcare or social services.[7]

Market access for publicly-funded health, social services and education, water services, film or TV will not be taken. Therefore the 'racket clause' will not apply.[7]

Parties involved

Initially having 16 members, the TISA has expanded to include 23 parties. Since the European Union represents 28 member states, there are 50 countries represented.[8] The 23 TiSA parties in order of their income categories are[9]

Income Group	Parties
High Income Countries	Australia, Canada, Chile, Chinese Taipei, European Union, Hong Kong, Iceland, Israel, Japan, Liechtenstein, New Zealand, Norway, Republic of Korea, Switzerland, United States, Uruguay.
Upper Middle Income Countries	Colombia, Costa Rica, Mexico, Panama, Peru, Turkey
Lower Middle Income Countries	Pakistan,Paraguay

Controversy

The agreement has been criticized for the secrecy around the negotiation. The cover page of the negotiating document leaked by Wikileaks says: "Declassify on: Five years from entry into force of the TISA agreement or, if no agreement enters into force, five years from the close of the negotiations."[2] Because of this practice it is not possible to be informed about the liberalizing rules that the participating countries propose for the future agreement. Only Switzerland has a practice of making public on the Internet all the proposals it submitted to the other parties since June 2012.[3] European Union published its "offer" for TISA only in July 2014,[10] after the Wikileaks disclosure.

Digital rights advocates have also brought attention to the fact that the agreement has provisions which would significantly weaken existing data protection provisions in signatory countries. In particular, the agreement would strip existing protections which aim to keep confidential or personally identifiable data within country borders or which prohibit its movement to other countries which do not have similar data protection laws in place.[11]

Analysis

A preliminary analysis of the *Financial Services Annex* by Professor Jane Kelsey, Faculty of Law, University of Auckland, New Zealand was published with the WikiLeaks release.[12]

The Public Services International (PSI) organization described TISA as:

a treaty that would further liberalize trade and investment in services, and expand "regulatory disciplines" on all services sectors, including many public services. The "disciplines," or treaty rules, would provide all foreign providers access to domestic markets at "no less favorable" conditions as domestic suppliers and would restrict governments' ability to regulate, purchase and provide services. This would essentially change the regulation of many public and privatized or commercial services from serving the public interest to serving the profit interests of private, foreign corporations.[13]

One concern is the provisions regarding retention of business records. David Cay Johnston said, "It is ... hard to make the case that the cost of keeping a duplicate record at the home office in a different country is a burden." He noted that business records requirements are sufficiently important that they were codified in law even before the Code of Hammurabi.[14]

Impacts of the law may include "whether people can get loans or buy insurance and at what prices as well as what jobs may be available."[14]

Dr. Patricia Ranald, a research associate at the University of Sydney, said:

"Amendments from the US are seeking to end publicly provided services like public pension funds, which are referred to as 'monopolies' and to limit public regulation of all financial services ... They want to freeze financial regulation at existing levels, which would mean that governments could not respond to new developments like another global financial crisis."[15]

Regarding the secrecy of the draft, Professor Kelsey commented: "The secrecy of negotiating documents exceeds even the Trans-Pacific Partnership Agreement (TPP) and runs counter to moves in the WTO towards greater openness."[12] Johnston adds, "It is impossible to obey a law or know how it affects you when the law is secret."[14]

http://en.wikipedia.org/wiki/Fast_track_%28trade%29

Fast track (trade)

From Wikipedia, the free encyclopedia
(Redirected from Fast track authority)

The **fast track negotiating authority** for trade agreements is the authority of the President of the United States to negotiate international agreements that Congress can approve or disapprove but cannot amend or filibuster. Also called **trade promotion authority (TPA)** since 2002, fast track negotiating authority is a temporary and controversial power granted to the President by Congress. The authority was in effect from 1975 to 1994, pursuant to the Trade Act of 1974, and from 2002 to 2007 by the Trade Act of 2002. Although it expired for new agreements on July 1, 2007, it continued to apply to agreements already under negotiation until they were eventually passed into law in 2011. In 2012, the Obama administration began seeking renewal of the authority.

Enactment and history

Congress started the fast track authority in the Trade Act of 1974, § 151–154 (19 U.S.C. § 2191–2194). This authority was set to expire in 1980, but was extended for eight years in 1979.[1] It was renewed in 1988 for five years to accommodate negotiation of the Uruguay Round, conducted within the framework of the General Agreement on Tariffs and Trade (GATT).[2] It was then extended to 16 April 1994,[3][4][5] which is one day after the Uruguay Round concluded in the Marrakech Agreement, transforming the GATT into the World Trade Organization (WTO). Pursuant to that grant of authority, Congress then enacted implementing legislation for the U.S.-Israel Free Trade Area, the U.S.-Canada Free Trade Agreement, the North American Free Trade Agreement (NAFTA), and the Uruguay Round Agreements Act.

In the second half of the 1990s, fast track authority languished due to opposition from House Republicans.[6]

Republican Presidential candidate George W. Bush made fast track part of his campaign platform in 2000.[7] In May 2001, as president he made a speech about the importance of free trade at the annual Council of the Americas in New York, founded by David Rockefeller and other senior U.S. businessmen in 1965. Subsequently, the Council played a role in the implementation and securing of TPA through Congress.[8]

At 3:30 a.m. on July 27, 2002, the House passed the Trade Act of 2002 narrowly by a 215 to 212 vote with 190 Republicans and 27 Democrats making up the majority. The bill passed the Senate by a vote of 64 to 34 on August 1, 2002. The Trade Act of 2002, § 2103–2105 (19 U.S.C. § 3803–3805), extended and conditioned the application of the original procedures.

Under the second period of fast track authority, Congress enacted implementing legislation for the U.S.–Chile Free Trade Agreement, the U.S.–Singapore Free Trade Agreement, the Australia–

U.S. Free Trade Agreement, the U.S.–Morocco Free Trade Agreement, the Dominican Republic–Central America Free Trade Agreement, the U.S.–Bahrain Free Trade Agreement, the U.S.–Oman Free Trade Agreement, and the Peru–U.S. Trade Promotion Agreement. The authority expired on July 1, 2007.[9]

In October 2011, the Congress and President Obama enacted into law the Colombia Trade Promotion Agreement, the South Korea–U.S. Free Trade Agreement, and the Panama–U.S. Trade Promotion Agreement using fast track rules, all of which the George W. Bush administration signed before the deadline.[10]

In early 2012, the Obama administration indicated that renewal of the authority is a requirement for the conclusion of Trans-Pacific Partnership (TPP) negotiations, which have been undertaken as if the authority were still in effect.[11] In July 2013, Michael Froman, the newly confirmed U.S. Trade Representative, renewed efforts to obtain Congressional reinstatement of "fast track" authority. At nearly the same time, Senator Elizabeth Warren questioned Froman about the prospect of a secretly negotiated, binding international agreement such as TPP that might turn out to supersede U.S. wage, safety, and environmental laws.[12] Other legislators expressed concerns about foreign currency manipulation, food safety laws, state-owned businesses, market access for small businesses, access to pharmaceutical products, and online commerce.[10]

In early 2014, Senator Max Baucus and Congressman Dave Camp introduced the Bipartisan Congressional Trade Priorities Act of 2014,[13] which sought to reauthorize trade promotion authority and establish a number of priorities and requirements for trade agreements.[14] Its sponsors called it a "vital tool" in connection with negotiations on the Trans-Pacific Partnership and trade negotiations with the EU.[13] Critics said the bill could detract from "transparency and accountability". Sander Levin, who is the ranking Democratic member on the House Ways and Means committee, said he would make an alternative proposal.[15]

Procedure

If the President transmits a fast track trade agreement to Congress, then the majority leaders of the House and Senate or their designees must introduce the implementing bill submitted by the President on the first day on which their House is in session. (19 U.S.C. § 2191(c)(1).) Senators and Representatives may not amend the President's bill, either in committee or in the Senate or House. (19 U.S.C. § 2191(d).) The committees to which the bill has been referred have 45 days after its introduction to report the bill, or be automatically discharged, and each House must vote within 15 days after the bill is reported or discharged. (19 U.S.C. § 2191(e)(1).)

In the likely case that the bill is a revenue bill (as tariffs are revenues), the bill must originate in the House (see U.S. Const., art I, sec. 7), and after the Senate received the House-passed bill, the Finance Committee would have another 15 days to report the bill or be discharged, and then the Senate would have another 15 days to pass the bill. (19 U.S.C. § 2191(e)(2).) On the House and Senate floors, each Body can debate the bill for no more than 20 hours, and thus Senators cannot filibuster the bill and it will pass with a simple majority vote. (19 U.S.C. § 2191(f)-(g).) Thus the entire Congressional consideration could take no longer than 90 days.

Negotiating objectives

According to the Congressional Research Service, Congress categorizes trade negotiating objectives in three ways: overall objectives, principal objectives, and other priorities. The broader goals encapsulate the overall direction trade negotiations take, such as enhancing the United States' and other countries' economies. Principal objectives are detailed goals that Congress expects to be integrated into trade agreements, such as "reducing barriers and distortions to trade (e.g., goods, services, agriculture); protecting foreign investment and intellectual property rights; encouraging transparency; establishing fair regulatory practices; combating anti-corruption; ensuring that countries enforce their environmental and labor laws; providing for an effective dispute settlement process; and protecting the U.S. right to enforce its trade remedy laws". Consulting Congress is also an important objective.[16]

Principal objectives include:

- Market access: These negotiating objectives seek to reduce or eliminate barriers that limit market access for U.S. products. "It also calls for the use of sectoral tariff and non-tariff barrier elimination agreements to achieve greater market access."
- Services: Services objectives "require that U.S. negotiator strive to reduce or eliminate barriers to trade in services, including regulations that deny nondiscriminatory treatment to U.S. services and inhibit the right of establishment (through foreign investment) to U.S. service providers."
- Agriculture: There are three negotiating objectives regarding agriculture. One lays out in greater detail what U.S. negotiators should achieve in negotiating robust trade rules on sanitary and phytosanitary (SPS) measures. The second calls for trade negotiators to ensure transparency in how tariff-rate quotas are administered that may impede market access opportunities. The third seeks to eliminate and prevent the improper use of a country's system to protect or recognize geographical indications (GI). These are trademark-like terms used to protect the quality and reputation of distinctive agricultural products, wines and spirits produced in a particular region of a country. This new objective is intended to counter in large part the European Union's efforts to include GI protection in its bilateral trade agreements for the names of its products that U.S. and other country exporters argue are generic in nature or commonly used across borders, such as parma ham or Parmesan cheese."
- Investment/Investor rights: "The overall negotiating objectives on foreign investment are designed "to reduce or eliminate artificial or trade distorting barriers to foreign investment, while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than domestic investors in the United States, and to secure for investors important rights comparable to those that would be available under the United States legal principles and practices."[17]

Scope

Fast track agreements were enacted as "congressional-executive agreements" (CEAs), which must be approved by a simple majority in both chambers of Congress.

Although Congress cannot explicitly transfer its powers to the executive branch, the 1974 trade promotion authority had the effect of delegating power to the executive, minimizing consideration of the public interest, and limiting the legislature's influence over the bill to an up or down vote:[18]

- It allowed the executive branch to select countries for, set the substance of, negotiate and then sign trade agreements without prior congressional approval.
- It allowed the executive branch to negotiate trade agreements covering more than just tariffs and quotas.
- It established a committee system, comprising 700 industry representatives appointed by the president, to serve as advisors to the negotiations. Throughout trade talks, these individuals had access to confidential negotiating documents. Most members of Congress and the public had no such access, and there were no committees for consumer, health, environmental or other public interests.
- It empowered the executive branch to author an agreement's implementing legislation without Congressional input.
- It required the executive branch to notify Congress 90 days before signing and entering into an agreement, but allowed unlimited time for the implementing legislation to be submitted.
- It forced a floor vote on the agreement and its implementing legislation in both chambers of Congress; the matters could not "die in committee."
- It eliminated several floor procedures, including Senate unanimous consent, normal debate and cloture rules, and the ability to amend the legislation.
- It prevented filibuster by limiting debate to 20 hours in each chamber.
- It elevated the Special Trade Representative (STR) to the cabinet level, and required the Executive Office to house the agency.

The 1979 version of the authority changed the name of the STR to the U.S. Trade Representative.[18]

The 2002 version of the authority created an additional requirement for 90-day notice to Congress before negotiations could begin.[18]

Arguments in favor

- Helps pass trade agreements: According to AT&T Chairman and CEO Randall L. Stephenson, Trade Promotion Authority is "critical to completing new trade agreements that have the potential to unleash U.S. economic growth and investment". Jason Furman, chairman of Obama's Council of Economic Advisers, also said "the United States might become less competitive globally if it disengaged from seeking further trade openings: 'If you're not in an agreement—that trade will be diverted from us to someone else—we will lose out to another country'".[19]
- Congress is allowed more say and members are shielded: According to I.M. Destler of the Peterson Institute for International Economics, fast track "has effectively bridged the division of power between the two branches. It gives executive branch (USTR) negotiators needed credibility to conclude trade agreements by assuring other nations'

representatives that Congress won't rework them; it guarantees a major Congressional role in trade policy while reducing members' vulnerability to special interests".[20]

- Assurance for foreign governments: According to President Reagan's Attorney General Edwin Meese III, "it is extremely difficult for any U.S. President to negotiate significant trade deals if he cannot assure other nations that Congress will refrain from adding numerous amendments and conditions that must then be taken back to the negotiating table". The very nature of Trade Promotion Authority requires Congress to vote on the agreements before they can take effect, meaning that without TPA, "those agreements might never even be negotiated".[21]

Arguments against

- Unconstitutional: Groups opposed to Trade Promotion Authority claim that it places too much power in the executive branch, "allowing the president to unilaterally select partner countries for 'trade' pacts, decide the agreements' contents, and then negotiate and sign the agreements—all before Congress has a vote on the matter. Normal congressional committee processes are forbidden, meaning that the executive branch is empowered to write lengthy legislation on its own with no review or amendments."[22]
- Lack of transparency: Democratic members of Congress and general right-to-know internet groups are among those opposed to trade fast track on grounds of a lack of transparency. Such Congressmen have complained that fast track forces "members to jump over hurdles to see negotiation texts and blocks staffer involvement. In 2012, Senator Ron Wyden (D-Ore.) complained that corporate lobbyists were given easy access while his office was being stymied, and even introduced protest legislation requiring more congressional input."[23]

https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds

United States Trade Representative

Investor-State Dispute Settlement (ISDS)

What is ISDS?

ISDS is a neutral, international arbitration procedure. Like other forms of commercial, labor, or judicial arbitration, ISDS seeks to provide an impartial, law-based approach to resolve conflicts. Various forms of ISDS are now a part of over 3,000 agreements worldwide, of which the United States is party to 50. Though ISDS is invoked as a catch all term, there are a wide variety of differences in scope and process. ISDS in U.S. trade agreements is significantly better defined and restricted than in other countries' agreements.

Governments put ISDS in place for at least three reasons:

1. To resolve investment conflicts without creating state-to-state conflict
2. To protect citizens abroad
3. To signal to potential investors that the rule of law will be respected

Because of the safeguards in U.S. agreements and because of the high standards of our legal system, foreign investors rarely pursue arbitration against the United States and have never been successful when they have done so.

What are the major criticisms of ISDS?

For some critics there is a discomfort that ISDS provides an additional channel for investors to sue governments, including a belief that all disputes (even international law disputes) should be resolved in domestic courts. Others believe that ISDS could put strains on national treasuries or that ISDS cases are frivolous. Based on our more than two decades of experience with ISDS under U.S. agreements, we do not share these views. We believe that providing a neutral international forum to resolve investment disputes under international law mitigates conflicts and protects our citizens.

The most significant concern that critics raise is about the potential impact of ISDS rulings on the ability of governments to regulate. Those concerns are why we have been at the leading edge of reforming and upgrading ISDS. The United States has taken important steps to ensure that our agreements are carefully crafted both to preserve governments' right to regulate and minimize abuse of the ISDS process. Those steps are described in detail below.

What rights are protected by ISDS under U.S. agreements?

In U.S. agreements, the investment rules enforced by ISDS provide investors in foreign countries basic protections from foreign government actions such as:

- **Freedom from discrimination**: An assurance that Americans doing business abroad will face a level playing field and will not be treated less favorably than local investors or competitors from third countries.

- **Protection against uncompensated expropriation of property**: An assurance that the property of investors will not be seized by the government without the payment of just compensation.

- **Protection against denial of justice:** An assurance that investors will not be denied justice in criminal, civil, or administrative adjudicatory proceedings.

- **Right to transfer capital:** An assurance that investors will be able to move capital relating to their investments freely, subject to safeguards to provide governments flexibility, including to respond to financial crises and to ensure the integrity and stability of the financial system.

These investment rules mirror rights and protections in the United States and are designed to provide no greater substantive rights to foreign investors than are afforded under the Constitution and U.S. law. For example, the Fifth Amendment to the U.S. Constitution states that no person shall be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment states that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Several of these rights – such as those relating to expropriation and denial of justice – are also longstanding elements of customary international law protections for investors abroad.

Why aren't local courts enough?

While ISDS does not provide additional substantive rights relative to U.S. law, it does provide an additional procedural right: the right for foreigners to choose impartial arbitration rather than domestic courts when alleging that the government itself has breached its international obligations, whether by discriminating against a foreign investor, expropriating the investor's property, or violating the investor's customary international law rights.

ISDS arbitration is needed because the potential for bias can be high in situations where a foreign investor is seeking to redress injury in a domestic court, especially against the government itself. While countries with weak legal institutions are frequent respondents in ISDS cases, American investors have also faced cases of bias or insufficient legal remedies in countries with well-developed legal institutions. Moreover, ISDS can be of particular benefit to small and medium-sized enterprises, which often lack the resources or expertise to navigate foreign legal systems and seek redress for injury at the hands of a foreign government. Indeed, SMEs and individuals have accounted for about half of all cases brought under international arbitration.

There is a long history of providing neutral forums for disputes that cross borders. Within the United States, for example, the rules of civil procedure allow for federal jurisdiction in cases involving citizens of foreign countries (or even citizens of different U.S. states) to eliminate biases that may occur within state courts. Internationally, there are a wide variety of judicial or arbitration mechanisms – including State-to-State dispute settlement and forums permitting direct actions by private parties – to create neutral means for resolving differences between parties from different countries; for example, the International Court of Justice, the World Trade Organization, and the Inter-American Court of Human Rights.

Where did ISDS come from?

Disputes between investors and foreign countries have required adjudication for as long as there has been cross-border investment. Prior to the evolution of the modern rules-based system, unlawful behavior by States targeting foreign investors tended either to go unaddressed or to escalate into conflict between States. Military interventions in the early years of U.S. history – gunboat diplomacy – were often in defense of private American commercial interests. As recently as 1974, a United Nations report found that in the previous decade and a half there had been 875 takings of the private property of foreigners by governments in 62 countries for which there was no international legal remedy. Though diplomatic solutions were possible, they were often ineffective and political in character, rather than judicial.

ISDS represented a better way.

Though the modern form of ISDS did not emerge until the 1960s, the idea of using special purpose panels to resolve disputes between private citizens and foreign governments dates to the earliest days of the Republic. One of the forerunners of modern investor-State arbitration mechanisms, the Jay Treaty between the United States and Britain, was negotiated by our first Chief Justice and included a process for resolving property disputes that arose during the Revolutionary War to ensure that investors received "full compensation for [their] losses and damages" where those could not be obtained "in the ordinary course of justice." Over the subsequent century, governments established more than 100 additional arbitration mechanisms, such as a series of U.S.-Mexican Claims Commissions, which heard thousands of private claims over the course of decades on issues ranging from cattle theft to denial of justice.

Opponents criticize ISDS for "elevating" corporations and investors to equal standing with countries by allowing corporations to "drag" sovereign governments to dispute settlement. But the right of private parties to challenge the actions of government is one of the oldest and most established legal principles (dating back 800 years to the Magna Carta): that "the king, too, is bound by law."

Importantly, while it provides a venue for conflict resolution, ISDS protects the sovereign right of States to regulate. Under U.S. agreements, ISDS panels are explicitly limited to providing compensation for loss or damage to investments. They cannot overturn domestic laws or regulations.

How expensive is ISDS?

ISDS is a complex form of dispute resolution and is accompanied by similar legal costs to complex litigation in our courts. But ISDS represents just a fraction of the legal expenses governments incur defending lawsuits. Over the past 25 years, under the 50 agreements the U.S. has which include ISDS, the United States has faced only 17 ISDS cases, 13 of which were brought to conclusion. During that same time period, the United States government was sued in U.S. courts hundreds of thousands of times – more than 1,000 of those for alleged "takings".

Though the U.S. government regularly loses cases in domestic court, we have never once lost an ISDS case and, in a number of instances, panels have awarded the United States attorneys' fees after the United States successfully defended frivolous or otherwise non-meritorious claims. The U.S. federal government defends challenges to U.S. state or local government measures in ISDS disputes.

According to the most recent UNCTAD data, only a quarter of concluded ISDS cases worldwide have been decided in favor of investors. When investors win, the damages they are typically awarded are substantially less than the value they have claimed. Because of high arbitration costs, the low winning percentage, the potential for future retaliation against the investor by the government being sued, ISDS is typically a recourse of last resort.

Will ISDS affect the ability of TPP governments to regulate?

The United States already has international agreements containing ISDS in force with six of the eleven other countries participating in TPP (Canada, Chile, Mexico, Peru, Singapore, and Vietnam). The remaining five countries (Australia, Brunei, Japan, Malaysia and New Zealand) are party to a total of over 100 agreements containing ISDS. TPP will not newly introduce ISDS to any of the countries participating in the agreement. Rather, it presents an opportunity to establish agreement among the parties on a high-standard approach to resolving international investment disputes.

Much of the concern about ISDS is the risk of companies using the mechanism to challenge legitimate regulations. Philip Morris International, for example, has challenged Australia's plain packaging regulation under a 1993 Hong Kong-Australia Bilateral Investment Treaty. Though that case has not yet been fully adjudicated and Australia has made no changes to their regulation, we nonetheless are working to ensure that TPP includes important safeguards that protect against ISDS being used to challenge legitimate regulation. That is why the United States has put in place several layers of defenses to minimize the risk that U.S. agreements could be exploited in the manner to which other agreements among other countries are susceptible.

In an effort to safeguard against potential abuses of ISDS, TPP will have state-of-the-art protections. It will recognize the inherent right to regulate and to preserve the flexibility of the TPP Parties to protect legitimate public welfare objectives, such as public health, safety, the environment, and the conservation of living or non-living exhaustible natural resources. The investment chapter will include carefully defined obligations and exceptions designed to ensure

that nothing in the chapter impinges on legitimate regulation or provides foreign investors with greater substantive rights than those already available under U.S. law. It will also reaffirm the right of any TPP government to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, or other regulatory objectives.

TPP will also incorporate numerous safeguards to ensure that the investment obligations are interpreted carefully and in a manner consistent with governments' intent, and that the ISDS process is not susceptible to abuse. These safeguards include:

- **Full transparency in cases**. Governments must make all pleadings, briefs, transcripts, decisions, and awards in ISDS cases publicly available, as well as open ISDS hearings to the public. One key objective of these provisions is to allow governments that are party to the agreement, as well as the public at large, to carefully monitor pending proceedings and more effectively make decisions about whether to intervene.

- **Public participation in cases**. Tribunals have the clear authority to accept *amicus curiae* submissions. In U.S. cases, *amicus* briefs have been submitted by a variety of NGOs, including the Sierra Club, Friends of the Earth, and Center for International Environmental Law. (Documents in all investor-State cases filed against the United States are available on the State Department website.)

- **Mechanism for expedited review and dismissal of frivolous claims and claims outside the tribunal's jurisdiction**. This mechanism enables respondent countries, on an extremely expedited basis, to move to dismiss (1) frivolous or otherwise unmeritorious claims (akin to provisions under the Federal Rules of Civil Procedure) and (2) claims the tribunal is not empowered to resolve.

- **Denial of benefits for sham corporations**. This provision prevents the use of shell companies to access ISDS.

- **Restriction on parallel claims**. This provision prevents a party from pursuing the same claims both in ISDS proceedings and domestic courts (i.e., restricting "forum shopping").

- **Statute of limitations**. A three-year statute of limitations protects respondents against old claims, which are difficult for governments to defend in part because access to documents and witnesses becomes more difficult over time.

- **Challenge of awards**. Both parties to an arbitration have the option to challenge a tribunal award.

- **Consolidation**. On request, tribunals may consolidate claims raising common questions of fact and law, which may increase efficiency, reduce litigation costs, and prevent strategic initiation of duplicative litigation.

- **Interim review of ISDS awards.** Parties to the arbitration are permitted to review and comment on a draft of the tribunal's award before it is made final.

- **Prudential exception.** This exception provides that nothing prevents countries from taking measures to safeguard the stability of their financial systems. If such measures are challenged, this provision allows the respondent country and investor's home country to jointly agree that the prudential exception applies and that decision is binding on the tribunal.

- **Tax exception.** This exception defines and limits the coverage of government tax measures under the investment provisions. In addition, this provision provides that if the respondent country and investor's home country agree that a challenged measure is not expropriatory, that decision is binding on the tribunal.

- **Mechanism for treaty Parties to issue binding decisions on how to interpret treaty provisions.** A binding interpretation mechanism enables TPP countries to confer after the agreement has entered into force and to issue joint decisions on questions of treaty interpretation that bind all tribunals in pending and future cases.

- **Independent experts on environmental, health, or safety matters.** In most ISDS cases, the disputing parties retain and appoint the experts. This provision provides arbitral tribunals with the power to appoint experts of their own choosing on environmental, health, and safety matters to ensure maximal objectivity in the evaluation of claims challenging such measures.

- **Limitations on obligations:** Clear limiting rules and definitions, including guidance on interpretation on the obligations frequently subject to litigation, to safeguard against subjective or overbroad interpretation – for example, the incorporation of U.S. Supreme Court standards on indirect expropriation and a clear tying of the "minimum standard of treatment" obligation to requirements under customary international law (i.e. the general and consistent practice of states that they follow from a sense of legal obligation).

The case record is instructive. Tribunals adjudicating ISDS cases under U.S. agreements have consistently affirmed that government actions designed and implemented to advance legitimate regulatory objectives do not violate investment obligations. In the *Chemtura v. Canada* case, for example, an ISDS panel rejected a claim that the Canadian government's actions to ban the use of chemical product breached Canada's NAFTA obligations. In rejecting the investor's claim, the tribunal showed deference to the government's scientific and environmental regulatory determinations. Similarly in the *Methanex v. the United States* case, an ISDS panel underscored the right of governments to regulate for public purposes, including regulation that imposes economic burdens on foreign investors, and stated that investors could not reasonably expect that environmental and health regulations would not change.

Some critics have argued that ISDS nonetheless "chills" regulation. But, far from inhibiting regulation, in the wake of U.S. trade agreements we typically see increases in public interest regulation. This is particularly true of recent U.S. agreements that have required trading partners

to upgrade both their labor and environmental laws. But even under older agreements, there is strong evidence of countries making regulatory improvements subsequent to concluding trade agreements with the United States. For example, a recent study by the Organization of American States found that CAFTA-DR countries have improved over 150 existing environmental laws and regulations, and adopted 28 new laws and regulations related to wastewater, air pollution, and solid waste.

The evidence is equally clear in the United States. Despite having 50 ISDS agreements in place, the United States has never lost a case and nothing in our agreements has inhibited our response to the 2008 financial crisis, diluted the financial reforms we put in place, or has challenged signature reforms like the Affordable Care Act or any of the other new regulations that have been put in place over the last 30 years.

ISDS Undermines National Legislation and Policy

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GOVT 446

Contents

I. Introduction

Investor-state dispute settlement (ISDS) provisions provide legal frameworks and safeguards for signatory parties to a trade agreement. The task of the present work is to examine the consequences of ISDS lawsuits on domestic public health and environmental policies in order to determine their ultimate devaluation of human rights. Trade is critical to the economic functionality of all states, as it provides for economic growth through the exchange of goods, services and ideas. However, rather recently, free trade agreements (FTAs), bilateral investment treaties (BITs) and international investment agreements (IIAs) have become increasingly invasive to national-level legislation and policy. Many of these trade and investment agreements are endowed with a legal ISDS mechanism, which serves to protect foreign investors' ability to function and incur profits through independent arbitration courts. In many cases, this effectively undermines domestic regulations intended to protect civilians' well being, as well as that of the environment.

Moreover, some critics argue that the inclusion of ISDS provisions is imperative to the decisiveness of foreign investors; suggesting countries that need foreign direct investment most, must also be willing to accept human and environmental degradation for the sake of alleged economic growth. The mechanism's inherently ambiguous legal language and further interpretation is far-reaching, allowing for diverse and often unethical situations to be considered applicable under ISDS protection. As it currently functions, investment arbitration "is not a fair, independent, and balanced method."[1] This paper will first analyze ISDS mechanics and functionality in relation to other arbitration and national

[1] Van Harten, Gus and David Schneiderman. "Public Statement on the International Investment Regime." 31 Aug 2010. 2.

courts. An examination of public health and environmental consequences of ISDS cases will also be thoroughly addressed.

II. ISDS Mechanism

According to the European Parliament Research Service (EPRS) ISDS provisions are found in over 3,000 IIAs, making it a prolific and significant aspect of modern international trade.[2] The most fundamental intention of the ISDS mechanism is to provide legal frameworks and safeguards for both parties, foreign investors and states, which become signatories to an investment agreement.[3] Investment treaties are increasingly enforceable via ISDS provisions, which "reduce the political risks related to rapidly increasing foreign investment."[4] Through this channel, political risk is reduced because investors can file suits directly against the host state, "without the intervention of the government of the investor's country of origin."[5] As ISDS cases become more commonly elicited, states have become increasingly compliant with, or at the very least, pay closer attention to demands of foreign investors. ISDS rules are established by the International Centre for Settlement of Investment Disputes (ICSID) Convention to which over 159 states are signatories; thus making the provision a widely accepted international norm.[6]

If an investor believes to have incurred a profit loss due to expropriation, direct or indirect, or any other breach of the established agreement, a case may be initiated directly to the state in which the investor has taken a stake.[7] Recent inclusion of ambiguous

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[2] European Parliamentary Research Service (EPRS). *Investor-State Dispute Settlement (ISDS) State of play and prospects for reform*, 2014, 1.
[3] European Commission (EC). (2013). Factsheet on investor-state dispute settlement.
[4] EPRS, 2.
[5] Ibid, 3.
[6] International Centre for Settlement of Investment Disputes (ICSID). (n.d.) *World Bank Group.*
[7] EC, 1.

language such as 'indirect expropriation' and 'intellectual property' protections, which encompass trademarking, may likely be the leading cause in the rise of ISDS cases brought to arbitration. The EPRS interprets 'indirect expropriation' "as host government actions, often through regulations, that significantly reduce an investment's value."[8] If a country modifies or introduces new legislation that compromises the investor's perceived ability to profit, a claim may be brought to arbitration under terms of expropriation.[9] Additional ISDS rules ensure investors' protection of capital flow, as well as "protection against 'unfair and inequitable treatment'", which is often arbitrarily invoked by investors.[10]

The broadening scope of ISDS terms allows claimants to challenge host governments on a variety of issues: "gas, nuclear energy, telecommunications, marketing and tax measures"[11] as well as licensing, changes of domestic law, withdrawal of subsidies, irregularities in public tenders and others.[12] It is evident by this spectrum, that ISDS provisions have an extensive reach. Many preliminary trade agreements, like the Trans-Pacific Partnership, further expand ISDS provisions to include 'intellectual property' protections, which increase arbitration potentialities far beyond their current capacity. Regardless of case specifics, however, the investor's objective is to receive monetary restitution and/or favorable legislation so that its business may continue in the host country. Popular thought contends, "ISDS is an important tool for protecting investments

[8] EPRS, 7.
[9] EC, 1.
[10] EPRS, 3.
[11] Ibid, 4.
[12] United Nations Conference on Trade and Development (UNCTAD). May 2013. Recent Developments in Investor-State Dispute Settlement (ISDS). *UNCTAD, United Nations.*

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and therefore for promoting and securing economic growth", a sentiment that is shared by many states and investors alike.[13]

i. ISDS Courts and Processes

Cases brought to arbitration under ISDS terms are often overseen by the Secretary-General of the ICSID of the World Bank Group; in 2012, 39 of the 58 ISDS cases filed were overseen by its auspices.[14] Other arbitration courts include the United Nations Commission on International Trade Law (UNCITRAL), the Stockholm Chamber of Commerce (SCC), the International Chamber of Commerce, and the Cairo Regional Centre for International Commercial Arbitration (CRCICA). Participating parties must mutually agree upon which tribunal will oversee the case.[15] Generally speaking, all ISDS courts feature unique functional frameworks, which are not present in national courts, they are "an autonomous and self-contained system for the institution, conduct and conclusion of [ISDS] proceedings."[16] Maximum discretion and secrecy of the cases is an extra amenity afforded by the arbitration courts.

To initiate a claim the investor must submit, in writing, a notice to the host government of its intention to sue. At this junction, the parties may settle out of court; restitution may be paid, policy may be diverted or the case may be thrown out. If a settlement is not reached within 90 days, the parties must agree on which tribunal court the case will be presented and select a set of panelists. Each party selects an arbitrator and mutually approves of a third to comprise a three-person board to hear the case. Under ISCID

[13] EC, 3.
[14] UNCTAD, 2.
[15] EPRS, 3.
[16] International Centre for Settlement of Investment Disputes (ISCID). (n.d.) Background information on the international centre for settlement of investment disputes (ISCID). *World Bank Group.*

auspices, if a third arbitrator cannot be mutually agreed upon, the Secretary-General of the ISCID retains the authority to choose. The legal framework for each individual case is provided by the FTA, BIT, or IIA, to which the parties are bound. "The North American Free Trade Agreement (NAFTA), the Energy Charter Treaty and the Argentina-USA BIT were the most frequent[ly]" cited in 2012.[17] The tribunals may, and often do, carry on for years operating under stringent secrecy.[18] Once a ruling has been made, "it is final and binding on the parties, but does not create a binding precedent applicable in other cases."[19]

ii. Why not National Courts?

The EC contends that relying on national courts to "enforce obligations" and manage the oversight of investment and trade agreements is "not always easy."[20] The most obvious reason being that judicial neutrality would be an issue for the foreign investor. It would be difficult to ensure impartial judgment if a foreign investor attempted to sue a host government in its own courts. Another important reason for not utilizing national courts is due to the likely inclusion of stipulations within the agreement, which are not included in national law.[21] This could result in the court's lack of commitment to or recognition of the agreement in favor of its national laws, which would supersede. There have been instances of an investor being denied access to local courts and compensation, thus impeding justice where it may be due.[22] From a business prospective, the inclusion of ISDS provisions allows for greater safeguards and judicial neutrality when taking on the risk of foreign investment.

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[17] EPRS, 4.
[18] Ibid, 3.
[19] Ibid.
[20] EC, 2.
[21] Ibid.
[22] Ibid.

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Most revealing are the existing ISDS advocates, whom fall into "two main groups: investment lawyers/arbitrators and businesses", multinational corporations specifically.[23] The implications are quite obvious; both groups clearly stand to gain the most financially from the inclusion of ISDS provisions in trade agreements.

iii. ISDS Mechanism and Arbitration Court Criticism

A United Nations Conference on Trade and Development (UNCTAD) report concludes, "It is still difficult to judge the effectiveness of this mechanism, especially given that most cases have not reached a conclusion."[24] It is widely accepted that "ISCID provides high-quality decisions, [but] that quality comes at a price",[25] as the average cost of ICSID arbitration is approximately $8,000,000 per party.[26] Collectively, these factors make the lack of case decisiveness increasingly problematic as parties continue to pay lawyer and court fees for the duration of the arbitration, thus increasing the financial burden. Criticism of court functionality reveals that these tribunals lack the protections of national legal systems due to non-existent precedent and appeal systems.[27] With the exception of the ISCID, the "majority of arbitration fora do not have a public register of cases"[28] and are not required to disclose any level of information, allowing for a remarkable lack of public transparency. Cases that directly affect citizens' jobs, social programs, environment and health, may remain hidden in secrecy, indefinitely and legally.

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[23] Tienhaara, Kyla and Patricia Ranald. July 2011. Australia's rejection of Investor-State Dispute Settlement: Four potential contributing factors. *Investment Treaty News.* 12 July 2011.
[24] United Nations Conference on Trade and Development (UNCTAD). May 2013. Recent Developments in Investor-State Dispute Settlement (ISDS). *UNCTAD, United Nations.* 48.
[25] Yackee, Jason Webb. (2013). Do States Bargain over Investor-State Dispute Settlement - Or, toward Greater Collaboration in the Study of Bilateral Investment Treaties. *Santa Clara Journal of International Law* 12.1: 303-316. HeinOnline Database.
[26] Ibid, 288.
[27] Gaukrodger, D. and Gordon, K. (2012). Investor-state dispute settlement: A scoping paper for the investment policy community. *OECD Working Papers on International Investment, No. 2012/3, OECD Investment Division.* 40.
[28] EPRS, 3.

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Furthermore, the tribunals lack arbitrator neutrality. The judges may also function as lawyers and/or referring experts, and may simultaneously be practicing advocates or have "inappropriate relationships with third-party funders of cases they are deciding."[29] Evidently, there are no stringent criteria for becoming member to the roster and no requirement of a judicial background. UNCTAD claims, "The major operational criticism that can be made of this mechanism is the difficulty of convening panels, due to the absence of an agreed roster of panelists."[30] This puts in question the legitimacy of tribunal composition and its members' capacity to formulate judicial rulings in a sound manner. If the roster from which tribunals must be chosen is deficient to start, then a ruling will inevitably be reflective of the caliber of its judges. These factors collectively institutionalize an increased likelihood of corruption and bias. The EPRS declares these overlapping arbitrator-lawyer-expert roles make "investment lawyers influential advocates of the ISDS system"[31]; as mentioned earlier, they fall into one of the two main groups that lobby for ISDS. Additionally, there is public and governmental concern regarding investors' increased ability to "challenge public health, environmental and social protection laws that harm their profits."[32] Valentina S. Vadi affirms this sentiment in her analysis of ISDS abuses by big tobacco companies; she claims the mechanism exists to protect foreign investors in order to promote domestic economic development at the expense of public health policy.[33]

[29] Gaukrodger and Gordon p. 40
[30] UNCTAD p. 48
[31] EPRS p. 4
[32] Ibid, 2.
[33] Vadi, Valentina S. (2012). Global Health Governance at a Crossroads: Trademark Protection v. Tobacco Control in International Investment Law. *Stanford Journal of International Law* 48.93: n.p.. LexisNexis Academic. n.p.

III. Consequences on Public Health Policy

ISDS provisions have an adverse impact on public health policy. There is an irrefutable "clash between public health law and international investment law before investment treaty tribunals."[34] Recent cases brought to arbitration courts are in direct conflict with host countries' proposed introduction of more health-conscious policies. One highly contentious topic highlighting this clash between public health and ISDS is that of the tobacco industry and its fight against government-mandated plain packaging. Proposed state legislation to standardize plain, colorless and logo-free cigarette packaging is part of an increasingly global campaign to make smoking less attractive and less common. This recurring issue, which pits domestic policy against corporate profits, has elicited suits in Canada, Australia and Uruguay.[35]

In many countries, the mere threat of arbitration by big tobacco companies, has successfully subdued government opposition into compliance; thereby complicating the emergence of any legislation for plain packaging or other reforms. As early as 1994, following the implementation of NAFTA, the tobacco industry exploited ISDS provisions "as an effective way to frame plain packaging as a legal issue divorced from health concerns."[36] In a recent notice of arbitration from P.J. Reynolds against Canada, the company pointed to "illegal expropriation of a legally protected trademark,"[37] which is a progressively common protective term interpreted under ISDS provisions. In April 2011 the Australian Government formally declared it would reject ISDS provisions in all its subsequent FTAs. This stance arises from globally trending cases, which attempt to "limit [states'] capacity to

[34] Ibid.
[35] Porterfield, M. and C. Byrnes, Philip Morris v. Uruguay: Will investor-State arbitration send restrictions on tobacco marketing up in smoke?. *Investment Treaty News* 12 July 2011, n.p.
[36] Ibid.
[37] Ibid.

put health warnings or plain packaging requirements on tobacco products."[38] In December of 2011, Australia implemented the *Tobacco Plain Packaging Act 2011*, which aims to significantly reduce the rate of smoking in the country.[39] Philip Morris Asia responded to this with a notice of arbitration under terms of expropriation and unfair treatment. It seeks to challenge the legislation under the 1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments; the case is being overseen by UNCITRAL.[40] The Australian Government states, "it is important that the public have access to information relating to the proceedings ... [and it] is committed to achieving transparency in these proceedings.[41] This is an important factor to note due to the established international norm of secrecy associated with ISDS arbitration cases. Australia is pushing back against big corporations for the sake of its citizens' rights while hinting at a level of contempt for the current operational mechanisms in investment law.

On 10 February 2010, Philip Morris filed a request for arbitration against Uruguay through the ICSID.[42] The company seeks to challenge three of Uruguay's tobacco regulations: (1) a 'single presentation' requirement that prohibits individual brands from marketing multiple products, (2) a requirement that tobacco packages include 'pictograms' with graphic images such as cancerous lungs, and (3) a mandate that health warnings cover 80% of the front and back of cigarette packages.[43] Not only is Philip Morris demanding monetary restitution for potential loss of profit due to the implementation of these policies,

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[38] Porterfield, M. and C. Byrnes, Philip Morris v. Uruguay: Will investor-State arbitration send restrictions on tobacco marketing up in smoke?. *Investment Treaty News* 12 July 2011, n.p.
[39] Australian Government Attorney-General's Department. "Investor-state arbitration - tobacco plain packaging." n.p.
[40] Ibid.
[41] Ibid.
[42] Porterfield and Byrnes, n.p.
[43] Ibid.

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it additionally requests that the tribunal mandate Uruguay "to suspend the application of the challenged regulations."[44] The implications of this latter action demonstrate the invasive power of arbitration tribunals and their capacity to undermine domestic law. If a tribunal, the legitimacy of which is questionable, orders Uruguay to refrain from pursuing legislation, then the value of rule of law as a whole will be thoroughly diminished. At what point and by whom, are multinational corporations held accountable to governments and civil society? In the case of *Philip Morris v. Uruguay* (2010), it appears that legality and authority lines have become irrefutably blurred. These examples illustrate that investment law may be one of the few realms within international law in which deterrent tactics are actually *too* effective. Evidently, the mere threat of a lawsuit can, in fact, be enough to steer well-intended domestic legislation and policy off course.

IV. Consequences on the environment

The largest award to date for an ISDS arbitration case, approximately US $1.76 billion, was the result of the highly controversial *Occidental v. Ecuador* case in 2012.[45] Ultimately the award package amounted to $2.4 billion; accounting for $589 million in backdated compound interest, the post-tribunal accumulated interest, as well as the costs of the tribunal itself.[46] "The financial drain is equivalent to the combined annual income of the poorest 20 percent of Ecuadoreans, nearly 3 million people."[47] This case, too, sheds light on many uncertainties regarding the current frameworks for arbitration, including the balance

[44] Porterfield and Byrnes, n.p.
[45] Sabahi, Borzu and Kabir Duggal. "Occidental Petroleum v Ecuador (2012): observations on proportionality, assessment of damages and contributory fault." *ISCID Review: Oxford Journals* 28.2 (2012): 279-290.
[46] Ibid.
[47] Wallach, Lori, Ben Beachy and Global Trade Watch. "Occidental v. Ecuador Award Spotlights Perils of Investor-State System: Tribunal Fabricated a Proportionality Test to Further Extend the FET Obligation and Used 'Egregious' Damages Logic to Hit Ecuador with $2.4 Billion Penalty in Largest Ever ICSID Award." Nov. 21, 2012 Public Citizen: Washington D.C., n.p.

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of investor rights with the regulatory power of States.[48] Furthermore, it illustrates the long-standing "idea of investment arbitration as a species of public law or global administrative law", which undermines all others when foreign investment is in question.[49]

Occidental Petroleum Corporation and Occidental Exploration and Production Company "entered into a Participation Contract [with the Republic of Ecuador] for the exploration and exploitation of hydrocarbons in Block 15 of the Ecuadorian Amazon" in 1999.[50] Occidental violated this contract when it sold 40 percent of its shares to Alberta Energy Company (AEC). "The ability to transfer or assign rights was 'subject to stringent conditions'" and Occidental was required to gain the Ecuadorean Government's authorization.[51] One of the most contested issues of the case was Occidental's pursuit, and the tribunal's granting, of 100 percent of the contract value, despite the fact that "40 percent of its economic interest had [already] been assigned to AEC."[52] Ecuador argued that any awarded damages should account for this significant detail, calling it "'reckless conduct'"[53] by Occidental, which voided the contract and initiated the opportunity for arbitration in the first place. Nevertheless, the tribunal not only neglected to address Occidental's fault, it penalized Ecuador for an unprecedented sum of money with interest.

One of the most vexing facts about these types of rulings in ISDS arbitration cases is one that is rarely addressed: who pays the bill when states lose big to foreign investors? The answer, of course, is taxpayers, the impoverished most of all. The implications of lawsuit losses go well beyond monetary factors. Many of these massive cases, most often initiated

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[48] Sabahi, B. and K. Duggal, n.p.
[49] Ibid.
[50] Sabahi, B. and K. Duggal, n.p.
[51] Ibid.
[52] Ibid.
[53] Ibid.

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in "Latin American countries including Ecuador, Venezuela, Bolivia and Argentina face an increased number of claims from the oil and gas industry."[54] These invasive natural resource industries, which seek to exploit the environments of developing countries, are also exploiting that of the people whom inhabit them. It's no secret that foreign investors in these industries are attracted to countries in which regulations are lax and cheap labor is available. Citizens become entrapped in social and economic injustices, which are perpetuated by the existence of shifty, profit-driven FTAs. In order to secure a livelihood, locals are absorbed into the corporate scheme for work, simultaneously, their environment and personal access to previously available natural resources is rapidly depleted. Following a losing ISDS arbitration case, like that of *Occidental v. Ecuador,* citizens are hit three-fold: they must now absorb financial costs for the arbitration, which in turn depletes funds for social welfare programs and development, the environment on which their livelihoods once depended has been comprised, and they may now be out of a job, driving them deeper into poverty and thus perpetuating the cycle.

V. Conclusion

A June 2010 UNCTAD public statement for reform argues that investment agreements must be "in accordance with the principles of public accountability and openness and should preserve the state's right to regulate in good faith and for a legitimate purpose."[55] As it functions currently, there is a certain, palpable tension between ISDS mechanisms and government policies and legislation. As illustrated throughout this paper, these cases often seek to provide greater protection of corporate rights at the expense of citizens' health and

[54] Garcia, J. (2013). THE ERA OF PETROLEUM ARBITRATION MEGA CASES. *Houston Journal Of International Law, 35*(3), 537-588. EBSCO Host Database, 540.
[55] http://www.osgoode.yorku.ca/public-statement/documents/Public_Statement_(final)_(Dec_2013).pdf 2

environmental well-being. To add insult to injury, these affected citizens never had a say in the political and legal processes that implemented the FTA, BIT or IIA in question. If foreign investors are allowed to bully governments into modifying, delaying or abandoning socially favorable policies, then they are simultaneously undermining state sovereignty and infringing upon human rights. It is the state's responsibility, legally and morally, to maintain "public welfare", which must not be "subordinated to the interests of investors."[56] Greater assurance of fulfilling that duty may be possible through the inclusion of "provisions regarding sustainable development, human rights as well as health policy and national security" in all investment treaties. Citizens and civil society should be given the right to participate in the processes that negotiate and ratify such investment agreements as they directly affect citizens' rights. With such a prolific global presence of trade agreements, there could and should be a "common investment policy" to "consolidate or supersede" many of them.[57]

Keen on this type of reform, Australia is pushing for a new global standard through its rejection of ISDS provisions as they're currently structured in all future trade agreements. However, not only should future agreements feature reformed, more open and fair legal safeguards, all existing FTAs, BITs and IIAs should also be evaluated and renegotiated with these significant factors in mind. If civil society, governments, international organizations and the like, continue to allow foreign investors to run amuck without regard for state sovereignty, human and environmental rights, we are surely headed in a negative direction. There needs to be greater awareness surrounding this type of abuse by wealthy and powerful elites, whom are currently unaccountable to anyone. The inclusion of ISDS mechanisms in trade agreements

[56] Van Harten, Gus and David Schneiderman. "Public Statement on the International Investment Regime." 31 Aug 2010. 1.
[57] Ibid, 8.

merely amplifies and institutionalizes this unaccountability, the implications of which reach far beyond monetary value. Movements like human rights and environmental sustainability are being thoroughly chipped away by the existence of ISDS frameworks; until the provisions are reformed to reflect reverence of morality and ethics, ISDS should be rejected.

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http://www.nytimes.com/2015/04/17/business/obama-trade-legislation-fast-track-authority-trans-pacific-partnership.html?_r=0

New York Times

Deal Reached on Fast-Track Authority for Obama on Trade Accord

By JONATHAN WEISMAN

APRIL 16, 2015

WASHINGTON — Key congressional leaders agreed on Thursday on legislation to give President Obama special authority to finish negotiating one of the world's largest trade accords, opening a rare battle that aligns the president with Republicans against a broad coalition of Democrats.

In what is sure to be one of the toughest fights of Mr. Obama's last 19 months in office, the "fast track" bill allowing the White House to pursue its planned Pacific trade deal also heralds a divisive fight within the Democratic Party, one that could spill into the 2016 presidential campaign.

With committee votes planned next week, liberal senators such as Sherrod Brown of Ohio are demanding to know Hillary Rodham Clinton's position on the bill to give the president so-called trade promotion authority, or T.P.A.

Trade unions, environmentalists and Latino organizations — potent Democratic constituencies — quickly lined up in opposition, arguing that past trade pacts failed to deliver on their promise and that the latest effort would harm American workers.

The deal was struck by Senators Orrin G. Hatch of Utah, the Finance Committee chairman; Ron Wyden of Oregon, the committee's ranking Democrat; and Representative Paul D. Ryan, Republican of Wisconsin and chairman of the House Ways and Means Committee. It would give Congress the power to vote on the more encompassing 12-nation Trans-Pacific Partnership once it is completed, but would deny lawmakers the chance to amend what would be the largest trade deal since the North American Free Trade Agreement of 1994, which President Bill Clinton pushed through Congress despite opposition from labor and other Democratic constituencies.

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While supporters have promised broad gains for American consumers and the economy, the clearest winners of the Trans-Pacific Partnership agreement would be American agriculture, along with technology and pharmaceutical companies, insurers and many large manufacturers that say they could also expand United States' exports to the other 11 nations in Asia and South America that are involved.

President Obama embraced the legislation immediately, proclaiming "it would level the playing field, give our workers a fair shot, and for the first time, include strong fully enforceable protections for workers' rights, the environment and a free and open Internet."

"Today," he added, "we have the opportunity to open even more new markets to goods and services backed by three proud words: Made in America."

But Mr. Obama's enthusiasm was tempered by the rancor the bill elicited from some of his strongest allies. To win over the key Democrat, Mr. Wyden, the Republicans agreed to stringent requirements for the deal, including a human rights negotiating objective that has never existed on trade agreements.

The bill would make any final trade agreement open to public comment for 60 days before the president signs it, and up to four months before Congress votes. If the agreement, negotiated by the United States trade representative, fails to meet the objectives laid out by Congress — on labor, environmental and human rights standards — a 60-vote majority in the Senate could shut off "fast-track" trade rules and open the deal to amendment.

"We got assurances that U.S.T.R. and the president will be negotiating within the parameters defined by Congress," said Representative Dave Reichert, Republican of Washington and a senior member of the Ways and Means Committee. "And if those parameters are somehow or in some way violated during the negotiations, if we get a product that's not adhering to the T.P.A. agreement, than we have switches where we can cut it off."

To further sweeten the deal for Democrats, the package includes expanding trade adjustment assistance — aid to workers whose jobs are displaced by global trade — to service workers, not just manufacturing workers. Mr. Wyden also insisted on a four-year extension of a tax credit to help displaced workers purchase health insurance.

Both the Finance and Ways and Means committees will formally draft the legislation next week in hopes of getting it to final votes

before a wave of opposition can sweep it away. "If we don't act now we will lose our opportunity," Mr. Hatch said.

At a Senate Finance Committee hearing Thursday morning, Jacob J. Lew, the Treasury secretary, and Michael Froman, the United States trade representative, pleaded for the trade promotion authority.

"T.P.A. sends a strong signal to our trading partners that Congress and the administration speak with one voice to the rest of the world on our priorities," Mr. Lew testified.

Even with the concessions, many Democrats sound determined to oppose the president. Representative Sander Levin of Michigan, the ranking Democrat on the House Ways and Means Committee, condemned the bill as "a major step backward."

The A.F.L.-C.I.O. and virtually every major union — convinced that trade promotion authority will ease passage of trade deals that will cost jobs and depress already stagnant wages — have vowed a fierce fight. The A.F.L.-C.I.O. announced a "massive" six-figure advertising campaign to pressure 16 selected senators and 36 House members to oppose fast-track authority.

"We can't afford to pass fast track, which would lead to more lost jobs and lower wages," said Richard Trumka, president of the A.F.L.-C.I.O. "We want Congress to keep its leverage over trade negotiations — not rubber-stamp a deal that delivers profits for global corporations, but not good jobs for working people."

In all, the bill sets down 150 negotiating objectives, such as tough new rules on intellectual property protection, lowering of barriers to agricultural exports, labor and environmental standards, rule of law and human rights. Reflecting the modern economy, Congress would demand a loosening of restrictions on cross-border data flow, an end to currency manipulation and rules for competition from state-owned enterprises.

Businesses and business lobbying groups lined up behind the bill as fast as liberal groups and unions arrayed in opposition. "With facts and arguments, we'll win this trade debate and renew T.P.A.," vowed Thomas J. Donohue, president of the U.S. Chamber of Commerce.

It all made for a dizzying change of tone in a Washington where partisan lines have hardened. Republican leadership fell firmly behind T.P.A. Business groups battling the president on climate change, taxes and health care urged Congress to expand his trade powers.

But a sizable minority of Republicans — especially in the House — are reluctant to give the president authority to do anything substantive. Whether Republican leaders can get their troops in line, and how Mr. Obama can round up enough Democratic votes, might be the biggest legislative question of the year.

Mr. Reichert, the Republican lawmaker, said 20 or fewer Democrats currently support the measure in the House; last year, House Speaker John A. Boehner of Ohio said he would need 50.

Senator Charles E. Schumer of New York, the third-ranking Democrat, said he will demand the inclusion of legislation to combat the manipulation of currency values, especially by China. "China is the most rapacious of our trading partners, and the stated goal of this deal is to lure these other countries away from China," Mr. Schumer said. "It's not at all contradictory to finally do something with China's awful trade practices."

Mr. Brown said the negotiating objectives must be turned into solid requirements. "I don't think negotiating objectives without more enforcement mechanisms get you very far," he said. "Negotiating objectives are, 'Hey U.S.T.R., try to get this,' and they'll say, 'We tried.' We need something better than that."

Others appeared dead set against the accord.

"Over and over again we've been told that trade deals will create jobs and better protect workers and the environment," said Senator Bob Casey, Democrat of Pennsylvania. "Those promises have never come to fruition."

MEMORANDUM

DATE: *May 5, 2015*

RE: ***Report to the Maine Citizen Trade Policy Commission on Round 9 Negotiations of the Trans-Atlantic Trade & Investment Partnership (TTIP) and the Proposed TTIP "Horizontal Regulatory Cooperation Chapter"***

FROM: ***Sharon Anglin Treat, Member, CTPC and Intergovernmental Policy Advisory Committee (IGPAC)***

Since the CTPC last met, there have been two rounds of TTIP negotiations, the 8th round in Brussels in February and the 9th round in New York City in April. The next round is planned for mid-July in Brussels. I was able to attend both recent rounds and make presentations during the one-day stakeholder event, focusing both times on the "Regulatory Cooperation" Chapter as proposed by the European Union negotiators. While in Brussels, I also met with members of the European Parliament to discuss the potential impact of TTIP on farmers and food policy.

This memo summarizes some of the issues that have come up so far in negotiations between USTR and the EU, and also issues of most interest to legislators in the EU – both in member countries, and also in the European Parliament itself. The Parliament is much more involved in setting trade policy than the U.S. Congress, with multiple committees meeting on TTIP and passing resolutions with their recommendations to the EU trade negotiators. The key committee is the International Trade Committee, which has set its vote for late May with the Parliament as a whole debating and voting its resolution on TTIP in June, while the Environment and Agriculture committees have already weighed in with specific recommendations.

Meanwhile in the U.S. few members of Congress are even aware of TTIP. Unlike in the EU, where trade negotiators have been forced by public opinion to publicly post copies of their proposed negotiating text, much of which has been leaked anyway ahead of time, in the U.S. the USTR has refused to make public any text.

Investor-State Dispute Settlement (ISDS). In Europe, there is strong interest and concern about Investor-State Dispute Settlement (ISDS), so much so that the European Commission, which is conducting the trade negotiations for the EU, has been forced to take ISDS off the negotiating table since January 2014. It held an online public consultation on ISDS from March to July 2014, which attracted about 150,000 comments, the most the Commission has ever received for a consultation. The majority (88%) did not want the ISDS clause in TTIP. The European Commission is now proposing to publish a new version of ISDS on May 7, 2015 that it asserts will address the concerns raised both in the public consultation and by legislators in member countries and in the European Parliament.

In the U.S., a recent ISDS case brought under NAFTA, *Bilcon v. Canada*, has highlighted concerns about how state and local permitting decisions could be affected. In that case, a decision by the Nova Scotia government to deny a permit based on extensive environmental impacts of the project, a massive quarry and marina in the Digby Neck area, was successfully

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challenged and the company is seeking $300 million in damages. The USTR has not indicated how the ISDS provision it has included in TPP or TTIP would compel a different result.

For returning members of the CTPC, you will recall that we have raised many objections ourselves to ISDS, which has been criticized from both the left and right of the political spectrum. The CTPC has written letters to the US Trade Representative objecting to including ISDS in future trade agreements. In summary, ISDS gives foreign corporations the right to sue governments—in private trade tribunals run by trade lawyers— over nearly any law or policy that a corporation argues would limit its "expected future profits" or reduce its predictable regulatory environment. This includes challenges to laws passed by state legislators or to state executive agency regulations. These companies do not have to first file their legal challenges in state or federal court, and the ISDS tribunal does not have to follow precedent or the rules of procedure that apply in the courts.

Food safety and agriculture. This is a hot topic in the EU with concerns that TTIP will undermine food safety protections, GMO laws, and policies that support small-scale farming. EU legislators were very interested in the CTPC's report of agriculture and TTIP and many of the issues we identified as concerns in Maine are also of interest in Europe, for example, protecting farm-to-school policies.

The EU has publicly posted its proposed TTIP food safety chapter (SPS). The U.S. also has a food safety (SPS) proposal, which is not public. Both were discussed in the latest round of negotiations. One of the issues for state legislators is how the SPS chapter will affect food sovereignty and existing and proposed laws and regulations concerning pesticides and animals that are not identical to federal law. Most states have multiple provisions that differ from federal law, and the EU text proposes that any SPS measure must be the same for the entire territory – eg, entire country.

Energy and raw materials. The European Commission is seeking a standalone chapter dedicated to liberalizing trade in energy and raw materials, and this was discussed in the New York round. Whether or not there is a separate chapter on energy, TTIP provisions proposed by negotiators on both sides of the Atlantic could expand energy exports from the U.S. and have implications for policies concerning pipelines, LNG storage, renewable energy and more.

Procurement. Market access for public procurement and goods was discussed as well. The EU is seeking to bind U.S. state government procurement, which up until now has always been voluntary for states. The EU proposal also seeks to open up procurement by universities and hospitals to EU companies and to do away with small business and women-owned and minority business preferences, as well as "Buy American" provisions. The USTR has stated publicly that it will oppose mandating binding procurement provisions on state governments, however, this bears watching as binding sub-central procurement is a key demand of the EU and will be tied to other goals the U.S. will want (and may have more interest in protecting, such as access to EU agricultural markets).

Regulatory Cooperation. In Europe, this topic is becoming as controversial as ISDS, and has the potential to be equally controversial here. It was the subject of negotiations in both the February

and April rounds. The EU has offered a text on "horizontal regulatory cooperation," with new provisions aimed at legislators and regulators on the EU member state and U.S. state level. A leaked draft of the sub-central regulatory cooperation proposal would require designated officials at the central level of government — the U.S. federal government or the European Commission — to pass on requests from each side to engage with their respective sub-central regulators.[1] In the U.S this would likely be OMB's Office of Information and Regulatory Affairs (OIRA), which currently reviews federal regulations.

The purpose of the chapter as a whole would be to require trade impact assessments of legislation and regulations before they are enacted or adopted, and further to promote a convergence or equivalence of regulations in both the EU and U.S. This raises a number of concerns at the U.S. state level. Obviously, if laws and regulations are harmonized at the federal U.S. and EU level but state laws remain different, it begs the question as to how those laws will fare if challenged in an ISDS proceeding as overly burdensome or "more trade restrictive than necessary." Even without directly reaching into the state legislative process, state laws could be vulnerable to additional challenges stemming from this chapter.

However, the EU regulatory cooperation chapter does, in fact, reach down to the state level. It would require a federal agency to share information and engage in consultations about proposed state laws and regulations if requested by a new ongoing international "Regulatory Cooperation Body" made up of U.S. and EU trade and federal agency bureaucrats. It is really unclear how this would work but at the very least, it could have a chilling effect on new proposals subjected to trade impact assessments and international consultations, and the EU proposal would also subject existing laws and regulations to trade impact review.

Although toned down from earlier EU proposals, which required state legislators and governors to send an annual advance list of laws and regulations to be introduced, it still raises concerns about state sovereignty and potential federal and international interference with the legislative process and state government in general. We also need to consider whether we really want significant taxpayer dollars going to hire additional staff at OMB to monitor state legislatures and governors, and a multitude of state agencies ranging from the Maine Seed Potato Board to the Maine Milk Board, and share that information with U.S. and EU trade regulators.

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[1] This provision is specific to U.S. states: "Article 11. Information and Regulatory Exchanges on regulatory acts at non-central level

1. The Parties encourage regulatory exchanges on regulatory acts at non-central level in areas or sectors where there may be common interest (new footnote).

2. At the request of one Party made via the respective Focal Points the other Party shall request the regulators and competent authorities at non-central level concerned to engage in regulatory exchanges on planned or existing regulatory acts. The regulators and competent authorities at central level of both Parties will coordinate the exchanges involving the regulatory authorities at non-central level responsible for the regulatory acts concerned."

Article notes
Citizen Trade Policy Commission

Articles from April 2015

Amid Slow Talks, EU Leaders Ponder How To Pitch TTIP To Skeptical Europe; (Daily News, 4/1/15)

This article discusses the significant controversy that the proposed TTIP has generated in many EU countries. One suggested cause is the inability of the US to make significant concessions in the TTIP negotiations because of prolonged delays in the TPP negotiations. The article also highlights the unprecedented amount of opposition to the TTIP within EU countries. Some EU leaders are expressing doubts as to whether a consensus within the EU can be reached to support a final version of the TTIP.

Round two in America's battle for Asian influence; (The Financial Times; 4/1/15)

This article highlights the recent US failure in leading a boycott of the Asian Infrastructure Investment Bank which was sponsored by and initiated by China. The TPP negotiations, led by the US, pointedly exclude China and this omission bothers many of the US's Asian trading partners. The degree to which the TPP is successful is seen as a crucial measure of US economic prowess in Asia.

Jobs in the balance: New Balance, Maine officials keep close eye on Pacific Rim trade agreement; (MaineBiz, 4/6/15)

This article focuses on the effect of TPP negotiations that could result in the possible elimination of footwear tariffs to the remaining shoemaking industry in New England- specifically Maine and Massachusetts. New Balance has 3 factories in Maine and 2 in Massachusetts with 850 and 600 jobs respectively. A rival footwear manufacturer, Nike, has all its footwear imported from Asian countries such as Vietnam and China. New balance is strongly opposed to the elimination of footwear tariffs and claims that such a move would result in the loss of most, if not all, of its manufacturing jobs in New England. In contrast, Nike supports elimination of the existing tariffs and claims that that change would result in "new footwear design, marketing, distribution and retail jobs". The article also mentions the general support of Maine's congressional delegation to maintain some form of the existing footwear tariffs and also highlights statements from CTPC member Sharon Treat indicating her concerns about the possible loss of footwear jobs and the detrimental consequences that the TPP may have on local procurement regulations and programs.

What Vietnam Must Now Do; (NY Times; 4/7/15)

This opinion piece was authored by a prominent Vietnamese sociologist Tuong Lai (aka Nguyen Phuoc Tuong). Mr. Lai strongly advocates that Vietnam must approve and be a part of the TPP. His reasoning is several fold:

- By joining the TPP, Vietnam can help realign geopolitical relations in Asia and help stem China's growing economic influence in the region;
- As another consequence of joining the TPP, Vietnam would become more completely integrated with the rest of the world's economy and thereby significantly that country's GDP; and
- Finally, joining the TPP would increase the efforts to truly democratize that country.

TPP Is A Mistake; (Forbes, 4/9/15)

This opinion piece was authored by Jean-Pierre Lehmann. Mr. Lehmann makes the following points:

- Assuming that the TPP is solely about Asia and that the TTIP is about Europe is wrong. The TPP includes many countries from the South American continent plus Australia and New Zealand as well as a number of Asian countries but excludes China, South Korea, India and Indonesia. Similarly, the TTIP excludes non-EU countries such as Iceland, Norway, Switzerland and Turkey;
- The TPP is most accurately thought of as a "geopolitical ploy with trade as a decoy";
- The US is the driving force behind the TPP and is doing so to safeguard its own economic interests and thereby contain those of China;
- The economies of South American countries and Asian countries have very little intersection and not much to gain from joining the TPP; and
- The geopolitical tensions that would be exacerbated from adoption of the TPP would have a significantly destabilizing effects on the efforts to achieve "greater global economic integration, peace, equity and prosperity".

Dallas Buyers Club judgment: Trans-Pacific Partnership could be worse news for online pirates; (smh.com, 4/12/15)

This Australian newspaper article reports on the likelihood that adoption of the TPP could significantly assist efforts to reduce the piracy of such popular movies as the "Dallas Buyers Club" which has frequently been illegally copied and distributed in Australia. TPP provisions pertaining to the protection of Intellectual Property will be used to further prohibit the online distribution and downloading of these movies.

Flipper vs. Fast Track: World Trade Organization Again Rules Against 'Dolphin-Safe' Labels, Says U.S. Policy Still Violates WTO Rules, Must Go; (Public Citizen; 4/14/15)

This news release from Public Citizen reports that the World Trade Organization (WTO) recently issued a ruling against a current US policy regarding voluntary "dolphin safe" food labeling. This policy has been effective in significantly reducing the number of dolphin deaths due to tuna fishing. The WTO ruling held that such a policy is a "technical barrier to trade" and must be rescinded. The article also suggests that this ruling regarding a popular and successful environmental protection measure is likely to have a detrimental effect on President Obama's current Fast Track Authority proposal in that use of a FTA has usurped a domestic regulation.

Special courts for foreign investors; (The Hill; 4/15/15)

This blog piece critically addresses the inclusion of the ISDS mechanisms in the TPP and TTIP and suggests that this issue is significantly hindering the chances of President Obama's Fast Track authority proposal of being approved. The author lists many of the popular criticisms of ISDS which include:

- ISDS allows multinational corporations to bypass the US judicial system and thereby rely on ISDS tribunals which are not required to make use of legal precedent and do not afford any appeals procedures;
- The ISDS process can be used by investors to challenge domestic antitrust enforcement decisions as well as any domestic rule, regulation or law that is seen as an obstacle to anticipated profits permitted under the terms of the FTA in question;
- The ISDS process is not available or open to individual citizens or groups but is instead restricted to international corporations or foreign investors; and
- It is estimated that, on average, it costs $8 million for a government to defend itself in an ISDS proceeding and that does not include the costs of any settlement or damages that are awarded to investors.

Obama's trade agreements are a gift to corporations; (Boston Globe; 4/17/15)

This opinion piece, authored by Boston Globe columnist Robert Kuttner, takes a position that is strongly critical of the TPP and the TTIP. In making his argument against these FTAs, Mr. Kuttner makes the following points:

- These FTAs are not really trade agreements but are more accurately described as gifts to corporations that "claim to be retrained by domestic regulations";
- The ISDS mechanisms allow corporations to take end runs around national governments;
- President Obama's Fast Track proposal is unpopular with many congressional Democrats as well as significant numbers of congressional Republicans; and
- These FTAs are conceived of and authored by multinational corporations and offer little real hope for economic policies that would actually increase the standard of living for the populations of signatory nations.

Obama's new trade deal represents massive executive overreach; (The Hill; 4/17/15)

This blog piece maintains that TPP and other FTAs are an example of massive executive overreach. The author, Kevin L. Kearns, maintains that the President's Fast Track authority proposal represents an abrogation of the congressional duty to meaningfully review and approve trade agreements. Mr. Kearns also points out that the administration initiated the TPP and the TTIP negotiations without congressional approval or input.

Don't Let TPP Gut State Laws; (Politico; 4/19/15)

This opinion piece was authored by Eric T. Schneiderman who is the Attorney General for the State of New York. AG Schneiderman maintains that the use of the ISDS mechanism in the TPP will serve to weaken and undermine many state laws and regulations. He also points out that the ISDS process creates a separate system of justice that is designed to address the claims of foreign investors that they are unfairly being denied potential profits. He maintains that the ISDS mechanism could be used to undue state laws pertaining to wage theft, predatory lending and consumer fraud.

Fact or Fiction: Does the Hatch-Wyden-Obama Trade Promotion Authority Bill Protect U.S. Sovereignty Over Domestic Policy?; (acslaw.org, 4/20/15)

This article, authored by Sean M. Flynn, examines the current Trade Promotion Authority (Fast Track) proposal that will be put before Congress for a vote in the very near future. Mr. Flynn makes the following points:

- The language in the bill that purports to ensure that no part of the TPP or the TTIP can or will infringe or negate any federal, state or local law or regulation has actually been included in every FTA approved by Congress since NAFTA; and
- The statutory language in question will not actually ensure that federal, state and local laws will not be superseded by an FTA but will instead provide for the prevalence of international law under the approved FTA and thus allow for the use of the ISDS measures to bind the US (and other signatory nations) to the outcomes of that process.

Newly Leaked TTIP Draft Reveals Far-Reaching Assault on US/EU Democracy; (Common Dreams; 4/20/15)

This article reports on the inclusion of a chapter in the TTIP dealing with "regulatory cooperation". As stated in the article, regulatory cooperation is defined as " *the harmonization of regulatory frameworks between the E.U. and the U.S. once the TTIP negotiations are done," ostensibly to ensure such regulations do not pose barriers to trade*". The article maintains that this chapter is extremely detrimental to democratic protections and in effect, will institute a "regulatory exchange" which will *"force laws drafted by democratically-elected politicians through an extensive screening process"*. The article concludes that inclusion of this proposed chapter in the TTIP represents a dramatic increase of corporate power.

US owes allies a clear path forward on Pacific trade talks; (Boston Globe; 4/20/15)

This editorial from the Boston Globe strongly supports the compromise Fast Track authority proposal that has been developed by several members of Congress from both parties. The editorial maintains that the proposal is a fair one that deserves support from all members of Congress regardless of whether individual members of Congress are in support of either the TPP or the TTIP. The authors suggest that the proposal adequately provides the opportunity for meaningful review and that if the FTA in question does address certain policy issues, than the Fast Track authority will be suspended and the FTA will be open to amendments from Congress.

TTIP negotiators get an earful from American critics; (euractive.com, 4/24/15)

This article highlights and compiles a number of criticisms regarding the TTIP. Included in the article is the following comments regarding CTPC member Sharon Treat:

> *'Sharon Anglin Treat, a representative of the National Caucus of Environmental Legislators, said the trade agreement could gut stricter rules enacted by states, such as laws in Massachusetts and New Jersey to label or restrict bee-killing pesticides.*
> *"US state laws and regulations do diverge from US federal law and EU regulations," Treat said. "That divergence is a hallmark of the US system of federalism and is enshrined in our Constitution." '*

On Trade: Obama Right, Critics Wrong; (NY Times, 4/29/15)

This op-ed piece was authored by NY Times columnist Thomas L. Friedman. Mr. Friedman supports adoption of the TPP and TTIP but not for the economic reasons that are often cited. Instead, he bases his support on the assertion that these FTAs will support and strengthen our national security in an increasingly unstable world. Mr. Friedman suggests that these FTAs offer an opportunity for the *"coalition of free-market democracies and democratizing states that are the core of the World of Order to come together and establish the best rules for global integration for the 21st century, including appropriate trade, labor and environmental standards. These agreements would both strengthen and more closely integrate the market-based, rule-of-law-based democratic and democratizing nations that form the backbone of the World of Order."*

Amid Slow Talks, EU Leaders Ponder How To Pitch TTIP To Skeptical Europe

Daily News

News Analysis

Posted: April 01, 2015

When European Union trade ministers sat down for an informal lunch meeting on the Transatlantic Trade and Investment Partnership (TTIP) last week, they had an item on their agenda that at another point in time might have seemed more appropriate for their public relations teams: how to better pitch the deal to citizens back home.

The fact that this issue is being addressed by trade ministers -- and even EU heads of government -- illustrates how pervasive, and overwhelmingly negative, the debate over TTIP has become in Europe, according to European officials and sources following the negotiations.

It is also a symptom of the more fundamental challenge facing TTIP: that after more than a year and a half of negotiations, and a more than year-long scoping exercise beforehand, the talks have still not yielded any concrete sense of what a TTIP agreement will contain -- and they seem unlikely to accelerate in the short term.

The United States already made clear to the EU late last year that it could not offer any significant concessions in the first half of 2015 because of the debate over Trade Promotion Authority and the Trans-Pacific Partnership (TPP) in Washington. With TPP now seemingly delayed by several months, some European officials wonder whether real negotiations on TTIP can really take place at all before the end of this year.

This lag has negatively impacted the ability of TTIP proponents to tout the benefits of the deal to the general public, as they cannot say concretely what its substance will be. Proponents say this leaves a vacuum that critics have filled -- and quite effectively, at that -- with fears about all the bad things the deal could do.

EU member states are not alone in trying to do a better job of selling TTIP to the European public, as they are backed by the European Commission. In addition, European business groups such as the Confederation of British Industry (CBI) are ramping up their efforts to change the debate around the trade initiative and urging member state governments to come out and rally support for TTIP, despite its contents being unclear.

But it is an open question whether these proponents of TTIP will be any more successful in touting the benefits of the deal than they have been in the past, as their efforts appear mainly aimed at amplifying their message that TTIP holds enormous potential; they have a harder time denying what will or won't be in a finished deal.

Among the benefits highlighted by these supporters are that TTIP would lower prices for consumers and EU businesses as well as increase their choices of products. They also say it would allow the two sides to set new trade rules on issues like labor rights and environmental protection that reflect their shared values.

The fact that TTIP has an image problem in the European Union is, by now, nothing new. But even proponents of the initiative acknowledge it is significant that EU trade ministers are being tasked with the management of the trade negotiation's image in such a way.

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"This is a completely different animal from what we have ever seen before," said one European diplomat about the TTIP debate in the EU. Never has the bloc seen such an intense debate around a trade policy issue, he added, arguing that in this climate it is important for member state governments to "sing from the same book" on why they are pursuing the deal.

The need to better engage with their citizens on the benefits of TTIP was just one of the issues that ministers discussed during a lunch session on the trade initiative at their March 24-25 informal trade council meeting in Latvia, which currently holds the rotating presidency of the EU Council.

The ministers also focused on how to approach the controversial issue of investment protection in TTIP, according to a spokesman with the Latvian foreign ministry. Since it was an informal meeting, the ministers did not reach any formal conclusions or issue an official statement.

Just a week prior, EU heads of government said in their conclusions after a March 19-20 meeting in Brussels that member states and the European Commission "should step up efforts to communicate the benefits of the agreement and to enhance dialogue with civil society."

John Cridland, director-general of CBI, admitted to reporters in Washington on March 24 that EU TTIP advocates had been somewhat blindsided by the outpouring of opposition from well-organized civil society organizations. He called for business lobby groups to fight back by "rebooting" the discussion around TTIP and framing the deal as something that will benefit consumers and be especially helpful to small and medium-sized enterprises.

"I'm not criticizing what business has done to date. I'm talking about the job business needs to do now," Cridland said at the National Foreign Trade Council. "In Britain, for example, when we started on this journey who had heard of 38 Degrees? Yet 38 Degrees as [an advocacy] group has generated a massive social media campaign and was responsible for a lot of the submissions made to the European Commission on the [investor-state dispute settlement] consultation. So business needs to step up a gear, it needs to do an even better job."

Last December, the CBI and other EU business groups hosted an event in Brussels with seven EU prime ministers -- including David Cameron and leaders from Italy, Spain, Poland, Latvia, Denmark and Finland -- aiming to highlight the important of reaching a TTIP deal.

U.S business is also weighing in. Just days before EU trade ministers gathered in Latvia for their informal council meeting, the majority of the American Chambers of Commerce in the European Union urged them to "further explore tangible steps to increase engagement with civil society and enhance the domestic debate on TTIP."

The 20 AmChams urged ministers to "improve dialogue with stakeholders at all levels on the key issues surrounding the debate," including by confronting issues that U.S. business believes are key parts of the agreement. These include issues such as ISDS and speeding the approvals of biotech crops for import, one business source said. There is an AmCham in each of the 28 member states, plus AmCham EU, but not all signed the letter because it was put together at the last minute, the source added.

The European Commission in the past has also pressured member states to be more coordinated in their messaging on TTIP. An internal memo from Nov. 7, 2013, revealed the commission was trying to ensure that member state press liaisons were communicating the same message about the purported benefits of the trade deal.

Meanwhile, civil society groups in Europe and around the globe are planning a "Day of Action" on April 18 against free trade and investment agreements in general. Groups started to lay the groundwork for the demonstration at a strategy session in Brussels in early February. Organizers said it would involve groups in Asia and Latin America, but that at least in the EU, the thrust of the message would be to oppose TTIP.

The website for the campaign -- www.GlobalTradeDay.org -- argues that trade deals have promoted corporate interests at the expense of citizens' rights and the environment. "For the last decades, we have been fighting for food sovereignty, for the commons, to defend our jobs, our lands, internet freedom and to reclaim democracy. Along the way, we have grown as a movement, we have made our voices heard and we had victories," it says.

Cridland took aim at the notion that FTAs benefit corporations at the expense of citizens. He argued that business needs to step in and play a role as a "consumer champion," and claimed that the interests of business owners is for the most part aligned with consumers. "What we're seeing here is a debate where TTIP is being characterized as good for business but questionable for the consumer. That can't be right," he said.

At the same time, he conceded that business and governments are limited in how they can sell TTIP, given that its ultimate contents are still unknown. But Cridland argued that advocates need to carry the message that the deal has positive potential to increase consumer choice for quality goods and services and create a truly trans-Atlantic marketplace.

"There's a large part of that prize that has not been defined ... [but] if we can meet the legitimate concerns of other stakeholders about what [TTIP] is not, and concentrate on what it really should be, then I think it is overwhelmingly upside," he said.

Round two in America's battle for Asian influence

http://www.ft.com/intl/cms/s/0/fabfd8ac-d6c1-11e4-97c3-00144feab7de.html#axzz3VzL1PDNm

The Trans-Pacific Partnership is just as likely to annoy America's allies in region as reassure them

The Financial Times

By David Pilling

April 1, 2015

In the sparring between China and the US over leadership in Asia, Beijing recently landed a tidy, if almost accidental, punch. Washington's attempt to lead a boycott of the China-led Asian Infrastructure Investment Bank ended in farce after Britain broke ranks and other nations from Germany to South Korea fell over themselves to join.

If round one was a defeat for America, round two hangs in the balance. Washington is trying to convince 11 Pacific nations to join a "next generation" trade agreement called the Trans-Pacific Partnership. Billed as the most important trade initiative since the collapse of the 2001 launch of the World Trade Organisation's Doha round, it would bind two of the biggest economies — the US and Japan — into a bloc covering 40 per cent of global output. Supporters say it would also reaffirm US commitment to the region at a time when China's economic pull is growing.

The stakes are high. If the TPP disappoints — or worse still, if it is not concluded at all — it will be another embarrassing setback for US regional diplomacy. The omens are mixed at best.

The TPP excludes China. That is quite an omission. It is also precisely the point. The region's most important trading nation has not been invited to join on the grounds that its economy is too centrally planned and too rigged to be part of such a highfalutin arrangement. Yet in a peculiar display of diplomatic contortion, Vietnam — a country whose economy is as centrally planned and as rigged as the best of them — is somehow considered fit for entry.

The exclusion of China serves twin objectives. Neither bears close scrutiny. The TPP is a "trade pivot" to Asia; the commercial equivalent of Washington's commitment to remain militarily engaged in the region. Yet it is just as likely to annoy allies as reassure them.

Almost all have expressed concern that some provisions intrude into their internal affairs. That is, indeed, the point of the TPP, which goes beyond tariff reduction to deal with "behind the border" issues thought to impede trade and investment. These include tendering processes, financial regulations, data protection rules and intellectual property laws. Opponents from Australia to Japan see it not as an act of US benevolence but rather as a charter for meddling in everything from pharmaceutical pricing to cigarette advertising.

The other reason for shutting out China is also questionable. The hope is that Beijing, slighted by its exclusion, may be goaded into reforming its economy so it can join at a later stage. Some in Beijing would indeed like to call Washington's bluff by seeking TPP membership. At least theoretically, China is already moving in a direction that might be conducive to that aim by allowing a greater role for market forces.

Yet it is folly to imagine it will be induced to move more quickly to obtain membership of a club to which it has only the most grudging of invitations. More, Beijing is supporting alternative regional trade initiatives, including the Regional Comprehensive Economic Partnership. Pointedly, that is a club to which the US is not invited.

There is a further hitch. If the TPP is seen in much of Asia as designed for the benefit of US corporations, in the US itself it is regarded with equal suspicion. Most members of President Barack Obama's Democratic party are wary of trade deals, which they blame for hollowing out manufacturing jobs and suppressing middle-class wages. Consumer groups say the TPP will expose Americans to all sorts of evils from dodgy Vietnamese seafood to slack financial regulation.

The TPP is nonetheless regarded as one of Mr Obama's best shots at a foreign policy legacy. If so, he could have sold it better to his own party. He remains uncomfortably reliant on the Republican majority in Congress to grant him the fast-track authority he needs to push it over the line.

While most Republicans support a deal in the name of free trade, some on the Tea Party end of the spectrum are opposed. Others may deny Mr Obama the authority he needs out of spite. Ian Bremmer, president of the Eurasia Group consultancy, says the vote on trade promotion authority will be "razor thin", though he believes ultimately Mr Obama will prevail.

Even if TPP is finally concluded, the chances are it will be too watered down to satisfy trade purists and too intrusive to please Washington's Pacific partners. For Beijing, fresh from its triumph over the infrastructure bank, the whole spectacle must be quite amusing.

Jobs in the balance: New Balance, Maine officials keep close eye on Pacific Rim trade agreement

http://m.mainebiz.biz/article/20150406/CURRENTEDITION/304029995/1088

4/6/15

What's at stake for Maine in the Trans-Pacific Partnership, the largest proposed free trade agreement in history, involving the United States and 11 countries on the Pacific Rim and representing close to 40% of the world's economy?

In two words: New Balance.

The Boston-based footwear company still doesn't know for sure if the agreement will eliminate footwear tariffs on shoes made in Vietnam, since deal-making has been cloaked in secrecy from the opening of negotiations in 2010. But the company has made it clear that if tariffs dating back to the 1930s are eliminated — as Vietnam and the world's largest shoemaker, Beaverton, Ore.-based Nike Inc., would like — it would risk more than 850 manufacturing jobs at New Balance's three Maine factories and another 500 jobs at two factories in Massachusetts. New Balance argues that it would have a competitive disadvantage against Vietnamese shoemakers whose workers earn an average of $90 to $129 a month.

Negotiations are in the end game for the trade agreement, and the Obama administration is pushing Congress to grant it "fast track" authority to set the terms and sign the agreement before the House and Senate vote on it, with no amendments allowed and strict limits being placed on debate. A fast track bill to accomplish that could come to a vote in Congress as early as mid-April.

New Balance declined to be interviewed for this story, but offered the following statement from Matt LeBretton, its vice president for public affairs: "We are closely monitoring both Trans-Pacific Partnership and Trade Promotion Authority [i.e., fast track] to ensure that the interests of the men and women who make New Balance shoes in Maine and Massachusetts are not negatively impacted. Our commitment to making shoes in the United States has not wavered and with the help of Sens. Susan Collins and Angus King we have made our position clear to the Obama administration. We are hopeful that the TPP, when and if it is passed, will reflect our commitment to making shoes in the United States."

In Maine, New Balance has plants in Norridgewock, Skowhegan and Norway.

New Balance has 1,350 U.S. employees, an "all-time company high," Amy Dow, New Balance's senior global corporate communications manager, said in an email to Mainebiz. Sales revenue has more than doubled in the last five years to a record of $3.3 billion in 2014.

In its battle over the TPP, New Balance has an ally in the Rubber and Plastic Footwear Manufacturers Association, which represents the company and other footwear firms that support

4,000 domestic jobs. "Eliminating these tariffs as part of the TPP at the request of the Vietnamese government would effectively end footwear manufacturing in the United States and destroy an important part of our industrial base that dates back to our country's founding," the group's trade counsel testified last spring at a House committee hearing on President Obama's trade agenda.

The trade group told committee members Vietnam's footwear industry "is doing very well under the current tariff system and does not need assistance getting its products to U.S. customers," citing a fivefold increase in Vietnam's total footwear imports between 2002 and 2013, with a 10% market share of roughly 235 million pairs of shoes valued at almost $3 billion in 2013. In a pointed reference to Nike, which no longer manufactures footwear in the United States, its testimony concluded: "The administration should not give an advantage to footwear companies that manufacture all of their products overseas, at the expense of ... domestic footwear manufacturers that are committed to keeping jobs in the United States. U.S workers will lose jobs if this occurs."

Nike: Eliminate the tariff

As wages in China continue to climb, the footwear industry is accelerating the movement of manufacturing facilities to lower-wage areas, notably Vietnam, which is the world's No. 2 shoemaker after China. Vietnam's wages are reportedly 38% of China's; TPP could accelerate the shift from factories in China to those in Vietnam. An estimated 600 businesses employ more than 1.1 million workers, who produce 800 million pairs of shoes annually in Vietnam, according to Thanh Nien News.

Nike Inc. (NYSE:NKE), which had sales last year of $27.8 billion, a 10% gain, has 333,591 workers at 67 factories in Vietnam, with 39% of them manufacturing footwear, according to its website. Given its investment in production in Vietnam, Nike has been one of the more vocal supporters of eliminating the footwear tariff. Although the issue is often framed as a 'New Balance vs. Nike' issue, it's actually broader than that, pitting a host of footwear exporters against a handful of domestic manufacturers.

"The industry and our consumers paid over $2.7 billion in footwear duties in 2014, more than $400 million of which was taxed on TPP footwear imports alone," says Matt Priest, president of the Footwear Distributors and Retailers of America, which represents more than 130 companies, 200 brands and 80% of total U.S. footwear sales. "Imagine the impact on consumers and footwear companies if outdated footwear tariffs from the 1930s — reaching upwards of 67.5% — were eliminated on footwear out of TPP countries."

Eliminating the tariff, Priest's group argues, would create "new footwear design, marketing, distribution, and retail jobs." Conspicuously absent from that lineup: manufacturing.

Fast track authority

Negotiations for the TPP, which have been dragging on since 2010, still have a handful of unresolved issues. President Obama highlighted the proposed trade agreement in his State of the Union speech on Jan. 20, urging Congress to act quickly on passing a Trade Promotion Authority bill, more commonly referred to as "fast track," setting the stage for an up-or-down vote on the TPP, with no amendments and limited debate, possibly in the fall.

U.S. Sen. Orrin Hatch, R-Utah, chairman of the U.S. Senate committee responsible for trade, has been pushing for a fast track vote soon after Congress returns from its Easter recess. Ironically, President Obama is getting more support from Republicans than Democrats on the fast track bill.

U.S. Sen. Angus King, Independent-Maine, says he supports New Balance's position on keeping Vietnam's footwear tariff in place. "I can't say what the final outcome is," he told *Mainebiz* in a phone interview from Washington. "Like everyone else in the free world, I haven't seen the [TPP] agreement. I do know that New Balance is in ongoing conversations about this tariff, but I don't know if it is, or isn't, part of the agreement."

King says the high-level secrecy surrounding the TPP is precisely the problem he has with the fast track bill, which would prevent Congress from making amendments. "To say it's like 'buying a pig in a poke' might be an insult to the pig," he says.

U.S. Rep. Chellie Pingree, D-1st District, opposes both fast track and major trade deals being negotiated in secret and worries the TPP could have more impact on American jobs than the North American Free Trade Agreement, which went into effect in 1994. U.S. Rep. Bruce Poliquin, R-2nd District, says he is closely monitoring negotiations. He said he supports "free and fair trade" that would open markets for "Maine farmers, wood product manufacturers and fishermen," but also wants to insure that "our companies and workers are competing on a level playing field." U.S. Sen. Susan Collins, R-Maine, takes a similar view, adding that she's "repeatedly urged the United States trade representative not to undermine footwear manufacturing jobs in Maine by precipitously eliminating long-standing duties on certain footwear."

Will it help Maine?

As co-chair of the state's Citizen Trade Policy Commission until she left the Legislature last December due to term limits, former state Sen. Sharon Treat has been following closely the TPP and the equally major Transatlantic Trade and Investment Partnership trade agreement pending with the European Union. The commission was established in 2003 to provide ongoing assessments of the impact international trade policies might have on state and local laws and Maine businesses.

While Treat agrees that preserving New Balance's manufacturing jobs in Maine and Massachusetts is critical, it's by no means the only issue in the TPP she believes Maine residents should be worried about.

Maine policies designed to help local farmers — such as "buy local" procurement guidelines or the Maine Milk Pool — could be challenged if the trade agreement prohibits procurement provisions that favor local producers. And long-established Maine policies governing pharmaceutical and medical device reimbursements, as well as "buy local" or "buy green" procurement guidelines, she says, "are all completely threatened by" the TPP and the equally sweeping Trans-Atlantic Trade and Investment Partnership with the European Union.

"What's going to be the net benefit if we do this?" she says. "And what are all those jobs they're talking about being created? Ultimately, the question is: What's our vision for Maine and does this trade deal promote that?

What Vietnam Must Now Do

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HO CHI MINH CITY — Vietnam must sign on to the Trans-Pacific Partnership, the United States-backed comprehensive trade plan. The agreement would allow Vietnam's economy to become fully integrated with the rest of the industrialized world, and with that would come the prospect of further democratization at home.

Equally important, the T.P.P., which involves 12 Pacific countries but not China, would realign geopolitical relations in the region and help stave off China's expansionism in the South China Sea — an important contribution to the United States's strategic rebalancing toward Asia.

Vietnam has nearly 3,500 kilometers of coastline fronting the South China Sea, a body of water vital to international trade. Almost one-third of the world's crude oil and over half of its liquefied natural gas passed through here in 2013. This route is also the shortest way from the western Pacific to the Indian Ocean, and a favored passage for many navies, including that of the United States.

But Vietnam cannot play its significant geopolitical role until it fully develops economically and further liberalizes politically. And adopting the T.P.P.'s requirements — free trade unions, reduced state participation in the economy, greater transparency — will help Vietnam along that route.

Following many years of economic isolationism, Vietnam made impressive progress after 1986, when it began to open up to the outside world. It recorded one of the world's highest G.D.P. growth rates during 1990-2010. It joined the World Trade Organization in 2007, and has since signed many important trade agreements. It was the world's second-largest exporter of rice and coffee in 2013. Last year, Vietnam was Asean's top exporter to the United States in dollar terms, ahead of Malaysia and Thailand.

But this was just a first phase of development, and it relied heavily on primary exports and labor-intensive and low-value-added industries. Vietnam now risks being stuck at the middle-income level. G.D.P. growth rates have slowed down significantly in recent years. Vietnam now ranks last among T.P.P. candidates in terms of economic development, with a G.D.P. per capita of about $1,910, compared with about $6,660 for Peru, the next lowest.

The T.P.P. provides a road map for the second phase of Vietnam's economic and social development. As Prime Minister Nguyen Tan Dung said in February, citing this and other trade deals: "These agreements require us to be more open. So our market must become more dynamic and efficient."

The T.P.P. would mean, for example, a substantial reduction in import tariffs that apply to Vietnamese apparel entering other T.P.P. countries, which will increase the competitiveness of those products against similar goods from China, India, Indonesia and Thailand. But the T.P.P.'s Rules of Origin also require that the materials used in the finished exports be produced locally.

This will force Vietnam to develop supporting industries and expand its manufacturing base — as well as help it become less dependent on China, which currently supplies much of the materials used in Vietnam's textile and apparel industry.

The T.P.P. also demands that its members embrace free labor unions, intellectual property rights and transparency in rules, regulations and practices. Perhaps most significant for Vietnam is the expectation that the governments of T.P.P. countries will not grant preferential treatment to state-owned enterprises or otherwise allow them to cause trade distortions. This will mean substantially reducing the role of such companies in Vietnam.

State-owned enterprises dominate major sectors of the economy — like commercial banking, energy production and transportation — and are very highly leveraged and often corrupt. Limiting their influence will likely trigger head-on confrontations with some high-ranking party members with ideological and financial interests in them. But the government now seems intent on doing so, partly because of these companies' inefficiencies.

Which means that there are now few domestic obstacles in the way of Vietnam's joining the T.P.P. The government has agreed to allow the formation of independent labor unions at the factory level. It has been making efforts recently to comply with international human rights norms it has been known to flout, releasing several prominent activists and refraining from arresting dissidents. It is also enforcing intellectual property rights, with the police periodically raiding stores that violate copyright laws.

The only major hurdle is obstructionism from China. Beijing is trying to counter Washington's strategic rebalancing toward Asia — the Obama administration's so-called pivot policy — by promoting its own free-trade zone, touting an Asia-Pacific Dream, starting a regional investment bank and pouring billions of dollars into massive infrastructure projects. It is also exerting tremendous pressure on Vietnam's leaders not to join the T.P.P., much as it did before Vietnam signed the W.T.O. agreement and the bilateral trade deal with the United States. When reports became more credible recently that the general secretary of the Communist Party of Vietnam would travel to the United States in June, Beijing suddenly invited him for high-level meetings in China this week.

For various economic, political and strategic reasons, Vietnam can hardly afford not to join the T.P.P. But doing so will also require difficult structural adjustments, and countervailing pressure from China is intensifying. Vietnam needs, and deserves, all the support it can get from the United States. It will take no less that a concerted effort to fend off China's increasing ambitions in the region.

Tuong Lai, also known as Nguyen Phuoc Tuong, is a sociologist and former adviser to two Vietnamese prime ministers. This article was translated by Nguyen Trung Truc from the Vietnamese.

http://www.forbes.com/sites/jplehmann/2015/04/09/tpp-is-a-mistake/

Forbes

TPP Is A Mistake

By Jean-Pierre Lehmann

April 9, 2015

The proposed Trans Pacific Partnership (TPP) trade deal is a mistake.

For starters the conventional view that TTIP (Trans-Atlantic Trade and Investment Partnership) is about Europe, whereas TPP is about Asia is wrong.

TTIP is indeed a proposed agreement between two parties, the US and the EU. It does not include other Atlantic nations such as Canada and Mexico, which are both members, with the US, of the North Atlantic Free Trade (NAFTA). Nor does it include non-EU member European states such as Iceland, Norway, Switzerland or Turkey. By currently common consent, TTIP negotiations appear to have got bogged down in bureaucratic technicalities and would seem to be going nowhere. There are hopes however that TPP might be concluded if President Obama can secure Trade Promotion Authority (TPA) from Congress.

Yet TPP is a really strange mélange of 12 members (see map below), including five from the Americas (Canada, Chile, Mexico, Peru and the US), five from Asia (Brunei, Japan, Malaysia, Singapore and Vietnam), along with Australia and New Zealand. In terms of populations the total American contingent which stands at 535 million, more than half the total population of the Americas (947 million), is significantly larger than the Asian population figures which amount to no more than 256.6 million (285 if you add Australia and New Zealand), compared to Asia's total population of 4.3 billion: almost half of the Asian contingent is accounted for by one member, Japan. Missing are large Asian economies, notably South Korea, India and Indonesia, all three members of the G20.

Also missing of course is China; but that would seem to be deliberate, the economic arsenal of Washington's (supposedly) strategic pivot to Asia, the fundamental aim of which is to contain China. Thus TPP is above all a geopolitical ploy with trade as a decoy.

Supporters and defenders of TPP argue that the reason China is excluded is not geopolitical but that TPP aims to achieve a very high standard trade agreement. Hence, they say, other Asian nations, including China, can apply and qualify for membership once they commit to meeting these high standards. Whether some of the current members, Vietnam, for example, are in a position to meet the high standards is for now an unresolved question. Though there is opposition to TPP in all member states, including in the two heavy-weight industrialized countries, Japan

and US, a key question for developing countries, leaving aside the geopolitics, is whether TPP is what they need at this particular stage of their development.

This is the subject addressed in an interesting publication by the Malay Economic Action Council (MTEM) entitled, *TPP – Malaysia is not for Sale*. It includes a foreword by former Malaysian Prime Minister Tun Dr Mahathir Mohamad, architect of Malaysia's impressive economic growth and development during his tenure, 1981 to 2003. As can be expected from Mahathir, he does not mince his words. He states that "the strongest campaigner of TPP is America ... [which seeks] ... to contain China and to safeguard its own economic interests [by] exploiting all resources from small but growing independent nations such as Malaysia". He adds that "TPP is not a fair or free trade partnership, but an agreement to tie down nations with rules and regulations that would only benefit American conglomerates". Furthermore, as Mahathir points out, the negotiations are occurring entirely in secret, thereby adding to the suspicion that it is a conspiracy. (Similar complaints on both counts can be heard in Europe in respect to TTIP.)

The fact is that just as TPP is on the US' Asia Pacific geopolitical agenda, the Asian nations that became members also did so principally for geopolitical reasons, in order, so they hope, of tightening security links with the US as a means of defense against China.

Besides that, the five Asian members of TPP are rather strange bedfellows. Even stranger is the prospect of putting in the same bed the five Asian and five American members. Whereas there is some cohesion in the membership of TTIP, both the US and the EU share a similar level of economic size and development, and a shared modern economic and political history, TPP is something else. There are growing economic ties between Latin America and Asia Pacific, but these are mainly with China. There is very little in terms of trade or investments between, say, Peru and Malaysia, or Chile and Brunei, nor can it be expected in the foreseeable future. (Brunei is strictly anti-alcohol so it is unlikely to become a market for those delicious Chilean wines!)

Nor is there much integration in their respective regions.

Three of the five American TPP members, Chile, Mexico and Peru, are among the four members of the Pacific Alliance, founded in 2011 – the fourth is Colombia. While the laudable aims are to promote "deep integration" of their economies through the free movement of goods, services, capital and labor," the current reality is that trade and other forms of economic exchange among the members is tiny in aggregate and an equally tiny proportion of their overall trade.

Whereas there is a great deal of intra-Asia Pacific trade and investment, it is mainly between Southeast and Northeast Asia. Trade and cross-border investment within the Association of South East Asian Nations (ASEAN) is small in comparison. Though there are ambitious plans to create an ASEAN Economic Community this year, in reality, as Professor Barry Desker, Former Dean of the Rajaratnam School of International Studies (RSIS), has pointed out, "ASEAN integration remains an illusion".

In many respects TPP appears essentially to be coming down to a US-Japan bilateral trade treaty that might complement the US-Japan security treaty.

For many reasons, concluding TPP would end up being a costly mistake. Economically it does not make much sense. The two communities have very little in terms of synergies – and very few prospects of finding them in the foreseeable future. The needs of developing countries would be much better served by concluding the WTO Doha Development Round!

Furthermore, the architects of the post-World War II trade régime sought to de-geo-politicize trade. It is probably impossible to do so completely. TPP, however, is highly geopolitical and highly geopolitically divisive.

Both communities, ASEAN and the Pacific Alliance, should continue to focus on solidifying their intra-regional institutions and ties, rather than seeking to expand to inter-regional, let alone inter-continental, dimensions! That is, as things currently stand, a bridge far too far and a distraction from more immediate priorities. In the jargon of the profession, TPP would definitely feature among the "stumbling blocks", not building blocks, to greater global economic integration, peace, equity and prosperity.

http://www.smh.com.au/digital-life/digital-life-news/dallas-buyers-club-judgment-transpacific-partnership-could-be-worse-news-for-online-pirates-20150411-1mh6td.html

Dallas Buyers Club judgment: Trans-Pacific Partnership could be worse news for online pirates

April 12, 2015

Michaela Whitbourn

Legal Affairs and Investigations reporter

Village says it won't hunt down illicit downloaders individually like the producers of Dallas Buyers Club.

A trade pact being negotiated in secret may create new criminal sanctions for illicit downloading of films and TV shows, ratcheting up the pressure on online pirates following a legal battle over Hollywood blockbuster *Dallas Buyers Club*.

The Federal Court ruled on Tuesday that internet service providers including iiNet should hand over to a US film studio the names and addresses of 4726 customers who allegedly shared pirated copies of the Oscar-winning film about blackmarket deals.

But the case, which could result in online pirates paying damages rather than facing criminal prosecution, is just one front in a much bigger global war against online piracy spearheaded by Hollywood studios.

The US and Japan are leading negotiations behind closed doors with Australia and nine other Pacific Rim countries over the Trans-Pacific Partnership Agreement (TPP), a proposed free trade and investment pact that is likely to require criminal penalties for some forms of copyright infringement.

"The strategy of the US is to expand criminal offences for copyright law and trademark law," said intellectual property expert Matthew Rimmer, an associate professor at the Australian National University.

"I think the reason why the *Dallas Buyers Club* dispute has attracted such controversy is that it really taps into these larger rolling policy efforts to have tougher, stronger copyright protection in the online environment."

The terms of the TPP will not be made public until a deal has been struck between the 12 countries, which account for 40 per cent of the global economy. But a leaked draft of the

intellectual property chapter, published by WikiLeaks in October last year, suggests a potential expansion of the range of conduct that could result in criminal sanctions.

There are already criminal offences in the Australian Copyright Act, in addition to provisions allowing rights holders to sue people who infringe their copyright for damages.

The Australia-US Free Trade Agreement, inked in 2004, created some new offences relating to copyright infringement on a "commercial scale" – which is broadly defined and may catch people sharing films online even when it is not a commercial activity. The maximum penalty is five years in jail.

"That covered the kind of uploading scenario, so if you're sharing a movie online that's already potentially criminal," said associate professor Kimberlee Weatherall, an intellectual property expert at the University of Sydney Law School.

The TPP may go a step further and extend criminal sanctions to private acts carried out for "financial gain", which "arguably covers downloading where you're avoiding paying for something," she said.

The nature of file-sharing services such as BitTorrent means that most users are both uploading and downloading content. But there are major hurdles to proving criminal infringement, which means prosecutors are likely to focus their energies on people setting up websites offering pirated films or other copyright works.

"I don't think the federal police are going to be bashing down file sharers' doors any time soon," said associate professor Weatherall, but "it's not OK to hold criminal liability over people's necks like the sword of Damocles."

The possibility of people being sued for copyright infringement could not be ruled out, although "the idea is that it's a deterrent, it scares people. It gets a lot of publicity and then hopefully people are put off".

As the TPP talks enter their final stretch, the telco industry has lodged a Copyright Code with the Australian Communications and Media Authority which would create a streamlined scheme for ISPs to hand over customers' details to film studios.

Sarah Agar, a policy and campaigns adviser at consumer group Choice who works on digital issues, said this would create a "rubber-stamp situation" compared with the *Dallas Buyers Club* case, where the ISPs fought the application and the court is supervising any legal letters sent to consumers.

"I think it's important for consumers that we do see those sort of court processes," she said. "There should be rigorous checks and balances before information is handed out on the basis of unfounded allegations."

Federal Trade Minister Andrew Robb has said the government is only supporting copyright and enforcement provisions "consistent with our existing regime" and will not support TPP provisions that would result in new civil remedies or criminal penalties for copyright infringement. However, legal experts say there is a risk Australia may agree to some new provisions in exchange for greater access to global markets.

"We completely believe the Department of Foreign Affairs and Trade and Andrew Robb's office when they say they don't intend to change Australian law," said Trish Hepworth, executive officer of the Australian Digital Alliance.

"But our concerns are two-fold: one is that they cannot guarantee that the laws won't be changed, and ... we may agree to things that, while they don't change our law now, restrict our ability to change our law in the future."

Mr Robb has said negotiations on the TPP could be concluded within the next two months.

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Flipper vs. Fast Track: World Trade Organization Again Rules Against 'Dolphin-Safe' Labels, Says U.S. Policy Still Violates WTO Rules, Must Go

Latest Attack on Environmental Measure Comes Weeks Before Expected Final WTO Edict on U.S. Country-of-Origin Meat Labeling, Further Burdening Obama Fast Track Push

WASHINGTON, D.C. – Today's ruling by a World Trade Organization (WTO) compliance panel against the U.S. "dolphin-safe" labeling program spotlights the conflict between basic environmental objectives and the status quo trade rules that the Obama administration seeks to expand. Rather than roll back the labeling program, which has contributed to a dramatic decline in tuna fishing-related dolphin deaths, the U.S. government should appeal the ruling, said Public Citizen.

The ruling further complicates the Obama administration's controversial bid to obtain Fast Track trade authority for two major agreements, the Trans-Pacific Partnership and the Trans-Atlantic Free Trade Agreement. Both of these pacts would expose the United States to more such challenges against U.S. consumer, environmental and other policies.

"That a so-called 'trade' pact can be used to attack a voluntary food label allowing Americans to avoid dolphin-deadly tuna just spotlights why so many Americans oppose Fast Tracking more of the same deals that go way beyond trade and expose commonsense environmental and consumer safeguards to challenge," said Lori Wallach, director of Public Citizen's Global Trade Watch. "Today's ruling against a basic dolphin protection sends a clear message to the environmental community: supporting Flipper means opposing Fast Track."

The WTO compliance panel decided that changes made to the U.S. dolphin-safe labeling program in 2013 in an effort to make it comply with a 2012 WTO ruling are not acceptable and that the modified policy still constitutes a "technical barrier to trade." The panel decided that the amended program "accord[s] less favorable treatment to Mexican tuna" in violation of WTO rules. The U.S. attempt to defend the dolphin-safe labeling program as "relating to the conservation of exhaustible natural resources" failed because the panel deemed the program's terms to be "unjustifiably and arbitrarily discriminatory."

The United States has one chance to appeal this decision before the WTO issues a final ruling. Under WTO rules, if the U.S. appeal fails, Mexico, which brought the WTO case against the

United States, would be authorized to impose indefinite trade sanctions against the United States unless or until the U.S. government changes or eliminates the dolphin-safe labeling program.

Background:

The U.S. ban on the sale of tuna caught with dolphin-deadly purse seine nets was eliminated in 1997 after 1991 and 1994 trade challenges by Mexico and other nations. The ban was enacted after six million dolphins were killed by the nets. Outrage over the initial 1991 tuna-dolphin ruling and subsequent elimination of the embargo on dolphin-deadly tuna launched environmental activism on trade issues.

Mexico's latest challenge targeted the voluntary labeling policy that replaced the ban on dolphin-deadly tuna. This market-oriented approach provides consumers with information so they can decide if they prefer dolphin-safe tuna. In a controversial move, the WTO ruled in 2012 that this U.S. labeling program, for which many countries' tuna qualifies, violated WTO non-discrimination rules because tuna caught in the Eastern Tropical Pacific (ETP) had to meet additional criteria to qualify for the label. The ETP is the only region where dolphins are known to congregate above schools of tuna. Thus, dolphin-safe criteria for that region are set by the Inter-American Tropical Tuna Commission, an international body that includes Mexico, and apply to all fishers operating there.

The U.S. labeling regime is voluntary. If U.S. or Mexican fishers choose to use the dolphin-safe methods stipulated by the regime, their tuna qualifies for U.S. dolphin-safe labels. Tuna not meeting the standard can be sold in the United States without the label. U.S., Ecuadorean and other tuna fleets chose to meet the dolphin-safe standard. After decades of refusing to transition to more dolphin-safe fishing methods, Mexico challenged the voluntary labeling program at the WTO. The WTO ruled against the policy even though the same standards applied to U.S. fishers and though the alleged discrimination resulted from Mexican fishers' decision not to meet the standard.

The improvements to the labeling policy, made in July 2013 by the National Oceanic and Atmospheric Administration and supported by Public Citizen and other consumer and environmental groups, addressed the discrimination claim by strengthening the criteria used to assure that tuna caught in other regions and sold under the dolphin-safe label is caught without injuring or killing dolphins. Even before this improvement, the labels contributed to a more than 97 percent reduction in tuna-fishing-related dolphin deaths in the past 25 years. The labels allow consumers to "vote with their dollars" for dolphin-safe methods.

Today's WTO ruling against the improved dolphin-safe labels continues a saga of WTO interference with countries' environmental policies and reinforces an anti-WTO public sentiment spurred by a spate of recent anti-consumer WTO rulings. In October 2014, another WTO compliance panel ruled against the popular U.S. country-of-origin labeling (COOL) program used to inform consumers where their meat comes from. In April 2012, the WTO ruled against the Obama administration's flavored cigarettes ban used to curb youth smoking. The ruling against COOL is still under appeal and a final ruling is expected by May 18.

https://thehill.com/blogs/congress-blog/foreign-policy/238843-special-courts-for-foreign-investors

Special courts for foreign investors

The Hill
By Simon Lester and Ben Beachy
April 15, 2015

On the precipice of the biggest congressional trade debate in decades, a once-arcane investment provision has become a lightning rod of controversy in the intensifying battle over whether Congress should revive Trade Promotion Authority (TPA), also known as "fast track," for the Trans-Pacific Partnership (TPP). Sen. Elizabeth Warren (D-Mass.) calls this provision a system of "rigged, pseudo-courts." The Republican leadership of the House Ways and Means Committee defends it as "a vital part of any trade agreement."

But this is not your standard partisan congressional battle. Inside Congress and out, criticism and support for this parallel legal system, known as investor-state dispute settlement (ISDS), crosses the political spectrum. Analysts with the Cato Institute and Public Citizen usually stand on opposing sides of trade policy issues, but we find common ground in opposing this system of special privileges for foreign firms.

The TPP would extend this controversial system, found in some existing trade pacts and investment treaties, to new countries and tens of thousands of new companies. Under ISDS, "foreign investors" – mostly transnational corporations – have the ability to bypass U.S. courts and challenge U.S. government action and inaction before international tribunals authorized to order U.S. taxpayer compensation to the firms.

Pacts with ISDS are often promoted as simply prohibiting discrimination against foreign firms. In reality, they go well beyond non-discrimination, and create amorphous government obligations that have given rise to corporate lawsuits against a wide array of policies with relevance across the political spectrum. Foreign corporations have used this system to challenge policies ranging from the phase-out of nuclear power to the roll-back of renewable energy subsidies. Nearly all government actions and inactions are subject to challenge, covering local, state, and federal measures taken by courts, legislators and regulators.

Take, for example, the recent U.S. Supreme Court rulings that companies cannot patent human genes or obtain abstract software patents favored by patent trolls. Foreign holders of those patents could use ISDS to claim that these decisions interfere with their patent rights and ask an international tribunal to order compensation from the U.S. government. And just recently, some TPP supporters suggested that foreign firms could use ISDS obligations to challenge domestic antitrust enforcement decisions.

The wide scope of policies exposed to challenge arises from broad obligations in these agreements, which offer corporations extensive litigation opportunities. For example, provisions

typically guarantee foreign firms a "minimum standard of treatment," including a government obligation to provide "fair and equitable treatment." To a non-lawyer, such an obligation may sound like a modest provision. Who could be against fairness?

But creative ISDS lawyers acting as "judges" have generated a variety of broad interpretations of this obligation, including that governments should not "frustrate the expectations" of foreign investors. The system's innocuous sounding legal principles thus function more like corporate litigation handouts, with the substance and process of almost all government actions susceptible to challenge.

Importantly, foreign investors alone – not domestic businesses or civil society groups – are empowered to use this parallel system of legal privileges. You may believe that international law can and should protect the rights of individuals. But why start with transnational corporations, which are pretty well situated to protect their own rights? Few other private actors enjoy such broad and enforceable international law obligations as ISDS grants to transnational corporations.

The structure of the system is also deeply flawed. ISDS cases are not heard by a permanent judicial body made up of neutral arbitrators. Instead, there is a rotating group of lawyers who litigate cases on behalf of corporate clients one day, but then act as "judges" in other cases the next day. Oddly, the judges are chosen by the parties themselves. And while the foreign investor and the defending government each pick one judge, only foreign investors can initiate cases. This structure creates an incentive for at least some ISDS judges to tailor their interpretations to the views of foreign firms that are uniquely positioned to launch new ISDS cases and to select them to serve again as (highly-paid) judges.

And unlike typical legal systems based on rule of law, ISDS tribunals are not required to follow legal precedent, nor is the substance of their rulings subject to review by an appellate court.

Seeing the utility of this system, foreign firms are now launching more ISDS cases than ever before. Though no more than 50 ISDS cases were initiated in the system's first three decades, foreign firms filed at least 50 cases each year from 2011 through 2013, and at least 42 claims in 2014.

Amid this surge in ISDS challenges, it is surprising that the Obama administration intends to subject the United States to an unprecedented increase in ISDS liability via the TPP and the Transatlantic Trade and Investment Partnership (TTIP). While most existing U.S. agreements with ISDS cover developing countries whose firms have few investments here, these two deals would newly grant ISDS privileges to corporations from 13 of the world's 20 largest exporters of foreign investment. Those corporations own more than 32,000 subsidiaries in the United States, any one of which could serve as the basis for an ISDS claim for U.S. taxpayer compensation.

While not all claims are successful, a majority of ISDS cases have resulted in the government having to compensate the foreign firm, either by order of the tribunal or via a settlement. And even when firms do not win, the government must spend an estimated $8 million per ISDS case just to defend a challenged policy.

Exposing domestic laws, not to mention taxpayers, to a wave of ISDS litigation does not even make sense in the name of promoting investment. A litany of studies, producing mixed results, has not been able to show that ISDS-enforced pacts actually boost foreign investment.

While we disagree about many aspects of today's trade pacts, we agree that plans for ISDS expansion should be scrapped. Across the political spectrum, few would support a system primarily designed to increase litigation, not liberalization. ISDS may be good for lawyers; it is less clear that it benefits anyone else.

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Boston Globe

Obama's trade agreements are a gift to corporations

By Robert Kuttner April 17, 2015

ON THURSDAY, legislation moved forward that would give President Obama authority to negotiate two contentious trade deals: the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). But for the most part, these aren't trade agreements at all. They're a gift to corporations, here and in partner countries, that claim to be restrained by domestic regulations.

If these deals pass, the pharmaceutical industry could get new leverage to undermine regulations requiring the use of generic drugs. The tobacco industry has used similar "trade" provisions to attack cigarette package warnings.

A provision in both deals, known as Investor State Dispute Settlement, would allow corporations to do end runs around national governments by taking their claims to special tribunals, with none of the due process of normal law. This provision has attracted the most opposition. It's such a stinker that one of the proposed member nations, Australia, got an exemption for its health and environmental policies.

To get so-called fast-track treatment for these deals, the administration needs special trade promotion authority from Congress. But Obama faces serious opposition in his own party, and he will need lots of Republican votes. He has to hope that Republicans are more eager to help their corporate allies than to embarrass this president by voting down one of his top priorities.

But the real intriguing question is why Obama invests so much political capital in promoting agreements like these. They do little for the American economy, and even less for its workers.

The trade authority vote had been bottled up while the Senate Finance Committee Chair, Orrin Hatch of Utah, and his Democratic counterpart, Ron Wyden of Oregon, worked out compromise language in the hope of winning over skeptical Democrats. The measure announced Thursday includes vague language on protections for labor and environmental standards, human rights, and Internet freedoms. Congress would get slightly longer to review the text, but it would still have to be voted on as a package that could not be amended.

Wyden trumpeted these provisions as breakthroughs, but they were scorned by leading labor and environmental critics as window dressing. Lori Wallach, of Public Citizen's Global Trade Watch, points out that the language is almost identical to that of a 2014 bill that had to be withdrawn for lack of support. Only about a dozen House Democrats are said to support the measure — and many Republicans won't back it unless more Democrats do.

But why would they, at a time when Hillary Clinton sounds more populist and momentum is increasing for campaigns to raise the minimum wage? Speaking last week at the Brookings Institution, Jason Furman, chair of Obama's Council of Economic Advisors, proclaimed that, according to an elaborate economic model, by 2025 the Pacific deal would increase US incomes by 0.4 percent, or about $77 billion.

That's pretty small beer. And as Furman admitted, the projection is only as good as its economic assumptions. One such heroic assumption is full employment, but this deal might well reduce US employment by increasing our trade deficit.

The TPP was rolled out with great fanfare in 2012 as part of Obama's "pivot to Asia." The subtext was that a Pacific trade deal would help contain China's influence in its own backyard.

Since then, Beijing has unveiled a development bank that rivals the US-dominated World Bank, and our closest allies — Britain, France, Germany, Italy — are lined up to join. It's not at all clear how the TPP, whose only large Asian member would be Japan, helps contain China, whose economic influence continues to grow.

Basically, ever since the North American Free Trade Agreement of 1993 (NAFTA), trade policy has been on autopilot. Tariffs are now quite low, and these deals are mainly about dismantling health, safety, consumer, labor, environment, and corporate regulations.

These agreements are conceived and drafted by corporations, and sponsored by both political parties. For the Obama administration, the key official negotiating these deals is US Trade Ambassador Michael Froman, a protégé of former Citigroup and Goldman Sachs executive Robert Rubin, who was a big promoter of NAFTA while serving as Bill Clinton's top economic official.

Mainly, these deals help cement a corporate alliance with the presidential wing of the Democratic Party and divert attention from the much tougher challenge of enacting policies that would actually raise living standards. In the closing days of the Obama era, this is what passes for bipartisanship.

Robert Kuttner is co-editor of The American Prospect and a professor at Brandeis University's Heller School.

http://thehill.com/blogs/congress-blog/foreign-policy/239155-obamas-new-trade-deal-represents-massive-executive

Obama's new trade deal represents massive executive overreach

The Hill
By Kevin L. Kearns
April 17, 2015

President Obama has a deal for America, two in fact: Trade Promotion Authority (TPA) and the Trans-Pacific Partnership (TPP). TPA, or "fast track," would force Congress to pass his TPP trade deal without exercising its constitutionally mandated duty to regulate foreign trade. Why? Because TPA does not allow Congress to alter even one comma in this secretly negotiated agreement.

If someone were to walk up to you on the street and say, "Hey, I've got a great deal for you," common sense dictates that you'd ask for the details. And if they said, "Don't worry. I've been working on it for a while. Just sign here," you'd rightly be reluctant. The analogy may be simplistic, but it fits exactly what Obama is now asking of Congress in requesting fast track to close out the TPP.

TPP is the controversial trade deal *du jour*, the latest in a long line, including: NAFTA, WTO, China, CAFTA, Columbia, Panama, Peru, South Korea, etc. Each of these deals was touted as a boost for American industry and workers. Instead the U.S. has lost five million manufacturing jobs and 57,000 manufacturing establishments since 2000.

Thus fast track and TPP have turned into a political battle between the executive and legislative branches. Members of Congress are justifiably troubled because Obama has negotiated the TPP without first asking Congress for authority to do so. That means Congress hasn't been able to provide a vetted set of negotiating partners and objectives. Now the president is seeking fast-track authority to simply slam-dunk the finished package through Congress.

Claims that Congress can put the brakes on Obama and still have input by granting fast track now are nonsense. So are claims that Congress has been consulted multiple times. Yes, some handpicked Members have been included. But a handful of representatives do not represent Congress acting as a whole through a deliberative process. This blatant bypassing of Congress reduces TPP to a government-managed, crony-capitalist trade agreement.

The bargain at the heart of fast track is supposed to work like this: Congress sets the negotiating partners and objectives, is consulted regularly as a body during negotiations, signs off as a body on any concessions or compromises, and, in exchange, gives up its rights to amend or filibuster the final agreement. With fast track done correctly, Congress effectively enjoys the status of a negotiating partner from the inception of talks. Thus, there is no need for Congress to amend the document since it has been involved from the start and there are no surprises to correct.

Obama's "negotiate-now-consult-afterwards" approach is a de facto rejection of the way fast track is designed to work. Instead, the Obama administration has relied mainly on itself and the advice of 600 non-governmental organizations, including many multinational corporations. These corporate advisors represent neither the American people nor the U.S. national interest. They represent only the parochial interests of their shareholders, officers, and directors.

The merits of TPP, in terms of adequately opening foreign markets and defending domestic U.S. manufacturers against predatory trade, are likely to be few if the past 20 years of trade deals are any guide. In any case, the merits are a separate issue from the constitutional defects posed by back-door dealing. Even those who might conceptually support a "free trade" deal should oppose an agreement that is ramrodded through Congress. And any agreement that runs to thousands of pages and includes carve-outs and special benefits for many industries can hardly be called "free trade."

Therefore, trade critics and supporters alike must unite against this unprecedented executive power grab and reject an after-the-fact, fast track agreement. Any alleged economic benefits of the TPP cannot be used as an excuse to bypass the Congress and the Constitution.

Kearns is president of the U.S. Business & Industry Council (USBIC), a national business organization advocating for domestic U.S. manufacturers since 1933.

http://www.politico.com/magazine/story/2015/04/trans-pacific-partnership-state-laws-117127.html#.VTZpPpMnI8Q

Don't Let TPP Gut State Laws

The partnership's potential to undermine state laws should concern Congress.

By ERIC T. SCHNEIDERMAN
April 19, 2015

State laws and regulators are increasingly important as gridlock in Washington makes broad federal action on important issues an increasingly rare event. From environmental protection to civil rights to the minimum wage, the action is at the state level. Ironically, one thing that may get done soon in Washington is a trade agreement, the Trans-Pacific Partnership, which has the potential to undermine a wide range of state and local laws.

One provision of TPP would create an entirely separate system of justice: special tribunals to hear and decide claims by foreign investors that their corporate interests are being harmed by a nation that is part of the agreement. This Investor-State Dispute Settlement provision would allow large multinational corporations to sue a signatory country for actions taken by its federal, state or local elected or appointed officials that the foreign corporation claims hurt its bottom line.

This should give pause to all members of Congress, who will soon be asked to vote on fast-track negotiating authority to close the agreement. But it is particularly worrisome to those of us in states, such as New York, with robust laws that protect the public welfare — laws that could be undermined by the TPP and its dispute settlement provision.

To put this in real terms, consider a foreign corporation, located in a country that has signed on to TPP, and which has an investment interest in the Indian Point nuclear power facility in New York's Westchester County. Under TPP, that corporate investor could seek damages from the United States, perhaps hundreds of millions of dollars or more, for actions by the Nuclear Regulatory Commission, the New York State Department of Environmental Conservation, the Westchester Country Board of Legislators or even the local Village Board that lead to a delay in the relicensing or an increase in the operating costs of the facility.

The very threat of having to face such a suit in the uncharted waters of an international tribunal could have a chilling effect on government policymakers and regulators.

Or consider the work my office has done to enforce the state of New York's laws against wage theft, predatory lending and consumer fraud. Under TPP, certain foreign targets of enforcement actions, unable to prevail in domestic courts, could take their cases to TPP's dispute resolution

tribunals. Unbound by an established body of law or precedent, the tribunals would be able to simply sidestep domestic courts. And decisions by these tribunals cannot be appealed.

Proponents of TPP note that similar tribunal constructs have been included in other international trade agreements involving the United States, often in order to encourage and protect our investments in countries with shaky, corrupt or even nonexistent civil justice systems. But more than in past trade agreements, a number of the nations expected to participate in TPP have the resources and legal sophistication to exploit the agreement and turn it against our laws and system of justice.

Maybe that's why the agreement is being negotiated in secret. If it weren't for WikiLeaks and a few media outlets, we wouldn't even know about this dangerous provision. The effort by negotiators to keep their discussions from the public is telling.
The beneficiaries here would be a discrete group of multinational business interests that should be entitled to treatment no better and no different than any other plaintiff receives in the trial and appellate courts of this country. The separate and unaccountable system of justice that TPP would create poses a major risk to critical statutes and policy decisions that protect our citizens — and it has no place in a nation committed to equal justice under law.

Eric T. Schneiderman is the 65th attorney general of New York state.

http://www.acslaw.org/acsblog/fact-or-fiction-does-the-hatch-wyden-obama-trade-promotion-authority-bill-protect-us

Fact or Fiction: Does the Hatch-Wyden-Obama Trade Promotion Authority Bill Protect U.S. Sovereignty Over Domestic Policy?

April 20, 2015

by Sean M. Flynn, Associate Director, Program on Information Justice, and Intellectual Property Professorial Lecturer in Residence, American University Washington College of Law

The Trade Promotion Authority (TPA) bill that was released last week contains a fascinating Section 8 on "Sovereignty." The section appears intended to make all trade agreements with the U.S. not binding to the extent that they contradict any provision of U.S. law, current or future. If valid, the section would go a long way to calming fears in this country that new trade agreements, like the old ones, could be used by corporations or other countries to force the U.S. to alter domestic regulations. (See, for example, analysis on how the leaked TPP text could enable challenges to intellectual property limitations and exceptions like the U.S. fair use doctrine).

Here, I analyze Section 8's promise using *The Washington Post's* "Fact or Fiction" Pinocchio scale. For containing numerous blatantly misleading characterizations of international law, including outright falsehoods concerning the ability of U.S. Congress to determine when international law binds, I give the provision four Pinocchios.

Section 8 of the TPA bill states:

8. SOVEREIGNTY

(a) UNITED STATES LAW TO PREVAIL IN EVENT OF CONFLICT.—No provision of any trade agreement entered into under section 3(b), nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States, any State of the United States, or any locality of the United States shall have effect.

(b) AMENDMENTS OR MODIFICATIONS OF UNITED STATES LAW.—No provision of any trade agreement entered into under section 3(b) shall prevent the United States, any State of the United States, or any locality of the United States from amending or modifying any law of the United States, that State, or that locality (as the case may be).

(c) DISPUTE SETTLEMENT REPORTS.—Reports, including findings and recommendations, issued by dispute settlement panels convened pursuant to any trade agreement entered into under section 3(b) shall have no binding effect on the law of the United States, the Government of the United States, or the law or government of any State or locality of the United States.

Let's take these in order. Section (a) is a repetition of the language in every free trade implementation act that has passed congress since NAFTA. In technical detail, it is mostly literally true. International trade agreements, like most international treaties in the U.S., are non-self-executing, meaning that they only become judicially cognizable as U.S. law through domestic legislation implementing their mandates. Section (a) can be

seen as articulating that standard. Elsewhere, the bill makes clear that the President has to identify through draft implementing legislation all the changes in US law required by the treaty. Any changes in law required by the treaty that are not adopted by the Congress in that implementing legislation will have no effect on U.S. law.

It is not true, however, that a failure of Congress to implement changes a treaty requires renders those provisions has having "no effect" whatsoever. The non-implemented provisions will still bind the U.S. under international law. Some other party of the treaty, or a private investor under investor-state dispute settlement (ISDS), could (depending on the enforcement language in the treaty) sue the U.S. for damages or to authorize trade sanctions. That dispute settlement process would bind the U.S. government – and have effect – even though it would not change U.S. law.

The language in (b) was not included in the last Trade Promotion Authority bill to pass Congress in 2002 or in any Free Trade Agreement implementing act. It shows that one of the major criticisms of U.S. trade policy, especially in the intellectual property field, is taking hold. The criticism is that even when the trade agreement provisions are consistent with presently existing U.S. law, they still have the negative effect of locking the U.S. into its present legislative structure.

Take the example of the use of software or services to break the code on a locked cell phone to use it with another carrier. Such action circumvents the "technological protection measure" imposed by the cell phone maker that blocks access to copyrighted software driving the phone. The Digital Millennium Copyright Act makes such "circumvention" illegal absent an exception. And the U.S. has entered a series of trade agreements that require countries to abide by the DMCA standard as it then was, including the lack of a permanent exception for cell phone unlocking. And thus, if Congress adopts a permanent exception for this problem (or for another problem, like facilitating accessible format copies for people with disabilities) the U.S. will be in derogation of trade agreement language it has already signed.

So does TPA section (b), claiming that nothing in a trade agreement can "prevent the United States, any State of the United States, or any locality of the United States from amending or modifying any law," solve the problem? No it does not. Like (a), section (b) can be read as literally true. The U.S. Congress can always amend U.S. law in contravention of international law, and therefore nothing in a trade agreement can "prevent" the amendment of U.S. law. But the clear implication of the section is, like (a), that changing our laws to violate a treaty will have no effect. This is clearly not true. If Congress changes our law to be in violation of a treaty commitment, the only way to avoid liability for that change is to re-negotiate the applicable treaties to remove the confining language at issue.

Section (c) contains the biggest whopper. There, the bill claims to be able to render findings by dispute settlement panels with "no binding effect" on the law or "the Government" of the U.S. The key here is that international law, not U.S. law, decides the extent to which international treaties bind and the scope of remedies available. If a treaty has a dispute resolution process, then the nature of how that process binds an individual country is determined by the treaty, including any reservations made in the treaty itself, not by local trade authorization legislation.

Thus, an international tribunal, following the Vienna Convention on the Law of Treaties and the scope of customary international law, would ask: (1) Is there a treaty, *i.e.*, did the president sign and Congress ratify? (Yes, yes.), and (2) Does the

treaty have a reservation carving out the U.S. from dispute resolution? (No.) Then the dispute resolution process binds. That is it. They don't have to look at the local legislation giving the president negotiating authority because, under international law, the president has the authority to bind the United States even where he exceeds his domestic constitutional authority.

Technically, clauses (a) and (b), and the statement in (c) about settlement panels binding the "law" of the U.S., can be true only if the concern is cabined to whether international law can directly change a U.S. statute by being self-executing. But the clear intent of the provision is to suggest that the legislation can render trade agreements that conflict with our laws as being without effect, including not binding the "U.S. government."

This the statute cannot do. For stating that the legislation can prevent trade agreements from binding the U.S. in areas where the statute can have no such effect, Section 8 of the TPA gets a Four Pinocchio rating from me. Members of Congress and the public concerned about the ability of trade tribunals to find our domestic laws and regulations in violation of vague limits on regulatory authority should find little comfort in the "Sovereignty" section of the TPA bill.

Monday, April 20, 2015

Common Dreams

Newly Leaked TTIP Draft Reveals Far-Reaching Assault on US/EU Democracy

Mammoth deal an even greater boon to corporate power than previously known, warn analysts

by

Sarah Lazare, staff writer

Protesters against the TTIP march in London on December 7, 2014. (Photo: Global Justice Now/flickr/cc)

A freshly-leaked chapter from the highly secretive Transatlantic Trade and Investment Partnership (TTIP) agreement, currently under negotiation between the United States and European Union, reveals that the so-called "free trade" deal poses an even greater threat to environmental and human rights protections—and democracy itself—than previously known, civil society organizations warn.

The revelation comes on the heels of global protests against the mammoth deal over the weekend and coincides with the reconvening of negotiations between the parties on Monday in New York.

The European Commission's latest proposed chapter (pdf) on "regulatory cooperation" was first leaked to Friends of the Earth and dates to the month of March. It follows previous leaks of the chapter, and experts say the most recent iteration is even worse.

"The Commission proposal introduces a system that puts every new environmental, health, and labor standard at European and member state level at risk. It creates a labyrinth of red tape for regulators, to be paid by the tax payer, that undermines their appetite to adopt legislation in the public interest," said Paul de Clerck of Friends of the Earth Europe in a press statement released Monday.

Regulatory cooperation refers to the "harmonization of regulatory frameworks between the E.U. and the U.S. once the TTIP negotiations are done," ostensibly to ensure such regulations do not pose barriers to trade, the Corporate Europe Observatory explained earlier this month.

However, analysts have repeatedly warned that, euphemisms aside, "cooperation," in fact, allows corporate power to trample democratic protections, from labor to public health to climate regulations, while encouraging a race to the lowest possible standards.

The newest version of the regulatory cooperation chapter reveals that the European Commission is angling to impose even more barriers to regulations.

The chapter includes a "regulatory exchange" proposal, which will "force laws drafted by democratically-elected politicians through an extensive screening process," according to an analysis from CIEL.

"Laws will be evaluated on whether or not they are compatible with the economic interests of major companies," the organization explains. "Responsibility for this screening will lie with the 'Regulatory cooperation body,' a permanent, undemocratic, and unaccountable conclave of European and American technocrats."

David Azoulay, managing attorney for the Center for International Environmental Law, told *Common Dreams* over the phone from Geneva that this red tape would apply to new and upcoming regulations, as well as existing ones. "What we are looking at here is potentially endless procedures at every step of the regulatory process, including once the legislation has been adopted," he said.

"We are concerned about this new version, because it would take power away from legislators and regulators and give it to this group of technocrats that is not elected and operates in secrecy," Azoulay continued. "Secondly, this would burden lawmakers with extremely heavy procedures, create red tape, and force legislators at the local, state, and federal levels to spend large amounts of time answering questions about regulations."

The regulatory cooperation plan was already widely opposed by civil society groups. Over 170 organizations denounced regulatory cooperation in a statement released in February: "The Commission proposals for regulatory cooperation carry the threat of lowering standards in the long and short term, on both sides of the Atlantic, at the state and member state/European levels. They constrain democratic decision-making by strengthening the influence of big business over regulation."

The potential implications of this latest proposal are vast, as the TTIP is slated to be the largest such deal in history. Taken together, the U.S. and E.U. account for nearly half of the world's GDP. The Obama administration is negotiating the accord alongside two other secret trade deals: the Trans-Pacific Partnership and the Trade in Services Agreement.

Analysts warn that the TTIP alone is poised to dramatically expand corporate power.

"Both the [E.U.] Commission and US authorities will be able to exert undue pressure on governments and politicians under this measure as these powerful players are parachuted into national legislative procedures," warned Kenneth Haar of Corporate Europe Observatory in a press statement. "The two are also very likely to share the same agenda: upholding the interests of multinationals."

Boston Globe

US owes allies a clear path forward on Pacific trade talks

By The Editorial Board April 20, 2015

THE FIGHT in Washington over the massive Trans-Pacific Partnership trade deal — which promises to be one of the largest congressional battles of President Obama's second term — has been on a slow burn for well over a year. But a deal struck late last week would give Obama "fast-track" authority to finish negotiating the agreement. Regardless of their views on the trade deal itself, lawmakers should vote for fast-track authority. Such a move would send a vital message to the trade deal partners that the United States negotiates in good faith, while also allowing Congress to reject the deal if lawmakers don't think it does enough to boost the US economy.

In 2008, the United States joined negotiations for the Trans-Pacific Partnership, which the White House sees as a central component of a long-term strategic pivot to Asia. Now including 12 Pacific Rim nations such as Japan, Australia, and Peru, and accounting for nearly 40 percent of global GDP, the partnership is intended to establish common regulations on tariffs, intellectual property, dispute resolution, the environment, labor, human rights, and a range of other issues. The Office of the US Trade Representative frames the partnership as a way to set the rules for 21st-century trade while providing a counterbalance to China's proposed alternative, the Free Trade Area of Asia and the Pacific.

The deal has also led to some strange bedfellows: Obama and mainstream Republicans see it as an important step for the American economy, while Tea Party conservatives and progressive Democrats tend to oppose it, if for different reasons. Tea Partiers see it as another example of presidential overreach, while many Democrats — along with the AFL-CIO and other unions — are skeptical that the Trans-Pacific Partnership will actually benefit workers.

Enter into the mix fast-track authority. The deal struck by Republican Senator Orrin Hatch, Democratic Senator Ron Wyden, and Republican Representative Paul Ryan last Thursday would allow Congress to vote on the deal, but would deny lawmakers the ability to amend the final draft. In return, Congress would give US trade negotiators a broad list of priorities to negotiate for. However, if 60 senators feel that the deal does not meet their standards, they can shut off fast-track authority and open the deal to amendments. Lawmakers plan to introduce formal drafts of this legislation in both houses this week.

That's a fair deal, and one that legislators on both sides of the issue should feel comfortable supporting. Besides, it also represents a responsible interjection into foreign policy — something Congress has struggled with in recent memory. Many US allies and negotiating partners worry that without fast-track, any deal they strike with the Obama administration will die by a thousand cuts in Congress. Given how divisive the issue has become, that concern is not unfounded. Japan

has expressed the same fear, and sees fast-track as a vital part of the negotiating process. Getting the bill sorted out before Japanese Prime Minister Shinzo Abe visits Washington later this month would be a sign of respect for one of our most important allies.

It is hard to say whether the Trans-Pacific Partnership will be one worth signing — a draft of the deal hasn't been released yet, and too many details about what it will include are still sketchy. But a vote for fast-track isn't an endorsement of the agreement as a whole, and lawmakers who back this provision can still vote against the partnership itself. Meanwhile, a vote for fast-track would give the negotiating partners peace of mind and show them that America's word can be trusted, while giving our negotiators the leverage they need to strike the best deal possible.

http://www.euractiv.com/sections/trade-society/ttip-negotiators-get-earful-american-critics-314056?utm_source=EurActiv+Newsletter&utm_campaign=46c69cd930-newsletter_daily_update&utm_medium=email&utm_term=0_bab5f0ea4e-46c69cd930-245803241

TTIP negotiators get an earful from American critics

Published: 24/04/2015 - 08:00 | **Updated:** 24/04/2015 - 09:18

In the margins of talks for a Transatlantic Trade and Investment Partnership (TTIP) on Thursday (23 April), US opponents to the deal vocally criticised the emerging agreement, saying it was a bad deal for consumers and the environment.

Critics included Jean Halloran, a senior adviser at the nonprofit Consumers Union, who suggested that a treaty would be the worst of all possible worlds, exposing European consumers to "faulty GM cars" and US children to toys that do not meet strict American standards.

"We cannot pursue mutual recognition or equivalence willy-nilly," she said. Halloran's remarks came during a three-hour stakeholders meeting.

Negotiators are meeting this week (20-24 April) for the ninth round of talks on TTIP, and are determined to make progress on all strands of the deal, but particularly on regulatory cooperation.

>>**Read:** EU, US trade talks seek to advance regulatory pillar

The agreement, which could create the world's biggest free-trade pact, has been billed by President Barack Obama and European Union leaders as critical to boosting economic growth and jobs in both regions.

Last week, Obama called for "major progress" on TTIP, saying the proposed major trade pact with Asia-Pacific countries would "absolutely" benefit American workers.

Supporters from across the business community emphasized on Thursday that standardizing rules could boost jobs in both regions.

But the talks have prompted large protests in Europe, where thousands rallied last weekend in Madrid and Brussels, and throughout Germany.

Opponents in the US have yet to take to the streets en masse, but about half of the roughly 60 scheduled presenters appeared to be TTIP foes, based on the names of their organisations. Some of the speakers did not show up, including Frack Free Nation and the Open the Cages Alliance.

Other frequent subjects of criticism included the secrecy surrounding the closed-door talks, as well as a Investor-State Dispute Settlement (ISDS) mechanism that campaigners say would undermine national sovereignty and favor big business.

Sharon Anglin Treat, a representative of the National Caucus of Environmental Legislators, said the trade agreement could gut stricter rules enacted by states, such as laws in Massachusetts and New Jersey to label or restrict bee-killing pesticides.

"US state laws and regulations do diverge from US federal law and EU regulations," Treat said. "That divergence is a hallmark of the US system of federalism and is enshrined in our Constitution."

But Ann Wilson of the Motor and Equipment Manufacturers Association urged negotiators to advance the talks, which offer the chance of uniform standards across jurisdictions.

"We are a global industry," she said. "It is important that we be able to operate on a global basis."

Eugene Philhower, a representative of the US Soybean Export Council, said that American farmers are as concerned about animal welfare and sustainability as their counterparts in Europe.

"American producers are just as interested in animal welfare," he said. "The biggest difference is whether to mandate it by the government."

If concluded, TTIP would be the world's biggest trade deal, linking about 60 percent of the world's economic output in a colossal market of 850 million consumers, creating a free-trade corridor from Hawaii to Lithuania.

New York Times

The Opinion Pages

OP-ED COLUMNIST

On Trade: Obama Right, Critics Wrong

APRIL 29, 2015

Thomas L. Friedman

BERLIN — I strongly support President Obama's efforts to conclude big, new trade-opening agreements with our Pacific allies, including Japan and Singapore, and with the whole European Union. But I don't support them just for economic reasons.

While I'm certain they would benefit America as a whole economically, I'll leave it to the president to explain why (and how any workers who are harmed can be cushioned). I want to focus on what is not being discussed enough: how these trade agreements with two of the biggest centers of democratic capitalism in the world can enhance our national security as much as our economic security.

Because these deals are not just about who sets the rules. They're about whether we'll have a rule-based world at all. We're at a very plastic moment in global affairs — much like after World War II. China is trying to unilaterally rewrite the rules. Russia is trying to unilaterally break the rules and parts of both the Arab world and Africa have lost all their rules and are disintegrating into states of nature. The globe is increasingly dividing between the World of Order and the World of Disorder.

When you look at it from Europe — I've been in Germany and Britain the past week — you see a situation developing to the south of here that is terrifying. It is not only a refugee crisis. It's a civilizational meltdown: Libya, Yemen, Syria and Iraq — the core of the Arab world — have all collapsed into tribal and sectarian civil wars, amplified by water crises and other environmental stresses.

But — and this is the crucial point — all this is happening in a post-imperial, post-colonial and increasingly post-authoritarian world. That is, in this pluralistic region that lacks pluralism — the Middle East — we have implicitly relied for centuries on the Ottoman Empire, British and French colonialism and then kings and dictators to impose order from the top-down on all the tribes, sects and religions trapped together there. But the first two (imperialism and

colonialism) are gone forever, and the last one (monarchy and autocracy) are barely holding on or have also disappeared.

Therefore, sustainable order — the order that will truly serve the people there — can only emerge from the bottom-up by the communities themselves forging social contracts for how to live together as equal citizens. And since that is not happening — except in Tunisia — the result is increasing disorder and tidal waves of refugees desperately trying to escape to the islands of order: Europe, Israel, Jordan, Lebanon and Iraq's Kurdistan region.

At the same time, the destruction of the Libyan government of Col. Muammar el-Qaddafi, without putting boots on the ground to create a new order in the vacuum — surely one of the dumbest things NATO ever did — has removed a barrier to illegal immigration to Europe from Ghana, Senegal, Mali, Eritrea, Syria and Sudan. As one senior German official speaking on background said to me: "Libya had been a bar to crossing the Mediterranean. But that bar has been removed now, and we can't reinvent it." A Libyan smuggler told The Times's David D. Kirkpatrick, reporting from Libya, now "everything is open — the deserts and the seas."

Here's a prediction: NATO will eventually establish "no-sail zones" — safe areas for refugees and no-go zones for people-smugglers — along the Libyan coast.

What does all this have to do with trade deals? With rising disorder in the Middle East and Africa — and with China and Russia trying to tug the world their way — there has never been a more important time for the coalition of free-market democracies and democratizing states that are the core of the World of Order to come together and establish the best rules for global integration for the 21st century, including appropriate trade, labor and environmental standards. These agreements would both strengthen and more closely integrate the market-based, rule-of-law-based democratic and democratizing nations that form the backbone of the World of Order.

America's economic future "depends on being integrated with the world," said Ian Goldin, the director of the Oxford Martin School, specializing in globalization. "But the future also depends on being able to cooperate with friends to solve all kinds of other problems, from climate to fundamentalism." These trade agreements can help build trust, coordination and growth that tilt the balance in all these countries more toward global cooperation than "hunkering down in protectionism or nationalism and letting others, or nobody, write the rules."

As Obama told his liberal critics Friday: If we abandon this effort to expand trade on our terms, "China, the 800-pound gorilla in Asia will create its own set of rules," signing bilateral trade agreements one by one across Asia "that advantage Chinese companies and Chinese workers and ... reduce our access ... in the fastest-growing, most dynamic economic part of the world." But if we get the Pacific trade deal done, "China is going to have to adapt to this set of trade rules that we've established." If we fail to do that, he added, 20 years from now we'll "look back and regret it."

That's the only thing he got wrong. We will regret it much sooner.

STATE OF MAINE

Citizen Trade Policy Commission

DRAFT AGENDA

Thursday, May 28, 2015 at 8:30 A.M.
Room 208, Burton M. Cross State Office Building
Augusta, Maine

8:30 AM Meeting called to order

I. Welcome and introductions

II. Review letters to Maine's Congressional delegation

III. Update from CTPC member Sharon Treat on recent activities of USTR

IV. Update on Fast Track legislation in Congress

V. Discussion of possible commission actions including Joint Resolution(s) and Congressional Letter(s)

VI. Articles of interest (Lock Kiermaier, Staff)

VII. Discuss future speakers and topics

VIII. Discussion of next meeting date

IX. Adjourn

STATE OF MAINE

Citizen Trade Policy Commission

May 19, 2015

The Honorable Susan Collins
United States Senate
68 Sewall Street, Room 507
Augusta, ME 04330
Re: Invitation to speak before the Maine Citizen Trade Policy Commission

Dear Senator Collins:

As you know, the Maine Citizen Trade Policy Commission was established in 2003 by the Maine State Legislature to, "*to assess and monitor the legal and economic impacts of trade agreements on state and local laws, working conditions and the business environment; to provide a mechanism for citizens and Legislators to voice their concerns and recommendations; and to make policy recommendations designed to protect Maine's jobs, business environment and laws from any negative impact of trade agreements.*" [10 MRSA §11 (3)].

To accomplish its statutory responsibilities, the CTPC has met regularly in the intervening years to study and review the various Free Trade Agreements that have been negotiated or are in the process of being negotiated. To that end, we have taken an active role in communicating our concerns and viewpoints with you and other members of Maine's congressional delegation, the Governor, the Legislature and the United States Trade Representative.

As a part of our effort to become more knowledgeable about the process by which Free Trade Agreements are negotiated and what the current issues in free trade are, we have frequently invited different individuals to appear before the commission to discuss particular issues and points of view. Currently and in recent years, the CTPC has spent a great deal of attention learning about and understanding the current FTAs which are negotiation including the TransPacific Partnership (TPP), the TransAtlantic Trade and Investment Partnership (TTIP) and the Trade In Services Agreement (TISA). Our review of these FTAs and their possible effects on Maine has necessarily included in-depth studies of the Trade Promotion Authority proposal which is currently before Congress and the Investor-State Dispute Settlement (ISDS) mechanism which is likely to be included in each of the aforementioned FTAs.

To add to our understanding of these various topics, we would like to invite you (or members of your staff) to appear before the commission. Our next meeting is scheduled for Thursday, May

28, 2015 from 8:30 AM to 10:30 AM at Room 208 of the Cross Office Building in Augusta. We also anticipate scheduling other meetings to take place over the course of the summer and fall.

We look forward to your participation and welcome any comments or questions that you may have regarding a future opportunity to meet with the CTPC. Please feel free to contact either of us or CTPC staff person Lock Kiermaier (phone: 207 446 0651) to arrange such a meeting.

Sincerely,

Senator Amy Volk, Chair

Representative Robert Saucier, Chair

STATE OF MAINE

Citizen Trade Policy Commission

May 19, 2015

The Honorable Angus King
United States Senate
4 Gabriel Dr Suite 3
Augusta, ME 04330

Re: Invitation to speak before the Maine Citizen Trade Policy Commission

Dear Senator King:

As you know, the Maine Citizen Trade Policy Commission was established in 2003 by the Maine State Legislature to, "*to assess and monitor the legal and economic impacts of trade agreements on state and local laws, working conditions and the business environment; to provide a mechanism for citizens and Legislators to voice their concerns and recommendations; and to make policy recommendations designed to protect Maine's jobs, business environment and laws from any negative impact of trade agreements.*" [10 MRSA §11 (3)].

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We appreciate the time you spent meeting with the CTPC Chairs on November 15, 2013. To add to our understanding of these various topics, we would like to again invite you (or members of your staff) to appear before the commission. Our next meeting is scheduled for Thursday, May 28, 2015 from 8:30 AM to 10:30 AM at Room 208 of the Cross Office Building in Augusta. We also anticipate scheduling other meetings to take place over the course of the summer and fall.

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Sincerely,

Senator Amy Volk, Chair

Representative Robert Saucier, Chair

Citizen Trade Policy Commission
c/o Office of Policy & Legal Analysis
State House Station #13, Augusta, ME 04333-0013 Telephone: 207 287-1670
http://www.maine.gov/legis/opla/citpol.htm

STATE OF MAINE

Citizen Trade Policy Commission

May 19, 2015

The Honorable Chellie Pingree
United States House of Representatives
2 Portland Fish Pier, Suite 304
Portland, ME 04101
Re: Invitation to speak before the Maine Citizen Trade Policy Commission

Dear Representative Pingree:

As you know, the Maine Citizen Trade Policy Commission was established in 2003 by the Maine State Legislature to, "*to assess and monitor the legal and economic impacts of trade agreements on state and local laws, working conditions and the business environment; to provide a mechanism for citizens and Legislators to voice their concerns and recommendations; and to make policy recommendations designed to protect Maine's jobs, business environment and laws from any negative impact of trade agreements.*" [10 MRSA §11 (3)].

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Sincerely,

Senator Amy Volk, Chair

Representative Robert Saucier, Chair

STATE OF MAINE

Citizen Trade Policy Commission

May 19, 2015

The Honorable Bruce Poliquin
United States House of Representatives
6 State Street
Suite 101
Bangor, ME 04401

Re: Invitation to speak before the Maine Citizen Trade Policy Commission

Dear Representative Poliquin:

As you know, the Maine Citizen Trade Policy Commission was established in 2003 by the Maine State Legislature to, "*to assess and monitor the legal and economic impacts of trade agreements on state and local laws, working conditions and the business environment; to provide a mechanism for citizens and Legislators to voice their concerns and recommendations; and to make policy recommendations designed to protect Maine's jobs, business environment and laws from any negative impact of trade agreements.*" [10 MRSA §11 (3)].

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Sincerely,

Senator Amy Volk, Chair

Representative Robert Saucier, Chair

Citizen Trade Policy Commission

May 28, 2015

Discussion: Possible Joint Resolution(s) and Congressional Letters

Introduction: Over the course of its existence, the CTPC has sponsored a number of Joint Resolutions on various free trade topics. These Joint Resolutions have typically been addressed to the President and members of Congress and have been unanimously approved by the Maine State Legislature. Most recently, in 2013, the 126th Legislature approved LR 2148 titled, JOINT RESOLUTION MEMORIALIZING THE PRESIDENT OF THE UNITED STATES, THE UNITED STATES CONGRESS AND THE UNITED STATES TRADE REPRESENTATIVE REGARDING THE USE OF TRADE PROMOTION AUTHORITY IN INTERNATIONAL TRADE POLICY. This resolution (see copy) urged that the President, USTR and Congress adopt an approach to TPA which incorporated meaningful cooperation with the states, public participation and increased transparency.

Background: As discussed in several articles provided for this meeting, the TPA has been passed for by the Senate and is headed for the House of Representatives for an anticipated vote in early to mid-June. In the Senate, both Maine Senators, Susan Collins and Angus King, voted against TPA (see copies of their statements). To date, Maine Representative Chellie Pingree has publically announced her intention to vote against TPA and Maine Representative Bruce Poliquin does not appear to have announced his position on the TPA.

Possible Actions: If the CTPC is interested in initiating a public stance on any of the free trade issues that are currently under intense public discussion, there are a number of avenues that the commission could consider for possible action. These possibilities are not mutually exclusive and include, but are not limited to, the following:

- Legislative Resolution regarding TPA; pro or con;
- Legislative Resolution regarding TPP; pro or con;
- Legislative Resolution regarding ISDS; pro or con;
- Letter(s) to Maine's Congressional Delegation on any of the above

At the request of CTPC Co-Chair Representative Robert Saucier, a draft resolution regarding opposition to the TPP and ISDS has been prepared for the commission's review:

WE, your Memorialists, the Members of the One Hundred and Twenty-seventh Legislature of the State of Maine now assembled in the First Regular Session, most respectfully present and petition the President of the United States, the United States Congress and the United States Trade Representative as follows:

WHEREAS, the latest provisions of the Trans-Pacific Partnership's Investor-State Dispute Settlement System aggressively expand the powers of multinational corporations, giving them the ability to undermine democracy by challenging our federal, state and local laws and programs that could diminish any of their future expected profits in international tribunals; and

WHEREAS, the TPP will spur another exodus of American jobs in the service, public and manufacturing sectors, as it includes rules that will make it even easier for corporate America to outsource call centers, programming, engineering, and manufacturing jobs, putting Americans out of work; and

WHEREAS, such unfettered power would result in an erosion of collective bargaining rights and a rollback of labor, health, consumer safety, and environmental regulations, and spurring a race to the bottom and an increase in wealth and income inequality;

RESOLVED, that We, your Memorialists, respectfully urge and request the rejection of the "fast tracking" of the Trans-Pacific Partnership, the rejection of any elements in that free trade agreement which result in the massive expansion of corporate power and the weakening of democratic rule and worker's rights, and request for the full and timely disclosure of all the details of the agreement; and

RESOLVED: That suitable copies of this resolution, duly authenticated by the Secretary of State, be transmitted to the Honorable Barack H. Obama, President of the United States, to the President of the United States Senate, to the Speaker of the United States House of Representatives, to the United States Trade Representative and to each Member of the Maine Congressional Delegation.

STATE OF MAINE

IN THE YEAR OF OUR LORD
TWO THOUSAND AND THIRTEEN

JOINT RESOLUTION MEMORIALIZING THE PRESIDENT OF THE UNITED STATES, THE UNITED STATES CONGRESS AND THE UNITED STATES TRADE REPRESENTATIVE REGARDING THE USE OF TRADE PROMOTION AUTHORITY IN INTERNATIONAL TRADE POLICY

WE, your Memorialists, the Members of the One Hundred and Twenty-sixth Legislature of the State of Maine now assembled in the First Regular Session, most respectfully present and petition the President of the United States, the United States Congress and the United States Trade Representative as follows:

WHEREAS, the State strongly supports international trade when fair rules of trade are in place and seeks to be an active participant in the global economy, and the State seeks to maximize the benefits and minimize any negative effects of international trade; and

WHEREAS, existing trade agreements have effects that extend significantly beyond the bounds of traditional trade matters, such as tariffs and quotas, and can undermine Maine's constitutionally guaranteed authority to protect the public health, safety and welfare and its regulatory authority; and

WHEREAS, a succession of federal trade negotiators from both political parties over the years have failed to operate in a transparent manner and have failed to meaningfully consult with the State on the far-reaching effect of trade agreements on state and local laws, even when obligating the State to comply with the terms of these agreements; and

WHEREAS, Article II, Section 2 of the United States Constitution empowers the President of the United States"...by and with the advice and consent of the Senate, to make treaties, provided two thirds of Senators present concur..."; and

WHEREAS, the trade promotion authority implemented by the United States Congress and the President of the United States with regard to international trade and investment treaties and agreements entered into over the past several years, commonly known as fast-track negotiating authority, does not adequately provide for the constitutionally required review and approval of treaties; and

WHEREAS, the United States Trade Representative, at the direction of the President of the United States, is currently negotiating or planning to enter into negotiations for several multilateral trade and investment treaties, including the Trans-Pacific Partnership Agreement and the Trans-Atlantic Trade and Investment Partnership; and

WHEREAS, proposals are under consideration to review these and future trade and investment agreements pursuant to a fast-track model; and

WHEREAS, the current process of consultation with states by the Federal Government on trade policy fails to provide a way for states to meaningfully participate in the development of trade policy, despite the fact that trade rules could undermine state sovereignty; and

WHEREAS, under current trade rules, states have not had channels for meaningful communication with the United States Trade Representative, as both the Intergovernmental Policy Advisory Committee on Trade and the state point of contact system have proven insufficient to allow input from states, and states do not always seem to be considered as a partner in government; and

WHEREAS, the President of the United States, the United States Trade Representative and the Maine Congressional Delegation will have a role in shaping future trade policy legislation; now, therefore, be it

RESOLVED: That We, your Memorialists, respectfully urge and request that future trade policy include reforms to improve the process of consultation both between the Executive Branch and Congress and between the Federal Government and the states; and be it further

RESOLVED: That We, your Memorialists, respectfully urge and request that the fast-track model of consultation and approval of international treaties and agreements be rejected with respect to pending agreements and agreements not yet under negotiation; and be it further

RESOLVED: That We, your Memorialists, respectfully urge and request that the President of the United States, the United States Congress and the United States Trade Representative seek to develop a new middle ground approach to consultation that meets the constitutional requirements for treaty review and approval while at the same time allowing the United States Trade Representative adequate flexibility to negotiate the increasingly complicated provisions of international trade treaties; and be it further

RESOLVED: That We, your Memorialists, respectfully urge and request that the President of the United States, the United States Congress and the United States Trade Representative seek a meaningful consultation system that increases transparency, promotes information sharing, allows for timely and frequent consultations, provides state-level trade data analysis, provides legal analysis for states on the effect of trade on state laws, increases public participation and acknowledges and respects each state's sovereignty; and be it further

RESOLVED: That We, your Memorialists, respectfully urge and request that each instance in which trade promotion authority is authorized by the United States Congress be limited to a specific trade agreement to help ensure the adequate review and approval of each international trade treaty; and be it further

RESOLVED: That suitable copies of this resolution, duly authenticated by the Secretary of State, be transmitted to the Honorable Barack H. Obama, President of the United States, to the President of the United States Senate, to the Speaker of the United States House of Representatives, to the United States Trade Representative and to each Member of the Maine Congressional Delegation.

http://blogs.rollcall.com/wgdb/senate-passes-trade-promotion-authority/?pos=adpb

Senate Passes Trade Promotion Authority (Updated)

CQ-Roll Call

By Steven Dennis Posted at 9:29 p.m. on May 22, 2015

Updated 10:20 p.m. | The Senate passed President Barack Obama's Trade Promotion Authority package Friday, sending the precursor to major trade deals with Asia and Europe to the House.

The package survived a near-death experience Thursday, with the Senate voting narrowly to cut off a filibuster in an extended vote, and again Friday, when the Senate narrowly rejected a bipartisan currency enforcement amendment that had drawn a veto threat.

Obama cheered the passage in a statement.

The legislation "includes strong standards that will advance workers' rights, protect the environment, promote a free and open Internet, and it supports new robust measures to address unfair currency practices," Obama said.

"I want to thank Senators of both parties for sticking up for American workers by supporting smart trade and strong enforcement, and I encourage the House of Representatives to follow suit by passing TPA and TAA as soon as possible."

Speaker John A. Boehner, R-Ohio, called the bill a "no-brainer" and said he would try and pass it in the House.

"The House will take up this measure, and Republicans will do our part, but ultimately success will require Democrats putting politics aside and doing what's best for the country," Boehner said. "Let's seize this opportunity to open new doors for the things Americans make and the people who make them."

A deal to vote in June on extending the charter of the Export-Import Bank helped pave the way for passage of the measure, as well as a months-long, intensive effort by the president on what has been his top economic priority and one of the last big legacy items of his presidency and one that exposed a deep rift within his party.

Final passage ultimately came with less drama on a 62-37 vote.

In theory, the trade bill should have sailed through. Trade Promotion Authority, which allows presidents the ability to get up-or-down votes in Congress on trade deals without amendments, had the support of the Republican majority, the Democratic president of the United States and ultimately 14 pro-trade Democrats.

An extension to a program called Trade Adjustment Assistance that provides income support and training to workers displaced by international trade was added to the trade package as a sweetener for Democrats, but that was not enough for most of them. Led by Sen. Elizabeth Warren, D-Mass., Minority Leader Harry Reid, D-Nev., and Sen. Sherrod Brown, D-Ohio, among others, most Democrats argued the trade deals would hurt American workers.

"This agreement, like bad trade deals before it, would force American workers to compete with desperate workers around the world – including workers in Vietnam where the minimum wage is 56-cents an hour," said Sen. Bernard Sanders, I-Vt., who is running for president and had called out Hillary Rodham Clinton for keeping her distance from the issue.

The 14 Democrats who backed the president included Michael Bennet of Colorado, Maria Cantwell of Washington, Benjamin L. Cardin of Maryland, Thomas R. Carper of Delaware, Chris Coons of Delaware, Dianne Feinstein of California, Heidi Heitkamp of North Dakota, Tim Kaine of Virginia, Claire McCaskill of Missouri, Patty Murray of Washington, Bill Nelson of Florida, Jeanne Shaheen of New Hampshire, Mark Warner of Virginia and Ron Wyden of Oregon.

Cardin had voted to filibuster the package earlier after being upset he did not get his amendments but had been a supporter of the package in committee.

Five Republicans voted no: Susan Collins of Maine, Mike Lee of Utah, Rand Paul of Kentucky, Jeff Sessions of Alabama and Richard C. Shelby of Alabama.

One Republican senator did not vote: Michael B. Enzi of Wyoming.

The Hill's Whip List

By Vicki Needham - 05/05/15 04:37 PM EDT

The fight over fast-track trade legislation is shifting to the House, where supporters face a tougher fight than in the Senate.

Senators approved legislation to boost President Obama's trade powers just ahead of the Memorial Day recess in a 62-37 vote.

But the White House and GOP House leaders have their work cut out for them, with strong opposition from progressives worried about trade's effect on American jobs and from conservatives balking at handing Obama more power.

Seventy-seven House Democrats are lined up against fast-track. Twenty-three House Dems, many of whom previously signaled support, aren't saying whether they will vote for fast-track.

That opposition could grow as trade critics launch a full-court press. Labor groups are vowing to fight hard to block the measure and Sens. Elizabeth Warren (D-Mass.) and Sherrod Brown (D-Ohio), who led the opposition in the upper chamber can be expected to lobby House Democrats.

Republican leaders will need to keep GOP defections to a minimum. Ways and Means Chairman Paul Ryan (R-Wis.) has been meeting with conservative lawmakers to sell them on the trade bill.

The Hill will continue to update this list. Please send updates to vneedham@thehill.com.

Lucy Feickert, Kelly Kaler, Mike Lillis, Marianna Sotomayor and Scott Wong contributed.

HOUSE

REPUBLICANS - YES (68)

REPUBLICANS - NO (7)

REPUBLICANS - UNDECIDED (12)

Note: Congressman Bruce Poliquin (Maine) has not yet appeared to take a public position on TPA

DEMOCRATS - YES (13)

DEMOCRATS - NO (77)

Rep. Chellie Pingree (Maine)

DEMOCRATS - UNDECIDED (23)

14

http://www.collins.senate.gov/public/index.cfm/press-releases?ID=f1a660d6-6a69-4b17-89d3-77b7a2269108

Recent Press Releases

May 22 2015

Senator Collins Votes to Protect Maine Workforce and Keep Jobs in America

Washington, D.C. – U.S. Senator Susan Collins released the following statement after voting in opposition to the trade bill considered today by the United States Senate:

"Workers across Maine have a hard-earned reputation as some of the most industrious and dedicated employees in the world. Today, I voted against the Trade Promotion Authority (TPA) legislation to protect Mainers from the disadvantages and unfair competition this legislation could impose on our workforce. TPA would pave the way for the Trans Pacific Partnership, which could jeopardize many American jobs.

"I am especially concerned about Maine's manufacturing and shoemaking jobs, some of which stand to be directly threatened by TPP. New Balance, for example, employs nearly 900 workers at three Maine factories. I am concerned that TPP would penalize companies like New Balance that have remained committed to American manufacturing, rather than moving all of their production jobs overseas."

Senator Angus King

King Opposes Trade Promotion Authority

Friday, May 22, 2015

WASHINGTON, D.C. - U.S. Senator Angus King (I-Maine) released the following statement after voting against legislation that would grant Trade Promotion Authority to the President:

"I can't justify supporting a process that, in effect, would approve a major trade deal that has substantial stakes for Maine when we haven't even seen it," **Senator King said**. "And I have serious concerns that the Trans Pacific Partnership will put Maine companies – and their workers – at a significant competitive disadvantage. I just don't know how to explain to Maine people that that they have to compete straight up with countries with little or no labor protections, weak environmental standards, and wages below a dollar an hour. This is one more blow to American manufacturing, and the country will come to regret the Senate's action today, probably sooner rather than later."

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Article notes
Citizen Trade Policy Commission

Articles from May 2015

EU Text for TTIP- Initial provisions for CHAPTER []- Regulatory Cooperation; (EU, 5/4/15)
This document represents the EU draft for the chapter on Regulatory Cooperation for inclusion in the TTIP. This proposed chapter was the subject of a May 5, 2015 memo from CTPC member Sharon A. Treat; that memo describes this proposed chapter thusly:

> ***Regulatory Cooperation.*** *In Europe, this topic is becoming as controversial as ISDS, and has the potential to be equally controversial here. It was the subject of negotiations in both the February and April rounds. The EU has offered a text on "horizontal regulatory cooperation," with new provisions aimed at legislators and regulators on the EU member state and U.S. state level. A leaked draft of the sub-central regulatory cooperation proposal would require designated officials at the central level of government — the U.S. federal government or the European Commission — to pass on requests from each side to engage with their respective sub-central regulators.[1] In the U.S this would likely be OMB's Office of Information and Regulatory Affairs (OIRA), which currently reviews federal regulations.*
>
> *The purpose of the chapter as a whole would be to require trade impact assessments of legislation and regulations before they are enacted or adopted, and further to promote a convergence or equivalence of regulations in both the EU and U.S. This raises a number of concerns at the U.S. state level. Obviously, if laws and regulations are harmonized at the federal U.S. and EU level but state laws remain different, it begs the question as to how those laws will fare if challenged in an ISDS proceeding as overly burdensome or "more trade restrictive than necessary." Even without directly reaching into the state legislative process, state laws could be vulnerable to additional challenges stemming from this chapter.*
>
> *However, the EU regulatory cooperation chapter does, in fact, reach down to the state level. It would require a federal agency to share information and engage in consultations about proposed state laws and regulations if requested by a new ongoing international "Regulatory Cooperation Body" made up of U.S. and EU trade and federal agency bureaucrats. It is really unclear how this would work but at the very least, it could have a chilling effect on new proposals subjected to trade impact assessments and international consultations, and the EU proposal would also subject existing laws and regulations to trade impact review.*
>
> *Although toned down from earlier EU proposals, which required state legislators and governors to send an annual advance list of laws and regulations to be introduced, it still raises concerns about state sovereignty and potential federal and international*

interference with the legislative process and state government in general. We also need to consider whether we really want significant taxpayer dollars going to hire additional staff at OMB to monitor state legislatures and governors, and a multitude of state agencies ranging from the Maine Seed Potato Board to the Maine Milk Board, and share that information with U.S. and EU trade regulators.

TPA Backers, Opponents Scramble to Lock In Votes Ahead of Senate Action; (Inside US Trade, 5/1/15) This article discusses the efforts made to secure votes in the Senate for the President's Trade Promotion Authority (aka "Fast Track") legislation. As of early May, it was anticipated that votes from 10 Democratic Senators (including Senator Angus King , I-ME) would be needed to pass this legislation in the Senate.

Digby Neck Quarry Bilcon Case, Tribunal Decision and Dissent; (Janet M. Eaton PhD; 5/11/15) This scholarly paper reexamines the decision of an ISDS arbitration panel which overturned the ruling of a Canadian joint federal-provincial panel which disallowed an application by a US company for an environmental permit to complete a mega-quarry in Nova Scotia. The author argues that the arbitration decision to overturn the governmental panel's environmental decision was unwarranted and consequently has provoked mounting criticism of the ISDS mechanism- especially in light of the upcoming TPP and TTIP trade agreements.

Trade and Trust; (New York Times opinion piece; 5/22/15) This opinion piece, authored by NY Times columnist Paul Krugman, maintains that the arguments offered by the Obama administration in favor of the TPP are lacking in intellectual honesty. Mr. Krugman suggests that the alleged benefits of free trade such as the lowering of trade tariffs and trade barriers have already been largely achieved over the past 70 years. Instead, the main purpose of the TPP is to strengthen intellectual property rights and to change the way that trade disputes are resolved and he argues that these changes may not be advantageous for the US. Mr. Krugman alleges that a breach in trust has occurred when the USTR claims that these changes may be good for the US economy; the real truth is that these changes are good for large international corporations.

Dairy Groups Praise Senate Passage of TPA, Call for Quick House Action; (AgWeb; 5/23/15) This joint press release from the National Milk Producers Federation and the U.S. Dairy Export Council applauds the recent vote in the US Senate to approve TPA (Fast Track Authority) and urges the US House of Representatives to also quickly approve the TPA legislation. These two groups maintain that the TPA helps to ensure appropriate congressional influence over trade agreements like the TPP and is necessary to encourage other trading partners to make their best negotiating offers. Ultimately, these dairy groups favor the TPP as a reflection of the fact that the US now exports $1/7^{th}$ of its total milk production.

Trade is about consumers buying things they desire; (Boston Globe opinion piece; 5/25/15) This opinion piece, authored by Boston Globe columnist John E. Sununu, points out that ultimately, consumers in the US and elsewhere, will buy whatever goods they truly desire- with or without a trade agreement such as the TPP. He also maintains that sooner or later, trade provides the opportunity for cheaper goods and a more efficient process. He suggests that TPA merely provides additional leverage for the President to obtain a favorable trade agreement and that contrary to the assertion of some, that domestic competition has been more responsible for

the loss of jobs than international competition. He concludes by noting the curious alliance of many Republican lawmakers and the President with a few Democratic supporters that have banded together to work for passage of TPA and the TPP.

New Balance's voice heard on tariffs; (Boston Globe; 5/27/15) This article reports on the likelihood that the TPP will include a phased-out approach to footwear tariffs. Achieving a phase-out of tariffs is regarded as a victory of sorts for New Balance which is the only remaining domestic athletic footwear manufacturer in the US. Conversely, the decision to include a phased-out approach of unspecified length is considered to be somewhat of a setback for Nike which is a leading athletic footwear manufacturer that depends solely on footwear manufactured outside of the US; Nike had lobbied strongly for an immediate end to footwear tariffs. New Balance has footwear manufacturing plants that are located in Maine and Massachusetts with a total of nearly 1,400 jobs. The article prominently mentions the efforts of Maine Senators Susan Collins and Angus King in helping to ensure a phased-out approach to footwear tariffs.

A realistic debate about free trade; (Boston Globe opinion piece; 5/27/15) This opinion piece, authored by Boston Globe columnist Scott Lehigh, addresses the question of whether the TPP will positively affect the current level of income inequality in the US. Mr. Lehigh suggests that based on previous FTAs and current projections, any loss in domestic manufacturing jobs will be more than offset by gains of jobs in the services sector. However, one particular study predicts that the median wage in the US will decrease by 0.6 percent. Mr. Lehigh appears to conclude that the losses resulting from the TPP will more than outweigh any gains for most American workers but cautions that free trade is an extremely complicated topic that defies easy and obvious conclusions.

This TEXTUAL PROPOSAL is the European Union's proposal for legal text on "Regulatory Cooperation" in TTIP. It was tabled for discussion with the US in the negotiating round of 20-24 April 2015 and made public on 4 May 2015. The actual text in the final agreement will be a result of negotiations between the EU and US.

TTIP – Initial Provisions for CHAPTER [ ] - Regulatory Cooperation

General notes:

1. The present document represents an initial draft which will need to be completed and refined by more detailed proposals in a number of areas.

2. Furthermore, as TTIP negotiations progress, the provisions in this Chapter may be reviewed in the light of developments in other Chapters, and vice versa, with a view to resolving possible duplications, overlaps or inconsistencies. In particular, there is a need to consider the relationship with the TBT and SPS chapters as well as with specific or sectoral provisions, including those on Financial Services. Specific or sectoral provisions are intended to respond to the specific needs of a sector. It will be important to strive as far as possible for coherence and consistency between the approaches and solutions embodied in the specific or sectoral provisions, on the one hand, and those in other parts of TTIP (including this Chapter), on the other hand. In case of overlap or doubt, the specific or sectoral provisions shall prevail, and it remains open at this stage whether in some sectors, such as for example chemicals, such specific or sectoral provisions might have a comprehensive character.

3. The institutional and decision-making modalities in the horizontal chapter regarding the update, modification or addition of specific or sectoral provisions will need to be discussed as negotiations on the regulatory cluster and the general institutional provisions of TTIP proceed.

4. Given that the provisions of this Chapter concern predominantly procedures for cooperation, they may not lend themselves to the application of dispute settlement rules. Alternative mechanisms for ensuring proper application could be explored, such as regular monitoring and reporting, including to the political level (Joint Ministerial Body). As regards the specific or sectoral provisions of the TTIP regulatory cluster, further reflection will be required as regards the most appropriate mechanisms of ensuring proper application. In respect of cooperation on financial services, the EU has expressed the view that provisions should not be subject to dispute settlement.

5. The scope of this Chapter is determined by the definition of "regulatory acts" and by the provisions of Article 3. Only those regulatory acts that fulfill the criteria in Article 3.1 (i.e. subject-matter of regulatory acts) are covered. Accordingly, this chapter does not cover legislation at central or non-central level which establishes the framework or principles

applicable on a cross-sectoral basis to achieve public policy objectives, such as acts determining the principles of, inter alia, competition, company law, consumer protection, IPR protection, the protection of personal data or the protection of the environment.

Preamble[1] to the TTIP: The Parties, having regard to:

- the importance of regulation to achieve public policy objectives, and their right to regulate and adopt measures to ensure that these objectives are protected at the level that each Party considers appropriate, in line with its respective principles;

Section I: Objectives, definitions and scope

Article 1 - General Objectives and Principles

1. The general objectives of this Chapter[2] are:

a) To reinforce regulatory cooperation thereby facilitating trade and investment in a way that supports the Parties' efforts to stimulate growth and jobs, while pursuing a high level of protection of *inter alia:* the environment; consumers; public health, working conditions; social protection and social security; human, animal and plant life; animal welfare; health and safety; personal data; cybersecurity; cultural diversity; and preserving financial stability;

b) To reduce unnecessarily burdensome, duplicative or divergent regulatory requirements affecting trade or investment, particularly given their impact on small and medium sized enterprises, by promoting the compatibility of envisaged and existing EU and US regulatory acts;

c) To promote an effective regulatory environment, which is transparent and predictable for citizens and economic operators;

[1] NB: These considerations are of a broader nature and would fit best in the preamble to the TTIP Agreement.

[2] NB: The provisions as set forth in this Chapter cannot be interpreted or applied as to oblige either Party to change its fundamental principles governing regulation in its jurisdiction, for example in the areas of risk assessment and risk management.

d) To further the development, adoption and strengthening of international instruments, and their timely implementation and application, as a means to work together more effectively with each other and with third countries to strive toward consistent regulatory outcomes.

2. This Chapter provides a framework for cooperation among regulators and encourages the application of good regulatory practices. It will help identify and make use of possibilities for cooperation in areas or sectors of common interest. Its provisions do not entail any obligation to achieve any particular regulatory outcome.

3. The provisions of this Chapter do not restrict the right of each Party to maintain, adopt and apply timely measures to achieve legitimate public policy objectives, such as those mentioned in paragraph 1, at the level of protection that it considers appropriate, in accordance with its regulatory framework and principles. Nothing in this Chapter shall affect or limit the ability of governments to provide or support services of general interest.

4. The Parties reaffirm their shared commitment to good regulatory principles and practices, as laid down in the OECD Recommendation of 22 March 2012 on Regulatory Policy and Governance.

Article 2- Definitions

For the purposes of this Chapter the following definitions shall apply:

a) "regulatory acts at central level" means:

for the EU:

Regulations and Directives within the meaning of Article 288 of the Treaty on the Functioning of the European Union, including:

i. Regulations and Directives adopted under a legislative procedure in accordance with that Treaty;

ii. Delegated and Implementing acts adopted pursuant to Articles 290 and 291 of that Treaty.

for the US:

i. Federal Statutes;

ii. (A) Rules as defined in 5 USC § 551 (4); (B) Orders, as defined in 5 USC § 551 (6); and (C) Guidance documents, as defined in Executive Order 12,866 § 3(g) issued by any federal agency, government corporation, government controlled corporation or other establishment in the executive branch of government covered by 5 USC § 552 (f) (1) of the Administrative Procedures Act, as amended;

iii Executive Orders and [other executive documents that lay down general rules or mandate conduct by government bodies].

"Regulatory acts at central level" do not include acts addressed to individual natural or legal persons.

b) "regulators and competent authorities at central level" means:

i. for the EU, the European Commission;

ii. for the US, US Federal agencies [defined by the Administrative Procedures Act (APA); 5 U.S.C. § 552 (f)].

c) "regulatory acts at non-central level" means:

for the EU:

- laws and regulations adopted by the central national authorities of an EU Member State, except those that transpose into domestic law European Union acts.

for the US:

- laws and regulations adopted by the central authorities of a US State.

"Regulatory acts at non-central level" do not include acts addressed to individual natural or legal persons.

d) "regulators and competent authorities at non-central level" means:

i. For the EU, the central government authorities of an EU Member State;

ii. For the US, the central government authorities of a US State.

e) "international instruments"[3] means documents adopted by international bodies or fora in which both Parties' regulators and competent authorities at central level participate, including as observers, and which provide requirements or related procedures, recommendations or guidelines on the supply or use of a service, such as for example authorization, licensing, qualification or on characteristics or related production methods, presentation or use of a product.

Article 3 – Scope

[The scope of this chapter will need to be further reviewed at a later stage in the negotiations]

1. The provisions of Section II apply to regulatory acts at central level[4] in areas not excluded from the scope of TTIP provisions, which:

   a) determine requirements or related procedures for the supply or use of a service[5] in the territory of a Party, such as for example authorization, licensing, or qualification; or

   b) determine requirements or related procedures applying to goods marketed in the territory of a Party concerning their characteristics or related production methods, their presentation or their use.

2. The provisions of Section III apply to regulatory acts at central and non-central level in areas not excluded from the scope of TTIP provisions, which fulfil the criteria in paragraph 1 and that have or are likely to have a significant impact[6] on trade or

[3] NB: This definition captures documents produced by international bodies in which both the Commission and US federal government or one or more of its agencies participate, including for example bodies like the UNECE, OECD, IMDRF, the ICH or the World Health Organisation; but the definition excludes bodies such as IEC, ISO, the ESOs, or US private standardisation bodies. The TBT Chapter is expected to cover cooperation in the area of product standards, generally; sectoral provisions in TTIP may also cover cooperation on standards.

[4] NB: Further reflection will be required regarding regulatory acts at non-central level.

[5] This Chapter shall not apply to regulatory acts concerning those services to which Section 1 of Chapter II [Liberalisation of investment] and Chapter III [Cross border supply of services] of Title [Services & Investment] do not apply.

[6] NB: The regulators and competent authorities at central level of each Party will identify regulatory acts at central level that may have a significant impact on EU-US trade (see also Article 9 par. 1). Further discussion will be needed on how to identify these acts at the non-central level.

investment between the Parties. Regulatory acts at central or non-central level concerning the matters covered by [specific or sectoral provisions concerning goods and services, to be identified] fall in any event within the scope of this Chapter.

Article 4 – Relationship with specific or sectoral provisions

1. In case of any inconsistency between the provisions of this Chapter and the provisions laid down in [specific or sectoral provisions concerning goods and services, to be identified], the latter shall prevail.[7]

2. Regulatory cooperation in financial services shall follow specific provisions set out in [to be identified – *FS chapter/section….*].

[Placeholder for Article on: (a) exchange of confidential information between regulators and competent authorities; (b) information exchanged pursuant to this Chapter to promote regulatory cooperation may not be used for other purposes without the agreement of the Party which provided it]

Section II: Good Regulatory Practices

Sub-section II.1. Transparency

Article 5 – Early information on planned acts

1. Each Party shall make publicly available at least once a year a list of planned regulatory acts at central level[8], providing information on their respective scope and objectives.[9]

[7] NB: The relationship of specific and sectoral provisions in TTIP and the Horizontal Chapter will need to be kept under review as both sets of provisions are taking shape.

[8] NB: Draft regulatory acts proposed by the US Administration to Congress are considered as "planned" acts, as are bills introduced by Congressmen.

[9] NB: Parties can in practice comply with this provision by publishing a more comprehensive list of regulatory acts.

2. For planned regulatory acts at central level undergoing impact assessment each Party shall make publicly available, as early as possible, information on planning and timing leading to their adoption, including on planned stakeholder consultations and potential for significant impacts on trade or investment.

3. [Placeholder – a provision on the publication and entry into force of adopted regulatory acts may be envisaged in this Chapter, taking into account whether a horizontal provision is included elsewhere in the TTIP text]

Article 6– Stakeholder Consultations

When preparing regulatory acts at central level undergoing impact assessment, the regulating Party shall offer a reasonable opportunity for any interested natural or legal person, on a non-discriminatory basis, to provide input through a public consultation process, and shall take into account[10] the contributions received. The regulating Party should make use of electronic means of communication and seek to use dedicated single access webportals, where possible.

Sub-section II.2 Regulatory Policy Instruments

Article 7- Analytical Tools

1. The Parties affirm their intention to carry out, in accordance with their respective rules and procedures, an impact assessment for planned regulatory acts at central level.

2. Whenever carrying out impact assessments on regulatory acts at central level, the regulating Party shall, among other aspects, including non-economic impacts that the Parties examine if provided for by their respective procedures, assess how the options under consideration:

   a) relate to relevant international instruments;

[10] NB: This is an obligation for regulators to examine comments on their merits, but not to take on board suggestions put forward by stakeholders. The language used ("take into account") is standard in international agreements dealing with regulatory matters and consultation: for instance, see Article 2.9.4 of the TBT Agreement.

b) take account of the regulatory approaches of the other Party, when the other Party has adopted or is planning to adopt regulatory acts on the same matter;

c) impact on international trade or investment[11].

3. With regard to regulatory acts at central level:

a) The findings of impact assessments shall be published no later than the proposed or final regulatory acts;

b) The Parties shall promote the exchange of information on available relevant evidence and data, on their practice to assess impacts on international trade or investment, as well as on the methodology and economic assumptions applied in regulatory policy analysis[12];

c) the Parties shall promote the exchange of experience and share information on planned ex-post evaluations and retrospective reviews.

Section III: Regulatory Cooperation[13]

[NB: See general note on the relationship of this Chapter with other TTIP Chapters]

Article 8– Bilateral cooperation mechanism

1. The Parties hereby establish a bilateral mechanism to support regulatory cooperation between their regulators and competent authorities to foster information exchange and to seek increased compatibility between their respective regulatory frameworks, where appropriate.

[11] NB: In this context, this will include EU-US trade and investment, which is understood to include the interests of investors of the other Party.

[12] NB: Any exchange of information needs to respect the rules to be agreed on the exchange of confidential information, see placeholder in Article 9, and needs to be consistent with each Party's legal framework as to information protected by intellectual property rights.

[13] NB: Except where indicated otherwise Articles in this section apply to both regulatory acts at central and non-central level (notably Articles 12-16).

2. The mechanism would further aim at identifying priority areas for regulatory cooperation to be reflected in the Annual Regulatory Cooperation Programme referred to paragraph 2(a) of Article 14.

3. Each Party shall designate an office to act as a Focal Point responsible for exchanging information about envisaged and existing regulatory acts. Those exchanges include submissions concerning acts that are being prepared or reviewed by each Party's legislative authorities.

[Placeholder for further details on the Focal Points at the non-central level.]

Article 9- Information and Regulatory Exchanges on regulatory acts at central level[14]

1. When a Party publishes a list of planned regulatory acts at central level referred to in Article 5.1[15], it shall identify those acts that are likely to have a significant impact on international trade or investment, including trade or investment between the Parties, and it shall inform the other Party through their respective Focal Points.

2. A Party shall also regularly inform the other Party about proposed regulatory acts at central level that are likely to have a significant impact on international trade or investment, including trade or investment between the Parties, where those proposed acts do not originate from the executive branch and were not included in the most recent list published pursuant to Article 5.1.

3. Upon the request of a Party made via the respective Focal Points, the Parties shall enter into an exchange on planned or existing regulatory acts at central level.

4. Regulatory exchanges shall be led by the regulators and competent authorities at central level responsible for or following the regulatory acts concerned.

5. The Parties shall participate constructively in regulatory exchanges. In addition to the information made available in accordance with Article 5 a Party shall provide to the

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[14] NB: The mechanism established under Article 9 does not preclude the existence of regular direct contacts between the regulators and competent regulatory authorities at central or non-central level, as the case may be, while keeping the Focal Points duly informed about these.

[15] NB: This obligation on the US side also covers US Federal Statutes.

other Party, if the other Party so requests, complementary available information related to the planned regulatory acts under discussion.

6. The cooperation may take the form of meetings, written exchanges or any other appropriate means of direct communication. Each point of substance raised by one Party shall be addressed and answered by the other Party.

7. Each Party shall communicate without delay to its legislative authorities and via its Focal point specific written comments or statements received from the other Party concerning regulatory acts at central level which are being prepared or reviewed by those bodies. Legislative bodies shall not be obliged to respond to comments put forward by the other Party.

Article 10– Promoting regulatory compatibility at central level

1. This Article shall apply to areas of regulation where mutual benefits can be realised without compromising the achievement of legitimate public policy objectives such as those covered in Article 1.

2. When a regulatory exchange has been initiated pursuant to Article 9 with regard to a planned or existing regulatory act at central level, a Party may propose to the other Party a joint examination of possible means to promote regulatory compatibility, including through the following methods:

   a) Mutual recognition of equivalence of regulatory acts, in full or in part, based on evidence that the relevant regulatory acts achieve equivalent outcomes as regards the fulfilment of the public policy goals pursued by both Parties;

   b) Harmonisation of regulatory acts, or of their essential elements, through:

      i. Application of existing international instruments or, if relevant instruments do not exist, cooperation between the Parties to promote the development of a new international instrument;

      ii. Approximation of rules and procedures on a bilateral basis or

   c) Simplification of regulatory acts in line with shared legal or administrative principles and guidelines.

3. A proposal under paragraph 1 shall be duly substantiated, including as regards the choice of the method. The Party receiving a proposal for a joint examination shall respond to the requesting Party without undue delay informing the latter of its decision. Every response should be substantiated.

4. In addition to regulatory exchanges pursuant to Article 9, the Parties agree to cooperate, in areas of common interest, with respect to pre-normative research, and to exchange scientific and technical information relevant for this purpose.[16]

Article 11 – Information and Regulatory Exchanges on regulatory acts at non-central level

1. The Parties encourage regulatory exchanges on regulatory acts at non-central level in areas or sectors where there may be common interest.

2. Regulators and competent authorities of one Party will, upon request of another Party, provide information through its Focal Point on specific planned regulatory acts or planned changes to existing regulatory acts at non-central level, in order to allow identification of areas of common interest.

3. If one Party makes a request to engage in a regulatory exchange on specific planned or existing regulatory acts at non-central level, the requested Party will take steps to accommodate such a regulatory exchange.[17] The regulators and competent authorities at non-central level concerned will determine their interest in entering into a regulatory exchange.

4. These exchanges will be led by the regulators and competent authorities responsible for the regulatory acts. The regulators and competent authorities at central level of both Parties will facilitate the exchanges.

5. Paragraphs 1 to 4 shall be without prejudice to more detailed provisions on regulatory cooperation concerning regulatory acts at the non-central level in [specific or sectoral provisions[18] – *to be identified*] of this Agreement.

[16] NB: See Footnote 12.

[17] The US Party, upon receipt of a request, shall solicit the responsible regulators and competent authorities at non-central level to engage in regulatory exchanges.

[18] NB: This will include for instance any provisions regarding mutual recognition of professional qualifications.

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Article 12– Timing of Regulatory Exchanges

1. When a regulatory exchange on a planned or existing regulatory act is requested under Article 9 paragraph 3 or Article 11 paragraph 3, it shall start promptly.

2. With regard to planned regulatory acts at central level, regulatory exchanges may take place at any stage of their preparation[19]. Exchanges may continue until the adoption of the regulatory act.

3. Regulatory exchanges shall not prejudice the right to regulate in a timely manner, particularly in cases of urgency or in accordance with deadlines under domestic law. Nothing in this Chapter obliges a Party to suspend or delay steps foreseen under its domestic regulatory procedure.

Article 13– Promoting International Regulatory Cooperation

1. The Parties agree to co-operate between themselves, and with third countries, with a view to strengthening, developing and promoting the implementation of international instruments *inter alia* by presenting joint initiatives, proposals and approaches in international bodies or fora, especially in areas where regulatory exchanges have been initiated or concluded pursuant to this Chapter and in areas covered by [specific or sectoral provisions – to be identified] of this Agreement.

2. The Parties reaffirm their intention to implement within their respective domestic systems those international instruments they have contributed to, as provided for in those international instruments.

Article 14- Establishment of the Regulatory Cooperation Body

1. The Parties hereby establish a Regulatory Cooperation Body (hereafter "RCB") in order to monitor and facilitate the implementation of the provisions set out in this Chapter for both regulatory acts at central and non-central level and of the [specific or

[19] For greater certainty, a dialogue may take place after the regulating Party has announced, through the publication of the list envisaged in Article 5.1, its intention to regulate, and: (a) in the case of the US, before the publication of a draft for consultation or (b) in the case of the EU, before the adoption of a Commission proposal. This note is not applicable to the proposed regulatory acts referred to in Article 9.2.

sectoral provisions concerning goods and services – to be identified] of this Agreement.

2. The RCB's functions shall be:

a) The preparation and publication of an Annual Regulatory Co-operation Programme reflecting common priorities of the Parties and the outcomes of past or ongoing regulatory cooperation initiatives under section III of this Chapter, including information on the follow-up, the steps envisaged and timeframes proposed in relation to these identified common priorities;

b) The monitoring of the implementation of the provisions of this Chapter, including the [specific or sectoral provisions concerning goods and services] of this Agreement, and reporting to the Joint Ministerial Body on the progress in achieving agreed co-operation programmes;

c) *[Placeholder on technical preparation of proposals for the update, modification or addition of specific or sectoral provisions. Such updates, modifications or additions will be adopted in accordance with the internal procedures of each Party. The RCB will not have the power to adopt legal acts];*

d) The consideration of new initiatives for regulatory co-operation, on the basis of input from either Party or its stakeholders, as the case may be, including of proposals for increased regulatory compatibility in accordance with Article 11;

e) The preparation of joint initiatives or proposals for international regulatory instruments in line with Article 13, paragraph 1;

f) Ensuring transparency in regulatory cooperation between the Parties;

g) The examination of any other issue concerning the application of this Chapter or of [specific or sectoral provisions concerning goods and services] raised by a Party.

3. In the domain of financial services the functions as set out under in paragraph 2 shall be performed by the [Joint EU/US Financial Regulatory Forum (FRF), which shall ensure appropriate information to the RCB. Any decisions concerning financial services should be taken by the competent authorities acting within the framework of the FRF.

4. The RCB may create sectoral working groups [as defined in annex x[20]] and delegate certain tasks to them or to such other working groups that may be set up by the Joint Ministerial body.

5. The agenda and the minutes of the meetings of the RCB shall be made public.

[6. Placeholder – provisions on the interaction of the RCB with legislative bodies]

Article 15- Participation of stakeholders

1. The RCB shall hold, at least once a year, a meeting open to the participation of stakeholders to exchange views on the Annual Regulatory Co-operation Programme.

2. The annual meeting shall be prepared jointly by the co-chairs of the RCB with the involvement *[NB: depending on whether these groups are established]* of the co-chairs of the Civil Society Contact Groups, ensuring a balanced representation of business, consumers, public health, trade unions, environmental groups and other relevant public interest associations *[to be agreed in more detail in the Rules of Procedures of the RBC, see Article 15 par. 2].* Participation of stakeholders shall not be conditional on them being directly affected by the items on the agenda of each meeting.

3. Each Party shall provide for means to allow stakeholders to submit their general views and observations or to present to the RCB concrete suggestions for further regulatory co-operation between the Parties. Any concrete suggestion received from stakeholders by one Party shall be referred to the other Party and shall be given careful consideration by the relevant sectoral working group that shall present recommendations to the RCB. If a relevant sectoral working group does not exist, the suggestion shall be discussed directly by the RCB. On proposals that have been considered by the RCB a written reply shall be provided by the latter to stakeholders without undue delay. These written replies shall also be published as part of the Annual Regulatory Co-operation Programme referred to in Article 14 paragraph 2 lit. a).

4. Procedures shall be developed for any sectoral working groups to allow stakeholders to consult with Civil Society representatives covering the different interests mentioned in Article 15.

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Article 16 –Composition and Rules of Procedure

1. The RCB shall be composed of representatives of the Parties, including at the non-central level. It shall include senior representatives of regulators and competent authorities, as well representatives responsible for regulatory coordination activities and international trade matters at the central level. In addition, whenever the RCB considers cooperation in relation to specific regulatory acts at central or non-central level, the relevant regulators and competent authorities responsible for those acts shall be invited to participate in RCB meetings.

2. Each Party shall nominate their representatives in the RCB by (date) and provide relevant information and contact details. The Parties shall identify a first set of areas of possible future cooperation by (date).

3. *[Placeholder for more detailed provisions on the composition, chairmanship and Rules of Procedure of the RCB].*

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20 The sectoral working groups may also consider specific cooperation initiatives related to regulatory acts at non- central level in areas of common interest for the relevant regulators and competent authorities.

TPA Backers, Opponents Scramble To Lock In Votes Ahead Of Senate Action

INSIDE U.S. TRADE - *www.InsideTrade.com* - **May 1, 2015**

With the full Senate poised to take up a pending Trade Promotion Authority (TPA) bill as early as next week after voting on legislation dealing with Iran's nuclear program, supporters and opponents of TPA are targeting a key group of 10 Democrats that are seen as undecided in the hope of locking in their votes.

They are Sens. Patty Murray (D-WA), Cory Booker (D-NJ), Ben Cardin (D-MD), Chris Coons (D-DE), Kirsten Gillibrand (D-NY), Tim Kaine (D-VA), Angus King (I-ME), Claire McCaskill (D-MO), Jeanne Shaheen (D-NH) and Heidi Heitkamp (D-ND), according to sources on both sides of the debate.

Cardin voted for fast track in the committee but reserved his right to change his vote on the floor if the bill to renew the Trade Adjustment Assistance (TAA) program does not move in parallel.

In all, at least 12 Democratic votes would be needed to block a filibuster of the TPA bill, given that six out of theSenate's 54 Republicans are seen as likely to vote against the legislation. They are Sens. Richard Shelby (R-AL), Jeff Sessions (R-AL), Steve Daines (R-MT), Lindsey Graham (R-SC), Richard Burr (R-NC) and Shelley Moore Capito (R- WV), sources said.

Six Senate Democrats are seen as likely to support TPA on the floor because they already voted for it in the Senate Finance Committee along with Cardin. Two pro-TPA lobbyists said Sen. Dianne Feinstein (D-CA) is also likely to vote in favor of TPA.

Blocking a filibuster would therefore require five additional votes out of a pool of 10 Democrats identified as undecided. One TPA supporter said this task seemed doable, but should not be taken for granted.

Sessions told *Inside U.S. Trade* on April 28 that, although he has not yet announced his position on the TPA bill, he is worried that future trade agreements could be used as a backdoor to change U.S. immigration policy.

He said he has raised these worries with other members of the Senate Republican caucus. "I haven't pushed it hard but I've discussed it a little bit," he said after a weekly caucus meeting.

Senate Finance Committee Chairman Orrin Hatch (R-UT) this week said one of his main worries regarding consider- ation of a pending TPA bill on the Senate floor is ensuring that there are the 60 votes required to overcome a filibuster on the legislation.

"You know, what I'm worried about is getting 60 votes for passage, and we're working with everybody to see what we can do," Hatch told reporters after participating at a trade event organized by *Politico*. He was responding to a question on whether there were sufficient votes to defeat a currency amendment slated to be offered to the TPA bill on the floor by Sen. Rob Portman (R-OH).

Hatch said he hoped the currency amendment could be defeated, but then signaled that securing 60 votes to over- come a filibuster on the underlying bill was his immediate priority.

Hatch also said he has talked to President Obama and urged him in that conversation to weigh in with his fellow Democrats, arguing they are the ones "making it more difficult to pass this." At the same time, Hatch added that there are a "significant number of Democrats" who are supporting TPA, noting that the Finance Committee passed the bill 20-6.

The Senate GOP leadership has already begun counting votes on TPA and TAA bills, according to Sen. John Thune (R-SD). "I don't know that we're whipping it yet, but I think we're starting the initial stages of trying to get a sense of where people are, probably both on TPA and TAA," he said on April 28.

Thune added that he expected a strong vote in the Senate in light of the 20-6 vote in the Finance Committee. "I hope in the end that it's going to be a 65-vote majority at least coming out in favor of TPA," he said.

Republican whip efforts also seem aimed at ensuring that a TPA bill gains the support of Tea Party favorites like Sens. Rand Paul (R-KY) and Mike Lee (R-UT). This is intended to provide political cover for conservative House Republicans to vote for the bill.

The Republican leadership also appears to be counting votes on a currency amendment to the fast-track bill that would require enforceable disciplines on currency manipulation in future trade agreements. This amendment is slated to be offered by Portman, who said he would do so after the amendment failed in the Finance markup on a vote of 15-11.

Thune said he thought there could be a "close vote" on this amendment but that it would ultimately be defeated, as it was in committee. He indicated that the Portman amendment could derail the Trans-Pacific Partnership (TPP) negotiations.

"My guess is based upon the vote coming out of the committee that there [will] be bipartisan support in recognition of the consequence of having certain amendments put on this bill and what that might mean for a future trade agreement," he said.

Sen. Debbie Stabenow (D-MI), who supports the Portman amendment but opposes the TPA bill, told reporters that she was working with her colleagues to round up votes against the legislation. "I'm certainly part of folks encouraging a no vote" on TPA, she said.

Separately, Sen. Sherrod Brown (D-OH) predicted that there would be "dozens and dozens" of amendments on the floor, offered by 10-15 senators, and that consideration of the bill could take two to three weeks. Thune said the TPA bill would be subject to an open amendment process on the floor, in keeping with the approach McConnell has taken for considering legislation.

Thune also said he expects the TPA bill to go to conference, but Hatch indicated that he wants to avoid that scenario. He said he plans to try to fight off amendments on the Senate floor and keep the bill clean, since the pending TPA legislation is "basically" acceptable to other countries and the House. — *Matthew Schewel*

Digby Neck Quarry Bilcon Case, Tribunal Decision and Dissent

By Janet M Eaton, PhD. * May 11, 2015

Introduction

The announcement that a NAFTA Investor State Tribunal had overturned the decision of a Canadian Federal Provincial Environmental Joint Review Panel (JRP) decision to reject a US mega-quarry proposed by Bilcon of Delaware Inc. for Whites Point, Digby Neck, Nova Scotia, sent shock waves across the province causing indignation amongst the many Nova Scotians who had been involved in the lengthy and hard fought struggle to preserve the small scale scenic, rural fishing community and economy on the ecologically sensitive and unique Bay of Fundy with its endangered right whales.

At the same time the Bilcon decision has been making waves internationally, sparking a new level of long standing debate about the failures of NAFTA Chapter 11 to safeguard laws put in place by democratic nations. In this regard it has been providing ammunition for the tireless crusade of activist lawyers, researchers and NGOs fighting to have this mechanism removed from the upcoming mega-trade agreements under negotiation: the Trans-Pacific Trade and Investment Agreement (TPPA), the Transatlantic Trade and Investment Partnership and the Canada- EU Comprehensive and Economic Trade Agreement (CETA).

Panel implementation and actions

The Bilcon case goes back to 2004 when a Joint Review Panel (JRP) was appointed by two levels of the Canadian government to review the Bilcon proposal in order to determine the potential effects of this project on the environment and the community before recommending whether the government should approve the project. After three years of extensive community consultation, hearings, and review of documentation the Panel experts recommended against approval, which was followed by a similar decision by the Provincial and Federal governments.

The Review Panel, admitting to a somewhat unconventional approach, evaluated the proponent's project proposal and potential environmental impacts employing an 'adequacy analysis' framework using two lenses i) five key principles: public involvement, traditional community knowledge, ecosystem approach, sustainable development, and the precautionary principle and ii) by scanning through various policy and planning documents including the local level *Multi-year Community Action Plan* as well as many pieces of federal and provincial legislation for further guidance regarding the values and principles that should inform decisions about development project .

One of many environmental issues of particular concern was the potential impact on the endangered North Atlantic Right Whale which the Panel ruled could be threatened from increased blasting from the quarry and the increased shipping to and from the proposed site which would increase the changes of fatal collisions with the whales.

The Panel based its final decision on the assessment of a range of adverse environmental impacts in particular "core values of the community" which in their view were regarded as a "valued environmental component." This reasoning led to the following Panel conclusion:

The implementation of the proposed White's Point Quarry on Digby Neck and marine terminal complex would introduce a significant and dramatic change to Digby Neck and Islands, resulting in sufficiently important changes to the community's core values that warrant the Panel describing them collectively as a significant adverse effect that cannot be mitigated.

Bilcon's Challenge under NAFTA Ch 11 [Investor-State Dispute Settlement]
Bilcon's lawyers, Appleton and Associates, argued that the quarry decision had breached international law by treating Bilcon in a discriminatory, arbitrary and unfair manner under NAFTA article 1105 (minimum standard of treatment) and that they had also been treated differently than local companies under Article 1102 (National Treatment). Bilcon presented a number of claims against the JRP process including that they had been encouraged by the Nova Scotia government to invest in the quarry only to be subjected to a lengthy process which became entangled in a local web of politics. They also argued that the Panel review had been a rare, costly and cumbersome obstacle that should never have been allowed to go ahead and among other things that the Panel was biased. However, Bilcon's core complaint was that the Panel's decision to reject the quarry had been made based on the concept of "Community Core Values" which they argued was not part of the relevant legal and regulatory framework and of which they had no advance notice. They further contested the legitimacy of the concept suggesting that the notion of community core values had no place in the Constitution of Canada, the administrative law framework, the environmental legislation or any other relevant law. Bilcon also argued that in considering the notion of community core values, the environmental review had relied upon arbitrary, biased, capricious, and irrelevant considerations that amounted to a violation of rules in NAFTA including the guarantee of a "minimum standard of treatment" for foreign investors.

Finally Bilcon argued that because it had been unjustly "forced into a most expansive, expensive and time-consuming environmental assessment, it would sue Canada for $188,000 as compensation.

The Tribunal's Decision:

The majority tribunal of Bruno Simma, chair, and Bryan Schwartz, investor's nominee, held Canada in breach of Chapter 11 of the North American Free Trade Agreement (NAFTA) finding Canada liable for unfair regulatory treatment and in breach of the minimum standard of treatment (article 1105), as well as national treatment (article 1102), to the U.S. claimants. The proponent's lawyers, Appleton and Associates, stated in a summary of the detailed 229 page Arbitration that the Tribunal reviewed the facts and found the JRP process fundamentally flawed under international law because the review panel failed to follow the stated rules and criteria, instead substituting unannounced criteria to reject the quarry. According to Appleton the Tribunal ruling also took into account the fact that the JRP failed to allow Bilcon to take any steps to address any adverse environmental effects through the adoption of mitigation measures.

The Majority Tribunal determined that the environmental impact assessment violated Canada's NAFTA obligation to afford Bilcon a "minimum standard of treatment" on the basis that this approach was "arbitrary", as per the interpretation of standards in the Waste Management II case, and that this arbitrary action had frustrated Bilcon's expectations about how the approval decision would be made.

The majority Tribunal also sided with the claimants in what they perceived as encouragement by enthusiastic local officials to pursue their investment only to find themselves in a regulatory review process that was expensive and "in retrospect unwinnable from the outset".

The Tribunal decision also ruled the JRP had violated Article 1102, National Treatment by not treating Bilcon as well as other Canadian proponents who were in similar circumstances.

The third lawyer on the Tribunal, Professor Donald McRae from the University of Ottawa, who was the Canadian government's nominee, delivered a strong dissent contending that the majority had turned what was nothing more than a possible breach of domestic law into an international wrong which should have been resolved in a Canadian federal court

Dissent: McRae's and other criticism of the Tribunal's findings.

Tribunalist Donald McRae's Dissent

In his formal 20 page Dissenting Opinion Donald McRae said the Panel was entitled to make its assessment on the basis of 'community core values' and that it was clearly within their mandate to do so. In this respect he stated that the term 'community core values' used by the JRP was merely a restatement encapsulating the various human environmental effects the project can have, which is something confirmed by Professor Meinhard Doelle referred to below. McRae also disagreed with the Majority Tribunal argument that the JRPs actions met the Waste Management II (referring to an earlier NAFTA tribunal case) standard of 'arbitrary', and found their reasoning somewhat circular and leading to a possible interpretation that any breach of Canadian law could be defined as arbitrary. He also noted that beyond the assertion of 'arbitrary', the Majority Tribunal made no attempt to show how the actions of the JRP were arbitrary. McRae believed the Panel thought what it was doing was justifiable and in regard to the charge of failure to mitigate he felt the Panel took the view that the project's problems as such could not be mitigated and hence the Panel did not need to provide a list of mitigations. McRae concluded that the most the Majority had shown was that there was a possibility that the JRP's analysis did not conform to requirements of Canadian Law and that this could have been clarified if the case had first been taken through a judicial review by a Canadian federal court which, unfortunately no Party determined to initiate. As such he felt that the NAFTA Tribunal decision did not meet the threshold in the Waste Management II case and that action of the JRP was not 'arbitrary' nor had the Majority shown any other standards of the Waste Management II case relevant, (i.e. that the minimum standard of treatment of fair and equitable treatment is infringed by conduct harmful to the State if conduct is arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory and exposes claimant to sectional or racial prejudice or involves a lack of due process leading to an outcome which offends judicial propriety.) McRae makes another insightful criticism based on failure to litigate this issue in a Canadian court- which is that Canadian law does not provide a damages claim whereas NAFTA does. He also concludes that NAFTA was not intended to litigate domestic law and therefore you can't get a remedy under NAFTA Ch 11 for a breach of Canadian law. You can only get a remedy for a breach of NAFTA.

Donald McRae concludes his Dissent with three pages of implications of the Majority Tribunal's decision relating to the future ability of a nation state to apply their own environmental laws and conduct proper environmental assessment reviews. After ascertaining that the Majority's case was not appropriate to be reviewed under NAFTA he cited potential negative consequences of the NAFTA Tribunal decision as follows i) that this decision is a "significant intrusion into domestic jurisdiction" ii) that if the majority view in this case is to be accepted, then the proper application of Canadian law by an environmental review panel will be in the hands of a NAFTA Chapter 11 tribunal, importing a damages remedy that is not available under Canadian law. iii) that of even greater concern, would be the inability of states to apply their environmental laws, because the majority decision effectively subjugates 'human environment' concerns to the scientific and technical feasibility of a project. iv) that a chill would be imposed on environmental review panels which would then be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment in case the result is a claim for damages. Finally, given all these considerations, he concludes that the decision of the majority will be seen as "a remarkable step backwards in environmental protection."

As Sierra Club US says in regard to the implications of the Bilcon Case decision:

> *In other words, the tribunal's ruling suggests not only that governments can run afoul of trade rules if they take community rights and values into account in environmental impact assessments, but also that foreign corporations should have the right to bypass domestic courts and sue governments for millions or even billions of dollars before extrajudicial tribunals if they don't agree with how governments are interpreting their own laws.*

McRae substantiated by other legal experts vis a vis use of 'community core values'

Other experts have also defended the Panel's decision vis a vis the use of 'Community core values.

Dalhousie University Professor and Director of Dalhousie University's Marine & Environmental Law Institute, Meinhard Doelle shortly after the Tribunal's decision was announced, provided an in-depth interpretation of federal and Nova Scotia's environmental assessment law exposing where the Tribunal went wrong.

As he explained, the Whites Point Panel focussed its reasons for rejecting the project on its conclusion that the proposed project was inconsistent with "core community values". and once it concluded that the project would result in significant adverse environmental effects that could not be justified, did not suggest measures to mitigate adverse. Doelle states:

> *On both issues, the majority reached its conclusion in large part based on "expert legal advice" filed on behalf of the proponent, advice which seems to have offered a one- sided interpretation of the federal EA process, and no meaningful legal interpretation of the provincial EA process. Perhaps more importantly, it seems clear that the "expert legal advice" was completely misunderstood and misapplied by the majority of the NAFTA tribunal.*

In short Doelle says, the Whites Point Panel did exactly what it was asked to do and because of the broad definition of environmental effect (that includes all socio-economic effects), and the broad discretion left to the provincial Minister to decide whether to approve a project, there is no question that the provincial Minister acted within his legal authority when he followed the recommendation of the Whites Point Panel to reject the project. Where there was question was in regard to the authority of the federal officials to reject. He says the proponent had every opportunity to challenge the federal decision through a judicial review application before the Federal Court but didn't, unfortunately, because it would have been an opportunity to clarify a number of issues that practicing lawyers and legal academics have been debating for 20 years. Also he notes that none of this rich literature, much of it peer reviewed and supporting what the Whites Point Panel and the federal Minister did in this case, was referenced in the NAFTA ruling. Doelle concludes that the failure of the proponent to pursue any of the legal remedies available to it in Canada should have resulted in the dismissal of this case, as it leaves too much legal uncertainty for the NAFTA tribunal to deal with. In this case it appears that the failure to explore readily available domestic remedies put the NAFTA tribunal in an impossible situation.

Another Dalhousie Environmental Law Professor, David VanderZwag also explained how Nova Scotia law would allow the panel to interpret community core values as part of Environmental impact:

> *The Nova Scotia Environmental Assessment Regulations have defined an 'environmental effect' as including, 'any effect on socio-economic conditions, on environmental health, physical and cultural heritage or on any structure, site or thing including those of historical, archaeological, paleontological or architectural significance'. This wording provides a firm basis in law to justify the inclusion of social, economic, and community-based concerns within the assessment of the Whites Point Quarry proposal.*

Gretchen Fitzgerald, Executive Director of Sierra Club Canada Atlantic, also stated in an op-ed submitted to the Chronicle Herald that:

> *The company was told clearly and in many ways that the environmental assessment would include an evaluation of how the project would impact local communities. This should come as no surprise: as every Grade 8 student learns, sustainability is the confluence of environmental, economic, and social factors. Our laws are written to reflect the fact that we are part of the fabric of life; environmental damage damages our communities in big and small ways.*

Legal expert on investment agreements and head of the Green Party of Canada, Elizabeth May, also defended the Panel's conclusions noting that language used in the Tribunal's decision confirms that the international trade lawyers involved in the decision did not have even the most rudimentary understanding of the environmental assessment process.

Professor Doelle echoed Ms May:

> *I have found a NAFTA Tribunal that lacked, with the exception of the dissenting member, even a basic understanding of the legal context within which the decisions it was asked to rule on were made. It also lacked any real appreciation for the factual context within which the decisions being challenged were made...*

Professor Nigel Barnes, Law Professor, University of Alberta commenting on the case in a recent University of Calgary Faculty of Law Blog on Developments in Alberta (ABlawg) referred to Donald McRae's strong dissent, adding that he had nothing to add to Mr. McRae's excellent critique while also referring his readers to Meinhard Doelle's post on the decision.

As noted in the introductory statements above, the Bilcon case has become a lightning rod for those law professors, lawyers, NGOs, researchers and activists who are producing statements, press releases, and news articles with the aim of trying to stop the inclusion of ISDS in the mega- trade agreements. In these writings they are pointing to the risks as spelled out in the Bilcon dissent should governments ratify TPP, TTIP, and CETA with ISDS still intact. US activists are also citing Bilcon in their attempts to stop a Fast Track vote in Congress. As recently noted in a paper published on the University of Oslo PluriCourts Blog on the Legitimacy of the International Judiciary:

> *For those opposing the inclusion of ISDS provisions in these agreements, the Bilcon decision is ammunition for the argument that investment treaty arbitration improperly bypasses potential domestic remedies, and that it interferes with a sovereign's ability to regulate in the public interest, protect the environment, or protect human health.*

Among these recent writings referencing Bilcon, another pertinent critique comes from Lisa Sachs and Lise Johnson, director of the Columbia Center on Sustainable Investment, and Head of Investment Law and Policy at the Columbia Center respectively, who after describing the Majority Tribunal's reasoning for overturning the Panel's decision to reject Bilcon's proposal stated:

> *In fact, the arbitrators got the international law standard wrong. The parties to the NAFTA—the United States, Canada and Mexico—have all repeatedly clarified that ISDS is not meant to be a court of appeals sitting in judgment of domestic administrative or judicial decisions. Yet in Bilcon, the majority of the arbitrators gave only lip service to the NAFTA states' positions.*

In other words the Majority Tribunal lawyer's ignored the clear intent of NAFTA's provisions and provided a judgement dismissive of domestic law.

And unfortunately for Canada it cannot even appeal this major misinterpretation because under ISDS, governments cannot overturn arbitral decisions for getting the law or facts wrong and Governments and their taxpayers remain responsible for paying out wrongfully decided ISDS awards.

Implications:

Shortly after the release of the Tribunal's decision, Lawrence Herman, international trade lawyer, reported in *Canada Loses Another Investment Dispute Under NAFTA,* that the Tribunal results were likely to stir up considerable controversy, because of Donald McRae's strong dissent, and statement that the NAFTA Tribunal went far beyond its jurisdiction under the treaty in questioning the reasoning of the federal-provincial environmental panel. As can be inferred from the degree of dissent articulated above, Herman's predictions were insightful and prophetic.

The implications of the Bilcon case include not only the threats to environmental law and assessment as outlined by Professor McRae. The Bilcon case when dissected also exposes many inherent flaws of NAFTA Ch 11, designed as it was from a business perspective to ensure protection for foreign investors with far less regard for the public welfare role of government. These insights are particularly relevant given the high level of debate in the EU Parliament around ISDS in TTIP and subsequently CETA as well as concerns that abound in regard to TPPA and ISDS.

These implications will be assessed in a forthcoming paper to follow on the heels of this one entitled: *Digby Neck Bilcon Tribunal Decision Sparks International Debate over Flaws and Failures of ISDS*

** Janet M Eaton, PhD [Marine Biology] Dalhousie University, is an independent researcher, and part-time academic who has taught courses in *Critical perspectives on Globalization*, *Community Political Power* and *Environment and Sustainable Society*. She has been a volunteer with Sierra Club Canada for over a decade, was one of four SCC researchers who contributed to the Terms of Reference for the proponent's Environmental Impact Statement [EIS] and to Sierra Club Canada's lengthy response to Bilcon's EIS. She also testified twice before the Joint Review Panel. Since then Janet has been an international trade representative for SCC on the national Trade Justice Network, was a SCC International Representative for Corporate Accountability, and maintained a blog site on international trade for SCC. In latter years she has followed closely the emergence of the international debate to reject or radically reform ISDS in free trade and investment agreements. See:

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What Do International Trade Agreements Have to Do With Dinner?

By Elizabeth Grossman, Civil Eats May. 20, 2015

International trade agreements may seem like a long way from what you're making for dinner. But the two agreements on the table this spring — the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) — could have a profound impact on the food we eat.

The agreements have been negotiated behind closed doors and could be submitted to Congress soon. In the case of the TPP, it could even happen this week. If Congress approves what's called "fast-track" authority, the agreements would have to be voted on as is — without any changes. And Monday morning, Reuters reported that the U.S. lost its appeal to the WTO for repeal of country of origin labeling (COOL) requirements for meat.

Civil Eats spoke to experts to find out what consumers need to know about these agreements.

What products do the TPP and TTIP cover?

"Everything from pork to pomegranates to [prawns]," could be impacted by the deals, says Food & Water Watch research director and senior policy advocate Patrick Woodall.

All types of food would be included: meat, produce, seafood, and processed food.

What countries are involved?

The TPP would include Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. Once the agreement is in place, other countries could join. According to Woodall, those that have expressed interest include China, Indonesia, Korea, the Philippines, and Thailand.

The TTIP, on the other hand, would include the 28 countries of the European Union.

The U.S. already has free trade agreements with many of these countries. But the new agreements would supplement those currently in place and it's expected that TPP and TTIP rules would prevail.

How do these agreements work?

The goal of the TPP — like other such free trade deals — is to make it easier for countries to export their products to others in the agreements. It does so by removing "barriers to trade," like import taxes and other regulations that can make it difficult to export or import certain products.

Center for Food Safety's international director, Debbie Barker, says it's important to remember that the TPP and TTIP, "like other modern day trade agreements, have gone beyond the historical role of dealing with tariffs and quotas." This means softening or even doing away with regulations in order to facilitate trade.

When it comes to food, this could mean relaxing rules that limit pesticide residue on produce, restrict antibiotic, pharmaceutical or other chemical use in aquaculture and livestock production or additives, including nanomaterials in food processing. It could also interfere with labeling requirements.

For example, the TTIP could potentially lead to reducing EU requirements for labeling food containing genetically engineered ingredients and nanomaterials. It could also relax rules for meat produced with certain antibiotics and hormones, poultry raised on feed additives that contain arsenic, and meat produced with a growth-promoting drug called ractopamine.

These agreements could also threaten labeling programs designed to promote locally produced food.

The TPP and TTIP also include provisions that allow countries and businesses to challenge new regulations considered obstacles to trade that would adversely affect anticipated profits.

How do the two agreements differ?

In the U.S., consumer advocates are concerned that the TPP will mean less safe food imported into the U.S. In Europe, there's concern that the TTIP will relax the EU's more stringent standards for meat, pesticides, and GMOs.

Overall, the EU's approach to food safety and chemicals is considered more precautionary than the United States'. But what's allowed, say, in Asian aquaculture, is considered less stringent than what's allowed in the U.S. Yet there are also countries in the TPP with policies that could restrict imports of U.S. products — such as Peru, which requires labeling of food containing GMOs and Japan, which has stringent food additive standards.

It's likely that both agreements will lower the standards for food safety across the board, simply to allow more food to be imported and exported between the partner nations.

Would these trade agreements make our food less safe?

That is the concern of U.S. Representatives Rosa DeLauro (D-Connecticut), Chellie Pingree (D-Maine), and Louise Slaughter (D-New York), who held a press conference last week.

The section of the TPP that covers food safety has these members of Congress — along with many environmental and consumer advocates — worried. "Trade trumps food safety," DeLauro said of the TPP.

The U.S. Trade Representative — the White House office that negotiates trade agreements — has compiled an enormous list of these "non-tariff" trade barriers. They include treatments required to protect against pathogens, use of specific drugs in livestock, required disease testing methods, regulations restricting biotechnology (including genetic engineering), food additives, and shelf-life standards.

Why is seafood a particular concern?

Because about 90 percent of the seafood Americans consume is imported, especially from countries in the TPP, the agreement could affect the shrimp, tilapia, crab, catfish, tuna, and lots of other types of seafood filling supermarket freezers.

While current U.S. regulations require country of origin labeling for imported meat, fish, and produce, "processed" seafood is exempt from these requirements. That means fish sticks, canned tuna, frozen boiled shrimp or any seafood that's been cooked or prepared in any way, is exempt from COOL requirements.

In 2012, the U.S. imported about 2 billion pounds of seafood from TPP countries. Shrimp, tuna, and farmed freshwater fish are the leading U.S. seafood imports. Much of this comes from Asia; TPP could mean even more.

While there are rules that essentially say imported meat and eggs have to meet safety standards that are equivalent to those in the U.S., there are no such rules for seafood.

And, as has happened with country of origin requirements for meat, these regulations can be challenged under free trade agreements like the TPP and TTIP.

Why are increased imports a concern?

Under the current volume of food imports, the U.S. Food and Drug Administration (FDA) physically inspects only about 2 percent of imported food. The concern is that if import volumes grow — as they have under other free trade deals, including NAFTA — even less will be inspected.

What happens next?

If "fast-track" authority passes both the House and Senate, the TPP and TTIP could be submitted to Congress for a vote that would have to come within 90 days.

The Obama administration is promoting these agreements as boons to U.S. businesses — including farmers and ranchers — large and small. While many businesses are looking forward

to increasing exports, consumer, environmental, and labor advocates and not a few members of Congress say the trade deals are not such a good deal.

American consumers are now demanding transparency in food sourcing and want more local food, says Representative Chellie Pingree. Flooding the marketplace with "cheap imports" with no ability for consumers to tell the difference is not what they want, she says. "Once the damage is done, it will be very hard to undo."

About the Writer

Elizabeth Grossman is a Portland, Oregon-based journalist specializing in environmental and science issues. She is the author of *Chasing Molecules, High Tech Trash, Watershed* and other books. Her work has appeared in a variety of publications, including *Scientific American, Environmental Health Perspectives, Yale e360, Ensia, High Country News, The Pump Handle, Chemical Watch, Washington Post, TheAtlantic.com, Salon, The Nation,* and *Mother Jones*.

http://www.nytimes.com/2015/05/22/opinion/paul-krugman-trade-and-trust.html?emc=eta1

Trade and Trust

Paul Krugman

MAY 22, 2015

One of the Obama administration's underrated virtues is its intellectual honesty. Yes, Republicans see deception and sinister ulterior motives everywhere, but they're just projecting. The truth is that, in the policy areas I follow, this White House has been remarkably clear and straightforward about what it's doing and why.

Every area, that is, except one: international trade and investment.

I don't know why the president has chosen to make the proposed Trans-Pacific Partnership such a policy priority. Still, there is an argument to be made for such a deal, and some reasonable, well-intentioned people are supporting the initiative.

But other reasonable, well-intentioned people have serious questions about what's going on. And I would have expected a good-faith effort to answer those questions. Unfortunately, that's not at all what has been happening. Instead, the selling of the 12-nation Pacific Rim pact has the feel of a snow job. Officials have evaded the main concerns about the content of a potential deal; they've belittled and dismissed the critics; and they've made blithe assurances that turn out not to be true.

The administration's main analytical defense of the trade deal came earlier this month, in a report from the Council of Economic Advisers. Strangely, however, the report didn't actually analyze the Pacific trade pact. Instead, it was a paean to the virtues of free trade, which was irrelevant to the question at hand.

First of all, whatever you may say about the benefits of free trade, most of those benefits have already been realized. A series of past trade agreements, going back almost 70 years, has brought tariffs and other barriers to trade very low to the point where any effect they may have on U.S. trade is swamped by other factors, like changes in currency values.

In any case, the Pacific trade deal isn't really about trade. Some already low tariffs would come down, but the main thrust of the proposed deal involves strengthening intellectual property rights — things like drug patents and movie copyrights — and changing the way companies and countries settle disputes. And it's by no means clear that either of those changes is good for America.

On intellectual property: patents and copyrights are how we reward innovation. But do we need to increase those rewards at consumers' expense? Big Pharma and Hollywood think so, but you can also see why, for example, Doctors Without Borders is worried that the deal would make medicines unaffordable in developing countries. That's a serious concern, and it's one that the pact's supporters haven't addressed in any satisfying way.

On dispute settlement: a leaked draft chapter shows that the deal would create a system under which multinational corporations could sue governments over alleged violations of the agreement, and have the cases judged by partially privatized tribunals. Critics like Senator Elizabeth Warren warn that this could compromise the independence of U.S. domestic policy — that these tribunals could, for example, be used to attack and undermine financial reform.

Not so, says the Obama administration, with the president declaring that Senator Warren is "absolutely wrong." But she isn't. The Pacific trade pact could force the United States to change policies or face big fines, and financial regulation is one policy that might be in the line of fire. As if to illustrate the point, Canada's finance minister recently declared that the Volcker Rule, a key provision of the 2010 U.S. financial reform, violates the existing North American Free Trade Agreement. Even if he can't make that claim stick, his remarks demonstrate that there's nothing foolish about worrying that trade and investment pacts can threaten bank regulation.

As I see it, the big problem here is one of trust.

International economic agreements are, inevitably, complex, and you don't want to find out at the last minute — just before an up-or-down, all-or-nothing vote — that a lot of bad stuff has been incorporated into the text. So you want reassurance that the people negotiating the deal are listening to valid concerns, that they are serving the national interest rather than the interests of well-connected corporations.

Instead of addressing real concerns, however, the Obama administration has been dismissive, trying to portray skeptics as uninformed hacks who don't understand the virtues of trade. But they're not: the skeptics have on balance been more right than wrong about issues like dispute settlement, and the only really hackish economics I've seen in this debate is coming from supporters of the trade pact.

It's really disappointing and disheartening to see this kind of thing from a White House that has, as I said, been quite forthright on other issues. And the fact that the administration evidently doesn't feel that it can make an honest case for the Trans-Pacific Partnership suggests that this isn't a deal we should support.

http://www.agweb.com/article/dairy-groups-praise-senate-passage-of-tpa-call-for-quick-house-action--NAA-dairy-today-editors/

Dairy Groups Praise Senate Passage of TPA, Call for Quick House Action

May 23, 2015 11:56 AM

"Trade promotion authority is crucial to concluding trade agreements that will open foreign markets to more U.S. dairy products." -- NMPF President and CEO Jim Mulhern.

Source: National Milk Producers Federation/U.S. Dairy Export Council

ARLINGTON, VA – The National Milk Producers Federation and U.S. Dairy Export Council today commended the Senate for approving new Trade Promotion Authority (TPA) legislation. They urged members of the House of Representatives to quickly pass their own TPA legislation.

"Trade promotion authority is crucial to concluding trade agreements that will open foreign markets to more U.S. dairy products," said NMPF President and CEO Jim Mulhern. "In the Trans-Pacific Partnership negotiations in particular, having TPA in place is essential to increase pressure on Japan and Canada to extend their best offers."

USDEC President Tom Suber added, "Knowing that a trade agreement will be considered by Congress under Trade Promotion Authority paves the way to press our negotiating partners to make their best offers on the most sensitive issues. Clearly, dairy exports fall into that category, and the U.S. needs all the tools it can muster to get the best possible deal."

The two organizations said TPA will increase congressional influence over trade negotiations and lead to agreements that are better for both the country and the dairy industry. They urged the House to take up TPA legislation soon after returning from the Memorial Day recess.

TPA, which expired in 2007, is important to the U.S. dairy industry because the United States now exports the equivalent of one-seventh of its milk production.

http://www.bostonglobe.com/opinion/2015/05/24/trade-about-consumers-buying-things-they-desire/M7iY7suggp0VURHVGLLyRJ/story.html?s_campaign=8315

Trade is about consumers buying things they desire

By John E. Sununu May 25, 2015

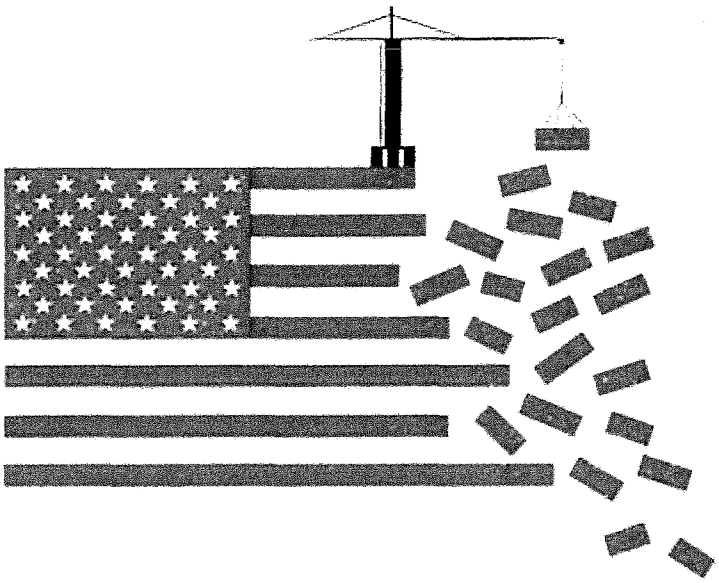
Why do the most rabid protectionists always kick off their tirades by insisting that they really do support trade? Of course, there's always a qualifier. They merely require that any trade deal — insert an appropriately amorphous or unattainable goal here — "is fair," "guarantees workers rights," "lowers the trade deficit," "promotes democracy," or cures the common cold. Admittedly, neither Alabama Senator Jeff Sessions nor Elizabeth Warren of Massachusetts have yet used that last excuse, but you get the point.

It's not as if resistance to international trade represents some new or progressive concept. The same sentiments fueling opposition to the trade measures before Congress today stoked the fires of opposition to trade with Japan in the 1980s, with Canada and Mexico under NAFTA in the 1990s, and the African Growth and Opportunity Act of 2000. For that matter, debates about import tariffs dominated national politics throughout the 1830s and '40s.

Yet throughout it all, one inevitable, irresistible, economic fact remains: With or without the United States of America, the volume of global trade will continue to increase — steadily and relentlessly — as it has for hundreds of years. For all the talk about tariffs, workers rights, and catfish labeling, at the end of the day trade is about consumers buying things they desire: Japanese buying Kentucky bourbon or Boeing Aircraft, Americans purchasing rugs made in Pakistan, or Italian shoes.

People want what they want, and trade works for them. It works for American consumers by providing access to less expensive goods; it makes the American economy more efficient by attracting capital to our most productive areas; and it gives American companies better access to overseas markets by reducing trade barriers.

Presidential Trade Promotion Authority, passed by the Senate last week and to be taken up by the House in June, is simply about leverage. Ironically, trade opponents reject "fast-track" for the same reason advocates embrace it: TPA will make it easier for the president to negotiate complex trade deals. To be sure, TPA cannot prevent the president from negotiating a bad deal — nothing can. That's why Congress will (and should) always hold the right to reject any proposal.



View Story

Barney Frank's open letter to Obama on trade

One of the effects of the Trans-Pacific Partnership will undeniably be increased inequality.

- Who is writing the TPP?

Clearly that does not satisfy antitrade activists who have always found it easy to rally isolationist emotions with stories of worker dislocations or objectionable trade barriers. In truth, however, domestic competition displaces far more workers than global competition; and manufacturing production has more than doubled since 1975. Global trade growth isn't a trend, it's a fact of life. Ignoring this cedes economic leadership and invites the rest of the world to forge agreements that set terms of trade and investment without us.

And as the Democrats' "antitrade left wing" undermines President Obama's agenda, Republicans are left to pick up the pieces. Leaders like Mitch McConnell in the Senate and Paul Ryan in the House have supported TPA for Democrat and Republican presidents alike. This is particularly instructive for those who have spent the past six years blaming "Republican partisanship" for the gridlock in Washington.

For all the talk about tariffs, workers rights, and catfish labeling, at the end of the day trade is about consumers buying things they desire.

"

For his part, Obama hasn't done much to help the cause. His penchant for secrecy only reinforces frustrations with the administration's failure to share details of a Pacific trade agreement in the works. Such specifics are rarely disclosed publicly before deals are finalized, but it creates an easy rallying point for critics. Nor has his rhetoric been well suited to the moment. Obama was right to declare Warren was "wrong on this." But by suggesting opponents were simply driven by politics, he called their motives into question — a cardinal mistake in politics (though, ironically, one that Warren makes all the time).

In the end, Sessions and Warren will vote no, TPA will pass the Senate, and Paul Ryan will save Obama's agenda in the House. What was that saying about strange bedfellows?

John E. Sununu, a former Republican senator from New Hampshire, writes regularly for the Globe.

http://www.bostonglobe.com/news/nation/2015/05/26/new-balance-could-beat-back-nike-for-partial-win-pacific-trade-deal/OECYcqEiHV3rIZcZrCfqZK/story.html?s_campaign=8315

New Balance's voice heard on tariffs

Nike wanted an immediate end to tariffs on sneakers made overseas, but a gradual phaseout favored by New Balance seems likely to prevail

- By Jessica Meyers Globe Staff May 27, 2015

WASHINGTON — If they are still employed in future years, the New Balance factory workers who stitch fabric in Massachusetts and run sewing machines in Maine may owe their jobs to a hard-fought provision in one of the world's biggest trade deals.

The Boston-based maker of athletic shoes appears poised to score a partial victory against American behemoths like Nike that want an immediate end to tariffs on sneakers manufactured overseas. Instead, after a long lobbying battle by New Balance, the trade pact is likely to impose a gradual phaseout of the tariffs.

New Balance says it wants a slower phaseout to help it preserve nearly 1,400 manufacturing jobs in New England.

Negotiators have yet to finish the 12-nation pact, known as the Trans-Pacific Partnership, and have kept most details secret. Although any agreements could still unravel, the latest developments reveal how a privately owned New England company and its well-placed allies in Congress can wield surprising influence in a cutthroat industry dominated by global trade.

"The administration has heard our concerns and appears to be moving forward in a way to give us enough time to react," said Matt LeBretton, vice president of public affairs for Brighton-based New Balance. Although officials have disclosed no timeframe for any elimination of tariffs, "we're hopeful for the longest possible phaseout," he said.

The shoe fight serves as one example of the extensive behind-the-scenes jockeying taking place in Washington as the administration seeks to win over hesitant lawmakers like Senator Angus King, a Maine Independent, and Senator Susan Collins, a Maine Republican. Both have lobbied to keep the protectionist tariffs in place.

It also highlights the intense competition between New Balance and rivals in the athletic footwear industry, where globalization's effects are evident in the dearth of American shoe factories. New Balance, a century-old company owned by a former marathoner and his wife, is the only major athletic footwear business that still produces running shoes in the United States. But only about a quarter of the shoes New Balance sells in the United States come from its five New England factories. The rest are imported from Asian countries such as Vietnam, a member of the proposed Pacific trade accord.

At the crux of the debate are tariffs on imported shoes that date back to the 1930s, when American footwear companies occupied bustling mill towns. Lawmakers intended to give US businesses a boost, but they turned into an impediment for the waves of shoe manufacturers who found cheaper labor abroad.

Tariff rates can stretch to 67.5 percent on shoes brought into the United States, and even on a cheap pair of $15 to $20 shoes can tack on another $5 or so. The United States imports about 98 percent of its shoes.

"There are practically no jobs in the US where manufacturing is prevalent when it comes to footwear," said Matt Priest, president of the Footwear Distributors and Retailers of America, a Washington-based trade organization that supports the Pacific deal. "These are just costs baked in that consumers end up paying."

Priest said the immediate elimination of tariffs would benefit consumers and most American companies, but acknowledged the challenges involved in pushing a deal through Congress. "We don't want the perfect to be the enemy of good," he said.

The century-old company owned by a former When trade negotiations started to pick up, New Balance acted as the primary mover for the protections. The company rallied to keep the tariffs, cited the need to preserve domestic production, and drew lawmakers to its side.

King held up the confirmation of US Trade Representative Michael Froman until Froman agreed to visit New Balance's Maine factories. Collins coordinated meetings between company executives and administration officials. Senator Edward J. Markey, a Massachusetts Democrat, peppered the trade representative with letters. Michael Michaud, a former congressman from Maine, handed the president a pair of New Balance sneakers that were made in the state.

"This is a family-owned company that has made a conscious decision to maintain a substantial amount of manufacturing of athletic shoes in the US," King said in a recent interview. "We should not whack them. We should reward them."

But the company has softened its tone in recent months and could still stand to benefit. Tariffs that help its American factories also raise the cost of its numerous shoes made elsewhere.

"It's a win for them on the imported side, since many of these shoes will be made in Asia," said Matt Powell, a sports industry analyst at NPD Group, a New York market research company. "And it's a partial win on the US side in that they will have a little more time to respond to change. What they will do then, I don't know."

New Balance, without elaborating on specifics, said a slower phaseout of the tariffs would give the company more time to plan and to adapt its business model.

"Part of that is changing up in the factories what we do, how efficient we can be," LeBretton said. "We look at what will allow us to make more in the US and not less."

That is a promise that Nike, which has 12 times as many employees, has also made. The Oregon company vowed to create up to 10,000 American manufacturing and engineering jobs if the trade deal goes through. New Balance's entire staff barely tops 4,000.

Obama recently visited Nike to sell the bill, a controversial move due to its past use of Asian sweatshops. (The company announced the job promise in conjunction with Obama's trip.)

"It would have been nice for the president to come out and actually see people making shoes here and explain why [the deal] would be helpful for them," said New Balance's LeBretton.

Collins called Obama's move "the height of irony, because Nike does not have a single domestic manufacturing job left in the US."

But Obama, framed by a massive Nike logo, sought to emphasize how the country must confront a new set of global challenges and create standards for labor, the environment, and intellectual property before China determines those rules. China is not a member of the Pacific trade pact.

"This deal would strengthen our hand overseas by giving us the tools to open other markets to our goods and services and make sure they play by the fair rules we help write," he said.

Nike staff did not respond to requests for comment.

Trade agency officials say the final deal will ensure that all sides benefit.

"Made-in-America footwear manufacturers will find it easier to export," said Trevor Kincaid, a spokesman for the US trade representative. "American footwear brands will enjoy new efficiencies and lower costs because of TPP."

That is a tough selling point for skeptical lawmakers, many of whom Obama still needs to convince.

The House is expected to take up a bill next month that would grant the president greater authority, called "fast track,'' to conclude negotiations. The actual trade pact would be brought before Congress later, once the negotiations are complete. Congress would not be permitted to amend the proposal.

When the Senate advanced the "fast track'' legislation earlier in May, both King and Collins voted against it, even though the final trade bill may offer these protections.

"These are people's lives in a small town where there are not other signs of economic activity," King said, recollecting the trips he has taken to Maine's bustling factories. "It's the equivalent of General Motors closing in Detroit."

http://www.bostonglobe.com/opinion/2015/05/26/realistic-debate-about-free-trade/oJEDgi5ZjNDDbTRPq9gj9O/story.html?s_campaign=8315#

A realistic debate about free trade

By Scot Lehigh Globe Columnist May 27, 2015

In recent weeks, the news coverage about the Trans-Pacific Partnership has revolved around President Obama's struggle to win fast-track authority from Congress. The broader question, however, should be this: If and when it's finalized and approved, how will the free trade pact affect income inequality in the United States?

The Economics 101 version is that free trade is an unalloyed positive, an economic sorting mechanism that lets each country focus on what it does best, thereby maximizing total economic output across member nations. But the view from 10,000 feet obscures dramatic differences in the economic topography.

It's obviously difficult to predict with any exactitude the effects of an agreement that remains more concept than detail. According to a Congressional Research Service synopsis of the various projections, one study concluded the pact could decrease the median wage by 0.6 percent. A second analysis predicts an overall economic gain for the United States, but says manufacturing will take a hit. That impact, however, will be more than offset by gains in the US services sector, which includes banking and insurance.

That projection underscores this reality: Free trade agreements have different consequences for different parts of the economy. If one's economic perch requires a college degree or is in a cutting-edge industry or with an enterprise that enjoys strong export potential, the likely impact will be positive. That person's firm may well find new business opportunities, while he or she will benefit from less expensive foreign goods. But workers in industries vulnerable to foreign competition may find their jobs at risk. In that case, the prospect of cheaper consumer goods obviously doesn't seem like an attractive trade-off.

Free trade theory addresses those disparate effects by noting that there will be more winners than losers — and that the winners can compensate the losers for the harm they suffer. That way, everyone is still better off.

Hmmm. Although that could happen, it doesn't generally occur in any substantial or sustained way. Yes, the federal government offers some retraining, relocation, and job-search help for workers displaced by trade. Younger workers in retraining can also qualify for a temporary stipend. Some workers over 50 who take a job at lower wages are eligible for income support capped at $10,000.

That's better than nothing, certainly, but if you face the prospect of being out of work for an extended period or of taking a job that pays much less, it will seem like pretty thin gruel.

Free trade agreements have different consequences for different parts of the economy.

In a vibrant economy, dislocated workers may find ample opportunities. But in sluggish times, trade-displaced workers will swell the pool of the unemployed, putting downward pressure on wages.

Clever policy makers could find ways to distribute free trade gains in a more equitable way to those who bear the brunt of free trade. But it's hard to imagine that happening in today's Washington. Alternatively, recognizing that free trade heightens economic inequality, the government could spend on policies and programs that promote higher wages and economic mobility. We could, for example, dramatically reduce the cost of a college education.

But at a time when there's no national agreement on a strategy to combat economic inequality, skeptics can't be blamed for fearing the benefits of the TPP will redound mostly to the better-off, while the ill effects will be felt principally by those on the lower rungs of the economic ladder.

Regardless of whether Obama wins fast-track authority, that's a discussion the country needs to have. It's a debate far more complex than the usual easy assurances about the value of free trade.

Scot Lehigh can be reached at lehigh@globe.com. Follow him on Twitter @GlobeScotLehigh.

STATE OF MAINE

Citizen Trade Policy Commission

DRAFT AGENDA

Thursday, August 6, 2015 at 10 A.M.
Room 208, Burton M. Cross State Office Building
Augusta, Maine

10:00 AM Meeting called to order

I. Welcome and introductions

II. Review 7/10/15 letter from CTPC Chairs to USTR Michael Froman

III. Presentation from Janine Bisaillon-Carey, President of the Maine International Trade Center (10:15 AM)

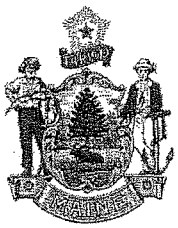
IV. Presentation from Linda Murch, New England Field Coordinator for the Alliance for American Manufacturing (11:15 AM)

V. Articles of interest (Lock Kiermaier, Staff)

VI. Discussion of next meeting date

VII. Adjourn

Citizen Trade Policy Commission
c/o Office of Policy & Legal Analysis
State House Station #13, Augusta, ME 04333-0013 Telephone: 207 287-1670
http://www.maine.gov/legis/opla/citpol.htm



STATE OF MAINE

Citizen Trade Policy Commission

July 10, 2015

The Honorable Michael Froman
United States Trade Representative
600 17th Street NW
Washington, DC 20508

Re: Support for Tobacco Carve-out in the TransPacific Partnership Agreement

Dear Ambassador Froman:

The Maine Citizen Trade Policy Commission (CTPC) is established in Maine State Law "..to assess and monitor the legal and economic impacts of trade agreements on state and local laws, working conditions and the business environment; to provide a mechanism for citizens and Legislators to voice their concerns and recommendations; and to make policy recommendations designed to protect Maine's jobs, business environment and laws from any negative impact of trade agreements." Since its inception in 2003, the CTPC has had a tradition of bipartisanship and unanimous votes. As the current Chairs of the CTPC, we are writing to you with that tradition in mind to reiterate a past motion of the CTPC with regards for the need to include a comprehensive Tobacco Carve-out in the soon-to-be completed TransPacific Partnership Agreement.

We have attached a letter to your predecessor as USTR, the Honorable Ron Kirk. This letter was dated August 1, 2012 and prominently referenced the 2012 Trade Policy Assessment which was authored by Professor Robert Stumberg of Georgetown University who was commissioned by the CTPC to conduct that assessment. In brief, the following outcomes listed by Professor Stumberg regarding the possible treatment of tobacco in the TPP continue to be concerns of the CTPC:

1. Investment - would give greater rights to foreign investors to challenge regulations outside of domestic courts. PMI is using investor rights to seek compensation for "indirect expropriation" of its trademarks by Uruguay and Australia.
2. Intellectual property- would provide (as proposed by the United States) a new right to use elements of trademarks (e.g., non-origin names that refer to a place like Salem and Marlboro).
3. Cross-border services–would expand the number of laws covered by trade rules that limit regulation of tobacco-related services such as advertising, distribution and display of products.
4. Regulatory coherence–would create obligations to involve tobacco companies ("stakeholders") in policy-making, which could undermine an FCTC obligation to limit the influence of tobacco companies.

5. Tobacco tariffs –would reduce tariffs to zero (as proposed by the United States) for a range of tobacco products. Several TPPA countries have relatively high tobacco tariffs, which inhibit expansion by international tobacco companies.

The 2012 Trade Policy Assessment can be viewed in its entirety at the following site: http://www.maine.gov/legis/opla/CTPC2012finalassessment.pdf

To reiterate the recommendations made to Ambassador Kirk in the August 1, 2012 letter, to preserve various public health related tobacco provisions in Maine state law and regulations, the CTPC continues to favor:

- A complete carve out of tobacco from the trade provisions of the TPP;
- Absent a complete carve out, a more moderate approach which exempts all federal and state laws and regulations pertaining to tobacco from provisions in the TPP; and
- The development of a policy statement from the USTR which clearly states the US position on tobacco related provisions which may be included in the TPP.

Recent news reports indicate that the TPP is nearing final negotiation and completion. We strongly recommend that the completed TPP agreement fully reflect the concerns and recommendations contained in this letter.

We look forward to hearing from you.

Sincerely,

Amy Volk
Senator Amy Volk, Chair

Robert Saucier
Representative Robert Saucier, Chair

cc: President Barack Obama
Senator Susan Collins
Senator Angus King
Representative Chellie Pingree
Representative Bruce Poliquin

STATE OF MAINE

Citizen Trade Policy Commission

August 1, 2012

The Honorable Ronald Kirk
Trade Ambassador
Office of the United States Trade Representative
600 17th Street, NW
Washington, DC 20508

Ms. Barbara Weisel
Assistant U. S. Trade Representative for Southeast Asia and the Pacific
Office of the United States Trade Representative
600 17th Street, NW
Washington, DC 20508

Re: 2012 Trade Policy Assessment; commissioned by the Maine Citizen Trade Policy Commission

Dear Ambassador Kirk and Ms. Weisel:

As you may know, the Citizen Trade Policy Commission (CTPC) is required by current Maine Law (10 MRSA Chapter 1-A) to provide an ongoing state-level mechanism to assess the impact of international trade policies and agreements on Maine's state and local laws, business environment and working conditions. An important part of the CTPC mandate is to conduct a biennial assessment on the impacts of international trade agreements on Maine.

We have enclosed a copy of our recently completed 2012 Trade Policy Assessment. In a process that is more fully described in an addendum included within the printed document, the Citizen Trade Policy Commission contracted with Professor Robert Stumberg of Georgetown University to conduct this assessment.

We believe that the 2012 Trade Policy Assessment is an invaluable tool for a more complete understanding of both the proposed TransPacific Partnership Agreement (TPPA) which is currently being negotiated and other international trade treaties and their current and potential effects on Maine. As a specific result of the 2012 Trade Policy Assessment, the CTPC has voted unanimously to make a number of recommendations regarding the potential treatment of *tobacco* within the TPPA:

- We favor a complete "carve out" of tobacco from the trade provisions of the TPPA; in other words, we would prefer that any regulations or laws pertaining to tobacco be completely excluded from the TPPA. The CTPC believes strongly that the efforts of individual nations to control tobacco and combat its adverse health effects should not be interfered or impeded in any way by provisions of the TPPA or any other international trade agreement;
- Absent a complete "carve out" of tobacco from the TPPA, we favor an approach which modifies the purported compromise proposal being made by the USTR; more specifically, the CTPC favors an approach which ensures that all federal and state laws and regulations pertaining to tobacco regulation are not subject to jurisdiction under the TPPA and further that any tobacco-related provisions of the TPPA embrace an approach which minimizes potential litigation be it through local, state or federal court and the possible use of "investor-state" dispute settlement systems; and
- Finally, the CTPC requests that the USTR develop a clear public statement on the specifics on the specific elements of a tobacco-related provision, as they are proposed by the USTR for consideration as a part of the TPPA.

In making these and other recommendations, members of the CTPC expressed a clear desire to further discuss these subjects in detail with either of you in the context of a public meeting held by the CTPC. We invite you to appear at such a public meeting at a date that is mutually satisfactory and as an alternative to you traveling to Maine, we suggest that a conference call could be arranged on a date to be determined in the near future.

On behalf of the CTPC, we thank you for your attention to the issues we have raised regarding the treatment of tobacco-related provisions in the TPPA and we look forward to discussing these issues with you in more detail.

Sincerely,

Senator Roger Sherman, Chair

Representative Joyce Maker, Chair

c: Governor Paul LePage
Senator Olympia Snowe
Senator Susan Collins
Representative Michael Michaud
Representative Chellie Pingree
Maine State Representative Sharon Treat, member of Intergovernmental Policy Advisory Committee

Alliance for American Manufacturing
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Testimony of
Linda Murch
Field Coordinator
Alliance for American Manufacturing
Before the
Maine Citizen Trade Policy Commission
August 6, 2015

Senator Volk, Representative Saucier, Members of the Commission, thank you for the opportunity to testify today. Trade agreements can have a serious impact on Maine's manufacturers and workers, which is why getting trade right is of the utmost importance for the people of Maine.

My name is Linda Murch. I was born and raised in Maine and currently live in Bangor. I worked for over 25 years in manufacturing facilities here in Maine. Most of my career was spent in the Bucksport paper mill, which, sadly, closed in December 2014, costing the state 500 good-paying jobs.[1]

Today, I work for the Alliance for American Manufacturing because I care about keeping manufacturing jobs here in America. And because I know what it is like to build a life, and a community, through manufacturing.

The Alliance for American Manufacturing (AAM) is a non-profit, non-partisan partnership formed in 2007 by some of America's leading manufacturers and the United Steelworkers. Our mission is to strengthen American manufacturing and create new private-sector jobs through smart public policies.

[1] MacQuarrie, Brian, "Closing of Maine Papermaker Ends a Way of Life", The Boston Globe, 20 Dec. 2014.

As recently at 1998, one in five Americans worked in manufacturing. But since that time, our nation lost 5.7 million good paying manufacturing jobs. Here in Maine, we have not been spared. Maine lost 31,000 manufacturing jobs, or 5.5% of all employment over that time.[2]

Today, eight percent of Maine's workforce is employed in manufacturing. And manufacturing punches above its weight in terms of economic impact, accounting for 10.36 percent of the state's economic activity.

If we want to maintain, and grow, Maine's manufacturing sector, we need to make sure that trade agreements reflect and enforce our economic values.

Right now the United States is negotiating two major trade agreements, the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP). I would like to briefly outline AAM's perspective on how these agreements can ensure a brighter future for American manufacturing and workers.

Trade Agreements and Manufacturing:

Trade Enforcement – Manufacturers and workers harmed by unfair trade should not have to wait for layoffs before taking action. Legislation passed by Congress and signed into law this year updates our trade laws to allow the U.S. government to more effectively hold trade cheats accountable. Through any trade agreements, we must support strong domestic trade enforcement as the central mechanism for holding our trading partners accountable.

Currency Manipulation – Some countries manipulate their currencies to get a trade advantage. When they do this, U.S. goods become relatively more expensive both at

[2] Scott, Robert E., "The Manufacturing Footprint and the Importance of U.S. Manufacturing Jobs", Economic Policy Institute, 22 Jan. 2015.

home and abroad. AAM urges the United States government to establish enforceable rules in the TPP to deter currency manipulation. Both Malaysia and Japan have engaged in this practice in recent years. The Economic Policy Institute (EPI) estimates that ending currency manipulation could create as many as 24,000 Maine jobs, and up to 5.8 million jobs nationally.[3]

Market Access – Many tariff and non-tariff barriers prevent American-made products from making their way into markets in the Asia-Pacific. For example, Japan sold over 5.3 million cars in the U.S. in 2012. Yet the Big Three sold fewer than 14,000 cars in Japan.[4] For U.S. manufacturers to get value out of the TPP, we must remove barriers that keep American-made goods from being sold abroad.

Rules of Origin - "Rules of origin" determine the national source of a product. This matters in trade deals because only those countries bearing the risks and responsibilities of signing an agreement should receive its benefits. Without strong rules of origin, it is possible to evade trade laws by obscuring the true source of a manufactured product.

Competition and State Owned Enterprises – American producers can compete with private companies anywhere, but not with foreign governments. State-Owned Enterprises (SOEs) in countries such as China benefit from subsidies like low-cost loans, rent-free land, cheap energy, and other supports unavailable to American producers. Trade agreements should encourage market-oriented business practices and level the playing field for American manufacturers.

[3] Scott, Robert E., "Stop Currency Manipulation and Create Millions of Jobs", Economic Policy Institute, 26 Feb. 2014.
[4] Paul, Scott, "There's Still Time to get the TPP's Trade Rules Right", The Washington Examiner, 31 July 2015.

Government Procurement and Investment – 91 percent of American voters support Buy America preferences for taxpayer-funded projects.[5] They want their dollars to be reinvested back in the American economy. By maximizing the domestic content of infrastructure projects, we can create 33 percent more jobs than by allowing the production to be outsourced.[6] Trade agreements should continue to recognize that domestic procurement, be it for national security or transportation, can rightfully be used to support domestic manufacturing supply chains.

Maine needs manufacturing. That is why it is important to understand how these trade agreements impact our citizens. With these measures in mind we can create a level playing field on which American manufacturers and workers can compete fairly.

I want to thank you again for allowing me to testify here today. I look forward to your questions.

[5] Mellman Group and North Star Opinion Research, "Make it in America: New Polling Shows Manufacturing Seen as the Most Important Industry to the American Economy", Jan. 2014.
[6] Pollin, Robert; Heintz, James; Garrett-Peltier, Heidi, "How Infrastructure Investments Support the U.S. Economy: Employment, Productivity and Growth", Political Economy Research Institute and the Alliance for American Manufacturing, Jan. 2009.

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July 24, 2015

The Honorable Michael Froman
United States Trade Representative
600 17th Street NW
Washington, DC 20508

Dear Ambassador Froman:

On behalf of the Alliance for American Manufacturing, I am writing to outline a number of priority issues within the Trans-Pacific Partnership (TPP) trade agreement negotiations that will determine whether or not U.S. manufacturing companies and American workers benefit from the final deal.

The "Petri" study – widely cited by proponents of the TPP to show the potential benefit of the agreement – predicts a $39 billion increase in the manufacturing trade deficit. Factory workers, who already face a high level of competition from TPP partner countries, deserve a deal that will work for them as well. We urge you to adopt the following points as negotiating goals, ensure they become core features of the TPP, and recognize that they are consistent with the objectives set out in the most recent grant of Trade Promotion Authority (TPA).

- **Currency manipulation.** Japan has a lengthy track record of foreign exchange manipulation and, in recent years, has aggressively devalued the yen to boost its own exports at our expense. Indeed, the Economic Policy Institute estimates that the trade deficit with Japan, driven by currency devaluation and structural impediments, cost the United States nearly 900,000 job opportunities in 2013. Other potential TPP partners, including Malaysia, have manipulated their currencies in the past. Without enforceable rules to deter predatory currency distortions, any bargained-for benefits elsewhere in the agreement could quickly be negated after a deal is signed, particularly if notorious manipulators like China "dock" to the TPP in the future. The TPA legislation passed by Congress includes principle negotiating objectives directing the Administration to address exchange rate manipulation with enforceable rules and other mechanisms.

- **Market access.** A host of tariff and non-tariff barriers prevent American-made manufactured products from making their way into markets in the Asia-Pacific. Meanwhile, the U.S. market is the most open in the world. Japan, for example, maintains an atmosphere that keeps U.S. exports from entering its market. According to the House Ways & Means Committee, in 2012, the Big Three auto companies sold just 13,637 cars in the Japanese market while Japanese auto companies sold 5,343,578 cars in the U.S. market – selling more in a single day than U.S. producers were able to sell in Japan over an entire year. Unfortunately, this example extends into a range of other domestic products. U.S. producers and American workers can benefit from the TPP only if these barriers are eliminated and the benefits of trade are reciprocal.

- **Rules of origin.** A trade agreement's rules of origin determine the national source of a product. This is important in the context of trade deals because only those countries bearing the risks and responsibilities of signing an agreement should obtain its benefits. The NAFTA

included a rule of origin of 62.5%. The US-Australia FTA included a 50% rule of origin. For South Korea, the rule of origin was set at 35%. We believe that a rule of origin must be set high enough to maximize the benefits for signatory countries and minimize the advantages to non-participating countries. In autos, auto parts and several other sectors, it is critical to ensure that production and job creation is maximized within the signatory countries. The goal must be to maintain, and reclaim, supply chains that have been outsourced. Lower rules of origin work against that goal.

- **Competition and state-owned enterprises.** The rise of "state-capitalism" has created enormous economic distortions in recent years. As globalization accelerates, the impact of state-owned enterprises (SOE) and state-controlled enterprises (SCE) is having a significant adverse impact on competition – globally, and also here at home as SOEs pursue investments in the U.S. market. While China has the largest and best-known SOEs and SCEs, Vietnam, Malaysia and other TPP participants have significant state actors whose rise could skew production and employment patterns. If the goal of the TPP is to write the rules of trade, rather than letting China do so, then SOEs and SCEs must be reined in. Unfortunately, it appears that what started out as an area of so-called "high ambition" has been weakened to a level where any new disciplines may have limited impact. U.S. negotiators should only accept proposals that create the framework that will put enforceable rules in place to ensure fair competition.

- **Government procurement and investment.** It is vital that U.S. taxpayers are able to ensure that their hard-earned tax dollars promote domestic production and employment. The President recognized this goal by supporting the retention of Buy America policies within the *American Recovery and Reinvestment Act* and the Administration, as a whole, has been a strong supporter of Buy America. Members of Congress from both parties have repeatedly reaffirmed their interest in ensuring government funds are not used to offshore U.S. jobs and domestic supply chains. Trade negotiations must not undermine or restrict these important domestic economic tools. In addition, investment protections must be enhanced while also ensuring that U.S. laws can be effectively used to ensure our economic and national security interests.

The outcome of these priority issues will have an enormous impact on trade flows as they influence siting and employment decisions of industrial America. We must not accept lowered ambitions in the hope of meeting an arbitrary deadline. An approach that opens foreign markets and ensures that our competitors will follow a robust set of enforceable rules is vital to the success of America's manufacturing sector. Thank you for your consideration of these issues.

Sincerely,

Scott N. Paul
President

Article notes
Citizen Trade Policy Commission

Articles from June, July and August 2015; and other miscellaneous articles

TTIP and Digital Rights; (European Digital Rights; no date)- This paper lists the concerns that a network of 33 civil and human rights organizations from 19 European countries have about the TTIP and how it pertains to digital rights. With regards to the TTIP, their concerns include:

- Lack of transparency;
- Respect for the rule of law and democracy;
- Data protection;
- Privacy;
- "Intellectual Property";
- Net neutrality; and
- The use of ISDS

Transatlantic Investment Treaty Protection –A Response to Poulsen, Bonnitcha and Yackee; (Centre for European Studies; March 2015)- This scholarly article suggests several alternatives to including ISDS in the TTIP:

1. Provide for nation-to-nation arbitration which would be unwieldy and inevitably lead to international controversy;
2. Allow the home nation to block any claims brought by investors; this approach could be modified to allow the home nation to be a third party intervener;
3. Allow the exhaustion of local remedies before allowing use of ISDS;
4. Adopt a fixed or flexible time frame for pursuing local remedies; and
5. Exclude substantive investment provisions entirely from the TTIP thereby eliminating any need for ISDS.

TPP May Set Stage for More Challenges Of U.S. Laws After WTO Ruling on COOL;(International Trade Daily; May 29, 2015)- This article makes the connection between a recent WTO decision that overturned a US country-of-origin labeling law and the likelihood that a similar ruling could result from the adoption of the TPP.

Wikileaks Releases Largest Trove of Trade Negotiations Documents in History on Proposed "Trade in Services Agreement," Exposes Secret Efforts to Privatize and Deregulate Services; (Wikileaks; June 3, 2015)- This news release from Wikileaks holds that recently leaked text from the ongoing TISA negotiations proves that adoption of TISA is likely to lead to extensive domestic deregulation of the financial industry as well as almost any other domestic regulation that can be construed as affecting a service industry.

Huge trade deal hinges on Big Pharma protections; (Politico; June 3, 2015)- This article reports that the pharmaceutical industry is heavily pressuring the Obama administration to include provisions in the TPP which would establish a 12 year protection on prices for costly drugs that are crucial for poorer, underdeveloped nations thereby effectively banning the use of cheaper, generic drugs during that time span.

Revealed Emails Show How Industry Lobbyists Basically Wrote The TPP; (techdirt.com; June 6, 2015)- This blog piece discusses the close relationship that industry lobbyists have with the USTR regarding the specific contents of the TPP. The author highlights the following passage:

" What is striking in the emails is not that government negotiators seek expertise and advice from leading industry figures. But the emails reveal a close-knit relationship between negotiators and the industry advisors that is likely unmatched by any other stakeholders."

Divided EU lawmakers postpone vote on U.S. trade deal; (Reuters; 6/9/15)- This article reports that the European Parliament recently took a preliminary, but crucial vote on whether to take a unified stance on the TPP; the vote failed.

Confidential LAC Report Says TPP Falls Short On Automotive, SOE Rules; (Inside US Trade; 6/5/15)- This detailed article reports on a confidential report issued by the Labor Advisory Committee (LAC) in September of 2014 regarding the TPP. The report outlines two major criticisms of the TPP:

1. The report alleges that the TPP will weaken rules of origin for automobiles, thereby resulting in the future migration of American auto jobs to other TPP countries; and
2. The report also claims that the TPP is weak regarding the lack of disciplines and rules for State-owned enterprises (SOE); specifically, the TPP will lack provisions that adequately address mergers and acquisitions.

MEMO: Three Burning Questions about the Leaked TPP Transparency Annex and Its Implications for U.S. Health Care; (Citizen.org; 6/10/15)- This blog piece questions the recently leaked provisions of the TPP text entitled, "*Annex on Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices*". The author raises three fundamental questions about this part of the TPP:

1. *What guarantees are there that the TPP's requirements would not override existing procedures for Medicare?* The author maintains that the relevant parts of the TPP are sufficiently vague so that the agreement could be used to override certain Medicare procedures.
2. *Would the TPP constrain pharmaceutical reform efforts in the US?* The author suggests that current efforts to negotiate the price of prescription drugs on behalf of Medicare beneficiaries would be at considerable risk under the provisions of the TPP; and

3. *Could the inclusion of this Annex in the TPP bolster the case of a pharmaceutical company that is suing the United States?* The author concludes that the inclusion of ISDS in the TPP would indeed increase the chance of success for such a legal action.

TPP Transparency Chapter ANNEX ON TRANSPARENCY AND PROCEDURAL FAIRNESS FOR PHARMACEUTICAL PRODUCTS AND MEDICAL DEVICES, (Wikileaks, 6/10/15) – This release from Wikileaks asserts several claims regarding the recently leaked Transparency Chapter of the TPP:

- It seeks to regulate state schemes for medicines and medical devices;
- It will force healthcare authorities to give more information about national decisions on public access to medicine to large pharmaceutical companies;
- It grants corporations greater opportunities to challenge policy decisions that that they regard as harmful to their interests;
- It will create obstacles to efforts to reform Medicare by the US Congress; and
- The text of this chapter cannot be publicly released until four years after the TPP is signed into law.

Why Does Obama Want This Trade Deal So Badly?; (The New Yorker; 6/11/15)- This column, authored by William Finnegan, entails a basic review of the President Obama's Fast Track authority proposal and the TPP and examines the reasons that many people oppose both proposals. Most prominently, a lot of opposition from Congressional Democrats is based on the allegations that NAFTA resulted in the loss of hundreds of thousands of manufacturing jobs in the US. Also cited as reasons used to oppose these proposals is the lack of transparency, extreme secrecy and inclusion of ISDS.

What will TTIP mean for food and climate?; (Food Climate Research Network; 6/16/15)- This bog piece offers a number of concerns about how the TTIP may affect food production and climate:

- It could stifle the enforcement of, and development of, agricultural rules and regulations as well as those pertaining to consumer protection and public safety;
- Use of the ISDS provides a means by which corporations can override governments;
- It could override the current EU authority to ban on the use of GMO foods; and
- It could be used to end the current US limitations on crude oil and natural gas exports, thereby increasing the use of these energy sources which consequently will hasten global warming.

Letter from US Senator Jeff Sessions to President Obama; (6/5/15)- This letter, authored by US Senator Jeff Sessions (R- Alabama), asks President Obama to provide the legal and constitutional basis used to justify the secrecy by which the text of the TPP agreement is being denied to members of Congress and the American public.

Trade agreements should not benefit industry only; (The Boston Globe; 6/23/15) – This opinion piece, authored by US Senator Elizabeth Warren (D- Massachusetts), questions why major trade agreements have been designed to favor large multinational corporations and suggests that modern trade agreements should benefit all segments of American society. Senator Warren assails the use of ISDS in trade agreements by stating:

> *"Leading economic and legal experts have called on America to drop ISDS from its trade deals. Hillary Clinton recently called ISDS "a fundamentally antidemocratic process." The conservative Cato Institute agrees, noting that ISDS is "ripe for exploitation by creative lawyers" looking to challenge the "world's laws and regulations."*
>
> *And here lies the double standard at the heart of our trade deals: Once they sign on, countries know that if they strengthen worker, health, or environmental standards, they invite corporate ISDS claims that can bleed taxpayers dry. But countries also know that if they fail to raise wages or stop dumping in the river — even if they made such promises in the trade deal — the US government will likely do nothing. "*

Leaked: What's in Obama's trade deal; (Politico; June 2015)- This article discusses the contents of the recently leaked TPP chapter on intellectual property and emphasizes the chilling effect that this chapter will have on the availability of cheaper generic drugs that are crucial to underdeveloped countries. The article also focuses on the USTR's apparent willingness to support the position of leading pharmaceutical manufacturers who have advocated for these provisions.

Just Before Round of Negotiations on the Proposed 'Trade in Services Agreement' (TISA), Wikileaks Releases Updated Secret Documents; (Huffington Post; 7/2/15)- This article reviews the recent Wikileaks release of leaked chapters of the ongoing TISA negotiations. These leaked documents include chapters on:

- Financial Services;
- Telecommunications Services;
- Electronic Commerce; and
- Maritime Transport.

The article's concerns about these chapters are summarized in the following excerpt:

> *"The documents, along with the analysis, highlight the way that the TISA responds to major corporate lobbies' desire to deregulate services, even beyond the existing World Trade Organization (WTO) rules. This leak exposes the corporate aim to use TISA to further limit the public interest regulatory capacity of democratically elected governments by imposing disciplines on domestic issues from government purchasing and immigration to licensing and certification standards for professionals and business operations, not to mention the regulatory process itself."*

U.S. Chamber of Commerce Works Globally to Fight Antismoking Measures; (New York Times; 6/30/15)- This article reports on recent efforts of the US Chamber of Commerce to use international trade agreements to fight antismoking laws and regulations.

Q&A on TTIP to leading trade expert Dr Gabriel Siles-Brügge, University of Manchester;(uniglobalunion.org; 7/6/15) – This blog post consists of an interview with trade expert Dr Gabriel Siles-Brügge, University of Manchester. In the course of the interview, Dr. Siles-Brügge makes the following points:

- The TTIP negotiations are being hastened by fears that delays will result in further opposition and a "diluted" TTIP;
- The recent actions within the European Parliament (EP) to modify a version of the ISDS within the TTIP includes the following elements:
  - moving towards a permanent roster of arbitrators;
  - including an appellate mechanism;
  - clarifying the relationship to domestic courts (so that foreign investors have to choose whether to take their case to domestic courts or arbitration tribunals) and
  - enshrining the 'right to regulate' in the investment protection text.
- Recent arguments in favor of including ISDS in the TTIP include:
  - EU-US investment flows can be boosted by providing investors with greater legal security, as there are both EU and US jurisdictions where courts are either slow/unreliable in upholding investor rights or indeed outright discriminate against foreign investors;
  - including ISDS in TTIP is necessary to set a precedent, and to ensure that such provisions can be included in a future investment agreement with China (such as the EU is currently negotiating); and
  - TTIP provides an opportunity to reform the flawed system of BITs (which some supporters admit had their problems) and replace it with a new, improved system that protects investors while fully recognizing the 'right to regulate' of states.

Exclusive - U.S. upgrades Malaysia in annual human trafficking report: sources; (Reuters; 7/9/15)- This article reports that the Obama administration has approved a measure which removes Malaysia from the lowest category of countries that contain the worst human trafficking centers. The article alleges that this move clears the way for Malaysia to be included as a signatory in the proposed TTP.

U.S.-Canada Dairy Spat Sours Trade Talks; (Wall Street Journal; 7/10/15)- This article reports on a disagreement between the US and Canada which threatens adoption of the proposed TPP. In short, the US objects to current Canadian policy which establishes dairy prices that are determined through a calculation the average costs of production; production is regulated through the use of a quota system and is protected through the use of tariffs.

U.S. firm sues Canada for $10.5 billion over water; (CBC News; 7/9/15)- This article reports that Sun Belt Water Inc. of California is suing the Canadian government under the provisions of NAFTA for its prevention of the importation of fresh water from British Columbia to the US.

TPP Deal Puts BC's Privacy Laws in the Crosshairs; (thetyee.ca; 7/16/15)- This opinion piece, authored by Scott Sinclair, explains how the proposed TPP will establish the rights of companies to freely move digital data such as financial transactions, consumer tendencies, online communications and medical records across international borders.

Yeutter sees 'slim' prospects for TPP agreement at Hawaii session; (agri-pulse.com; 7/15/15)- This article reports that former USTR Clayton Yeutter has significant doubts that the US and other countries will be able to finalize TPP negotiations in late July.

The TPP's Bad Medicine: The Draft Agreement's Intellectual Property Protections Could Go Too Far ; (Foreign Affairs; 7/13/15)- This opinion piece, authored by Fran Quigley, maintains that the TPP text regarding intellectual properties protections are likely to go too far in that they will severely restrict the international availability of crucial generic drugs at an affordable cost. Mr. Quigley also holds that the US is pushing for these protections in the TPP over the objections of many other nations participating in the TPP negotiations.

UACT Letter to TPP Negotiators; Re: Effects of TPP provisions on cancer patients and their families; (Union for Affordable Cancer Treatment; 7/26/15)- This document consists of a letter from the UACT to the TPP negotiators regarding their concerns over possible provisions in the TPP which would inhibit access to affordable cancer treatment.

The EDRi papers

EDITION 11

TTIP

transatlantic trade & investment partnership

AND DIGITAL RIGHTS

EDRi

European Digital Rights (EDRi) is a network of 33 civil and human rights organisations from 19 European countries. Our goal is to promote, protect and uphold fundamental human rights and freedoms in the digital environment.

Editors: Joe McNamee and Maryant Fernández Pérez (EDRi)

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CONTENTS

WHAT IS TTIP?

The Transatlantic Trade and Investment Partnership (TTIP – pronounced "tee-tip") is a draft trade agreement being negotiated between the United States (US) and the European Union (EU). President Barack Obama announced TTIP at his State of the Union address to Congress in February 2013. Representatives from the European Commission and the US Government held their first meeting to discuss TTIP in June 2013 and they have met roughly every three months since then.

TTIP's proponents argue that it will increase trade and investment by reducing trade barriers between two of the largest economic blocs in the world. The European Commission says that it will inter alia help large and small businesses by increasing their access to US markets, reducing the amount of red tape they have to go through and making it easier to develop new rules to make international trade.[1]

Despite the assurances given by the European Commission and the US Government, European and US citizens have serious concerns about TTIP, the way it is being negotiated without adequate levels of transparency, and its potentially negative impacts, including on fundamental rights and freedoms.

This booklet presents the concerns that EDRi and its members have regarding TTIP, such as the lack of transparency in the negotiations, respect for the rule of law and democracy, data protection, privacy, "intellectual property", net neutrality, and ISDS, which would give rights to foreign companies to claim compensation from governments, undermining democracy and the right to legislate.

EDRi's RED LINES on TTIP

1. Ensuring real **transparency** and accountability
2. Protection of the **right to regulate** and a guarantee of respect for **rule of law**
3. **Data protection and privacy** not included
4. End of **mass surveillance** and no lock-in of **encryption** standards
5. **"Intellectual Property"** not included
6. No provisions on **net neutrality**
7. **Exclusion of any form of ISDS**
8. Inclusion of a binding and enforceable **Human Rights clause**

1 European Commission Trade Policy in focus: Transatlantic Trade and Investment Partnership (TTIP) - About TTIP http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/

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1. INSUFFICIENT TRANSPARENCY AND DEMOCRATIC DEFICIT: NOT A GOOD STARTING POINT

Transparency, democracy and accountability are core principles that any trade negotiation should respect. However, both the US' and the EU's trade policies fail to even set these as possible goals. The lack of real transparency and the democratic deficit of the negotiations are two of the key criticisms surrounding TTIP and other free trade agreements.

Before the TTIP negotiations even started, many civil society organisations had asked the European Union and the United States to "release, in timely and ongoing fashion, any and all negotiating or pre-negotiation texts."[2] However, citizens' demands have not been adequately addressed.

Thanks to pressure from the public opinion and certain policy- and decision-makers, the European Commission has taken small steps to change its transparency policy in TTIP,[3] fearing a repeat of ACTA[4]'s failure.[5] According to official documents[6], the Council of the European Union (which represents Member States) and the Commission want to do so by reinforcing[7] their public relations activities, "explain[ing] the basics of the negotiations and [addressing] criticism".[8]

However, transparency is not achieved by telling people that they know what they don't know.

Due to the serious concerns raised, the European Ombudsman, the EU authority dealing with maladministration in EU bodies and institutions, launched a public consultation on transparency in the TTIP negotiations.[9] On 6 January 2015, she adopted a decision on the matter.[10] The Ombudsman challenged the anti-openness position that she caricatured as saying that "greater transparency could lead to confusion and misunderstandings among citizens." She said that "such arguments are profoundly misguided. The only effective way to avoid public confusion and misunderstanding is more transparency and a greater effort proactively to inform public debate." As of 19 May 2015, the European Ombudsman's view was that she still did not see enough efforts regarding transparency, especially from the US side.[11]

Transparency is achieved by opening the negotiations to the public. Otherwise, the result is lack of accountability and public scrutiny and a democratic deficit.

2 http://www.citizen.org/IP-out-of-TAFTA

3 https://edri.org/editorial-transparency-ttip/

4 https://edri.org/acta-archive/

5 https://edri.org/ttip-european-ombudsman-warns-european-institutions-learn-acta-negotiations/

6 http://data.consilium.europa.eu/doc/document/ST-16713-2014-INIT/en/pdf

7 In November 2013, the Commission had already foreseen a PR strategy to overcome criticism: http://corporateeurope.org/trade/2013/11/leaked-european-commission-pr-strategy-communicating-ttip

8 http://corporateeurope.org/international-trade/2013/11/leaked-european-commission-pr-strategy-communicating-ttip

9 You can read EDRi's response to the consultation here: https://edri.org/files/ttip_consultation.pdf

10 http://www.ombudsman.europa.eu/en/cases/decision.faces/en/58668/html.bookmark

11 http://www.ombudsman.europa.eu/cases/correspondence.faces/en/59793/html.bookmark

2. REGULATORY COOPERATION: ADDING BUREAUCRATIC HURDLES AS A WAY OF REMOVING BUREAUCRATIC HURDLES

With the stated purpose of cutting costs and bureaucratic red-tape for European companies, the European Commission is negotiating Regulatory Cooperation provisions within TTIP. But it is not possible to surmise what Regulatory Cooperation actually means when reading the Commission's proposal of 4 May 2015.[12] Apart from being characterised by the same vague wording as the first proposal,[13] the text does not actually include any definition of Regulatory Cooperation. What is clear is that the Commission's proposed text contains legal obligations for EU and US regulators to consult each other before developing new regulations or reviewing existing ones, with the purpose of aligning their standards.

These legal obligations could range from information sharing and exchange of best practices, to regulatory exchanges on planned acts – which "may take place at any stage" of the legislative process and which would "continue until the adoption of the regulatory act"[14] – and joint evaluation of possible regulatory compatibility.[15] Such provisions would deeply influence the development of potential regulations, producing a "chilling effect" on legislators – both from EU and Member States, since the Regulatory Cooperation chapter would apply also at national level.[16]

As to the implementation of these rules, the Commission's position again is not clear. An unspecified "bilateral cooperation mechanism" would be responsible for the "information and regulatory exchanges," but the Commission also proposed the establishment of a "Regulatory Cooperation Body."[17] This body, composed of "senior representatives of regulators and competent authorities, as well [as by] representatives responsible for regulatory cooperation activities and international trade matters at the central level,"[18] would "monitor and facilitate the implementation of the provisions[19] on Regulatory Cooperation" in different ways, such as drafting an "Annual Regulatory Co-operation Programme"[20] and considering "new initiatives for regulatory co-operation"[21]. It is not clear how this body would be organised, how it would be held accountable and, even more importantly, which value and effects its acts would have. What is clear is that, ironically, it is a proposal to invent new bureaucracy as a means of generating less bureaucracy.

Having the Regulatory Cooperation chapter

12 European Commission textual proposal on Regulatory Cooperation in TTIP, 4 May 2015, http://trade.ec.europa.eu/doclib/html/153403.htm. This proposal was preceded by leaks and other official versions.

13 TACD Resolution on Regulatory Cooperation in TTIP, http://tacd.org/wp-content/uploads/2015/02/TACD-TTIP-Resolution-on-Regulatory-Cooperation.pdf

14 Article 12 of the textual proposal on Regulatory Cooperation

15 Article 9 and 11 of the textual proposal on Regulatory Cooperation

16 Art 3, p 2 of the textual proposal on Regulatory Cooperation

17 Art 8 of the textual proposal on Regulatory Cooperation

18 Art 16, p 1 of the textual proposal on Regulatory Cooperation

19 Art 14, p 1 of the textual proposal on Regulatory Cooperation

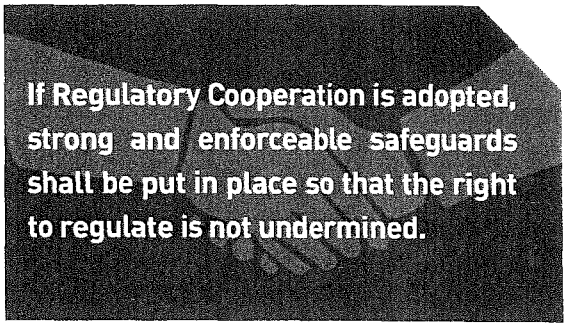
20 Art 14, p 2, lett a) of the textual proposal on Regulatory Cooperation

21 Art 14, p 2, lett d) of the textual proposal on Regulatory Cooperation

in force would mean that every time the Commission will propose new rules – or reviews existing ones – they will be firstly addressed as trade issues in an additional impact assessment process[22] and debated in non accountable bodies, even before submitting them to EU legislators or regulators. This would affect European Commission's power of initiative and would undermine the European Parliament and Council's powers and role in the legislative procedure.

The broad application of these provisions is even more worrisome. The Regulatory Co-operation chapter would apply to regulatory acts which "determine requirements or related procedures for the supply or use of a service" or "determine requirements or related procedures applying to goods"[23] "[...] in areas not excluded from the scope of TTIP provisions [...] that have or are likely to have a significant impact on trade or investment between the Parties."[24] This is particularly dangerous because it opens the application of these rules outside of TTIP's scope and to every sector not explicitly excluded in the text. Additionally, they could apply to standards of protection which do not have the same legal basis in the EU and in the US. The right to the protection of personal data, for example, is considered a fundamental right in the EU but only a consumer right in the US. Regulatory Cooperation would allow the US to influence future EU rules in this field.[25]

The Commission has repeatedly stated that EU standards will not be watered down by TTIP. Even if this turns out to be true for measures that are in the final draft of TTIP, regulatory cooperation provisions are likely to have this effect in the future, prejudicing the possibility to adopt new regulations.



22 Art. 7 of the textual proposal on Regulatory Cooperation

23 Art 3, par 1, of the textual proposal on Regulatory Cooperation

24 Art 2, para 2, of the textual proposal on Regulatory Cooperation

25 EDRi, Love food or TTIP, https://edri.org/ttip_factsheet/

23

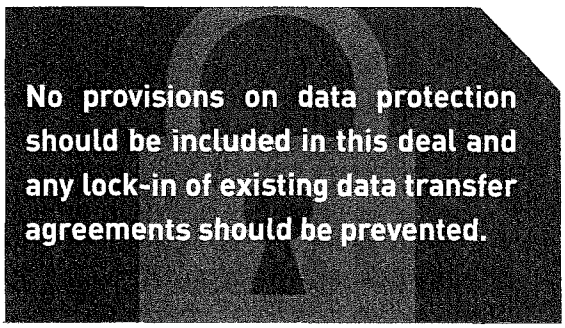
3. TTIP & DATA PROTECTION: SECRETS AND LIES

With the intended chapter on e-commerce, it was clear from the very beginning of the trade negotiations that TTIP would have an impact on the digital sphere. While privacy has been excluded from the EU negotiating mandate, the discussion on "data flows" within the e-commerce chapter necessarily draws privacy and data protection into the discussion.[26]

In December 2014, a leaked e-commerce proposal from the US that was tabled in both TiSA and TTIP revealed provisions that would undermine the protections developed in the EU to guarantee the rights to privacy and data protection, as recognised by the EU Charter of Fundamental Rights.[27] For instance, the US proposal would authorise the transfer of EU citizens' personal data to any country, trumping the EU data protection framework, which ensures that this data can only be transferred in clearly defined circumstances.[28]

For years, the US has been trying to bypass the default requirement for storage of personal data in the EU. It is therefore not surprising to see such a proposal being tabled in the context of the trade negotiations. While the US has been accusing the EU of "data protectionism" through the establishment of data localisation rules, it is important to remind that data *can* be transferred from the EU by developing rules ensuring adequate standards for the protection of data that is being processed.[29] In an attempt to weaken the EU framework on data protection, the US is confusing two different principles - local data protection storage measures and mandatory data localisation practices. While local data protection storage allows transfer of data under clearly defined conditions conditions, mandatory data localisation practices impede the movement of data and can put the fundamental openness of the internet at risk.

In line with EDRi's redlines on TTIP, we restate our view that trade negotiations are not an appropriate forum to discuss measures for the protection of privacy nor a place where to establish new standards.[30]



26 TTIP negotiating mandate from the EU: http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf

27 US proposal in TiSA on e-commerce: https://data.ewp.is/filtrata/2014/12/17/19.html

28 See European Commission page on adequacy mechanisms: http://ec.europa.eu/justice/data-protection/document/international-transfers/adequacy/index_en.htm

29 Obama Calls out European Data Protection as Plain Protectionism, Marketing Research Association, 18 February 2015: http://www.marketingresearch.org/article/obama-calls-out-european-data-protection-plain-protectionism

30 EDRi's Redlines on TTIP: https://edri.org/ttip_redlines/

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4. SURVEILLANCE AND ENCRYPTION: NO TO ENTANGLED ALLIANCES

Surveillance

Since the Snowden revelations, it is clear that the NSA spies on EU diplomats (and everybody else in Europe).[31] Spying on EU diplomats prevents the necessary level playing field for the negotiators and this – as well as the mass-surveillance on EU citizens - undermines the trust necessary to reach a balanced agreement on TTIP.[32]

The European Parliament has been very clear in condemning US mass surveillance. The Resolution of the European Parliament on the NSA surveillance programme states that "as long as the blanket mass surveillance activities and the interception of communications in EU institutions and diplomatic representations are not completely abandoned and an adequate solution is found for the data privacy rights of EU citizens, including administrative and judicial redress, the consent of the European Parliament to the TTIP agreement could be withheld."[33] The Council of Europe adopted a resolution with similar language.[34]

Put simply, if these conditions are not met, there should not be an agreement on TTIP.

Encryption

There are also negotiations on encryption in TTIP.35 Both for our security and our privacy, it is vital to create and use the best level of encryption possible and to keep improving this level. There is an increasing demand to lower encryption standards and/or have "damaged by default" encryption with back-doors for state authorities.[36] Weak and damaged encryption undermine our security. Negotiating standards on encryption in TTIP could lead to creating weak security or a lack of flexibility[37], as these standards might be, due to the inflexible nature of trade agreements, very difficult to improve.

The (digital) security of European and American citizens should not be negotiated upon in a trade agreement. Any form of standardisation of encryption or interoperability of encryption standards leading to a possible lock-in of standards, should be discussed in other fora than a trade agreement.

31 http://www.spiegel.de/international/europe/nsa-spied-on-european-union-offices-a-908590.html

32 https://www.eff.org/deeplinks/2013/07/new-revelations-nsa-surveillance-european-allies

33 Cf. Paragraph 74 of the European Parliament's Resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs. http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0139+0+DOC+XML+V0//EN
This was reiterated by the Parliamentary Committee on Civil Liberties, Justice and Home Affairs (LIBE) in its opinion on TTIP, 7 April 2015 point 1(b): http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-546.558%2b01%2b00%2bDOC%2bPDF%2bV0%2f%2fEN

34 http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=19238&lang=en

35 http://trade.ec.europa.eu/doclib/docs/2014/july/tradoc_152666.pdf

36 http://www.theguardian.com/us-news/2015/feb/23/nsa-director-defends-backdoors-into-technology-companies

37 http://www.brookings.edu/~/media/research/files/papers/2012/8/07%20cyber%20security%20and%20trade%20global%20cohen%20friedman/brookings_cybersecurity_new.pdf

25

5. COPYRIGHT AND OTHER IP RIGHTS IN TTIP: INTERFERENCE WITH THE EU'S DEMOCRATIC PROCESS

EDRi is of the opinion that so-called intellectual property rights (IPR) are fundamentally intertwined with freedom of expression, the right to participate in cultural life and to share in scientific advancement and its benefits,[38] both in substantive legislation as well as in relation to enforcement. For these reasons alone, IPR legislation requires a full and transparent democratic process and should not be negotiated as part of international agreements.[39] It is therefore fundamentally objectionable for IPR reform to be included in TTIP.

From the TTIP negotiation mandate, we do know that so-called intellectual property rights are on the agenda for TTIP. What is also public is the Commission's position paper on the TTIP IPR chapter[40], the US Trade Representative publicly stated goals[41] as well as the Trans-Atlantic Business Council's position paper,[42] which reads like a wish list for anyone that would like to return to a pre-digital age, in which gatekeepers of culture would go unchallenged by modern technology. Examples of these wishes are:

- more direct enforcement;
- more indirect enforcement imposed by liability of intermediaries (such as internet service providers);
- enforcing trade secrets as IPR;
- 'global leadership to combat IPR erosion', which translates as resistance to any attempt to reintroduce balance in currently unbalanced IPR regimes.

After the failure of ACTA, demanding ACTA 2.0 hardly seems like a productive lobbying position.

The Commission's ambitions are more modest and largely focused on geographic indicators, but also include the export of uniquely European problematic aspects of IPR rules, such as levies on broadcast content (with all the accompanying problems of the governance of collecting societies) and the idea that the resale of certain types of artistic works should incur a payment to the original artist (the so-called *droit de suite*). However, it can be expected that there will be pressure on the European Commission to broaden the scope and depth of its ambitions, both from industry and from the USA. A proof of such intentions are emails revealed in the SonyHack leak.[43]

In the European Commission's "factsheet" on IPR and Geographical indicators, we can read that "[i]n TTIP [they] want to raise awareness of the role of IPR in encouraging innovation and creativity". A trade agreement is not a mechanism for raising "awareness" of anything and the idea that TTIP could or should be used to raise awareness of IPR in

38 http://www.un.org/en/documents/udhr/

39 See also this civil society statement: http://www.citizen.org/IP-out-of-TAFTA

40 http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153331.7%20IPR%20EU%20position%20paper%2020%20March%202015.pdf

41 https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-t-tip/t-tip-10

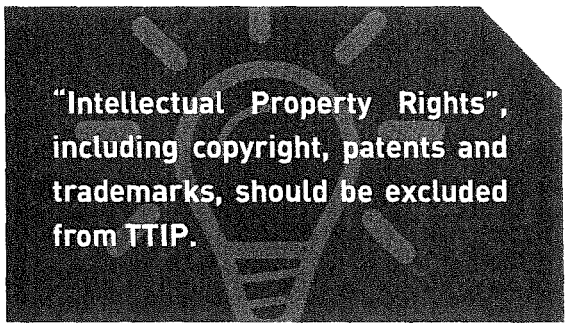
42 https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-t-tip/t-tip-10

43 https://wikileaks.org/sonypress/

26

the USA is laughable. The factual basis for this "encouragement" is also rather difficult to ascertain.[44]

In the Commission's public consultation on copyright reform[45], the vast majority of respondents called for a moratorium on additional enforcement legislation and a focus on readjusting copyright to make it fit for the digital age. It is clear, therefore, that any inclusion of copyright and trade secrets in TTIP would pre-empt the ongoing democratic process in the European institutions and therefore aggravate the already fundamental problem of negotiating IPR as part of a trade agreement.



44 http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153009.7%20IPR.%20de%20.pdf

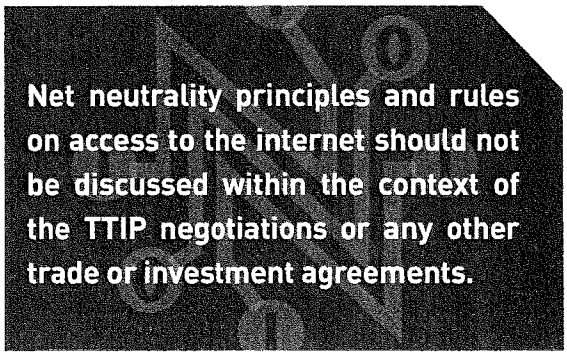
45 http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf

6. TTIP & NET NEUTRALITY: IS THIS THE END OF INTERNET AS WE KNOW IT?

Rules on access to the internet and access to online services are being proposed in the TTIP and the TiSA negotiations.[46]

Net neutrality lies at the very core of the internet's potential for development and the exercise of rights online. According to this principle, all traffic on the internet is treated on an equal basis, no matter the origin, type of content or means of communication. Any deviation from this principle, for instance for traffic management purposes, must be proportionate, temporary, targeted, transparent, and in accordance with relevant laws, including with the letter and spirit of international law. If these criteria are not respected, individuals and businesses face restrictions on their freedoms to receive and impart information. Historically, this type of interference has been imposed by direct intervention in the network through blocking or throttling and, as seen most recently, by agreements between internet access providers and online platforms in the form of paid prioritisation, price discrimination or zero-rating schemes.[47] These new types of restrictions limit user access to a narrow range of services and applications. Users are then delivered access to some, but not all, of the internet — the very opposite of net neutrality. Such practices also limit the market for new online services, reducing incentives to innovate, damaging the internet ecosystem and the economy.

The broad and vague language put forward in the provisions on internet access proposed by the US in the e-commerce chapter would not successfully limit such restrictions, thereby putting at risk the openness that is at the heart of the social and economic benefits of the internet. In the absence of any real possibility of including text that would ensure networks stay open, competitive and innovative, the addition of net neutrality provisions carries possible costs but no possible benefits.



46 US proposal in TiSA on e-commerce: https://data.wp.nl/illtrata/2014/12/17/19.html

47 Access' policy brief on zero rating: https://accessnow.org/page/-/Access Position-Zero-Rating.pdf

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7. ISDS: INCOMPATIBLE WITH DEMOCRATIC RULE OF LAW

TTIP could include an investment protection chapter, which would provide foreign investors with special rights. That chapter would include provisions for a dispute settlement mechanism between foreign investors and a state. That mechanism is the so-called "ISDS", which stands for Investor-to-state dispute settlement.

ISDS would give foreign investors - and only foreign investors - the right to bypass local courts and challenge governments' decisions before supranational investment tribunals. The essence of ISDS is to implement a structural and explicit discrimination against local investors, governments and citizens in order to "solve" a problem that does not exist in countries with developed legal systems (like the EU and USA) – an inability to protect foreign investors from incidental discrimination.[48]

ISDS lacks institutional safeguards for independence, such as tenure, fixed salary, neutral appointment of adjudicators, and prohibition of outside remuneration. Only foreign investors can start cases; arbitrators have an incentive to favour foreign investors, as this will attract new cases. In addition, ISDS offers procedural advantages to the USA. For example, in all (currently 73) annulment procedures (the only form of appeal possible), the president of the World Bank appointed all three the arbitrators. The president of the World Bank has always been the candidate of the US.[49]

Democratic states can change laws if courts use unacceptable interpretations. In contrast, to change a treaty, all parties have to agree. ISDS in agreements with Canada and the US would lock the EU into a mechanism that is systemically biased towards investors and the US, as it is practically impossible to withdraw from trade agreements. ISDS poses specific problems for digital rights, as ISDS tribunals rule on intellectual property rights cases and may decide cases on data flows and privacy issues.

Most importantly, ISDS is not essential. Major international investments are almost always accompanied by contracts negotiated between governments and the investor, often including their own dispute settlement mechanisms that are tailored to the situation. Investors also have the option to take out political risk insurance and, overall, local courts and state-to-state arbitration adequately complement the above-mentioned negotiated contracts.

No form of ISDS should be accepted.

48 http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2015/04/30/Editorial-Opinion/Graphics/oppose_ISDS_Letter.pdf
49 http://blog.ffii.org/white-house-defends-isds/

8. A HUMAN RIGHTS CLAUSE MUST BE MEANINGFUL

The European Commission started discussing the necessity of a standard Human Rights clause in trade agreements in the late 1970s and 1980s[50] and these have been included since the 1990s.[51] However, they usually lack of enforcement measures or binding effects. For instance, the EU-Canada Comprehensive Economic and Trade Agreement (CETA) consolidated text published on September 2014[52] refers only to the importance of Human Rights in the preamble and occasionally refers to them, with no apparent real applicability by any of the Parties to the agreement.

TTIP and all trade agreements need a human rights clause, but not *any* Human Rights clause, as no trade agreement should obstruct states in their respect and enforcement of human rights. Instead, any trade agreement should contain a binding, enforceable and suspensive Human Rights clause to promote and ensure their respect. But what does this mean? In short, and in accordance with EDRi's red lines[53], we believe TTIP should contain a Human Rights clause, including:

- confirmation of state obligations under the Universal Declaration of Human Rights and other relevant Human Rights instruments;
- assurance that no obligation arising from TTIP would in any way alter the Parties' obligations to respect and protect fundamental rights and freedoms;
- an exception for the Parties to the agreement, permitting them to suspend their obligations arising from TTIP if evidence shows fundamental rights have been breached;
- a mechanism establishing a periodic human rights impacts assessment, to be conducted jointly by the US Congress and the European Parliament;
- a mechanism for bringing complaints before national courts;
- assurance that citizens will have, as an absolute minimum, equality with businesses before the law;
- non-discrimination on the basis of citizenship in any matter related to public order, national security, crime or other public interest grounds;
- an accessible mechanism to impose sanctions when fundamental rights and standards are abused, after dialogue or mediation have been exhausted.

50 Bartels, L., A Model Human Rights Clause for the EU's International Trade Agreements, German Institute for Human Rights and Misereor, 2014, available at http://ssrn.com/abstract=2406852

51 The first one was in the 1990 EC-Argentina cooperation agreement. Cf. Ibid.

52 http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf

53 EDRi's red lines on TTIP: https://edri.org/ttip_redlines/

CONCLUSION: TTIP AND DIGITAL RIGHTS

Throughout this booklet, we demonstrated the dangers of including certain provisions in trade and/or investment agreements that may lead to undesired outcomes - to the detriment of EU and US citizens. Ultimately, there is one important question negotiators, policy makers and the public opinion should ask themselves: how can digital rights be respected?

What is needed in TTIP

- Negotiations open to the public and subject to accountability
- Rule of law and the right to regulate
- Exclusion of rules on data protection or privacy
- Exclusion of lock-in of encryption standards; end of mass surveillance programmes
- Exclusion of IPR
- Exclusion of net neutrality
- Exclusion of ISDS out of all trade and investment agreements; thereby respecting the 97% negative responses to the European Commission's public consultation
- Binding and enforceable human rights clause

What is NOT needed in TTIP

- Secrecy, lack of accountability or democratic scrutiny
- Chilling effects on decision-making and public policies
- Restrictions to the fundamental rights to privacy and data protection; lock-in of existing data transfer agreements
- Restrictions to the fundamental right to privacy
- ACTA/SOPA/PIPA II
- Breaches to net neutrality, discriminating traffic on the basis of origin, destination or type of data
- Failed efforts to fix the fundamentally flawed and unnecessary mechanism of ISDS
- Mere references to human rights which would not be enforceable

TTIP would set a precedent in the digital rights sphere

The conclusion of the agreement may be jeopardised and we will fight!

What outcome do the EU and the US want in TTIP?

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Transatlantic Investment Treaty Protection – A Response to *Poulsen, Bonnitcha and Yackee*

Freya Baetens

Paper No. 4 in the CEPS-CTR project "TTIP in the Balance" and CEPS Special Report No. 103 / March 2015

Abstract

An investment chapter in TTIP offers an unprecedented opportunity to reform and improve the system of investment law. If the EU and the US seize this opportunity, it would set an important precedent in treaty-drafting, allowing for the incorporation of public policy objectives, thereby protecting states' right to regulate. Ultimately, this type of concerted strategy is likely to be far stronger than the individual country strategy necessitated by the present system of over 3,000 bilateral treaties. The most important conclusion that should emerge from current discussions is that that there is a need for correct, timely and complete information for law- and policy-makers as well as the broader public, in relation to international investment law and procedures for investor-state dispute settlement (ISDS).

This paper is the fourth in a series produced in the context of the "TTIP in the Balance" project, jointly organised by CEPS and the Center for Transatlantic Relations (CTR) in Washington, D.C. It is published simultaneously on the CEPS (www.ceps.eu) and CTR websites (http://transatlantic.sais-jhu.edu). For more information about the project, please see the penultimate page of this paper.

The views expressed in this report are those of the author only and do not necessarily represent those of CEPS, CTR or the institutions with which she is associated.

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Freya Baetens*

Paper No. 4 in the CEPS-CTR project "TTIP in the Balance" and CEPS Special Report No. 103 / March 2015

This paper is intended as a response to the thought-provoking paper of Lauge Poulsen, Jonathan Bonnitcha and Jason Webb Yackee, focusing on some of their findings that are open to discussion and structuring the arguments made below along the lines of their paper. As such, the present paper does not intend to raise any new topics in this debate but serves only as a response to the original paper.

1. Introduction

A number of preliminary comments apply to the *Poulsen, Bonnitcha and Yackee* (2015) paper as a whole: firstly, while its focus on investor-state dispute settlement (ISDS) is valid, it is important to keep in mind that there is more to the investment chapter in TTIP than solely its dispute settlement clause. As such, it would be productive for future work to address how the bulk of the investment chapter, namely its substantive standards, could be improved upon. Secondly, the authors chose not to cover pre-establishment national treatment – a regrettable exclusion, as this might well be included in the final text of the agreement, following the US approach in its other investment treaties. Furthermore, the authors' assumption that post-establishment investment protection will be enforceable by way of ISDS is not necessarily correct, in light of the ongoing debate of the issue, and as such it would have been interesting to conduct a cost-benefit analysis of investment protection in TTIP *without* an ISDS clause, if only to assess whether this is a viable option.

2. Treaty provisions: The likely content of the 'I' in 'TTIP'

Poulsen, Bonnitcha and Yackee offer an overview of US practice in negotiating investment treaties, for example drawing attention to the prudential measures taken to ensure its ability to regulate the finance sector, but also including references to safeguard domestic labour laws and the environment in order to preserve the host-state's policy space. Another pertinent example is the manner in which the 'minimum standard of treatment' is defined in Annex A of the US model BIT as "the customary international law minimum standard of treatment of aliens". However, one aspect of this practice – relevant when it comes to assessing the legitimacy and desirability of such treaties – is *not* mentioned, namely the fact that the US has been among the first states to include provisions concerning an ISDS appeals mechanism in several investment agreements (Annex 10-H of the US-Chile FTA, Annex 10-F of CAFTA, and the 2012 US model BIT). Admittedly, none of these proposals has yet materialised, but the foundation stones have been laid, making clear that the US is open to creating such a mechanism.

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One further aspect of US practice – the transparency of ISDS proceedings as for example adopted in NAFTA Chapter 11 disputes – is only cursorily mentioned. However, this increased level of transparency might prove vital in the future, as "justice should not only be done: it must also be seen to be done", and this will contribute to the legitimacy of the entire ISDS process.

3. Potential benefits of ISDS

Poulsen, Bonnitcha and Yackee note that the benefits of TTIP could materialise in two possible ways: firstly, by promoting US investment in the EU; and secondly, by protecting EU investment in the US.

3.1 Protection of US investment in the EU

On the question of whether TTIP – or any other investment agreement – will promote US investment in the EU, the authors argue that past practice has shown that investment treaties with investment protection chapters have negligibly (or not at all) affected investment flows. As such, TTIP would not provide much benefit to the EU in terms of higher investment rates by the US, as the region is already considered 'safe' from the perspective of US investors. However, this argument is made on the basis of limited empirical evidence, and such evidence often cuts both ways: for every study that claims that there is a significant economic benefit that can be gained by the inclusion of an investment chapter,[1] another can be found that says that this is not the case.[2]

In any event, just because there may be no impressive increase in FDI as a result of the conclusion of a BIT, this does not mean that BITs are valueless. They may not be a direct gateway to massively increased investment rates, but rather a tool that is considered by a given company as part of its investment strategy. Ultimately, a company's decision to invest in a country will be based upon a range of factors about the country or region in which they are seeking to invest, of which the availability of ISDS is one, serving as a "confidence and credibility-inspiring signal".[3]

There are several other aspects of this discussion that merit further mention. Firstly, *Poulsen, Bonnitcha and Yackee* argue that the types of risks an investment protection chapter would cover are generally not considered present in most EU member states. However, one type of risk that is certainly present in several EU member states relates to the possibility of not being granted a fair trial before a domestic court. According to a recent country ranking of 'judicial independence' performed by the World Economic Forum,[4] some EU countries are among the best in the world (Finland and Denmark are in the top five), but others perform rather poorly (Slovakia ranks at 130 out of 140, Bulgaria at 126) – at place 30, the US is still below countries with which ISDS is planned to be concluded, such as Canada (place 9) or Singapore (at 20), or with which it can be expected to be concluded, such as Uruguay (at 21) or Saudi Arabia (at 26). The extensive jurisprudence of the European Court of Human Rights shows that some EU

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[1] See e.g. Sauvant & Sachs *(2009);* UNCTAD (1998), Banga (2003), Tobin & Rose-Ackerman (2006), Salacuse & Sullivan (2005), Neumayer & Spess (2005), Aisbett (2007) and Busse et al. (2008).

[2] See e.g. Hallward-Driemaier (2003), Tobin & Rose-Ackerman (2003) and Gallagher & Birch (2006).

[3] Interview with Eric Neumayer, Kevin P. Gallagher and Horchani Ferhat at www.iisd.org/itn/2009/04/30/do-bilateral-investment-treaties-lead-to-more-foreign-investment/;

[4] See http://reports.weforum.org/global-competitiveness-report-2014-2015/rankings/

member states such as Italy, France and Germany have repeatedly violated Article 6 of the European Convention on Human Rights through their inability to provide a hearing and/or a decision within a 'reasonable time'.[5] This also shows why investors may prefer international arbitration: in the large majority of cases, a final decision will be rendered much sooner than if such disputes were to be decided through the domestic court system.

Secondly, the authors mostly focus on whether US or Chinese investors consider the EU a safe place to invest, but do not address whether the converse is true.

Thirdly, *Poulsen, Bonnitcha and Yackee* rely upon a 2010 survey of legal counsel within the 100 largest American multinationals in order to underscore their argument that investment treaties have little impact on investment flows, given that the majority of counsel stated that these treaties did not play a (critical) role in their decisions to invest abroad. However, the ISDS system is not employed to a great extent by the large multinationals, but rather by middle-sized or smaller ones. An OECD survey concluded that 22% of all ISDS claims are brought by individuals or "very small corporations".[6] Medium and large multinational companies account for 50% of the claims, and the rest of the cases (28%) were brought by investors about which there is little public information. The fact that larger companies do not rely as frequently upon ISDS as one might expect due to their relative size, is arguably because the largest companies have other means of leverage, and thus do not need to resort to the courts in order to achieve their goals.

This author agrees with *Poulsen, Bonnitcha and Yackee* that, in Europe, BITs have not been widely publicised or 'politicised' – at least not until quite recently. It is important that the public is informed of the role that BITs play in the international realm, as the current level of knowledge about these instruments – even amongst media and NGOs claiming to specialise in this area – is shockingly low. This is dangerous because they play such an important role in informing civil society – as was evident by their impact on the recent consultation of the European Commission. There, many of the replies to the survey circulated by the Commission indicated fears that ISDS inclusion in TTIP would place too great a limit on states' policy space. However, the majority of these replies "were based on copy-and-paste templates circulated by non-governmental organisations campaigning against TTIP",[7] much like pressing a 'dislike' button on Facebook or signing an online petition, without the need for any actual knowledge or substantiated contribution to the debate. Such tactics are not new; they were applied by Philip Morris in order to allege that public opinion was against the EU Tobacco Products

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[5] See, e.g. landmark cases: *H. v. France*, 24 October 1989, Series A no. 162-A; *X. v. France*, 31 March 1992, Series A no. 234-C; *Caloc v. France*, no. 33951/96, ECHR 2000-IX; *Kress v. France* [GC] no 39594/98, ECHR 2001-VI; *Frydlender v. France*, [GC] no 30979/96, ECHR 2000-VII; *Katte Klitsche de la Grange v. Italy*, 24 October 1994, Series A, no 293-B; *Scordino v. Italy (no. 1)* [GC] no 36813/97, ECHR 2006-V; *Capuano v. Italy*, 25 June 1987, Series A no. 119; *Bottazzi v. Italy*, [GC] no 34884/97, ECHR 1999-V; *Di Pede v. Italy*, 26 September 1996, ECHR 1996-IV; *Vocaturo v. Italy*, 24 May 1991, Series A no. 206-C; *Cappello v. Italy*, 27 February 1992, Series A no. 230-F; *Fisanotti v. Italy*, 23 April 1998, ECHR 1998-II; *Bock v. Germany*, 29 March 1989, Series A no. 150; *Pammel v. Germany*, 1 July 1997, ECHR 1997-IV; *Probstmeier v. Germany*, 1 July 1997, ECHR 1997-IV; *Sürmeli v. Germany*, [GC] no 75529/01, ECHR 2006-VII; *Blake v. UK*, no 68890/01, 26 September 2006; *Robins v. UK*, no. 22410/93, 23 September 1997; *H. v. UK*, 8 July 1997, ECHR 1997-VIII. For a more complete overview see European Court of Human Rights, *Guide to Article 6 – Right to a Fair Trial* (2013) p. 51 et seq.

[6] OECD (2012), "Investor-State Dispute Settlement", Public Consultation Document, p. 16 (www.oecd.org/investment/internationalinvestmentagreements/50291642.pdf).

[7] C. Olivier, "Public Backlash Threatens EU Trade Deal with the US", *Financial Times*, 13 January 2015.

Directive[8] – an example which suggests that mass automatic replies ought to be interpreted cautiously.

3.2 Protection of EU investment in the US

Turning to the second strand of *Poulsen, Bonnitcha and Yackee*'s argument – whether TTIP will protect EU investment in the US – several comments can be made. The authors argue that TTIP is unlikely to improve the situation for EU investors in the US, because, in general, the protection level of foreign investors in the US is already high, and TTIP will not offer much additional protection. In general, it is indeed true that there is no evidence of systematic, serious flaws in the US system. But do *Poulsen, Bonnitcha and Yackee* mean to state that domestic courts should deal with all private claims in countries where the rule of law is strong, to the exclusion of international judicial review?

Following this line of reasoning to its logical conclusion, they should in that case also be advocating the abolishment of the various regional courts for human rights as the legal systems of the European member states and the US already contain strong human rights protection. The only difference would be that the European Convention on Human Rights for example, does require applicants to exhaust local remedies – as a result, there can easily be 10-15 years or more between the injury and the remedy. However, an argument could be made for allowing a state to first attempt to address a violation in relation to a protected investment via its own court system and only if this does not result in an appropriate solution within an acceptable time frame (for example, two years after bringing a claim), the investor could revert to an international tribunal. This option is further discussed below, in the Conclusions.

To state that domestic courts should 'suffice' for the handling of investment claims overlooks the fact that many domestic courts are not allowed – meaning that it is not within their legal scope of jurisdictional competence – to apply public international law, such as BITs, directly. Moreover, US courts that are in theory allowed to do so have a track record of nevertheless not accepting any claims of individuals based on any form of international law.[9] (Indeed, the same is true in Europe.[10] For example, on 13 January 2015, the Grand Chamber of the European Court of Justice held, inter alia, that the NGO *Stichting Natuur en Milieu* was not entitled to invoke the Aarhus Convention of 1998 on access to information, public participation, and access to justice in environmental matters, in spite of an explicit reference in the EU regulation implementing this Convention.[11] Importantly, this was decided upon at the request of the European Commission, Council and Parliament – some members of which are now arguing that investment protection standards in international treaties should be enforced by domestic and EU courts. Why would private investors be allowed to rely upon international treaties before such courts, while NGOs are not?)

Hence stating that "the appropriate response by the EU would be to insist in its negotiations that the US pass implementing legislation securing a right to access US courts for certain TTIP violations", as *Poulsen, Bonnitcha and Yackee* do, shows a lack of knowledge about US

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[8] See e.g. article at: www.theguardian.com/society/2013/jun/07/tobacco-firm-stealth-marketing-plain-packaging

[9] See e.g. Haljan (2014), Wojcik (2013) and Hix (2013).

[10] See Bronckers (2015).

[11] Joined cases C-404/12 P and C-405/12 P, *Council of the European Union and European Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, Judgment of the Court (Grand Chamber) of 13 January 2015, not yet published (Court Reports - general).

negotiation policy and the actual practice of domestic courts. Looking at US practice concerning domestic enforcement of individual rights under international treaties,[12] it is highly unlikely that the US would ever agree to pass legislation that would make substantive treaty standards domestically enforceable. For example, the US only ratified the International Covenant on Civil and Political Rights on the condition that its standards would not be enforceable before US courts.[13] In practice, if substantive protection for investors is included in TTIP, the only option of redress for violations of such standards would be through some form of international dispute settlement mechanism.

Another common misconception is that investment arbitration is consistently more expensive than national court proceedings; this is not necessarily the case. *Poulsen, Bonnitcha and Yackee* argue that "it is impossible to say whether investor-state arbitration is more cost-effective than resolving disputes through national court proceedings in the absence of significantly more comprehensive evidence than is currently available". But they proceed to examine precisely that question, making four points. First, EU countries will need to maintain court systems regardless of whether they agree to ISDS. That may be so, but referring more cases (and in particular, more complex cases concerning matters in which domestic judges are not specialised) to domestic courts, already overburdened and prone to delays, is not an obvious remedy.

Secondly, it is true that the parties' legal and witness costs constitute the vast majority of costs associated with investment treaty arbitration (although tribunal costs are not negligible either). For this reason, the 'loser pays' principle, whereby the claimant who brings a manifestly unfounded claim has to reimburse the state's legal and witness costs, would form a valuable safeguard – one that cannot be offered under most domestic court systems (including the US). In *Chemtura*, to take a salutary example, the unsuccessful claimant was ordered to pay Canada's costs, including an allowance for the time invested by government officials in preparing Canada's defence.[14] Other cases in point are *ADC v Hungary, Plama v Bulgaria, Europe Cement v Turkey,* and *Gemplus v Mexico*.[15]

Thirdly, arbitrators who are specialised in the interpretation of 'vague and imprecise' standards should have less trouble deciding the factual and legal questions in an investment dispute than local judges would have who would be called upon to decide such cases (particularly if investment standards would be 'copied and pasted' into national legislation, as the authors seem to envisage). This is not to say that some investment standards such as 'fair and equitable treatment' or 'indirect expropriation' as such would not benefit from the incorporation of more clearly defined standards. Additionally, if treaty standards would have to be implemented in national legislation, this risks exacerbating interpretation problems due

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[12] See Powell (2001, p. 245); Roth (2001, p. 891); Spiro (1997, p. 567); Kaye (2013, p. 95).

[13] International Covenant on Civil and Political Rights, adopted 16 December 1966, S. Exec. Doc. E, 95-2 (1978) 999 UNTS 171, ratified by the US 8 June 1992.

[14] *Chemtura Corporation v. Government of Canada,* UNCITRAL (formerly *Crompton Corporation v. Government of Canada*) 2 August 2010.

[15] *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary,* ICSID Case No. ARB/03/16, 2 October 2006; *Plama Consortium Limited v. Republic of Bulgaria,* ICSID Case No. ARB/03/24, 27 August 2008; *Europe Cement Investment & Trade S.A. v. Republic of Turkey,* ICSID Case No. ARB(AF)/07/2, *13 August 2009; Gemplus S.A., SLP S.A., Gemplus Industrial S.A. de C.V. v. The United Mexican States,* ICSID Case No. ARB(AF)/04/3 16 June 2010.

to the well-known problem of translation differences across the EU.[16] The same standard in Portuguese, for example, may be interpreted by local courts as meaning something different in Latvian - thereby nullifying the stability and predictability that a uniform treaty could bring.

Finally, in the majority of cases, arbitral proceedings offer a complete and final resolution of a dispute. Under any ISDS system, except the one set up by International Centre for Settlement of Investment Disputes (ICSID), annulment and appeal are not possible. The ICSID system cannot be included in TTIP because the EU, as a regional organisation is not, and cannot, be a member of the Convention; but even if it were, its annulment procedure is intended to be rare and limited to five strictly defined grounds,[17] unlike an appeal before a national court which reviews the entire case. In most countries, even an appeal is not the end of the dispute: there is a possibility to ask for a third consideration of the case before a supreme court or court of cassation. Furthermore, arbitral awards and national court decisions alike can subsequently be subjected to review as soon as the claimant attempts to enforce them in a different country - so there is no difference in this regard. Admittedly, annulment procedures have become more frequent in recent years and as the European Commission proposal for TTIP is putting forward the inclusion of an appeal mechanism, the gap in time and cost is, in this respect, narrowing.

4. Potential costs

In their fourth section, *Poulsen, Bonnitcha and Yackee* posit that the costs of the agreement significantly outweigh any possible benefits to the EU in general. However, this argument is not systematically supported by evidence and appears to be based on a number of challengeable extrapolations. Firstly, they argue that the likelihood of claims against the EU can be expected to increase roughly in proportion with the size of the investment stock in the EU covered by the treaty, but do not properly underscore why this would be this case. The authors make a number of further claims in their paper, without specifying how they arrived at or calculated them, such as the fact that a great number of investment projects are of sufficient size to make the economics of an investment claim viable in theory; or that, with respect to sectors, US companies have made significant investments across virtually all sectors of the EU economy.

They also state that an investment treaty with the US would be disadvantageous given that 'American' investors tend to be the most litigious. This statement is, however, outdated; in 2013, it was investors from the Netherlands, Germany, Luxembourg and the United States that brought the largest number of claims. This also corresponds with overall trends throughout the history of ISDS.[18] By the end of 2013, US investors had brought 125 claims against states, followed by the Netherlands (61), the United Kingdom (42) and Germany (39). Comparing US investor claims to all EU investor claims helps put this hypothesis into perspective - six of the top ten home states for investors are member states of the European Union, which have brought a total of 225 claims.

[16] See for example, Kunnecke (2013, pp. 243-260) and Pozzo (2006).

[17] Article 52 of the ICSID Convention.

[18] Tietje & Baetens (2014, p. 26).

Poulsen, Bonnitcha and Yackee note that there remain several important factors that would increase the risk of adverse awards, one of which is the fact that certain important terms within investment law remain undefined (such as 'fair and equitable treatment') and are thus capable of being interpreted expansively by an arbitral tribunal in a manner unfavourable to the EU. Whilst this is true, one must pause to consider the other alternative: would this situation not be as bad if such treaty provisions were to be interpreted by various domestic courts?

The mere fact that arbitral tribunals have significant discretion to interpret the terms of investment law should not be an argument against the conclusion of an investment treaty, as this role is also performed by domestic judges – interpretation is what adjudicatory bodies do for a living. Another option would be through state-to-state dispute settlement, i.e. espousal of investors' claims by their home state. However, it was precisely to prevent the problems arising from the essentially political and arbitrary character of espousal that ISDS procedures as well as human rights adjudicatory bodies were created, establishing private standing for injured individuals.

Poulsen, Bonnitcha and Yackee furthermore argue that the legal costs of investment disputes are disproportionately high, even if the respondent state 'wins' the case. As stated above, several tribunals have recently adopted some form of the 'loser pays' approach, ordering the losing party not only to bear all arbitration costs of an adverse award, but also to make a substantial contribution to the winning party's legal fees – in particular when a case concerns a frivolous claim. This approach has also been taken in the discussions surrounding the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, where frivolous claims can be terminated at an early stage in proceedings, and generally the unsuccessful party is required to cover all the costs made in the process of a case.[19] Ultimately, even if the costs of ISDS are considered too high, there are ways of lowering them. One could think of negotiating the fees with the registry office and arbitrators, or capping lawyers' fees and negotiating an hourly rate – given that the market for arbitrators and lawyers is sufficiently saturated in order to survive a payment cap.

Two risks are raised as possible political costs of TTIP: i) the risk of reduced policy space, and ii) the risk of controversial claims or adverse awards. Particularly the first emerged as one of the main grounds of concern in the results from the recent consultations on TTIP conducted by the European Commission. The results from these consultations indicated that one of the most prevalent fears amongst respondents was the perceived negative effects that the inclusion of ISDS in TTIP would have on national sovereignty.[20]

Essentially, all obligations that a state undertakes, 'limit' its policy space: promising to do A, may affect how one can do B. Also, governments will not infrequently wait with the enactment of new legislation until the result of a domestic or EU court case emerges, the same as if a state would postpone a certain measure pending the outcome of an arbitral award. Investment claims are mostly brought against executive decisions made with respect to one particular investor or in the context of a particular concession, permission or promise granted to an investor, *not* against legislative acts (with a limited number of notorious exceptions). When looking at all ISDS disputes, the respondent states have *won* in approximately 60% of the cases.[21] In the few cases where claims have been brought against acts of legislation, the investor quasi-invariably ended up on the losing side, as tribunals recognised and protected the policy

[19] Kuijper (2014, p. 111).

[20] C. Olivier, "Public Backlash Threatens EU Trade Deal with the US", *Financial Times*, 13 January 2015.

[21] Tietje & Baetens (2014).

space and the right to regulate of the respondent state.[22] As such, the inclusion of ISDS would not threaten or reduce policy space, because most arbitral awards would not encroach upon it.

An example of this was the *Vattenfall/Germany* arbitration, where the government first granted licenses to a coal plant (which resulted in the awarding of voluntary damages to the investor) and for a nuclear plant (of which the case is still pending), and subsequently retracted these licences.[23] These cases have not had a measurable impact on Germany's environmental regulations – only on the procedures followed with regards to transparency in the decision-making process (benefitting not only investors but also other stakeholders), as well as the fact that 'disclaimers' are now incorporated into any licenses granted by the state; such developments could hardly be seen as negative. Even if there is an adverse award, one must recall that the state will *not* be forced to make any changes in policy: a tribunal can only require a state to pay appropriate damages to the individual investor, and investors usually receive much less compensation than what they asked of the tribunal (as the authors show). Ultimately, the fear of regulatory chill expected from the inclusion of ISDS, due to which states allegedly would refrain from adopting certain legislative, executive or administrative acts, has not been empirically (beyond the mere anecdotal or purely hypothetical) established.[24] In other words, there is no scientific ground to assume there would be more regulatory chill because of the risk of ISDS cases, than there is based on the looming possibility of domestic court cases.

Furthermore, the apparent widespread fear of ISDS inclusion in TTIP might appear more endemic than it actually is, when one takes into account that many of the negative responses to the consultations that vocalised this fear "were based on copy-and-paste templates circulated by non-governmental organisations campaigning against TTIP", as stated above.[25] Similarly, with regard to the risk of controversial claims, public controversy also surrounds domestic court decisions. One would be greatly pressed to prove that the societal impact would not be demonstrably greater than a 'notorious' case at the national level. If fears still remains that ISDS inclusion will limit policy space to too great an extent, the stakeholders could opt to include "*an express general clarification in TTIP and other investment treaties that foreign investors should get the same high levels of protection as domestic investors receive in domestic law, but not higher levels of protection*".[26] They could also make explicit statements that the treaty is not to impinge upon the good-faith exercise of public policy objectives by the state; such statements would need to be taken into account by arbitral tribunals in their interpretation of the relevant investment agreement.[27] Another option, would be to restrict ISDS access for the more controversial issues which are related to the exercise of public policy objectives of the State, such as *bona fide* environmental measures.[28]

Poulsen, Bonnitcha and Yackee posit that it is unlikely that TTIP will change much of the already close relations between the EU and the US, nor would it, they argue, make it more likely that

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[22] Tietje & Baetens (2014, p. 47).

[23] Tietje & Baetens (2014, p. 103).

[24] Tietje & Baetens (2014, p. 48).

[25] C. Olivier, *Public Backlash Threatens EU Trade Deal with the US*, Financial Times, 13 January 2015; see also www.vieuws.eu/eutradeinsights/exec-to-struggle-for-way-out-of-controversy-after-release-of-isds-consultation-results/

[26] Kleinheisterkamp & Poulsen (2014).

[27] Kuijper et al. (2014, p. 42).

[28] Kuijper et al. (2014, p. 87).

China and India would enter into an investment treaty with the EU. The US and the EU member states have to date concluded many more BITs with developing than with developed countries. It is important to keep in mind the signal that might be sent out if the EU somehow refuses to incorporate ISDS into TTIP, given that "*the EU has 1,400 bilateral ISDS agreements … Rejecting ISDS completely would open up European countries to a charge of double standards in that they are seeking to deny US companies the same safeguards that their businesses enjoy*".[29] Apart from being a potentially detrimental starting position in further treaty negotiations, this is ultimately sending out a signal of distrust and inferiority towards developing states, forming a strong and, in this author's opinion, highly unfortunate reminiscent of certain colonial attitudes.

5. Conclusion

Four possible alternatives to the inclusion of ISDS in TTIP are frequently mentioned. The first would be to opt for state-to-state arbitration. However, such an option would hardly be preferable, as it will invariably politicise a dispute and blow it far out of proportion, potentially influencing the international relations between states as a whole. As these cases are not actually located at the inter-state level, they should not be framed as disputes between states. In order for such cases to proceed to the inter-state level, investors would need to rely upon diplomatic protection, which is sporadic, arbitrary in its incidence and prone to politicisation, as there is no control over the process or any form of remedy for the individual whose claim is espoused. Furthermore, the decision whether to espouse a claim is often not taken on legal grounds but is rather dependent upon other factors such as the relative size of a state and potential need for foreign aid. As such, espousal of claims has rightly been superseded by investment protection and human rights law.

A second option would be for the home state to be able to block any claims brought by investors. Some of the problems of this second approach could be mitigated by allowing the home state to be a third-party intervener – which is perhaps a route that could still be explored.

The third option would be to require the exhaustion of local remedies before allowing a claim to be brought under ISDS. However, the problem with this is that the amount of time and costs required are significantly higher for all parties involved. A possible solution to such issues would be to rely upon 'fork-in-the-road' clauses (where the investor has to initiate national court proceedings or international arbitration, but not both). Also, one could establish mediation as a mandatory precursor or alternative to ISDS proceedings.

Another possible solution would be to adopt a fixed or elastic time period for pursuing local remedies. The latter could be based on a "third-party index measuring the potential of domestic courts to produce effective solutions to claims of remedies rule". The more such an index would indicate that a domestic court system is 'reliable', the greater emphasis would be placed upon domestic courts being the first port of call, as opposed to other, more internationalised paths to dispute resolution.[30] Other potential procedural safeguards could include protection against frivolous claims, by virtue of offering tribunals a way to reject manifestly unfounded claims at a preliminary stage or by forcing a frivolous claimant to pay

[29] C. Olivier, "Public Backlash Threatens EU Trade Deal with the US", *Financial Times*, 13 January 2015.

[30] Kuijper et al. (2014), p. 44.

not only its own legal costs but all costs of the proceedings and potentially the legal costs of the respondent also.

The fourth, and ultimately most honest option, would be to exclude substantive investment provisions from the agreement entirely. If TTIP is to include a right, there should also be a remedy for violations of that right; if one is to take away the remedy of ISDS, then it is better not to grant the right.

One final issue that was raised during the discussion of the paper at the Brussels Conference in 2014 was the question of whether a standing court for investment claims would be preferable over an *ad hoc* method of procedure, as is currently the case. Poulsen (presenting the paper) argued in favour of the former and this author recognises the merits of such argument – in part because of the aversion the term 'arbitration' seems to provoke among the general public. However, some important problems remain. Crucially, there is no single legal instrument giving jurisdiction to a single court, but instead there is a network of BITs. As such, to argue in favour of a standing court raises the issue of how one could confer competence upon such a court – or would the idea be to create a standing court for each and every treaty the EU concludes? In the latter case, possibly the TTIP Court could serve as a model court for subsequent treaty partners. Further potential problems would arise in the appointment of the judges to the Court – who is to be appointed, and what would happen if the integrity of a judge is called into question? Such problems could be solved by careful treaty drafting.

However, at present it seems unrealistic to hope for the creation of an overarching international investment organisation with a separate dispute settlement body, such as the WTO. Both options – a standing court or a permanent international organisation – have been tried and failed, notably in the case of the Multilateral Investment Agreement and the International Trade Organisation, which was to be established by the Havana Charter. Ultimately, the issue with ISDS, as often becomes clear in heated public discussions, is that certain segments of civil society simply do not want 'foreigners' to examine the legality of state actions – whether this examination is done by a standing or *ad hoc* body could be seen as being of little import, in the broader scheme of things.

Poulsen, Bonnitcha and Yackee distinguish broadly two camps in the discussion surrounding ISDS in TTIP: those who see its inclusion as an unmitigated good, and those who see it as the exact opposite. But there remains a large number of scholars who choose the middle path, arguing that the system currently catering to the settlement of investment disputes needs to be reformed but that the risks of ISDS inclusion are overestimated. The present author would see herself in the last category, based on her view that domestic law *does* sufficiently protect investors most of the time and that domestic courts *do* a good job at applying the law in most disputes. As is the case for the European and American Conventions on Human Rights and their respective courts, investment law and its international enforcement (whether by means of arbitration or a new court) should serve only as a safety net, to provide a remedy in those cases (no doubt rare but by no means unknown) where the domestic system has not been able to provide a fair remedy.

It is necessary that, in the future, investment disputes are depoliticised, and that a general international standard of treatment is established. Much work remains; one can think of further defining and limiting of the scope of application of investment law, so that not all and sundry qualifies as an investor; or further definition of the scope of the more vague standards of protection, such as fair and equitable treatment and indirect expropriation. There is a need to incorporate more justifications for state action with regard to environmental, health and labour issues; the inclusion of an appeals system within the ISDS framework; greater

transparency, or a review of the methods to calculate damages. Unfortunately, few of these issues are discussed in *Poulsen, Bonnitcha and Yackee's* paper.

There are many ways in which safeguards could be built into the arbitral process, in order to refine the current procedures and make them more amenable to those stakeholders currently opposed to ISDS inclusion. Firstly, with regards to transparency, one can think for example of the publication of information about the dispute at hand; whilst final awards are in the large majority of cases already in the public domain, further actions can be taken, such as allowing open hearings, or making written submissions and evidence publicly accessible online (where the information concerned is not classified information or confidential business knowledge, as determined by the tribunal). Secondly, there should also be an active role given in proceedings to other states that are parties to the treaty, as well as third-party stakeholders, such as NGOs, industry groups, or international and regional organisations. Furthermore, it would be desirable to establish a code of conduct with clear disclosure rules and methods of avoiding conflicts of interests, as well as to create a roster of arbitrators ahead of any conflict between states and investors.

Fourthly, one could perhaps envisage the creation of an appellate mechanism, as suggested by the European Commission. It is frequently argued that such a mechanism would add to the stability, predictability and legitimacy of investment law; whilst the opportunity for appeal would add to the duration and cost of proceedings, it is likely that – over time – the number of appeals would decrease (as has been the case for the WTO Appellate Body), thus offsetting a potential increase in cost by the probable increase in stability within investment procedures. If such an appeals mechanisms were to prove politically unfeasible, one could envision the creation of a treaty committee or an *ad hoc* procedure through which the parties to TTIP could give "authoritative interpretations of the provisions of the investment instrument",[31] thus ultimately providing for some measure of consistency and perceived fairness between cases. Such an option – the establishment of a treaty committee that interprets controversial treaty provisions in order to provide clarity and consistency – appears to also be currently taken by the EU and Canada in the context of the CETA negotiations, with the establishment of a Committee on Services and Investment.[32]

In sum, an investment chapter in TTIP offers an unprecedented opportunity to reform and improve the system of investment law, in a way that gradual renegotiation of individual BITs never would be able to achieve. This author hopes that the EU and the US will grasp this opportunity to rewrite international investment law by setting an important precedent in treaty-drafting, allowing for the incorporation of public policy objectives, thereby protecting states' right to regulate. Ultimately, the type of concerted strategy that could result from TTIP is likely to be far stronger than the individual country strategy necessitated by the present system of over 3,000 international investment agreements (IIAs). Perhaps the most important conclusion that should emerge from the current discussions – irrespective of whether TTIP will actually include an investment chapter – is that that there is a need for correct, timely and complete information for law and policy-makers as well as the broader public, in relation to international investment law and ISDS procedures.

[31] Kuijper et al., pp 40-41 and p. 68.

[32] Kuijper et al., p. 70.

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International Trade Daily
International Trade Reporter

TPP May Set Stage for More Challenges Of U.S. Laws After WTO Ruling on COOL

By Catherine Boudreau | May 29, 2015 07:35PM ET

Trans-Pacific Partnership and Country-of-Origin Labeling

Key Takeaway: Critics of trade agreements say recent WTO decision on U.S. country-of-origin labeling serve as reminder that nation's laws can be challenged by foreign countries, and as warning about ongoing TPP negotiations.

Potential Impact: International trade lawyers say U.S. can't be forced to change its laws but should comply with trade obligations, promote compliance.

May 29 (BNA) -- The Trans-Pacific Partnership (TPP) is likely to contain provisions that could undermine U.S. policies, similar to the effect of a recent World Trade Organization decision that U.S. country-of-origin labeling (COOL) regulations violate international obligations, according to Democratic legislators and consumer advocates.

The WTO, founded to promote free trade and settle disputes, ruled on May 18 that the U.S. Department of Agriculture's (USDA) COOL rules discriminate against beef and pork imported from Canada and Mexico. COOL requires that meat producers specify on retail packaging where an animal was born, raised and slaughtered and prohibits the mixing of muscle cuts from different countries under a general label.

Canada and Mexico have threatened retaliatory tariffs on U.S. products (32 ITR 924, 5/21/15).

As a result of the WTO decision, the House Agriculture Committee approved legislation designed to repeal COOL that is scheduled to be considered on the House floor the week of June 8. While the Senate has yet to take action, Agriculture Committee Chairman Pat Roberts (R-Kan.) has said COOL repeal is an option .

As the TPP nears completion, it and other free trade agreements open U.S. laws and regulations to challenges by foreign countries and businesses. Further, in a global system that promotes the concept of a level playing field, one country can't ask its trading partners to eliminate trade barriers without doing so itself.

Critics say trade agreements can diminish U.S. sovereignty by taking down congressionally enacted policies, including those designed to protect consumers. This is a major reason that groups like Consumers Union and Public Citizen, as well as many Democratic lawmakers, oppose the TPP, which is being negotiated among the U.S. and 11 other countries on the Pacific Rim.

"The TPP will contain provisions that are similar to the WTO rules that they used in this country-of-origin labeling case, if not even worse for domestic laws and regulations," Rep. Rosa DeLauro (D-Conn.), one of Congress's leading critics of the TPP, said during a May 19 press call. "So we should expect similar results."

Cost of Defying Trade Rules

Ted Posner, a partner at Weil, Gotshal & Manges LLP, told Bloomberg BNA that there is a distinct difference between the ability to challenge a country's law and forcing repeal or modification of that law. Critics often merge these two very separate concepts.

A country can keep a law found to be noncompliant with trade rules after a decision like the WTO's on COOL, but it will face consequences. Posner pointed to the European Union's decision to maintain its ban on imports of hormone-treated beef after the WTO ruled in 1997 that it violated international trade rules. As a result, the U.S. slapped tariffs on EU agricultural goods. "That's the nature of the bargain; it's not a cost-free system," Posner said. "But a country can't be forced to change its law; that's up to each country to decide based on the cost and benefits."
Should the U.S. decide to keep its COOL regulations intact, Canada plans to seek retaliation by imposing an estimated $2 billion in tariffs on imports of U.S. goods. Mexican officials haven't announced what U.S. goods they would target (32 ITR 983, 5/28/15).
Critics say that large compliance costs of the USDA rules and the ongoing trade dispute offset consumer benefits.
"Technically it's true, nothing can require us to repeal laws, but the U.S. is facing enormous economic pressure, and [Congress] is already preceding with repealing COOL before we know what the degree of retaliation is," Karen Hansen-Kuhn, director of international strategies at the Institute for Agriculture and Trade Policy (IATP), told Bloomberg BNA.
Rep. Peter DeFazio (D-Ore.) shared those concerns during the May 19 conference call, saying while the U.S. can pay to keep its laws, odds are against COOL regulations and other consumer laws being upheld, considering the swift action expected in Congress. This scenario could play out regarding other policies on the environment and labor in trade agreements, for example.

ISDS Further Weakens U.S. Law

Others contend that U.S. policies could be challenged under investor-state dispute settlement (ISDS) provisions that are included in the TPP but not in WTO agreements.
ISDS allows private investors to initiate a case against a foreign government for violating terms of a treaty, whether it be a free trade agreement or an investment pact. Three arbitrators are selected by the parties involved under varying conflict-of-interest rules, according to Kenneth Vandevelde, professor at Thomas Jefferson School of Law, San Diego.
Vandevelde said these provisions are necessary to ensure an impartial, law-based approach to resolving investment disputes in countries that may not have a legal system as robust as in the U.S.
"If we're going to have a system of treaty protections for investment, there needs to be an effective remedy to enforce that," Vandevelde said. "Where there's no remedy there's no right. ISDS is the best mechanism we've come up with. That doesn't mean it can't be improved, and debate on that should be welcomed."
Opponents of ISDS, including DeLauro and DeFazio, say this is another example of how free trade deals undermine U.S. sovereignty and allow foreign entities to circumvent the national judicial system by using a private tribunal. Even if foreign corporations lose a case, the U.S. and other countries still have spent hundreds of millions of dollars defending their laws.
The lawmakers cited tobacco companies that used ISDS to challenge cigarette labeling requirements intended to discourage smoking in Uruguay and Australia, and the Canadian generic drug company Apotex, which challenged U.S. Food and Drug Administration rulings on certain medications. U.S. COOL rules could be a target as well.
International trade lawyers like Vandevelde and Posner said it is far-fetched to say COOL regulations would be challenged using ISDS. The North American Free Trade Agreement already includes ISDS provisions, as do 50 other treaties the U.S. has signed.
The lawyers again pointed to the difference between bringing a case and winning one. "So far, 17 [investment] claims have been brought against the U.S., and we have prevailed in every one,"

Vandevelde said. "The reason for that is investment treaties are designed to incorporate U.S. legal norms. So as long as we're acting consistently with our own federal laws, there shouldn't be a legitimate claim against us."

Prioritizing Trade Over Safety

International rules favor trade flows over consumer information and safety laws, critics say. These rules will likely be adopted into the TPP, with additional mechanisms for settling trade disputes.

COOL was challenged under the WTO agreement on Technical Barriers to Trade (TBT), while the EU lost its beef hormone case under the Sanitary and Phytosanitary (SPS) measure that allows countries to enact policies to protect human, animal or plant life or health. Both the TBT and SPS agreements aim to ensure that countries' laws don't create unnecessary obstacles to trade and that they serve a legitimate objective.

"Rules in the WTO go beyond just treating imports and domestic exports the same; they prioritize trade flows over other kinds of policy priorities, and in the case of COOL, consumer information," Lori Wallach, director and founder of Global Trade Watch, a division of Public Citizen, said. "The WTO ordering the U.S. to gut a key consumer law is a little bit of a canary in coal mine reminder that we know everything in WTO is in TPP, plus."

Posner said he doesn't see trade flow and consumer laws as being incompatible. Free trade agreements are adopted on a broad spectrum of issues, including investments and goods, against a backdrop that acknowledges that governments regulate in the interest of public health and the environment. In some cases, a country may have ulterior motives.

"There are governments around the world that do things under the pretense of protecting welfare, but really want to protect a local industry against foreign competition," Posner said, adding that WTO cases should be put into perspective. The global organization has been around for 20 years and heard nearly 500 cases, most of which didn't challenge health and safety.

Encouraging Compliance

The U.S. should comply with WTO decisions to set an example for the more than 150 members of the organization should they lose a case in the future, Scott Miller, senior adviser and Scholl Chair in international business at the Center for Strategic and International Studies, said.

"Encouraging compliance is superior to other approaches because it protects our export interests and makes sure the U.S. plays by the rules," Miller told Bloomberg BNA.

Critics say while a rules-based international trade system is important, the rules matter. Hansen-Kuhn of IATP said the rules are already problematic, so including them in the expansive TPP deal with countries like Japan, Malaysia and Vietnam is dangerous.

"I think there's different ways to adopt trade agreements, like focusing on specific areas, such as the U.S. has done in equivalency agreements," Hansen-Kuhn said. "Focus on one issue instead of within a larger context so it can be done right."

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https://wikileaks.org/tisa/owinfs-statement.html
Wikileaks June 3, 2015

Wikileaks Releases Largest Trove of Trade Negotiations Documents in History on Proposed "Trade in Services Agreement," Exposes Secret Efforts to Privatize and Deregulate Services

Leaks Prove "Fast Track" Critics in the United States like Senator Elizabeth Warren Right: were Fast Track passed, a potential TISA, if approved under it, would lead to Financial (and other Services) Deregulation

Statement of Our World Is Not for Sale (OWINFS) global network

Today, as Ministers meet to further a controversial and little known proposed Trade in Services Agreement (TISA) on the sidelines of the annual Organization for Economic Cooperation and Development (OECD) meeting, Wikileaks released (wikileaks.org/tisa/) a trove of negotiating texts, including annexes covering a wide range of issues on domestic regulation, financial services, air and maritime transportation, electronic commerce, transparency, telecommunications, professional services, and the natural movement of persons (called "Mode 4" in trade agreements.)

The TISA negotiating texts are supposed to remain secret for five years after the deal is finalized or abandoned. Today, the secrecy charade has collapsed, and the risks to Wall Street oversight are exposed for all to see.

"The secrecy charade has collapsed. TISA members trying to keep their publics in the dark as to the negative implications of the corporate TISA for financial stability, public safety, and elected officials' democratic regulatory jurisdiction have been exposed to the light of day, in the largest leak of secret trade negotiations texts in history," said Deborah James of the OWINFS network.

The leak throws further fuel on the fire ignited by the debate in the United States over the controversial Fast Track legislation, also known as Trade Promotion Authority (TPA). Critics like U.S. Senator Elizabeth Warren, who played a crucial role in leading the post-crisis regulation of the financial sector in the U.S., has already warned that the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP) risk undermining even the limited changes achieved to restore financial stability. After President Obama called her worrying "wrong", analysts in Bloomberg, The Hill, and other publications concurred with the Senator. However, their debate focused on the speculated impacts of a potential TPP, the financial services text of which has yet to be made public; with this leak, the dangers to financial stability of a financial services chapter in the proposed TISA are no longer speculative. (The 2015 Fast Track bill specifies that Fast Track procedures will apply to "an agreement with respect to international trade in services entered into with WTO [World Trade Organization] members" – the TISA.)

Trade unionists in Uruguay have been engaged in a high-stakes battle with pro-corporate government officials as to whether the nation should participate in the agreement. The leaked **telecommunications annex**, among others, demonstrate potentially grave impacts for deregulation of state owned enterprises like their national telephone company. The leak of the documents today provides direct ammunition for the "No to TISA" side.

Analysis of the **air transport services annex** by the International Transport Workers' Federation notes that "[i]n the TISA document there is virtually no discussion on safety standards. .. . Over the last decade outsourcing and offshoring aircraft maintenance has been on the rise and there are scientific studies pointing out the possible negative implications of this for current and future aviation safety." The TISA proposed TISA annex states that its rules would take precedence over the International Civil Aviation Organization (ICAO), which has far more credibility and expertise on the issue.

Analysis of the text on so-called ";**transparency**" states that "'[t]ransparency' in this TISA text means ensuring that commercial interests, especially but not only transnational corporations, can access and influence government decisions that affect their interests – rights and opportunities that may not be available to local businesses or to national citizens.";

Preliminary analysis notes that the goal of **domestic regulation texts** is to remove *domestic* policies, laws and regulations that make it harder for transnational corporations to sell their services in other countries (actually or virtually), to dominate their local suppliers, and to maximize their profits and withdraw their investment, services and profits at will. Since this requires restricting the right of governments to regulate in the public interest, the corporate lobby is using TISA to bypass elected officials in order to apply a set of across-the-board rules that would never be approved on their own by democratic governments.

The documents show that the TISA will impact even non-participating countries. The TISA is exposed as a developed countries' corporate wish lists for services which seeks to bypass resistance from the global South to this agenda inside the WTO, and to secure and agreement on servcies without confronting the continued inequities on agriculture, intellectual property, cotton subsidies, and many other issues.

Background

This leak backs warning from global civil society about the privatization and deregulation impacts of a potential TISA since our first letter on the issue, endorsed by 345 organizations from across the globe, in September 2013. At that time, OWINFS argued that ";[t]he TISA negotiations largely follow the corporate agenda of using "trade" agreements to bind countries to an agenda of extreme liberalization and deregulation in order to ensure greater corporate profits at the expense of workers, farmers, consumers and the environment. The proposed agreement is the direct result of systematic advocacy by transnational corporations in banking, energy, insurance, telecommunications, transportation, water, and other services sectors, working through lobby groups like the US Coalition of Service Industries (USCSI) and the European Services Forum (ESF)." Today's leaks prove the network's arguments beyond a shadow of a doubt.

Today's leak follows others, including a June 2014 Wikileaks revelation of a previous version of the Financial Services secret text, the December 2014 leak of a U.S. proposal on cross-border data flows, technology transfer, and net neutrality, which raised serious concerns about the protection of data privacy in the wake of the Snowden revelations.

The TISA is currently being negotiated among 24 parties (counting the EU as one) with the aim of extending the coverage of scope of the existing General Agreement on Trade in Services (GATS) in the WTO. However, even worse than the opaque talks at the WTO, the TISA negotiations are being conducted in complete secrecy – until now. Public Services International (PSI) global union federation published the first critique, TISA vs Public Services, by Scott Sinclair, in March 2014, and PSI and OWINFS jointly published The Really Good Friends of Transnational Corporations Agreement report on Domestic Regulation by Ellen Gould in September 2014. A factsheet on the TISA can be found here and more information on the TISA can be found at http://ourworldisnotforsale.org/en/themes/3085.

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OWINFS is a global network of NGOs and social movements working for a sustainable, socially just, and democratic multilateral trading system. www.ourworldisnotforsale.org

POLITICO

Huge trade deal hinges on Big Pharma protections

By Brett Norman and Adam Behsudi

6/3/15 3:41 PM EDT

A class of drugs with the potential to treat intractable diseases like cancer and other killers — as well as to explode health spending globally — is at the center of the toughest negotiations of the biggest trade deal in history.

The pharmaceutical industry has been pressing the Obama administration to demand that these complex and costly drugs receive 12 years of monopoly pricing power around the world. Critics of the trade pact say such unprecedented protection from cheaper copycat versions globally would lock in higher drug costs for poorer countries and prevent the United States from setting its own policy.

The 12-year provision is unanimously opposed by the other 11 nations that would be party to the TPP. International relief organizations have very publicly warned that the deal would mean far fewer people in developing countries would be able to afford life-saving medical breakthroughs.

Yet with the backing of many Republicans and some Democrats, major pharmaceutical companies and their trade associations have thrown down the gauntlet. They insist they're standing firm on the 12-year provision for biologics, as these highly promising drugs are known. As organic products derived from living cells, they're typically injectable — in contrast to the traditional prescription pills most consumers get at the pharmacy.

The industry recently garnered a letter supporting the full period from GOP Sen. Rob Portman, a former U.S. trade representative under President George W. Bush, and 10 fellow Republicans. Some of the administration's essential allies on the trade pact say they would have to rethink their support if biologics don't get the full protection.

"I'll be very upset," Sen. Orrin Hatch told POLITICO. "I'd have a rough time supporting the bill."

And then there's the Obama administration's own complicated position on the issue.

As part of the ACA, the White House allowed industry a dozen years of exclusivity with the drugs. Since then, however, the administration has repeatedly tried through budget proposals to cut the period to seven years. Agreeing to a dozen years in the trade talks would lock that in at home, too.

U.S. negotiators adopted the 12-year term as their initial position — it is current U.S. law, after all — but the other Pacific Rim countries in the talks are vehemently fighting back. In

Washington, many Democrats and AARP oppose it based on the same concerns of affordability and access abroad as well as at home.

Trade Representative Michael Froman, who declined a request to comment for this story, has been quick to respond to lawmakers pressing for the full period by highlighting the huge differences in monopoly protection among TPP participants.

"Around the table, you have five countries that have zero years, four countries that have five years, two countries that have eight years, and we're 12 years," Froman testified at a Senate Finance Committee hearing in April.

The TPP trade deal aims to be the largest ever, covering more than 40 percent of the world's gross domestic product. The pharmaceutical issue is only one among a set of broad new intellectual property rules the agreement would establish. Movie studios, publishers and software companies all have a stake in rules that would set the global standard for decades to come.

The drug industry says it needs the extended protection to recoup biologics' higher development costs. But even as drug company executives reaffirmed the issue's priority last month at a Pharmaceutical Research and Manufacturers of America meeting, an industry source said many were taking a broader view of how the overall deal would benefit them.

"I think potentially at the end of the day, we have to look at the totality of the agreement," he said. "Are we at a better place or a worse place?"

Despite the public pressure for the 12-year lockout, two industry lobbyists said an eight- or nine-year period may be the most that pharma can realistically expect. Some Democrats are pushing for just five years, the same as was given for traditional medications in a 2007 trade deal that House Democrats negotiated with the Bush administration. A House Democratic aide familiar with the negotiations said that seven years would likely be acceptable, though — since that's considered the target for U.S. law.

The length of the exclusivity period isn't the only consideration for biologics. Also in play are provisions about when countries will have to comply with the new standards. The definition of exactly what constitutes a biologic drug is on the table, as well.

The stakes are huge. Sales of biologics were $130 billion worldwide in 2013 and are projected to hit $290 billion by 2020, according to Deloitte. And while drug makers often have patents that are longer than the government-sanctioned monopolies they get under U.S. law after a product is approved, those patents aren't always honored internationally, especially in developing countries. The guaranteed monopoly pricing would be an added defense against weaker patent laws abroad.

Nongovernmental relief groups like Oxfam; Doctors Without Borders; and amfAR, the Foundation for AIDS Research, have protested that the trade deal could make the drugs unaffordable for many poorer countries — even after accounting for the lower prices that manufacturers regularly negotiate outside of the United States. Doctors Without Borders

mounted an advertising campaign in Washington Metro stations last month to decry TPP as "a bad deal for medicine."

Other critics point to the potential impact closer to home, where changing the amount of time biologics have the market to themselves could also have major economic consequences. The White House estimates that capping the monopoly term at seven years would save $4.5 billion in spending over a decade just for federal health care programs.

Enshrining 12 years in the trade deal would block any future efforts to cut back the protection that was written into the ACA.

"Yes, BIO and PhRMA won in 2010," Generic Pharmaceutical Association CEO Ralph Neas said, referring to the two biggest industry trade groups. "The important point here is that if BIO and PhRMA get their way in the TPP ... then that 12 years would be permanent. That's why they're fighting so hard on this."

Exactly what effect competition will have is unknown. The FDA approved the first generic-like "biosimilar" drug this year, but legal wrangling has so far kept it off the U.S. market. In Europe, where such biosimliars have been available since 2006, the cost in general is about 30 percent cheaper than the biologics they copy, according to some estimates. The European Union provides 10 years of exclusivity for biologics.

With the TPP trade ministers expected to bring negotiations to a close by early July, the protection provision must be resolved soon. Before that happens, President Barack Obama will have to secure fast-track legislation pending in Congress, which would allow him to submit an unamendable trade agreement for an up-or-down vote. Many countries are reluctant to offer their own bottom lines until they know the deal won't get picked apart by U.S. lawmakers.

House Ways and Means ranking member Sander Levin considers the issues to be integrally linked. The Michigan Democrat fears the TPP discussions are moving "in the wrong direction" and eroding the progress reflected in that 2007 trade deal.

That pact "struck the right balance on medicines between the need to promote innovation and the need to protect public health," Levin said in a statement to POLITICO. "This is the wrong time for Congress to give up its leverage. ... This issue is too important to lives around the globe to fast-track the wrong approach in TPP."

https://www.techdirt.com/articles/20150605/11483831239/revealed-emails-show-how-industry-lobbyists-basically-wrote-tpp.shtml

techdirt.com; 6/5/15

Revealed Emails Show How Industry Lobbyists Basically Wrote The TPP

from the *well-isn't-that-great...* dept

Back in 2013, we wrote about a FOIA lawsuit that was filed by William New at IP Watch. After trying to find out more information on the TPP by filing Freedom of Information Act (FOIA) requests, and being told that they were classified as "national security information" (no, seriously), New teamed up with Yale's Media Freedom and Information Access Clinic to sue. As part of that lawsuit, the USTR has now released a bunch of internal emails concerning TPP negotiations, and IP Watch has a full writeup showing how industry lobbyists influenced the TPP agreement, to the point that one is even openly celebrating that the USTR version copied his own text word for word.

What is striking in the emails is not that government negotiators seek expertise and advice from leading industry figures. But the emails reveal a close-knit relationship between negotiators and the industry advisors that is likely unmatched by any other stakeholders.

The article highlights numerous examples of what appear to be very chummy relationships between the USTR and the "cleared advisors" from places like the RIAA, the MPAA and the ESA. They regularly share text and have very informal discussions, scheduling phone calls and get togethers to further discuss. This really isn't *that* surprising, given that the USTR is somewhat infamous for its revolving door with lobbyists who work on these issues. In fact, one of the main USTR officials in the emails that IP Watch got is Stan McCoy, who was the long term lead negotiator on "intellectual property" issues. But he's no longer at the USTR -- he now works for the MPAA.

You can read through the emails, embedded below, which show a very, very chummy relationship, which is quite different from how the USTR seems to act with people who are actually more concerned about what's in the TPP (and I can use personal experience on that...). Of course, you'll notice that the USTR still went heavy on the black ink budget, so most of the useful stuff is redacted. Often entire emails other than the salutation and signature line are redacted.

Perhaps the most incredible, is the email from Jim DeLisi, from Fanwood Chemical, to Barbara Weisel, a USTR official, where DeLisi raves that he's just looked over the latest text, and is gleeful to see that the the rules that have been agreed up on are "our rules" (i.e., the lobbyists'), even to the point that he (somewhat confusingly) insists "someone owes USTR a royalty payment." While it appears he's got the whole royalty system backwards (you'd think an "IP advisor" would know better...) the point is pretty

clear: the lobbyists wrote the rules, and the USTR just put them into the agreement. Weisel's response? "Well there's a bit of good news..."

http://www.reuters.com/article/2015/06/09/us-eu-usa-trade-idUSKBN0OP26E20150609

Markets | Tue Jun 9, 2015 2:09pm EDT

Divided EU lawmakers postpone vote on U.S. trade deal

BRUSSELS | By Robin Emmott

The European Parliament failed on Tuesday to agree a unified stance on a proposed trade deal with the United States, postponing a vote that was meant to cement its support for the biggest accord of its kind.

The failure to agree on a resolution meant that the parliament would merely debate the proposed deal in Strasbourg on Wednesday, but not hold a vote, highlighting the growing doubts in the European Union about its benefits.

Negotiations on the Transatlantic Trade and Investment Partnership (TTIP), which would encompass a third of world trade, are still under way but, because the parliament has the power to reject any final deal, it must set out its position during the process.

EU lawmakers preparing the resolution received more than 200 proposed amendments, meaning it was highly unlikely to pass, prompting parliament president Martin Schulz to postpone the vote to avoid the public embarrassment of having the resolution defeated.

"One could call it failure," tweeted centre-right lawmaker Daniel Caspary of the European People's Party (EPP).

Far-left, far-right and Green lawmakers who are determined to block the pact seized on the postponement as a sign that the deal was in danger, but aides to centre-right and centre-left lawmakers told Reuters that a vote was still likely to be held after the summer.

"The European Parliament's establishment in is panic that the vote will reveal the clear divisions," said French Green Yannick Jadot.

While an accord will not be ready before 2016, the European Parliament must establish its position much as the U.S. Congress must decide whether to grant President Barack Obama "fast-track" powers to negotiate trade deals.

The parliament's positions have become harder to predict since last year's European elections, in which anti-EU parties did well.

Much of the discord focuses on how companies settle disputes under the pact; lawmakers fear that U.S. multinationals will challenge European laws on grounds that they restrict free commerce.

Washington says it considers the issue of investment arbitration non-negotiable because EU governments have secured some 1,400 investment protection agreements since the 1960s.

Critics of the deal also fear it will be detrimental to food safety and the environment.

"It is high time for the negotiators to take stock and stop the negotiations," said Natacha Cingotti, a campaigner at Friends of the Earth Europe.

(Editing by Kevin Liffey)

INSIDE U.S. TRADE - *www.InsideTrade.com* - June 5, 2015

Confidential LAC Report Says TPP Falls Short On Automotive, SOE Rules

A confidential assessment of the Trans Pacific Partnership (TPP) prepared by the Labor Advisory Committee (LAC) in September 2014 and reprinted below charges that the automotive rules of origin as they are emerging in the negotiations are so weak they will result in the migration of U.S. and North American auto sector jobs to Malaysia, Vietnam, and other TPP partners, and provide benefits for third countries not part of the agreement.

The 11-page assessment, in which LAC members in their official capacity detail their specific recommendations for TPP that have been rejected by the U.S. government, was part of a 16-page "interim report" on the TPP negotiations that the AFL-CIO had sought clearance from the administration to release to members of Congress.

The other five pages consisted of an April 13 analysis signed by AFL-CIO President Richard Trumka explaining in more general terms how the administration has ignored labor's recommendations for TPP and has failed to provide effective briefings on developments in those talks.
The Office of the U.S. Trade Representative ultimately gave clearance for the AFL-CIO to publish the April 1 analysis, with a paragraph relating to the auto rule of origin redacted, but not the September 2014 assessment. Unredacted copies of both documents were obtained by *Inside U.S. Trade.*

The September 2014 assessment charges USTR has not heeded LAC recommendations for strong rules of origin in the auto sector, although it does not disclose what the regional value content requirement will likely be.

However, the unredacted version of the April 13 analysis states that "based on proposals shared with cleared advisers [the TPP regional value content requirement would be] 55 percent at best and we understand that it will probably be lower as a result of objections by other parties."

This analysis notes the TPP will coexist with existing FTAs and that companies will be able to choose which of them will provide them with the most benefits. In the case of cars, the TPP therefore "could result in the immediate reduction in content requirements for vehicles sold in the U.S.", implying firms would mostly likely choose the more lenient TPP rules in contrast to those under the North American Free Trade Agreement (NAFTA).

According to the analysis, USTR has denied this is the case and that the rule in TPP will be effectively as stringent as the origin requirements under NAFTA, but has not substantiated this claim. "While USTR staff have indicated that their intention is that the new rule would be as strict as the existing NAFTA rule, as there are certain methodological differences to date, after numerous meetings with interested [labor union staff], no data has been provided that would support this contention," the analysis says.

This part of the analysis was blacked out at the insistence of USTR, according to Trumka. The only part of the paragraph that was left unredacted in the public version stated that "to date, after numerous meetings with interested [labor union staff], no data has been provided that would support this contention."

The September 2014 document notes that individual unions made a proposal that would have started with the current 62.5 percent regional value standard set in NAFTA and increase it over time to 75 percent using a similar formula to NAFTA. This proposal is justified to retain automotive jobs in the United States, the document says.

Critics of the TPP, such as Sen. Sherrod Brown (D-OH), have charged that failure to set strong automotive rules of origin in TPP will have a ripple effect on the health of the steel industry and other suppliers to auto companies.

Labor advocates have expressed anger over USTR's withholding approval to release the September 2014 document and pressure to censor the AFL-CIO-released analysis part of it, which the administration also insisted could only be

released if it was published in LAC members' personal capacity and not as a "LAC product." They have also accused the administration of purposely delaying authorization of the analysis until the vote on Trade Promotion Authority (TPA) in the Senate had passed by throwing up procedural hurdles.

A U.S. official sidestepped a request to respond to these specific charges, and instead said only that the September 2014 document was out of date and inaccurate, while stressing the lengths the administration has gone to in order to garner feedback from labor unions.

"The document released today is inaccurate, incomplete, and out of date. It does not reflect the text of the agreement or the conversations labor representatives have had with the Administration in the course of hundreds of hours of consulta tions," said the official. "As with any other stakeholder, labor has achieved many of their priorities in the negotiation, but not all of them. We are proud of the impact labor input has had on our negotiations and their positive contribution to trade policy over the years."

The confidential Sept. 3, 2014, assessment by the LAC also expresses alarm on the issue of disciplines for state-owned enterprises (SOEs) — an area of TPP that the administration has frequently touted as going beyond any previous free trade deal. By contrast, the LAC report rattles off a litany of areas where the proposed SOE text falls short.

The document says that among its "greatest concerns" about the SOE chapter are a lack of coverage for mergers and acquisitions, an adverse effects test that it too limited and will leave too many workers without remedy, and a lack of coverage for sovereign wealth funds.

It also says there is a "lack of clarity regarding the ability to address SOE activities in our domestic market that may have an anti-competitive impact on production and jobs, and whether the definition of an SOE is broad enough to cover necessary foreign commercial entities while also providing definite assurances for public services in each country and U.S. public institutions."

In its rebuttal to the analysis part of the report, USTR emphasized that it had included SOE disciplines at the request of the labor union, though the issue has been a priority for major trade associations such as the U.S. Chamber of Commerce.

The document also takes issue with the structure of the TPP, and specifically that it will allow other countries to dock on at a later stage. It says that the LAC has repeatedly urged the administration "to include standards for new entrants regarding labor rights, democratic governance, open markets, and other readiness criteria."

But the LAC says it has seen no U.S. proposal to include such a provisions in the TPP. "We therefore remain concerned that future administrations would commence negotiations with inappropriate trading partners and without adequate Congressional consultations and approval."

The document also notes that LAC members have been assured that Congress will have an opportunity for an up or down vote for each new entrant to the TPP, but have seen nothing in writing. "We are reluctant to trust such oral assur- ances and would prefer to see the legislative text that would ensure that, unlike for the WTO, Congress must vote in the affirmative before any new party may join the TPP," the document said.

In the congressional debate over TPA, Brown offered an amendment that would require congressional approval prior to any new entrants joining the TPP. It was defeated 47-52 in the Senate.

This notion of the living agreement to which other countries can dock has also been flagged by Sen. Jeff Sessions (R-AL), who complained in a public memo that TPP's "living agreement" provisions could allow China to accede to the deal without congressional approval.

In 2012, Assistant U.S. Trade Representative Barbara Weisel, the chief negotiator in the TPP talks for the U.S., said that the subsequent entry of another country after conclusion of the deal would likely require an additional vote in Congress. She said this would also be the case if TPP parties themselves reopened the agreement to change its obligations (*Inside U.S. Trade*, July 6, 2012).

According to Trumka, the administration has refused to allow the release of the interim report in full on the grounds that it had not been discussed at a LAC meeting and therefore has not been drafted or submitted in a manner that complies with the Federal Advisory Committee Act. The administration has set June 22 as the date for the next LAC meeting — past the date when House Republicans have said they may seek a vote on TPA.

Trumka rejected USTR's argument by pointing out that the Sept. 3, 2014 document was discussed at a Sept. 4 LAC meeting. He also repeatedly criticized the administration for dealing with the LAC request for the release of the entire interim report to Congress so slowly, noting that it was first sent to USTR on April 16.

Both the April 13 analysis and the September 2014 document say the U.S. has failed to take up LAC recommendations in the TPP negotiations to curb foreign countries' policies that force U.S. companies to transfer technology, produc- tion and jobs in return for market access and government procurement opportunities. These policies are incentives for U.S. companies to move U.S. jobs offshore, they charge.

It also charges that USTR has not heeded LAC advice in these and almost all other areas of the TPP negotiations, has failed to provide "full and on-going access" to negotiating texts, which it says severely undermines the ability of the LAC to fulfill its statutory mandate.

A USTR spokesman issued a lengthy rebuttal of the April 13 analysis before it was published by the labor federation on June 2. USTR did not share these comments ahead of time with labor unions, according to AFL-CIO sources.

The USTR rebuttal insisted that the "latest U.S proposals, in their entirety, have been and continue to be provided to the LAC and all advisory committees." It notes that there are many areas where negotiations are still underway and where negotiators cannot report more than that they are "making progress towards meeting our objectives."

In countering the LAC charge that USTR has largely ignored the recommendations made by the LAC, USTR insisted that "the labor community has had a demonstrable and significant impact on individual trade agreements and the evolu- tion of American trade policy as a whole over the last two decades."

It notes that since the early 1990s, labor has advocated for enforceable labor and environmental obligations in trade agreements subject to the same dispute settlement mechanism than other obligations. "We have made this a bedrock principle in our negotiations," USTR said.

The cover letter by LAC Chairman R. Thomas Buffenbarger to the September 2014 report notes that while there have been some important improvements on labor and environment in the past 20 years, "these changes have fallen significantly short of what is needed to guarantee that workers are able to exercise their basic rights and that the environment is protected."

As an example, Buffenbarger says that the "reality" in Colombia — a U.S. FTA partner since 2012 — is that workers cannot exercise their fundamental rights to organize and bargain collectively without fear for their lives, despite the strong FTA provisions on labor rights.

September 3, 2014

The Honorable Thomas Perez Secretary of Labor

The Honorable Michael Froman United States Trade Representative

U.S. Department of Labor
Office of the United States Trade Representative

Re: Labor Advisory Committee for Trade Negotiations and Trade Policy: Advice for Negotiating the Trans-Pacific Partnership Agreement

Dear Secretary Perez and Ambassador Froman:
We strongly support President Obama's efforts to create

shared prosperity for all families in America. However, we do not believe that continuing to put in place trade policies similar to those enacted over the last 25 years will in fact achieve our shared goals. In our experience, our current trade policies have been an obstacle to creating good and sustainable jobs, provid- ing the opportunity for rising prosperity for all, alleviating gross income inequality, and reinvigorating our manufacturing sec- tor.

We, as members of the Labor Advisory Committee, on be- half of the millions of working people we represent, believe that our current trade policy is imbalanced. The primary mea- sure of the success of our trade policies should be increasing jobs, rising wages, and broadly shared prosperity, not higher corporate profits and increased offshoring of America's jobs and productive capacity. Trade rules that enhance the already formidable economic and political power of global corporations undermine worker bargaining power, here and abroad, and weaken both democratic processes and regulatory capacity at the national, state, and local levels.

Repeatedly, over many decades, America's workers have protested flawed trade policies, including those enshrined in the North American Free Trade Agreement (NAFTA), the World Trade Organization (WTO), Permanent Normal Trade Relations (PNTR) for China and more recently implemented agreements.

Under these agreements, U.S. communities lost hundreds of thousands of jobs, as companies shed their U.S. workforces to shift jobs and production to places where workers' fundamental labor and human rights are routinely violated and wages are consequently unfairly suppressed. While there have been some important improvements in trade-linked labor and envi- ronmental provisions over the past twenty years, these changes have fallen significantly short of what is needed to guarantee that workers are able to exercise their basic rights and that the environment is protected. The reality is that in Colombia, which is bound to the strongest labor rights provisions in any U.S. trade agreement, workers still cannot exercise their fundamental rights to organize and bargain collectively without fear for their lives and for their families' well-being.

Furthermore, improvements in labor and environmental standards must be coupled with changes to the underlying trade rules, which incentivize the off-shoring of jobs and exacerbate the erosion of worker bargaining power and leakage of trade benefits to countries that are not part of the agreements.

The statutory mandate to provide advice to the USTR and Department of Labor is severely undermined by the lack of full and ongoing access to negotiating texts. Given the importance of trade policy to our nation's overall economic strategy, we will continue our work to reform and update the trade negotiat- ing authority process so that this and future trade negotiations can be more open, democratic, and participatory.

We believe our government must enact and implement a broad set of domestic industrial and economic policies to re- build, repair and modernize our infrastructure and prepare our workforce for the jobs of the future. Absent these investments, so-called globalization and free trade will continue to leave workers behind.

Similarly, we are concerned that current U.S. trade agree- ments undermine our regulatory capacity and democratic deci- sion-making processes. We believe strongly that our govern- ment must use trade negotiations and trade rules to work to- ward balanced and reciprocal trade by effectively addressing mercantilist policies such as currency manipulation that harm U.S.-based manufacturers and their employees. Likewise, our trade rules do not effectively address other countries' market- distorting policies that require the transfer of U.S. technology and production in return for market access.

In addition, U.S. trade policies unduly protect and privi- lege the "rights" of corporations and investors—even to the point of creating a private system of "corporate courts" (investor-to- state dispute settlement, or ISDS). The result is an ever-widen- ing gulf between the share of GDP going to profits for corpora- tions and the share that workers take home. The status quo ap- proach is unacceptable.

America's workers—and our brothers and sisters around the world—are not willing to accept more trade deals that put profits before people.

Annexed to this letter is a list of concrete suggestions we have requested in one or more venues since the beginning of the TPP negotiations in 2010. We would very much like to dis- cuss the reasons why these suggestions have not been incorpo- rated into the TPP, while status-quo proposals harmful to work- ing people continue to advance.

Trade can be a force for progress in the world, or it can continue to be a disguise for rules that create profit centers for global corporations that do not behave as good global citizens. This is unsustainable.

The U.S. can and must lead the world in creating progressive trade rules that build middle classes and consumer demand everywhere. America's workers want our government to alter its current approach to trade so that it will promote broadly shared prosperity.

Sincerely,

R. Thomas Buffenbarger
Chair, Labor Advisory Committee for Trade Negotiations and Trade Policy (LAC)

FOR SECURED ADVISERS ONLY —NOT FOR DISTRIBUTION— Annex

LAC letter, September 3, 2014 Suggestions for a Worker-Centered Trade Policy

1. Currency: Misaligned currency is an important con- tributing factor to the U.S. trade imbalance with China and other Asian nations. Overnight, a country can undermine the price- reduction effects of tariff elimination by devaluing its currency. Traditional trade theory assumes the absence of such manipu- lation, yet USTR has repeatedly failed to address the issue either at the World Trade Organization or in any of bilateral or plurilateral trade agreements.

Since we filed our initial comments on the prospective TPP negotiations in January 2010, we have urged the administration to include in the TPP an "effective tool to deal with misaligned or manipulated currency." We have yet to see any proposal to include effective curbs on currency manipulation in the TPP.

2. Rules of Origin: Strong, specific, and enforceable rules of origin help to ensure the bulk of the benefits of a trade agree- ment inure to the parties to that agreement—those who have made reciprocal promises to each. Otherwise, benefits are likely to leak to countries that are free to operate in a manner wholly inconsistent with the strictures of the agreement. In our 2010 filing, we advised that "rules of origin should be negotiated such that the signatories are the primary beneficiaries of new market access."

In May 2012, the USTR requested comments on its "RVC Percentages for Select Product-Specific Rules (Non-Textile Goods) in the TPP Negotiations." We responded that the TPP "must include strong rules of origin that will target benefits to the parties to the agreement (including, of course, the United States)—rather than weak rules of origin that will allow non- parties, who have made no reciprocal obligations to the U.S., to reap the rewards. Our primary goal must not be to expand sup- ply chains, but to expand employment opportunities here in America." Moreover, several individual affiliates developed and presented a very thoughtful proposal on regional value content for autos (starting with the current NAFTA standard of 62.5% and increasing over time to a higher 75% using a similar increasing formula to that used in NAFTA). The ambitious proposal is justified because anything less will

result in the migration of auto sector jobs to Malaysia, Vietnam, and other TPP partners and away from North America and the U.S. specifically.

Our comments appear to have fallen on deaf ears. It does not appear that rules of origin are being strengthened in any significant way.

3. Market Access Assurances: Part of the reason that successive FTAs have failed to cure existing trade imbalances is that these agreements fail to ensure reciprocal market access. USTR has not developed an impressive history of accurately identifying and eliminating arbitrary and unreasonable non-tar- iff barriers. Such tools were included in a very limited way in the Korea FTA, but the proof is in the pudding. So far, the Korea FTA has only succeeded in adding to our trade woes. In our January 2010 filing on the TPP, we advised that "a results-oriented approach that allows for automatic responsive measures when market access limitations are not lifted should be included in a TPP."

Since then, testimony by the AFL-CIO and UAW at the International Trade Commission requested that reductions in U.S. tariffs on Japanese imports must be tied to an actual, verifiable opening of the Japanese auto market and a substantial reduction in our bilateral auto trade deficit with Japan.

Unfortunately, we have seen no proposals that would en- sure that tariff reductions for Japan on autos, auto parts, and light trucks will be contingent upon actual inroads into the Japa- nese market.

4. State-Owned Enterprises (SOEs): While the AFL-CIO recognizes that foreign direct investment (FDI) can and often does contribute to the creation and maintenance of high-skill, high-paying jobs, such an outcome is not inevitable. Of par- ticular concern are investments by state-owned, state-controlled, and state-influenced enterprises (collectively SOEs) which may not operate on the basis of commercial considerations, but in- stead may orient their operations to drive existing U.S. com- petitors out of the market, to undermine U.S. supply chains or to transfer valuable technology, equipment, intellectual prop- erty, and other assets to the home country or other points abroad. Moreover, regardless of an SOE's purpose for in investing in the U.S., if it can access subsidized inputs (such as low or no cost capital or subsidized inputs imported directly from its home- country operations), traditional U.S. anti-dumping and countervailing duty law would not be able to reach such behav- iors, leaving U.S.-located producers and their employees in- jured and without remedy.

To address this issue, we were hopeful that provisions in the TPP would appropriately discipline the behavior of SOEs. We have been providing advice on creating such disciplines since our initial filing in 2010. After numerous in-person meet- ings and multiple rounds of written comments, including spe- cific textual suggestions, we remain greatly concerned about the current state of the SOE disciplines.

Our greatest concerns about the SOE Chapter's current weakness include lack of coverage for mergers and acquisitions, an adverse effects test that is too limited and will leave too many workers without remedy, lack of coverage for sovereign wealth funds, lack of clarity regarding the ability to address SOE activities in our domestic market that may have an anti- competitive impact on production and jobs, and whether the definition of an SOE is broad enough to cover necessary for- eign commercial entities while providing definite assurances for public services in each country and U.S. public institutions.

5. Labor Provisions: As you know, firms that can operate in conditions in which ILO core labor standards are not respected will drive down wages and working conditions, drawing in ad- ditional investment, enabling social dumping of lower-priced goods, and suppressing wages and working conditions in other markets against which producers everywhere are forced to "com- pete." Past trade agreements, even those that contain the so- called "May 10" provisions, failed to include standards and institutions that would effectively protect labor rights and reverse the race to the bottom. Thus, in Colombia, illegal subcontract- ing and threats against workers persist, and in Peru, the government has weakened some labor and environmental laws in hopes of attracting additional foreign investment.

In the case of labor provisions, not only have we attended a number of meetings and submitted numerous written comments, we joined with trade union federations from a number of other TPP nations to draft a labor chapter so

there would be no question regarding our advice on meaningful improvements to the labor provisions. The following list comprises critical suggestions we have made that we understand were never in- cluded in the USTR labor chapter proposal:

a. Reference to the ILO Core Conventions, not just the ILO Declaration.

b. Elimination of the "May 10" footnote limiting the inter- pretation of the labor provision to the Declaration—a "prin- ciples" document—rather than the ILO Conventions, which the ILO relies upon to interpret labor standards.

c. A requirement that Parties not waive or derogate from any of their labor laws (laws implementing either ILO Core Conventions or acceptable conditions of work)—regardless of whether the breach occurred inside or outside of a special zone.

d. A broader definition of "acceptable conditions of work" to also include all wages (not just minimum wages), workers representatives, termination of employment, compensation in cases of occupational injuries and illnesses, and social security and retirement, as well as a directive that Parties should "give full effect" to any ILO conventions or recommendations that cover any of the aforementioned "acceptable conditions of work."

e. The ability of a petitioner to bring a claim based on a single egregious violation, rather than waiting for a "sustained or recurring course of action" to occur.

f. An entirely new article protecting the rights of mi- grant workers and specifically guaranteeing them the same rights and remedies under its labor laws as they relate to the core labor rights as well as wages, hours of work, occupa- tional safety and health and workers compensation. We also proposed an annex laying out "Protections for Workers Re- cruited Abroad."

g. Additional duties for the Labor Affairs Council, includ- ing preparing reports on matters related to the implementation of the Chapter and developing guidelines for consideration of public communications to the LAC that include clear deadlines. (See Model Labor Chapter Article 17.7.2 and Annex 2 for full details—the major point of Annex 2 is that a meritorious sub- mission will not languish, but will continue to move through the system in a prompt fashion).

h. A requirement that a Party that has received a public submission and has issued a finding that, if confirmed, would lead the Party to determine that the Party complained against is in violation of its obligations under the labor chapter must con- tinue to proceed to the next step in the process. We also re- quested clearer deadlines for each Party to advance labor cases (to avoid years-long delays like those confronted in the Guate- mala and Honduras cases).

i. The creation of an independent labor secretariat and Trans-Pacific works councils for firms operating in more than one TPP country.

6. Investment: In order to ensure that the TPP achieves shared prosperity rather than simply further skewed gains for global corporations, it is important that the TPP provide better balance in its investment provisions. If the skew toward private interests in the investment chapter is not remedied, global corporations will continue to force a race to the bottom, chilling efforts to increase labor, environmental, public health and con- sumer safety standards by countries competing with each other for foreign direct investment (FDI). Such a competition cannot and does not benefit working families, either here or abroad. America in particular cannot win and should not engage in such a race to the bottom. As such, since our first TPP filing in 2010, we have put forth a number of suggestions to rebalance investment protections to provide due respect and space for govern- mental decisions about how best to secure the public interest, including not only the replacement of the investor-to-state dispute settlement process (ISDS) with a state-to-state mechanism, but other specific, practical changes to the investment chapter and the ISDS process to address current shortcomings, key elements of which are included below.

a. Require investors to exhaust domestic remedies before filing an ISDS case.

b. Require a foreign investor to have the burden of demon- strating that a purported standard of protection under custom- ary international law is based on actual state practice rather than on the unsupported assertions of previous investment tribunals (as the U.S. argued in the Glamis Gold case).

c. Codify the traditional, narrow definition of Minimum Standard of Treatment so that it applies only to the following three areas (as the U.S. argued in the Glamis Gold case): The obligation to provide internal security and protection to foreign investors and investment; to not deny justice by engaging in notoriously unjust or egregious conduct in judicial and admin- istrative proceedings; and to provide compensation for direct expropriation.

d. Clarify that regulatory measures that adversely affect the value of an investment but do not transfer ownership of the investment or permanently destroy its entire economic value do not constitute acts of indirect expropriation.

e. Narrow the definition of investment to include only the kinds of property that are protected by the U.S. Constitution. This would mean excluding the expectation of gain or profit and the assumption of risk.

f. Ensure that foreign investors may not use the most fa- vored nation principle to assert rights provided by other invest- ment agreements or treaties.

g. Explicitly limit national treatment to instances in which a regulatory measure is enacted primarily for a discriminatory purpose.

h. Clarify the language to ensure that foreign subsidiaries are not allowed to bring investment claims against a nation that is the home of their parent company.

i. Modify the restriction on capital controls (used for ex- ample in the U.S.-Korea FTA, Art. 11.7.1(a)) so that it allows the use of such controls—at least with regard to circumstances consistent with recent IMF guidance.

j. In Annex 10-B on Expropriation, strengthen the "excep- tion" by omitting the phrase "except in rare circumstances." In addition, the non-exhaustive list of "excepted" policies should also explicitly include, "labor," "decent work" as that term is understood by the ILO, and all measures that Parties take in order to comply with the Labor and Environment Chapters of the agreement.

Our understanding is that none of these suggestions have been incorporated into the TPP's investment chapter.

7. Enhanced Screening Mechanism for Inward Bound FDI: On a related note, we have repeatedly recommended that the administration improve the current Committee on Foreign Investment in the United States protocol so that the Committee can examine more than just national security issues, but can also consider economic security. The U.S. should emulate the screening mechanisms that Australia and Canada use (e.g., add a "net economic benefit test") in order to ensure that FDI is not used to undermine the U.S. economy or U.S. workers. Existing policy prevents the U.S. from scrutinizing deals such as the original proposal by China Development Bank Loan to Lennar Corporation, which would have required the homebuilder to use a Chinese state-owned construction company. Specifically, we requested that USTR abandon its policy of constricting other nation's investment screening policies and instead leave room for the U.S. to add such a policy in the future. Our understand- ing is that this suggestion has been rejected.

8. Procurement: Because they undermine important job creation programs, we have long opposed procurement chap- ters altogether. We believe that government procurement at the federal, state, and local level is an important tool of economic and social policy. When governments so decide, they should be able to use stimulus funds to create jobs within their borders, and not be required to spend those funds to create jobs else- where. In addition, it is simply bad policy to limit a government's ability to make its spending conditional so as to advance do- mestic social policy. We strongly support the widest possible use of Buy America, Buy American, and Buy "State" policies. We oppose

any procurement commitments in FTAs that restrict the potential stimulative benefits of procurement programs by requiring procuring entities to treat foreign bidders the same as domestic bidders or that do not allow government entities to prohibit the purchase of goods made with child labor, forced labor, under unfair labor conditions, from employers who un- lawfully discriminate, or from employers who practices other- wise undermine U.S. policy. Since our 2010 filing on the TPP, we have recommended, in the case that the Administration re- fuses to omit a procurement chapter, that:

• The USG should negotiate language that would carve out from procurement access obligations all procurement projects funded by stimulus funds appropriated in response to a verified recession.

• The USG should expand the language in the "May 10" agreement to include living wage laws and, for the sake of clarity, prevailing wage laws.

Not only do we understand that the USG has failed to include either recommendation in its TPP proposals, we were surprised to learn at a recent meeting with your staff, that these suggestions regarding prevailing wages were "new" to them. Such a response indicates our suggestions were never seriously considered at all.

9. Dock-on: The existence of the dock-on approach pre- sents a potential major problem—the rules negotiated in the TPP could be even more devastating to U.S. workers depend- ing upon which countries join at a later date. Since our 2010 filing, we have repeatedly urged the Administration to include standards for new entrants regarding labor rights, democratic governance, open markets, and other readiness criteria. To date we have not seen a proposal for such provisions in the TPP. We therefore remain concerned that future administrations would commence negotiations with inappropriate trading partners and without adequate Congressional consultation and approval. In addition, while we have been assured that Congress will have an opportunity for an up or down vote for each new entrant to the TPP, we have seen nothing in writing. We are reluctant to trust such oral assurances and would prefer to see the legislative text that would ensure that, unlike for the WTO, Congress must vote in the affirmative before any new party may join the TPP.

10. Elimination of Technology Transfer Mandates and Production Offsets in Return for Market Access: Some for- eign countries rely heavily on official and non-official policies that force U.S. companies to transfer technology, production, and jobs in return for market access or government procure- ment. While such activity has been well-noted by the Depart- ment of Commerce, Bureau of Industrial Security in its annual reports to Congress with respect to the defense industry, this market distorting mechanism also occurs in the commercial sector—the effect is clear: it is yet another incentive to move jobs and whole factories from the U.S. As we have argued in numerous fora, trade agreements, including the TPP, should prohibit such activity. To date, we are unaware of any proposals in the TPP to effectively eliminate this practice.

11. Intellectual Property: Though we strongly support in- tellectual property protections, we have long opposed exces- sive protections for pharmaceutical products, which form part of the basic human right to health care. Proposals that require patent linkage, excessive data exclusivity periods, and evergreening of patents and that ban pre-grant opposition to patents actually deter innovation instead of promoting it by turn- ing drug makers into rent seekers instead of innovative organi- zations. Since our initial TPP filing in 2010, we have recom- mended that pharmaceutical protections adhere to the TRIPS, rather than TRIPS+ provisions that jeopardize access to afford- able medicines, particularly in developing countries. In addi- tion, we recommended that USTR abandon its so- called "trans- parency provisions" that give drug makers leverage over drug listing and pricing decisions made by government health pro- grams.

The USTR's proposals for the TPP failed to incorporate any of these recommendations (in fact, some of the USTR's intellectual property proposals were not even fully consistent with existing U.S. intellectual property law). Although we un- derstand the text has subsequently changed due to strong oppo- sition by TPP Parties, since we have not seen the working text, we do not know if those changes will adequately protect U.S. job creation while promoting public health here and abroad.

12. Services and Regulations: From the beginning, we have also provided concrete suggestions for improving the carve- out for public services and clarifying the prudential exception for the financial services chapter. Such suggestions will pre- serve the stability of our financial system and the right of state, local, and national governments to provide public services at the level and in the manner they see fit. Likewise, we have ob- jected to a variety of proposals that would undermine effective environmental protections and food and consumer product regulations and put in place burdensome obligations to engage in "regulatory impact analysis" and similar requirements that un- dervalue the protective benefits of regulations while overem- phasizing the "costs" to business interests.

Given our lack of access to the working texts, we do not know the latest status of these texts or to what degree, if any, our suggestions have been incorporated.

Contact: Peter Maybarduk, +1 202 588 7755; pmaybarduk@citizen.org

MEMO: Three Burning Questions about the Leaked TPP Transparency Annex and Its Implications for U.S. Health Care

June 10, 2015

Today, WikiLeaks published the draft Trans-Pacific Partnership (TPP) "Annex on Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices." This Annex sets rules that TPP country health authorities would be required to follow regarding pharmaceutical and medical device procurement and reimbursement. The draft is dated December 17, 2014. An earlier version leaked in 2011. Unlike that document, the new leak expressly names the Centers for Medicare & Medicaid Services (CMS) as covered by the text, "with respect to CMS's role in making Medicare national coverage determinations." Under the TPP, then, these determinations would be subject to a series of procedural rules and principles, the precise meaning of which are not clear and perhaps not knowable.

Pharmaceutical companies could attempt to exploit the general language of the annex to mount challenges to Medicare and health programs in many TPP negotiating countries. The Annex would constrain future policy reforms, including the ability of the U.S. government to curb rising and unsustainable drug prices.

Medicare's national coverage determinations include whether Medicare Part A and Part B will pay for an item or service. Among other things, Part A and B cover drugs administered in a hospital or a physician's office, and durable medical equipment.[1] Below are questions to which the American public and members of Congress should have full and complete answers before voting on whether to cede trade promotion authority (fast track) to the Obama administration.

1. **What guarantees are there that the TPP's requirements would not override existing procedures for Medicare?**

The Office of the United States Trade Representative (USTR) claims that Medicare today is fully compliant with the proposed provisions of the TPP. Yet the ambiguous language of the TPP leaves our domestic healthcare policies vulnerable to attack by drug and device manufacturers. For example:

- Could companies use the Annex to compel Medicare to cover expensive products without a corresponding benefit to public health? Medicare reimbursement is limited to products that are "reasonable and necessary" for treatment. But the TPP "recognize[s] the value" of pharmaceutical products or medical devices through the "operation of competitive markets" or their "objectively demonstrated therapeutic significance," regardless of whether there are effective, affordable alternatives.

- The TPP also requires countries to "make available a review process" for healthcare reimbursement decisions. Medicare national coverage determinations allow for appeals, but only in a limited set of circumstances.[2] Might this conditional appeal process be construed as insufficient, if companies argue the TPP grants them an unconditioned right to review?

- Similarly, the TPP mandates that parties provide opportunities for applicants to comment on reimbursement considerations "at relevant points in the decision-making process." Though Medicare national coverage determinations allow for comments in certain stages of the process, these determinations may be vulnerable to legal challenge depending on the construction of "relevant points."

2. Would the TPP constrain pharmaceutical reform efforts in the U.S.?

In addition to its application to Medicare Part A and B, the Annex would apply to any future efforts related to national coverage determinations by the CMS, including potential Medicare Part D reforms.

In response to soaring drug coasts, advocates have increasingly called on the government to enable the Secretary of Health and Human Services to negotiate the price of prescription drugs on behalf of Medicare beneficiaries. Vital to this reform would be the establishment of a national formulary, which would provide the government with substantial leverage to obtain discounts. [3]

The development of such a national formulary would be subject to the requirements of the TPP. These procedural requirements would pose significant administrative costs, enshrine greater pharmaceutical company influence in government reimbursement decision-making and reduce the capability of the government to negotiate lower prices.

3. Could the inclusion of this Annex in the TPP bolster the case of a pharmaceutical company that is suing the United States?

Investor-State Dispute Settlement is a mechanism that has been a prominent feature of U.S. trade and investment pacts over the last two decades. It allows foreign companies to challenge directly government policies which they claim impinge on their expected future profits, demanding unlimited sums in taxpayer compensation.

Would a foreign pharmaceutical company that has launched an investor-state suit against a government for a reimbursement decision use this annex to bolster their case? The company could attempt to claim that their legitimate expectations have been frustrated, making reference to the expectations created by the annex.

Contact: Peter Maybarduk, +1 202 588 7755; pmaybarduk@citizen.org

[1] Medicare Drug Coverage under Medicare Part A, Part B, Part C , & Part D. (2015, May 1). Retrieved June 9, 2015, from http://www.cms.gov/Outreach-and-Education/Outreach/Partnerships/downloads/11315-P.pdf

[2] "Department of Health and Human Services; Centers for Medicare & Medicaid Services [CMS-3285-N] Medicare Program; Revised Process for Making National Coverage Determinations," 78 Federal Register 152 (7 August 2013), pp. 48164 - 48169.

[3] Outterson, K., & Kesselheim, A. (2009). How Medicare Could Get Better Prices On Prescription Drugs. Health Affairs. Retrieved June 9, 2015, from http://content.healthaffairs.org/content/28/5/w832.full

https://wikileaks.org/tpp/healthcare/press.html

TPP Transparency Chapter

ANNEX ON
TRANSPARENCY AND PROCEDURAL FAIRNESS FOR
PHARMACEUTICAL PRODUCTS AND MEDICAL DEVICES

Today, Wednesday 10 June 2015, WikiLeaks publishes the Healthcare Annex to the secret draft "Transparency" Chapter of the Trans-Pacific Partnership Agreement (TPP), along with each country's negotiating position. The Healthcare Annex seeks to regulate state schemes for medicines and medical devices. It forces healthcare authorities to give big pharmaceutical companies more information about national decisions on public access to medicine, and grants corporations greater powers to challenge decisions they perceive as harmful to their interests.

Expert policy analysis, published by WikiLeaks today, shows that the Annex appears to be designed to cripple New Zealand's strong public healthcare programme and to inhibit the adoption of similar programmes in developing countries. The Annex will also tie the hands of the US Congress in its ability to pursue reforms of the Medicare programme.

The draft is restricted from release for four years after the passage of the TPP into law.

The TPP is the world's largest economic trade agreement that will, if it comes into force, encompass more than 40 per cent of the world's GDP. Despite the wide-ranging effects on the global population, the TPP and the two other mega-agreements that make up the "Great Treaty", (the TiSA and the TTIP), which all together cover two-thirds of global GDP, are currently being negotiated in secrecy. The Obama administration is trying to gain "Fast-Track" approval for all three from the US House of Representatives as early as tomorrow, having already obtained such approval from the Senate.

Julian Assange, WikiLeaks publisher, said:

It is a mistake to think of the TPP as a single treaty. In reality there are three conjoined mega-agreements, the TiSA, the TPP and the TTIP, all of which strategically assemble into a grand unified treaty, partitioning the world into the west versus the rest. This "Great Treaty" is descibed by the Pentagon as the economic core to the US military's "Asia Pivot". The architects are aiming no lower than the arc of history. The Great Treaty is taking shape in complete secrecy, because along with its undebated geostrategic ambitions it locks into place an aggressive new form of transnational corporatism for which there is little public support.

Few people, even within the negotiating countries' governments, have access to the full text of the draft agreement and the public, who it will affect most, have none at all. Hundreds of large corporations, however, have been given access to portions of the text, generating a powerful

lobby to effect changes on behalf of these groups. WikiLeaks has launched a campaign to crowd-source a $100,000 reward for the rest of the TPP, which at time of press had raised $62,000.

Read the TPP Transparency for Healthcare Annex here

Read the Analysis by Dr Deborah Gleeson (Australia) on TPP Transparency for Healthcare Annex here

Read the Analysis by Professor Jane Kelsey (New Zealand) on TPP Transparency for Healthcare Annex here

The New Yorker

June 11, 2015

Why Does Obama Want This Trade Deal So Badly?

By William Finnegan

Republican opponents of the Trans-Pacific Partnership have begun calling it Obamatrade. And yet most of the plan's opponents are from the President's own party. Credit Credit: Pablo Martinez Monsivais / AP

The political battle over the enormous, twelve-nation trade agreement known as the Trans-Pacific Partnership keeps getting stranger. President Obama has made the completion of the deal the number-one legislative priority of his second term. Indeed, Republican opponents of the T.P.P., in an effort to rally the red-state troops, have begun calling it Obamatrade. And yet most of the plan's opponents are not Republicans; they're Democrats.

Obama's chief allies in his vote-by-vote fight in the House of Representatives to win "fast-track authority" to negotiate this and other trade deals are Speaker John Boehner and Representative Paul Ryan—not his usual foxhole companions. The vote may come as soon as Friday. The House Republican leaders tell their dubious members that they are supporting Obama only in order to "constrain" him. Meanwhile, Obama is lobbying members of the Black Congressional Caucus, whose support he can normally count on, tirelessly and, for the most part, fruitlessly. "The president's done everything except let me fly Air Force One," Representative Cedric Richmond, Democrat of Louisiana, told the *Christian Science Monitor* this week. Nonetheless, Richmond said, "I'm leaning no."

The long, bad aftertaste of NAFTA—the North American Free Trade Agreement, enacted in 1994—explains much of the Democratic opposition to the T.P.P. Ronald Reagan originally proposed NAFTA, but Bill Clinton championed it, got it through Congress mainly on Republican votes, and signed it. In many Democratic districts, NAFTA is still widely blamed for the loss of hundreds of thousands of American manufacturing jobs, and for long-term downward pressure on wages. When President Obama argues that the T.P.P. is not NAFTA, he is correct. It convenes Pacific Rim nations and economies of many stripes, from wealthy, democratic Japan to authoritarian, impoverished Vietnam, and it includes six countries with which the United States already has free-trade agreements. If enacted, it will encompass forty per cent of global economic activity. It is less a traditional trade deal than a comprehensive economic treaty and, at least for the United States, a strategic hedge against the vast and growing weight of Chinese regional influence. What exactly the T.P.P. will *do*, however, is difficult to know, because its terms are being negotiated in secret. Only "cleared advisors," most of them representing various private industries, are permitted to work on the text. Leaked drafts of chapters have occasionally

surfaced—enough to alarm, among others, environmentalists, labor groups, and advocates for affordable medicine.

Some of the fear and loathing inspired by the T.P.P. is hard to take seriously. Conservative opponents of immigration reform, for instance, have descried in the T.P.P. a Trojan horse, inside which, they fear, the dreaded immigration reform will be smuggled into law. (Paul Ryan has tried to debunk this notion, calling it an "urban legend.") There are House Republicans who seemingly refuse to support any measure that Obama wants, simply because he wants it. Last week, contemplating the approaching fast-track vote, Representative Ryan Zinke, of Montana, said, "We are talking about giving Barack Obama—a President who negotiates with rogue nations like Iran and Cuba—exorbitant authority to do what he thinks is best." Zinke, a former Navy SEAL commander, went on, "I don't have faith that President Obama will negotiate in the best interest of Montana or America."

More substantive objections to the T.P.P. have emerged from senators and representatives, who are now allowed, under strictly controlled conditions—in a guarded basement room under the Capitol, with no note-taking—to read drafts of the eight-hundred-page agreement. Senator Elizabeth Warren has criticized its provisions for "investor-state dispute settlement." I.S.D.S. allows corporations to sue governments over laws that may adversely affect "expected future profits." Environmental regulations, public-health measures, and even minimum-wage laws can be challenged under I.S.D.S., which is already a feature of many trade agreements. A Swedish power company is currently suing Germany, seeking $4.6 billion in damages, because of steps Germany is taking to phase out nuclear power, and Philip Morris is suing to prevent Uruguay and Australia from implementing policies to reduce smoking. Under the T.P.P., the international tribunals that would hear such cases would not, according to Warren, be staffed by judges but by a rotating cast of corporate lawyers. Challenges to American laws should at least be lodged, she argues, in American courts.

WikiLeaks has published T.P.P. draft chapters on investment, the environment, and two versions, from 2013 and 2014, of the intellectual-property-rights chapter. The environment chapter was a major disappointment to activists who had been led to believe that it would contain real enforcement mechanisms. In the Sierra Club's analysis, the T.P.P. will generate a rapid increase in exports of American liquefied natural gas, which will in turn lead to more fracking, more methane emissions, a shift of the domestic energy market from gas toward coal, and the exacerbation of climate change. The proposed intellectual-property agreements appear to have been dictated by the entertainment, tech, and pharmaceutical industries. Doctors Without Borders declared that, if the drug-patent provisions do not change in the final draft, the T.P.P. is on track to become "the most harmful trade pact ever for access to medicines" in developing countries. With each glimpse of the draft chapters, the coalition opposing the agreement grows. Even a "sweetener" in the form of assistance for workers who lose their jobs because of trade agreements turns out to be partly financed by a seven-hundred-million-dollar raid on Medicare. Now Julian Assange, the Wikileaks founder, is trying to raise a hundred thousand dollars through crowdsourcing, planning to offer the money as a reward to anyone who leaks the entire T.P.P. text—twenty-nine chapters' worth.

With the fast-track authority that President Obama seeks, he would be able to negotiate trade agreements and present them to Congress for an up-or-down vote, with no amendments or filibusters permitted. Such agreements would then require only fifty-one votes, not sixty, to pass. Paul Ryan recently said, on CNN, that "every President since Franklin Delano Roosevelt has had" some form of fast-track authority. That is not quite right—Richard Nixon never got it, although he initiated the modern version of it. Still, not having it plainly galls Obama. And his only realistic hope of enacting the T.P.P. now turns on getting fast-track authority from the House.

The Senate passed fast-track last month, sixty-two to thirty-seven, with only fourteen Democrats voting yes. Boehner and Ryan expect to be able to produce two hundred Republican votes. That means eighteen Democratic votes are needed. Nancy Pelosi, the minority leader, is reported to be working closely with Boehner and Ryan to come up with the number they need—although she still hasn't said which way she'll vote herself. That's how strange the legislative politics of the T.P.P. have become. Nearly every constituency in the Democratic Party opposes it; and the more they learn about it, the more they oppose it. And yet their leader, Obama, wants it badly.

But why? Maybe it's a better agreement—better for the American middle class, for American workers—than it seems in the leaked drafts, where it appears bent to the will of multinational corporations. John Kerry, the Secretary of State, and Ashton Carter, the Secretary of Defense, co-authored a column on Monday in *USA Today* arguing, in evangelical tones, that the T.P.P. will usher in a glorious new era of American-led prosperity, a "global race to the top" for all parties. Meanwhile, the A.F.L.-C.I.O. sees only a race to the bottom. Organized labor, by all accounts, plans to punish any elected Democrat who supports the T.P.P., or even supports fast-track for Obama, in the next campaign. It's difficult, again, to evaluate the agreement when we can't see it. And it will be difficult for Congress to do its job if its members can't study each part of the many-tentacled T.P.P. on its merits, but must simply vote yes or no on the whole shebang. What's the rush? Is it simply Obama's wish to make his mark on history and to complete his pivot toward Asia before his time is up? Politicians are often accused of supporting pro-corporate policies to please wealthy backers, looking toward the next campaign. That can't be Obama's motive now.

http://www.fcrn.org.uk/fcrn-blogs/vicki-hird/what-will-ttip-mean-food-and-climate

Food Climate Research Network

What will TTIP mean for food and climate?

Submitted by Vicki Hird on 16 Jun 2015 - 8:22am.

This blog-post is written by FCRN advisory board member Vicki Hird MSC FRES RSA. She is a food, farming and environmental professional with 25 years' experience in research, policy advocacy and campaigning with some great wins, some moderate successes, some useful failures, many reports and a book on food and farming policy. She started out studying slime mould ecology and agricultural pest control but got sidetracked...

A trade treaty between the US and EU, which represents around a third of global trade, should be big news. And rightly so. The Transatlantic Trade and Investment Treaty (TTIP) will result in a comprehensive free trade and investment treaty between the European Union and the USA. It is aimed at reducing barriers to trade between the two blocks - such as customs duties, red tape and restrictions on investment. Negotiations started in June 2013 are expected to conclude in 2016. It could have a potentially major effect on our economy, businesses and society.

And it may not. Making a concrete case for why this trade negotiation is so contentious and increasingly problematic is not so easy. In the absence of a negotiating text, when talking of trade negotiations going on behind well closed doors, it is often a case of known unknowns and unknown unknowns.

The politics are getting very messy (link is external) – and for some EU members states a bit tied up in national politics right now (see some MEPs making a merry with parliament (link is external)). In the US the ability of the Obama administration to fast track these negotiations (link is external) is getting mired in politics.

There is much hype about how much economic gain and how many jobs would be created through greater trade between these two giants. The modelling and data these claims are based on have been strongly critiqued (link is external).

Yet what is clear that any wide-ranging trade deal between the EU and US could have a significant impact on global food trade. In such deals, food and farm related regulations may be traded away in the negotiations in return for gains in other areas. The real 'unknown unknowns'. Additionally, given that both climate and chemical related policies (including pesticides and food treatments) are also likely to be affected, the impact on food production and consumption could go far wider.

TTIP – why complacency is not a good idea

Trade negotiations in the era of the General Agreement on Tariffs and Trade used to be about reducing trade barriers, such as quota and import taxes. Now they are more about the alignment of regulations. And we have, rightly, a strongly regulated food sector.

TTIP cannot change European laws and regulations outright, yet it could create huge pressure to weaken how those rules are applied – and it can chill the development of new rules for consumer protection or public safety. Other similar trade partnerships have shown this. The North American Free Trade Agreement (NAFTA) which allows free trade between Canada, the US and Mexico for instance – 20 years old last year–weakened labour, environmental and public health standards.[1] It also accelerated an obesity epidemic in Mexico. (link is external) In the UK the MPs Environmental Audit Committee (EAC) reported on findings of their TTIP enquiry noting that it "*could weaken European and UK environmental and public health regulations if laxer US regulations are 'mutually accepted' in the deal*". [2]

Additionally the Investor State Dispute Settlement (ISDS) – a core and hugely contentious element of this and many other trade treaties –provides a means by which corporate interests can override governments – if corporations believe that laws restrict or harm their investments. In essence, companies are given powers to contest – and potentially reverse – government decisions (on health, environment etc.) using international private tribunals. There are many examples where this mechanism has proved effective for them.[3] The EAC noted further that the "*prospect of litigation ... produces a chilling effect on policy-making*" and noted also that there was not a strong case made yet for ISDS whilst many risks in introducing it.

What the TTIP may do to regulations

Trade commissioner Cecilia Malmström insists that the alignment of European and American regulations will not be at the expense of the environment, health, safety or consumer protection.[4]

Sam Lowe of Friends of the Earth highlighted in a 2014 blog three key concerns from his reading of the European Commission draft TTIP chapter on Sanitary and Phytosanitary (food safety, animal health and plant health) issues (link is external), leaked to the US based Institute for Agriculture and Trade Policy[5]:

1. **Food safety standards jeopardised** by conflict of interest - the EU is pushing for a system of 'mutual recognition'. This means that both parties (the EU and US) would accept each other's approach so long as it complies with "the importing Party's appropriate level of protection". Each may lodge an objection on individual issues, so long as it doesn't create an "unjustified barrier to trade" … whatever that is.
2. **Cut in port inspections** could lead to a rise in contaminated food imports - The European Commission is planning to reduce port of entry food safety inspections and tests. This increases the probability of contaminated goods slipping through the safety net; and the importing party would be required to accept the exporting party's judgement despite there being clear safety concerns.

3. **Importing countries lose power to block suspected unsafe food from entering**. Even if the importing party suspected contamination, TTIP would render it unable to ban or restrict imports of the potentially infected product.

Beyond these basics there are other food related concerns in the 'known unknown' category. One of the US government's key objectives is to secure better access to European markets for US-grown GM food. US negotiators, pushed by their biotech industry, see Europe's labelling rules and safety checks for GM food as barriers to trade (link is external). The US was hugely annoyed at (link is external) the recent EU decision to allow members states to ban GM. It is unclear how this will be used in negotiations. Will the EU give in on GM seeds and food in return for another part of the deal?

Pesticides and chemicals used in the food sector are another potential stumbling block. The European Parliament's environment committee reports (link is external) that 82 pesticides used in the US are banned in Europe. The precautionary principle which underpins EU chemical safety rules and licencing[6] – is almost the opposite of the US approach where the onus is on authorities to prove that a chemical is hazardous before imposing any restrictions. Endocrine disrupting chemicals (link is external) – a group which includes chemicals used in food packaging and some pesticides and which are linked to reproductive disorders and some cancers - has been identified already as TTIP sensitive. Reports of meetings have suggested that proposed new EU bans on use of this group of chemicals have been watered down to accommodate the US position during the TTIP negotiations (link is external).

Hormones and chemical washes as well as standards overall (including those affecting livestock welfare) used in the livestock industry are also hugely contentious. European Parliamentarians published a paper (link is external)outlining concerns that if the EU accepts US standards then EU farmers will be disadvantaged. UK farmers hold mixed views (link is external) – there is a huge opportunity to get Americans eating our sheep apparently - but they are clearly concerned at having their market flooded.

How trade-treaties influence our climate policies?

It is worth noting how our fellow campaigners in the US see this negotiation. This blog reflects on some of their deep (link is external) concerns about TTIP. Amongst many, a major concern is how the EU appears to want the US to end its current legal prohibition on crude oil exports and restrictions on natural gas exports. That means more US coal, oil and gas exports that will fuel continued global warming and it "*threatens to turn the US into an EU fracking colony*". This would have direct (land and water) and indirect implications for food production.

As FCRN members know well, the IPCC make it clear that climate change is already drastically affecting food security for some and is set to grow in impact globally unless strong and rapid action is agreed at the UNFCCC and at national level. A 2°C rise in temperature will have enormous impacts on agricultural and other types of food production around the world. This will be via heat waves, droughts, loss of farmland and fisheries and flooding. Weather extremes, disease spread, sea level rise, ocean acidification, and salinization will all worsen the extent and

severity of food impacts. Agriculture is also central to the lives and livelihoods of billions globally so the social impacts are and will be severe.

With every failure to curb temperature rise, the extent of these impacts become harsher. If TTIP and other such treaties increase the likelihood of more fossil fuels (link is external) being taken out of the ground we can be clear the food impact is at the very least unhelpful.

So whilst overall it is not possible to say yet how the TTIP could affect the food system, the potential for harmful impacts are evident. The health, cultural, environmental, ethical and economic issues already plaguing our food system are unlikely to be sorted by more unfettered trade, a 'harmonisation of legislation' and more corporate control.

Perhaps I am being unduly pessimistic, but positive impacts potentially arising from this agreement - in terms of a truly sustainable, resilient food system for all - have been hard to find. That said, if you know of any - or have any additional details and comment about the agreement and its development, I'd be keen to hear them.

Any discussion via the FCRN website would be most welcome.

Vicki Hird MSc FRES RSA.

Please contribute with your views or share additional details in the comments box below - especially if you have suggestions on studies and reports looking into potential sustainability impacts from this agreement. You will need to be signed in as a member to do so. Contact us (link sends e-mail) if you have any problems.

Connect with Vicki on twitter: @Vickihird

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[1] For example a recent case http://www.commondreams.org/views/2015/04/09/new-nafta-rulings-favor-corporations-over-community-values-environment (link is external)

[2] http://www.publications.parliament.uk/pa/cm201415/cmselect/cmenvaud/857/85702.htm (link is external)

[3] This paper provides an excellent overview - Christiane Gerstetter & Nils Meyer-Ohlendorf, Investor-State Dispute Settlement under TTIP: A risk for environmental regulation? (December 2013) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2416450 (link is external)

[4] http://europa.eu/rapid/press-release_SPEECH-14-1921_en.htm (link is external)

[5] http://www.iatp.org/documents/leaked-document-reveals-us-eu-trade-agreement-threatens-public-health-food-safety (link is external)

[6] http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52000DC0001&from=EN (link is external)

JEFF SESSIONS
ALABAMA

COMMITTEES:
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United States Senate
WASHINGTON, DC 20510–0104

June 5, 2015

President Barack Obama
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear President Obama:

On May 6th of this year, I sent you a letter (enclosed) regarding your request for Congress to grant you fast-track executive authority. Under fast-track, Congress transfers its authority to the executive and agrees to give up several of its most basic powers. These concessions include: the power to write legislation, the power to amend legislation, the power to fully consider legislation on the floor, the power to keep debate open until Senate cloture is invoked, and the constitutional requirement that treaties receive a two-thirds vote.

The latter is especially important since, having been to the closed room to review the secret text of the Trans-Pacific Partnership, it is clear it more closely resembles a treaty than a trade deal. In other words, through fast-track, Congress would be pre-clearing a political and economic union before a word of that arrangement has been made available to a single private citizen.

The letter, which received no reply, asked several fundamental questions Congress ought to have answered before even considering whether to grant the executive such broad new powers. Among those, I asked that you make public the section of the TPP that creates a new transnational governance structure known as the Trans-Pacific Partnership Commission. The details of this new governance commission are extremely broad and have the hallmarks of a nascent European Union, with many similarities.

Reviewing the secret text, plus the secret guidance document that accompanies it, reveals that this new transnational commission - chartered with a "Living Agreement" clause - would have the authority to amend the agreement after its adoption, to add new members, and to issue regulations impacting labor, immigration, environmental, and commercial policy. Under this new commission, the Sultan of Brunei would have an equal vote to that of the United States.

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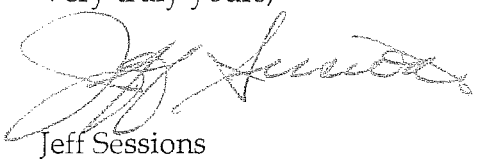
The implications of this new Pacific Union are extraordinary and ought to be discussed in full, in public, before Congress even contemplates fast-tracking its creation and pre-surrendering its power to apply the constitutional two-thirds treaty vote. In effect, to adopt fast-track is to agree to remove the constitutional protections against the creation of global governance structures before those structures are even made public.

I would therefore ask that you provide to me the legal and constitutional basis for keeping this information from the public and explain why I cannot share the details of what I have read with the American people. Congress should not even consider fast-tracking the transfer of sovereign power to a transnational structure before the details of that new structure are made fully available for public review.

Very truly yours,



Jeff Sessions
United States Senator

JS:ph

JEFF SESSIONS
ALABAMA

COMMITTEES
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ENVIRONMENT AND PUBLIC WORKS
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United States Senate
WASHINGTON, DC 20510-0104

May 6, 2015

The Honorable Barack Obama
President
The White House
Washington, DC 20500

Dear Mr. President:

You have asked Congress to approve fast-track legislation (Trade Promotion Authority) that would allow international trade and regulatory agreements to be expedited through Congress for the next six years without amendment. Fast-track, which proponents hope to adopt within days, would also ensure that these agreements—none of which have yet been made public—could pass with a simple majority vote, rather than the 67 votes applied to treaties or the 60 votes applied to important legislative matters.

The first international trade and regulatory agreement that would be expedited under "fast-track" is the Trans-Pacific Partnership, or TPP. This is one of the largest international compacts in the history of the United States. Yet, this agreement will be kept a closely-guarded secret until *after* Congress agrees to yield its institutional powers and provide the Administration with a guaranteed "fast-track" to adoption.

The U.S. ran a record $51.4 billion trade deficit in March, the highest-level recorded in six years. This is especially concerning since assurances were made from the Administration that the recent South Korea free trade deal would "increase exports of American goods by $10 billion to $11 billion." But, in fact, American domestic exports to Korea increased by only $0.8 billion, an increase of 1.8 percent, while imports from Korea increased $12.6 billion, an increase of 22.5 percent. Our trade deficit with Korea increased $11.8 billion between 2011 and 2014, an increase of 80.4 percent, nearly doubling in the three years since the deal was ratified.

Overall, we have already lost more than 2.1 million manufacturing jobs to the Asian Pacific region since 2001.

Former Nucor Steel Chairman Daniel DiMicco argues that we have not been engaged in free trade but in "unilateral trade disarmament and enablement of foreign mercantilism."

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Due to the enormity of what is at stake, I believe it is essential Congress have answers to the following questions before any vote is scheduled on "fast-track" authority.

1. **Regarding the "Living Agreement":** There is a "living agreement" provision in TPP that allows the agreement to be changed after adoption—in effect, vesting TPP countries with a sweeping new form of global governance authority. TPP calls this new global authority the "Trans-Pacific Partnership Commission." These measures are unprecedented. While I and other lawmakers have been able to view this provision in secret, I believe it must be made public before any vote is scheduled on TPA, due to the extraordinary implications. I call on you today to make that section of TPP public for the American people to see and review.

2. **Regarding trade deficits:** Will TPP increase or reduce our cumulative trade deficit with TPP countries overall, and with Japan and Vietnam specifically?

3. **Regarding jobs and wages:** Will TPP increase or reduce the total number of manufacturing jobs in the United States generally, and American auto-manufacturing jobs specifically, accounting for jobs lost to increased imports? Will average hourly wages for U.S. workers, including in the automobile industry, go up or down and by how much?

4. **Regarding China:** Can TPP member countries add new countries, including China, to the agreement without future Congressional approval?

5. **Regarding foreign workers:** TPA is a six-year authority. Can you state unconditionally that no agreement or executive action throughout the lifetime of TPA will alter the number, duration, availability, expiration enforcement, rules, or processing time of guest worker, business, visitor, nonimmigrant, or immigrant visas to the United States?

Thank you for your responses to these questions. Congress has an obligation to defend the legitimate interests of U.S. workers, and the rights of all Americans as citizens of a sovereign Republic.

Very truly yours,

Jeff Sessions
U.S. Senator

http://www.bostonglobe.com/opinion/2015/06/23/warren/CJluXWm4B5VDTdUDsCkwEL/story.html?s_campaign=8315

Boston Globe

Trade agreements should not benefit industry only

By Elizabeth Warren June 23, 2015

Recently Hillary Clinton joined Nancy Pelosi and many others in Congress to call on the president to reorient our trade policy so that it produces a good deal for all Americans — not just for a handful of big corporations. Here's a realistic starting point: Fix the way we enforce trade agreements to ensure a level playing field for everyone. Many of our close allies — major trading partners like Australia, Germany, France, India, South Africa, and Brazil — are already moving in this direction. American negotiators should stop fighting those efforts and start leading them.

We live in a largely free trade world. Over the past 50 years, we've opened up countless markets, so that tariffs today are generally low. As a result, modern trade agreements are less about reducing tariffs and more about writing new rules for everything from labor, health, and environmental standards to food safety, prescription drug access, and copyright protections.

Even if those rules strike the right balance among competing interests, the true impact of a trade deal will turn on how well those rules are enforced. And that is the fundamental problem: America's current trade policy makes it nearly impossible to enforce rules that protect hard-working families, but very easy to enforce rules that favor multinational corporations.

For example, anyone who wishes to enforce rules that impose labor or environmental standards must plead with our government to bring a claim on their behalf. Reports from the Government Accountability Office, the Labor Department, and the State Department have shown that the Clinton, Bush, and Obama administrations have rarely brought such claims, even in the face of overwhelming evidence of violations. Without strong enforcement, promises that American workers won't have to compete against 50-cent-an-hour foreign laborers or promises that countries with terrible environmental records will raise their standards are meaningless.

But multinational corporations don't have to plead with the government to enforce their claims. Instead, modern trade deals give corporations the right to go straight to an arbitration panel when a country passes new laws or applies existing laws in ways that the corporations believe will cost them money. Known as investor-state dispute settlement (ISDS), these international arbitration panels can force countries to pony up billions of dollars in compensation. And these awards stick: No matter how crazy or outrageous the decision, no appeals are permitted. Once the arbitration panel rules, taxpayers must pay.

Because of how costly these awards can be, ISDS creates enormous pressure on governments to avoid actions that might offend corporate interests. Corporations have brought ISDS cases against countries that have raised their minimum wage, attempted to cut smoking rates, or prohibited dumping toxic chemicals. Just last month, a foreign corporation successfully challenged Canada's decision to deny a blasting permit because of concerns about the environmental impact on nearby fishing grounds, and now the company could get up to $300 million from Canadian taxpayers. Will Canada's environmental regulators hesitate before they say no to the next foreign corporation that wants to dump, blast, or drill?

Leading economic and legal experts have called on America to drop ISDS from its trade deals. Hillary Clinton recently called ISDS "a fundamentally antidemocratic process." The conservative Cato Institute agrees, noting that ISDS is "ripe for exploitation by creative lawyers" looking to challenge the "world's laws and regulations."

And here lies the double standard at the heart of our trade deals: Once they sign on, countries know that if they strengthen worker, health, or environmental standards, they invite corporate ISDS claims that can bleed taxpayers dry. But countries also know that if they fail to raise wages or stop dumping in the river — even if they made such promises in the trade deal — the US government will likely do nothing.

While American negotiators ignore this problem, the rest of the world is waking up and fighting back. After Phillip Morris targeted it for billions in ISDS compensation, Australia began raising significant objections to ISDS. Negotiations with Europe over a massive new trade deal have stalled in part because of objections to ISDS, including from Germany and France. India is considering abandoning ISDS. So is South Africa, after being hit with an ISDS action challenging — incredibly — its postapartheid policies promoting minority ownership in its mining sector. Brazil has flatly refused to include ISDS in any of its trade agreements.

America needs trade — but not trade agreements that offer gold-plated enforcement for giant corporations and meaningless promises for everyone else. If we truly want better deals that work for everyone, we should stop clinging to our enforcement double standard and start joining our allies in trying to level the playing field.

Elizabeth Warren is a US senator from Massachusetts.

http://www.politico.com/agenda/story/2015/06/tpp-deal-leaked-pharma-000126

Politico

Leaked: What's in Obama's trade deal

Is the White House going to bat for Big Pharma worldwide?

By Michael Grunwald

A recent draft of the Trans-Pacific Partnership free-trade deal would give U.S. pharmaceutical firms unprecedented protections against competition from cheaper generic drugs, possibly transcending the patent protections in U.S. law.

POLITICO has obtained a draft copy of TPP's intellectual property chapter as it stood on May 11, at the start of the latest negotiating round in Guam. While U.S. trade officials would not confirm the authenticity of the document, they downplayed its importance, emphasizing that the terms of the deal are likely to change significantly as the talks enter their final stages. Those terms are still secret, but the public will get to see them once the twelve TPP nations reach a final agreement and President Obama seeks congressional approval.

Still, the draft chapter will provide ammunition for critics who have warned that TPP's protections for pharmaceutical companies could dump trillions of dollars of additional health care costs on patients, businesses and governments around the Pacific Rim. The highly technical 90-page document, cluttered with objections from other TPP nations, shows that U.S. negotiators have fought aggressively and, at least until Guam, successfully on behalf of Big Pharma.

The draft text includes provisions that could make it extremely tough for generics to challenge brand-name pharmaceuticals abroad. Those provisions could also help block copycats from selling cheaper versions of the expensive cutting-edge drugs known as "biologics" inside the U.S., restricting treatment for American patients while jacking up Medicare and Medicaid costs for American taxpayers.
"There's very little distance between what Pharma wants and what the U.S. is demanding," said Rohit Malpini, director of policy for Doctors Without Borders.

Throughout the TPP talks, the Obama administration has pledged to balance the goals of fostering innovation in the drug industry, which means allowing higher profits, and promoting wider access to valuable medicines, which means keeping prices down. U.S. Trade Representative Michael Froman has pointed out that pharmaceutical companies often have to invest hundreds of millions of dollars to get a new drug to market, which they would have little incentive to do without strong protections for the patented product. But Froman has also recognized the value of allowing much cheaper generic drugs to enter the market after those brand-name patents expire. In the U.S., generics now comprise more than five-sixths of all prescription drugs, but only about one-quarter of drug costs.

Advocates for the global poor, senior citizens, labor unions and consumers as well as the generics industry have accused the administration of abandoning that balance, pushing a pharmaceutical-company agenda at the expense of patients and taxpayers. One critic, hoping to illustrate the point and rally opposition to TPP in Congress, gave POLITICO the draft chapter, which was labeled "This Document Contains TPP CONFIDENTIAL Information" on every page.

U.S. officials said the key point to remember about trade deals is that no provision is ever final until the entire deal is final—and that major compromises tend to happen at the very end of the negotiations. They expect the real horse-trading to begin now that Obama has signed "fast-track" legislation requiring Congress to pass or reject TPP without amendments.

"The negotiations on intellectual property are complex and continually evolving," said Trevor Kincaid, a spokesman for Froman. "On pharmaceutical products, we are working closely with stakeholders, Congress, and partner countries to develop an approach that aims to make affordable life-saving medicine more widely available while creating incentives for the development of new treatments and cures. Striking this important balance is at the heart of our work."

The draft chapter covers software, music and other intellectual property issues as well, but its most controversial language involves the rights of drug companies. The text reveals disputes between the U.S. (often with support from Japan) and its TPP partners over a variety of issues—what patents can cover, when and how long they can be extended, how long pharmaceutical companies can keep their clinical data private, and much more. On every issue, the U.S. sided with drug companies in favor of stricter intellectual property protections.

Some of the most contentious provisions involve "patent linkage," which would prevent regulators in TPP nations from approving generic drugs whenever there are any unresolved patent issues. The TPP draft would make this linkage mandatory, which could help drug companies fend off generics just by claiming an infringement. The Obama administration often describes TPP as the most progressive free-trade deal in history, citing its compliance with the tough labor and environment protections enshrined in the so-called "May 10 Agreement" of 2007, which set a framework for several trade deals at the time. But mandatory linkage seems to be a departure from the May 10 pharmaceutical provisions.

In an April 15 letter to Froman, Heather Bresch, the CEO of the generic drug company Mylan, warned that mandatory patent linkage would be "a recipe for indefinite evergreening of pharmaceutical monopolies," leading to the automatic rejection of generic applications. The U.S. already has mandatory linkage, but most other TPP countries do not, and Bresch argued that U.S. law includes a number of safeguards and incentives for generic companies that have not made it into TPP.

"With all due respect, the USTR has…cherry-picked the single provision designed to block generic entry to the market," Bresch wrote.

Generics are thriving in the U.S. despite linkage, saving Americans an estimated $239 billion on drugs in 2013. But the U.S. is the world's largest market, and advocates fear that generic manufacturers may not take on the risk and expense of litigation in smaller markets if TPP tilts the playing field against them. One generics manufacturer, Hospira, reportedly testified at a TPP forum in Melbourne, Australia, that it would not launch generics outside the U.S. in markets with linkage.

The opponents are also worried about the treaty's effect on the U.S. market, because its draft language would extend mandatory patent linkage to biologics, the next big thing in the pharmaceutical world. Biologics can cost hundreds of thousands of dollars a year for patients with illnesses like rheumatoid arthritis, hepatitis B and cancer, and the first knockoffs have not yet reached pharmacies. The critics say that extending linkage to biologics—which can have hundreds of patents—would help insulate them from competition forever.

"It would be a dramatic departure from U.S. law, and it would put a real crimp in the ability of less expensive drugs to get to market," said K.J. Hertz, a lobbyist for AARP. "People are going to look at this very closely in Congress."

Drug companies are already pushing for TPP to guarantee them 12 years of exclusivity for their data regarding biologics, although the draft text suggests the other TPP nations have not agreed. Jay Taylor, vice president of the Pharmaceutical Research and Manufacturers of America, said it's crucial for TPP to protect the intellectual property that emerges from years of expensive research, so that drug companies can continue to develop new medicines for patients around the world.

"These innovations could be severely hindered if IP protections are scaled back," Taylor said. "This is especially important in the area of biologic medicines, which could hold the key to unlocking treatments for diseases that have thwarted researchers for years."

U.S. officials would not discuss the status of the TPP talks. But they suggested the May 10 Agreement did include a milder form of linkage, although it didn't prevent regulators from approving generics mired in patent disputes. They also believe a 2009 U.S. law included a form of linkage for biologics, although again, that law's dispute resolution process for patent issues was not as prescriptive as the TPP draft. And they cautioned that any pre-Guam draft would not reflect recent negotiations over "transition periods" that would delay the stricter patent standards in developing countries like Vietnam.

In any case, Kincaid said U.S. negotiators are determined to strike a balance between innovation and access in the final product.

"While this is our touchstone, the negotiations are still very much in process, and the details of a final outcome cannot yet be forecasted," he said.

But Malpani of Doctors Without Borders said U.S. negotiators have basically functioned as drug lobbyists. The TPP countries have 40 percent of global economic output, and the deal is widely seen as establishing new benchmarks for some of the most complex areas of global business.

Malpani fears it could set a precedent that crushes the generic drug industry under a mountain of regulation and litigation.

"We consider this the worst-ever agreement in terms of access to medicine," he said. "It would create higher drug prices around the world—and in the U.S., too.

http://www.huffingtonpost.com/deborah-james/just-before-round-of-nego_b_7715478.html

Just Before Round of Negotiations on the Proposed 'Trade in Services Agreement' (TISA), Wikileaks Releases Updated Secret Documents

Posted: 07/02/2015 1:21 pm EDT Updated: 07/02/2015 6:59 pm EDT

Today, Wikileaks released a *second batch* of the most updated draft texts on the proposed TISA, along with substantive analysis, on each of four massive services sectors: Financial Services, Telecommunications Services, Electronic Commerce, and Maritime Transport. This follows on their release yesterday of cross-cutting annexes on Domestic Regulation, the "Movement of Natural Persons," Transparency, and Government Procurement, and the Agenda for next week's negotiations, along with what Wikileaks called the journalistic holy grail: the Core Text of the proposed agreement. The negotiating texts are supposed to remain secret for five years after the deal is finalized or abandoned.

The documents, along with the analysis, highlight the way that the TISA responds to major corporate lobbies' desire to deregulate services, even beyond the existing World Trade Organization (WTO) rules. This leak exposes the corporate aim to use TISA to further limit the public interest regulatory capacity of democratically elected governments by imposing disciplines on domestic issues from government purchasing and immigration to licensing and certification standards for professionals and business operations, not to mention the regulatory process itself.

The Agenda indicates that other services will likely come under the jurisdiction of the proposed TISA -- topics include energy services, environmental services, delivery services, and "patient mobility."

Given the added dangers of the recently approved Fast Track provisions which would apply to a potential TISA, it is clear that governments should abandon negotiations on this corporate wish list and focus on strengthening public interest regulation and the democratic process.

"The Annex on **Domestic Regulation** is a serious threat to regulations that people really care about -- like what kind of development is allowed in their neighbourhood or the standards for hospital care. Negotiators are using the excuse that these regulations are somehow related to trade in order to create a vast array of restrictions on the right to regulate," said Ellen Gould, a Canadian-based consultant on trade agreements whose research accompanies the Domestic Regulation Annex. The existence of an annex restricting even non-discriminatory domestic

regulations belies the claims by some TISA proponents that the agreement is only about promoting transparency and tackling discriminatory laws.

The existence of a **Transparency Annex** in a secret trade agreement is itself ironic. The annex shows that corporations are pushing far beyond how a normal person understands "transparency." The sections on "prior notification of new measures" would mandate that any measure (including laws, regulations, agency rulings, etcetera) must be published in advance, with a "reasonable opportunity" for corporations to comment on them to the governmental entity. But it goes much further; the rationale for the measure must be included, and governments must set up an avenue by which it must respond to the comments. Some countries are even pushing for a mandatory "judicial or administrative review of decisions," if corporation disagrees with a proposed measure. This Annex, then, proposes a direct pathway for foreign corporate input into the domestic policymaking process of parliamentary and also local elected officials.

The leaked TISA texts reveal the dangers of sweeping, so-called "trade" agreements that are negotiated outside of public scrutiny, providing a cautionary tale for the controversial Trans-Pacific Partnership and Trans-Atlantic Free Trade Agreement that are also being negotiated in secret. "As governments around the world implement the lessons of the 2008 financial crisis by re-regulating financial firms to prevent another crisis, the leaked TISA rules could require countries -- including the world's largest financial centers -- to halt and even roll back financial regulations. Indeed, TISA would expand deregulatory "trade" rules written under the advisement of large banks before the financial crisis, requiring domestic laws to conform to the now-rejected model of extreme deregulation that led to global recession," noted Ben Beachy, Research Director at Public Citizen's Global Trade Watch and author of the analysis on the leaked **Financial Services** proposed text.

According to analysis provided by the International Transport Workers' Federation (ITF), the secret documents predict a power grab by transport industry players at the expense of the public interest, jobs and a voice for workers. Specifically they reveal a potential and continuing threat to seafarers' wages and conditions, should the agreement be adopted. The **Maritime Annex** does acknowledge the sectoral standards adopted by the UN bodies but fails to recognise these are minimum protections, stating that in cases where parties 'apply measures that deviate from the above mentioned international standards, their standards shall be based on non-discriminatory, objective and transparent criteria.'

ITF president Paddy Crumlin stated: "Who decides the criteria? What will happen to safety provisions, pay or qualifications which are better than the minimum? The ILO Maritime Labour Convention explicitly sets minimum standards, with member states being encouraged to go above and beyond its provisions. This fact appears to have escaped those drawing up the plans."

The Annex on the "**Movement of Natural Persons**," called Mode 4, makes crystal clear that immigration policy would be an integral part of the TISA, notwithstanding certain governments' protestations to the contrary. A labor lawyer with IDEALS in the Philippines, Tony Salvador said that "we oppose trade agreements that include migrant workers, rather than just bona fide service suppliers, as migrants should instead be protected by the domestic labor and employment laws of the host country where they work. Having the status of a worker/employee guarantees

that she/he is also covered by ILO Conventions," referring to the International Labor Organization. He added, "however, the host country should maintain its prerogative to pass and implement immigration and national security laws, and apply them to both migrant workers and foreign service suppliers, even as the home country of the migrants may continue to have laws that protect migrants from recruiters and their purported employers in the home country."

The leaked documents include a previously unpublished annex on state purchasing, which, according to analysis published by Wikileaks provided by Sanya Reid Smith of the Third World Network, "would require extreme opening of services **government procurement** (GP) of TISA countries, beyond the level required by the optional rules at the WTO or in free trade agreements involving the EU, U.S. or others. If accepted, this proposal is predicted to undermine programs in developed and developing TISA countries that facilitate development, help create local jobs and assist disadvantaged communities including indigenous peoples and Small and Medium Enterprises (SMEs)."

Perhaps the most explosive text is that on **Electronic Commerce**. "You can't negotiate an open internet behind closed doors. The recent leak of the TISA Annex on e-commerce once again demonstrates that trade negotiations are playing an important role in shaping the future of internet governance. Because these negotiations are closed, they are a poor forum for making internet policy, leading to policy that naturally favors businesses with major lobbying operations in Geneva and Washington DC, rather than the sort of open and multi-participant forums deciding issues on the merits we would prefer," said Burcu Kilic, a lawyer at Public Citizen, who co-authored the analysis on the subject. "Privacy is a fundamental human right central to the maintenance of democratic societies. TISA includes requirements that could damage privacy protections. TISA should be debated publicly, in order to ensure that adequate, express privacy safeguards are included. Multistakeholderism requires this," she added.

The documents show that the TISA will impact even non-participating countries. The TISA is exposed as a developed countries' corporate wish lists for services which seeks to bypass resistance from the global South to this agenda inside the WTO, and to secure an agreement on services without confronting the continued inequities on agriculture, intellectual property, cotton subsidies, and many other issues.

Background Information

This leak justifies warnings from global civil society about the privatization and deregulation impacts of a potential TISA since our first letter on the issue, endorsed by 345 organizations from across the globe, in September 2013. At that time, OWINFS argued that "[t]he TISA negotiations largely follow the corporate agenda of using "trade" agreements to bind countries to an agenda of extreme liberalization and deregulation in order to ensure greater corporate profits at the expense of workers, farmers, consumers and the environment. The proposed agreement is the direct result of systematic advocacy by transnational corporations in banking, energy, insurance, telecommunications, transportation, water, and other services sectors, working through lobby groups like the US Coalition of Service Industries (USCSI) and the European Services Forum (ESF)." Today's leaks prove the network's arguments beyond a shadow of a doubt.

Today's leak follows others, including a June 2014 Wikileaks revelation of a previous version of the Financial Services secret text; the December 2014 leak of a U.S. proposal on cross-border data flows, technology transfer, and net neutrality (available in English and Spanish), which raised serious concerns about the protection of data privacy in the wake of the Snowden revelations; the February 5, 2015 release of a background paper promoting health tourism in the TISA (available in English, French, German, and Spanish); and last month's Wikileaks publication of 17 documents on the TISA.

The TISA is currently being negotiated among 24 parties (counting the EU as one) with the aim of extending the coverage of scope of the existing General Agreement on Trade in Services (GATS) in the WTO. However, even worse than the opaque talks at the WTO, the TISA negotiations are being conducted in complete secrecy. Public Services International (PSI) global union federation published the first critique, TISA vs Public Services in March 2014, and PSI and OWINFS jointly published The Really Good Friends of Transnational Corporations Agreement report on Domestic Regulation in September 2014. A factsheet on the TISA can be found here and more information on the TISA can be found here.

Deborah James, djames@cepr.net, facilitates the global campaign against the TISA for OWINFS, together with PSI. OWINFS is a global network of NGOs and social movements working for a sustainable, socially just, and democratic multilateral trading system.
www.ourworldisnotforsale.org

http://www.nytimes.com/2015/07/01/business/international/us-chamber-works-globally-to-fight-antismoking-measures.html?_r=0

New York Times

U.S. Chamber of Commerce Works Globally to Fight Antismoking Measures

By DANNY HAKIM
JUNE 30, 2015

KIEV, Ukraine — A parliamentary hearing was convened here in March to consider an odd remnant of Ukraine's corrupt, pre-revolutionary government.

Three years ago, Ukraine filed an international legal challenge against Australia, over Australia's right to enact antismoking laws on its own soil. To a number of lawmakers, the case seemed absurd, and they wanted to investigate why it was even being pursued.

When it came time to defend the tobacco industry, a man named Taras Kachka spoke up. He argued that several "fantastic tobacco companies" had bought up Soviet-era factories and modernized them, and now they were exporting tobacco to many other countries. It was in Ukraine's national interest, he said, to support investors in the country, even though they do not sell tobacco to Australia.

Mr. Kachka was not a tobacco lobbyist or farmer or factory owner. He was the head of a Ukrainian affiliate of the U.S. Chamber of Commerce, America's largest trade group.

From Ukraine to Uruguay, Moldova to the Philippines, the U.S. Chamber of Commerce and its foreign affiliates have become the hammer for the tobacco industry, engaging in a worldwide effort to fight antismoking laws of all kinds, according to interviews with government ministers, lobbyists, lawmakers and public health groups in Asia, Europe, Latin America and the United States.

The U.S. Chamber's work in support of the tobacco industry in recent years has emerged as a priority at the same time the industry has faced one of the most serious threats in its history. A global treaty, negotiated through the World Health Organization, mandates anti-smoking measures and also seeks to curb the influence of the tobacco industry in policy making. The treaty, which took effect in 2005, has been ratified by 179 countries; holdouts include Cuba, Haiti and the United States.

Facing a wave of new legislation around the world, the tobacco lobby has turned for help to the U.S. Chamber of Commerce, with the weight of American business behind it. While the chamber's global tobacco lobbying has been largely hidden from public view, its influence has been widely felt.

Letters, emails and other documents from foreign governments, the chamber's affiliates and antismoking groups, which were reviewed by The New York Times, show how the chamber has embraced the challenge, undertaking a three-pronged strategy in its global campaign to advance the interests of the tobacco industry.

In the capitals of far-flung nations, the chamber lobbies alongside its foreign affiliates to beat back antismoking laws.

In trade forums, the chamber pits countries against one another. The Ukrainian prime minister, Arseniy Yatsenyuk, recently revealed that his country's case against Australia was prompted by a complaint from the U.S. Chamber.

And in Washington, Thomas J. Donohue, the chief executive of the chamber, has personally taken part in lobbying to defend the ability of the tobacco industry to sue under future international treaties, notably the Trans-Pacific Partnership, a trade agreement being negotiated between the United States and several Pacific Rim nations.

"They represent the interests of the tobacco industry," said Dr. Vera Luiza da Costa e Silva, the head of the Secretariat that oversees the W.H.O treaty, called the Framework Convention on Tobacco Control. "They are putting their feet everywhere where there are stronger regulations coming up."

Thomas J. Donohue, the head of the U.S. Chamber of Commerce, has defended the tobacco industry's right to sue under future international treaties. Credit Brendan Hoffman for The New York Times

The increasing global advocacy highlights the chamber's enduring ties to the tobacco industry, which in years past centered on American regulation of cigarettes. A top executive at the tobacco giant Altria Group serves on the chamber's board. Philip Morris International plays a leading role in the global campaign; one executive drafted a position paper used by a chamber affiliate in Brussels, while another accompanied a chamber executive to a meeting with the Philippine ambassador in Washington to lobby against a cigarette-tax increase. The cigarette makers' payments to the chamber are not disclosed.

It is not clear how the chamber's campaign reflects the interests of its broader membership, which includes technology companies like Google, pharmaceutical giants like Pfizer and health insurers like Anthem. And the chamber's record in its tobacco fight is mixed, often leaving American business as the face of a losing cause, pushing a well-known toxin on poor populations whose leaders are determined to curb smoking.

The U.S. Chamber issued brief statements in response to inquiries. "The Chamber regularly reaches out to governments around the world to urge them to avoid measures that discriminate against particular companies or industries, undermine their trademarks or brands, or destroy their intellectual property," the statement said, adding, "we've worked with a broad array of business organizations at home and abroad to defend these principles."

The chamber declined to say if it supported any measures to curb smoking.

The chamber, a private nonprofit that has more than three million members and annual revenue of $165 million, spends more on lobbying than any other interest group in America. For decades, it has taken positions aimed at bolstering its members' fortunes.

While the chamber has local outposts across the United States, it also has more than 100 affiliates around the world. Foreign branches pay dues and typically hew to the U.S. Chamber's strategy, often advancing it on the ground. Members include both American and foreign businesses, a symbiotic relationship that magnifies the chamber's clout.

For foreign companies, membership comes with "access to the U.S. Embassy" according to the Cambodian branch, and entree to "the U.S. government," according to the Azerbaijan branch. Members in Hanoi get an invitation to an annual trip to "lobby Congress and the administration" in Washington.

Since Mr. Donohue took over in 1997, he has steered the chamber into positions that have alienated some members. In 2009, the chamber threatened to sue if the Environmental Protection

Agency regulated greenhouse gas emissions, disputing its authority to act on climate change. That led Nike to step down from the chamber's board, and to Apple's departure from the group. In 2013, the American arm of the Swedish construction giant Skanska resigned, protesting the chamber's support for what Skanska called a "chemical industry-led initiative" to lobby against green building codes.

The chamber's tobacco lobbying has led to confusion for many countries, Dr. da Costa e Silva said, adding "there is a misconception that the American chamber of commerce represents the government of the U.S." In some places like Estonia, the lines are blurred. The United States ambassador there, Jeffrey Levine, serves as honorary president of the chamber's local affiliate; the affiliate quoted Philip Morris in a publication outlining its priorities.

The tobacco industry has increasingly turned to international courts to challenge antismoking laws that countries have enacted after the passage of the W.H.O. treaty. Early this year, Michael R. Bloomberg and Bill Gates set up an international fund to fight such suits. Matthew L. Myers, president of the Campaign for Tobacco-Free Kids, an advocacy group that administers the fund, called the chamber "the tobacco industry's most formidable front group," adding, "it pops up everywhere."

In Ukraine, the chamber's involvement was no surprise to Hanna Hopko, the lawmaker who led the hearing in Parliament. She said the chamber there had fought against antismoking laws for years.

"They were against the tobacco tax increase, they were against placing warning labels on cigarettes," she said. "This is just business as usual for them."

Photo

Country-by-Country Strategy

More than 3,000 miles away, in Nepal, the health ministry proposed a law last year to increase the size of graphic warning labels from covering three-fourths of a cigarette pack to 90 percent. Countries like Nepal that have ratified the W.H.O. treaty are supposed to take steps to make cigarette packs less appealing.

Not long afterward, one of Nepal's top officials, Lilamani Poudel, said he received an email from a representative of the chamber's local affiliate in the country, warning that the proposal "would negate foreign investment" and "invite instability."

In January, the U.S. Chamber itself weighed in. In a letter to Nepal's deputy prime minister, a senior vice president at the chamber, Tami Overby, wrote that she was "not aware of any science-based evidence" that larger warning labels "will have any discernible impact on reducing or discouraging tobacco use."

A 2013 Harvard study found that graphic warning labels "play a lifesaving role in highlighting the dangers of smoking and encouraging smokers to quit."

While Nepal eventually mandated the change in warning labels, cigarette companies filed for an extension and compliance has stalled.

"Since we have to focus on responding to the devastating earthquake, we have not been able to monitor the state of law enforcement effectively," said Shanta Bahadur Shrestha, a senior health ministry official.

The episode reflects the chamber's country-by-country lobbying strategy. A pattern emerged in letters to seven nations: Written by either the chamber's top international executive, Myron Brilliant, or his deputies, they introduced the chamber as "the world's largest business federation."

Then the letters mention a matter "of concern." In Jamaica and Nepal, it was graphic health warnings on packages. In Uruguay, it was a plan to bar cigarettes from being displayed by retailers. The Moldovan president was warned against "extreme measures" in his country, though they included common steps like restricting smoking in public places and banning advertising where cigarettes are sold.

A proposal to raise cigarette taxes in the Philippines would open the floodgates to smugglers, the government there was told. Tax revenue has increased since the proposal became law.

"We are not cowed by them," said Jeremias Paul, the country's under secretary of finance. "We meet with these guys when we're trying to encourage investment in the Philippines, so clearly they are very influential, but that doesn't mean they will dictate their ways."

Protecting tobacco companies is portrayed by the chamber as vital for a nation's economic health. Uruguay's president is warned that antismoking laws will "have a disruptive effect on the formal economy." El Salvador's vice president is told that "arbitrary actions" like requiring graphic health warnings in advertisements undermine "investment and economic growth."

On the ground, the chamber's local affiliates use hands-on tactics.

After Moldova's health ministry proposed measures in 2013, Serghei Toncu, the head of the American Chamber of Commerce in Moldova, laid out his objections in a series of meetings held by a regulatory review panel.

"The consumption of alcohol and cigarettes is at the discretion of each person," Mr. Toncu said at one meeting, adding that the discussion should not be about "whether smoking is harmful."

"You do not respect us," he told the health ministry at another.

At a third, he called the ministry's research "flawed from the start."

His objections were not merely plaintive cries. The American chamber has a seat on Moldova's regulatory review panel giving it direct influence over policy making in the small country.

"The American Chamber of Commerce is a very powerful and active organization," said Oleg Chelaru, a team leader on the staff that assists the review panel. "They played a very crucial role in analyzing and giving an opinion on this initiative."

Mr. Toncu, who has since left the chamber, declined to comment. Mila Malairau, the chamber's executive director, said its main objective was to make sure the industry "was consulted" in "a transparent and predictable manner."

Photo

After recently passing in Parliament, the long-stalled measures were subject to fresh objections from the chamber and others, and have not yet been enacted.

Fighting a Trade Exception

In Washington, the U.S. Chamber's tobacco lobbying has been visible in the negotiations over the Trans-Pacific Partnership, a priority of the Obama administration that recently received critical backing in Congress.

One of the more controversial proposals would expand the power of companies to sue countries if they violate trade rules. The U.S. Chamber has openly opposed plans to withhold such powers from tobacco companies, curbing their ability to challenge national antismoking laws. The chamber says on its website that "singling out tobacco" will "open a Pandora's box as other governments go after their particular bêtes noires."

The issue is still unresolved. A spokesman for the United States trade representative said negotiators would ensure that governments "can implement regulations to protect public health" while also "ensuring that our farmers are not discriminated against."

Email traffic shows that Mr. Donohue, the chamber's head, sought to raise the issue in 2012 directly with Ron Kirk, who was then the United States trade representative. In email exchanges between staff members of the two, Mr. Donohue specifically sought to discuss the role of tobacco in the trade agreement.

"Tom had a couple of things to raise, including urging that the tobacco text not be submitted at this round," one of Mr. Donohue's staff members wrote to Mr. Kirk's staff. The emails were produced in response to a Freedom of Information request filed by the Campaign for Tobacco-Free Kids, which provided them to The Times.

Mr. Kirk is now a senior lawyer at Gibson, Dunn, a firm that counts the tobacco industry as a client. He said in an interview that during his tenure as trade representative, he met periodically with Mr. Donohue but could not recall a specific conversation on tobacco.

He said trade groups were generally concerned about "treating one industry different than you would treat anyone else, more so than doing tobacco's bidding."

The chamber declined to make Mr. Donohue available for an interview.

A Face-Saving Measure

In Ukraine, it was Valeriy Pyatnytskiy who signed off on the complaint against Australia in 2012, which was filed with the World Trade Organization. At the time, he was Ukraine's chief negotiator to the W.T.O. His political career has survived the revolution and he is now an adviser to the Ukrainian prime minister, Mr. Yatsenyuk.

In a recent interview, he said that for Ukraine, the case was a matter of principle. It was about respecting the rules.

He offered a hypothetical: If Ukraine allowed Australia to use plain packaging on cigarettes, what would stop Ukraine from introducing plain packaging for wine? Then Ukrainian winemakers could better compete with French wines, because they would all be in plain bags marked red or white.

"We had this in the Soviet times," he said. "It was absolutely plain packaging everywhere."

Some Ukrainian officials have long been troubled by the case.

"It has nothing to do with trade laws," said Pavlo Sheremeta, who briefly served as Ukraine's economic minister after the revolution. "We have zero exports of tobacco to Australia, so what do we have to do with this?"

Last year, he urged the American Chamber in Kiev to reconsider.

"I wrote a formal letter, asking them, 'Do you still keep the same position?' " Mr. Sheremeta said. "Basically I was suggesting a face-saving way out of this." But when he met with chamber officials, the plain packaging case was outlined as a top priority.

They refused to back down. After Mr. Pyatnytskiy, a tobacco ally, was installed as his deputy, Mr. Sheremeta resigned.

"The world was laughing at us," he said of the case.

Shortly after The Times discussed the case with Ukrainian government officials, there were new protests from activists. Mr. Yatsenyuk called for a review of the matter. Ukraine has since suspended its involvement, but other countries including Cuba and Honduras are continuing to pursue the case against Australia.

Andy Hunder, who took over as president of the American Chamber of Commerce in Kiev in April, said the organization was moving on, adding, "We are looking forward now."

http://www.uniglobalunion.org/news/qa-ttip-leading-trade-expert-dr-gabriel-siles-brugge-university-manchester

July 6, 2015

Q&A on TTIP to leading trade expert Dr Gabriel Siles-Brügge, University of Manchester

UNI Europa poses some of the tough questions to trade expert Dr Gabriel Siles-Brügge, Lecturer in Politics based at the University of Manchester, ahead of the plenary vote on TTIP in the European Parliament.

Although the negotiations have taken longer than planned, it is as though there is a sense of urgency surrounding completing the trade agreement. Do you agree, and if so, why do you think this is so?

Given the immense controversy that surrounds the negotiations of the trade agreement between the EU and the US (TTIP), it is not altogether surprising that negotiators are keen to press on. Delays not only embolden the opposition, and may result in a potential TTIP agreement being 'diluted', but also mean that TTIP's supporters in the business community may eventually lose interest in the talks (as indeed happened during the Doha Round of multilateral trade talks).

You have followed the TTIP discussions closely, not only in Brussels, but around Europe and the US, what is your take on the report written by the European Parliament's Trade Committee (INTA), and the new compromise amendment on investor-state-dispute settlement, ISDS, proposed by Schultz? Are you surprised?

Having followed the political debate surrounding the recent INTA resolution, it is clear that the key fault-line was within the group of socialists and democrats (S&D group) in the European Parliament, with some of its members more concerned than others over the potential inclusion of ISDS provisions in TTIP. There are some suggestions, moreover, that the S&D agreed to a compromise amendment with the conservative EPPs in an earlier session of INTA (with softer language on ISDS than Bernd Lange's earlier draft report) in exchange for a call in the resolution for TTIP to include enforceable labour standards in its sustainability chapter. The new compromise amendment (approved by a vote of 56 to 34 MEPs) seems to reflect these tensions within the S&D group: the concerns of several members over ISDS have been weighed up against a simultaneous interest in participating 'constructively' in the TTIP discussions and shaping them in an ostensibly more centre-left vein.

Is it, as some claim, an ISDS light?

Two things should be stressed at this point. First, the EP resolution is legally non-binding (although of course it carries much political significance as the EP has to give its w assent to the final TTIP text). Second, the amendment is the length of a short paragraph and there are therefore considerable ambiguities as to its meaning in practice. That being said, it is notable that

the text of the amendment does not reject the principle of foreign investor arbitration itself. It merely notes that this should be 'subject to democratic principles and scrutiny' through 'public hearings' where 'publicly appointed, independent judges' make decisions that 'respect' EU and Member State courts and which 'cannot undermine public policy objectives'. It also mentions the need to include an appellate mechanism (whereby a ruling can be appealed, which is not currently the case).

So, in short, the answer is broadly yes. The compromise sounds very much in tune with the European Commission's proposals to reform ISDS by moving towards a permanent roster of arbitrators; including an appellate mechanism; clarifying the relationship to domestic courts (so that foreign investors have to choose whether to take their case to domestic courts or arbitration tribunals) and enshrining the 'right to regulate' in the investment protection text. These reforms (and the amendment which seems to implicitly support them) only tinker with the investment protection regime. Indeed investors will still likely be able to choose the proceeding they feel is most likely to give them the desired result: domestic court or arbitration tribunal. While the inclusion of an appellate mechanism and a permanent roster would represent modest improvements, on the whole the proposed changes do not appear to change the fundamental nature of a system where only investors can bring suits against states: their interests are ultimately privileged over public policy considerations.

UNI Europa initiated that research on the position of collective agreements and ISDS was clarified. The answer from Prof. Dr. Markus Krajewski was that autonomous agreements could not be subject to ISDS, but tripartite agreements and generalised erga omnes agreements could. In your view, does the compromise agreement change this?

The new amendment does not appear to change the fundamental principle that a foreign investor can bring a claim against a state, including potentially one based on tripartite agreements that are perceived to infringe their rights as investors.

We have been reaching out to pro-TTIP/ISDS voices (via facebook and twitter) for good reasons why an ISDS is needed, but no one has answered. What do you hear the reasons are, and are they plausible?

As far as I understand the case being made for ISDS in TTIP this rests on three broad sets of arguments.

First of all, advocates will argue that EU-US investment flows can be boosted by providing investors with greater legal security, as there are both EU and US jurisdictions where courts are either slow/unreliable in upholding investor rights or indeed outright discriminate against foreign investors. On this, my argument would be that there is very little evidence that the inclusion of ISDS boosts investment between OECD states with developed legal systems (indeed, EU-US investment flows are already very substantial). Moreover, from a public policy perspective, why would you include a provision which systematically discriminates in favour of foreign investors when there is no systematic discrimination against such investors in either the EU or the US?

The second argument that is often heard is that including ISDS in TTIP is necessary to set a precedent, and to ensure that such provisions can be included in a future investment agreement with China (such as the EU is currently negotiating). But China has gone from merely being a

capital importing to a capital exporting country and is thus quite keen on such provisions in its bilateral investment treaties (BITs).

A third, and related argument, is that TTIP provides an opportunity to reform the flawed system of BITs (which some supporters admit had their problems) and replace it with a new, improved system that protects investors while fully recognising the 'right to regulate' of states. Such an argument is made particularly forcefully with respect to the EU's Member States that currently have 'old-style' BITs with the US. Moreover, there are currently (vague) proposals on the table to multilateralise the system of investor protection in TTIP by setting up a permanent investment court (on the base of the Commission's proposed arbitrator roster). The problem here is threefold. For one, as I noted above in response to q. 3, a reformed ISDS does not alter the fundamental nature of the system, which privileges foreign investors over other considerations. Secondly, not only would TTIP not replace existing EU Member State BITs with the US (these would have to be terminated separately, with various 'sunset clauses' applying) but it would leave in place a whole network of EU BITs with third parties that would still be very difficult to reform. Finally, talk of a permanent, multilateral investment court is extremely premature at this stage as that would require the agreement of many other states, a number of which have started to voice fairly critical views of investor arbitration.

Is TTIP ever going to happen?

That's the million dollar (or euro) question. At this stage I think it's too early to tell what will happen. But TTIP will certainly take far longer to negotiate than its initiators had intended. The key questions are whether: a) business loses interest because the negotiations drag out or the agreement is substantially 'watered down' from its perspective; b) the opposition from civil society is appeased by compromises on such issues as ISDS or GMOs.

For many more angles and insightful criticisms on TTiP, read Gabriel's upcoming book available this autumn: TTIP: The Truth about the Transatlantic Trade and Investment Partnership (Polity Press) (co-authored with Ferdi De Ville). Available here

http://uk.reuters.com/article/2015/07/09/uk-usa-malaysia-trafficking-exclusive-idUKKCN0PJ00D20150709

Reuters

Exclusive - U.S. upgrades Malaysia in annual human trafficking report: sources

«Top News

Thu Jul 9, 2015 10:33am BST

By Jason Szep, Patricia Zengerle and Matt Spetalnick

WASHINGTON (Reuters) - The United States is upgrading Malaysia from the lowest tier on its list of worst human trafficking centres, U.S. sources said on Wednesday, a move that could smooth the way for an ambitious U.S.-led free-trade deal with the Southeast Asian nation and 11 other countries.

The upgrade to so-called "Tier 2 Watch List" status removes a potential barrier to President Barack Obama's signature global trade deal.

A provision in a related trade bill passed by Congress last month barred from fast-tracked trade deals Malaysia and other countries that earn the worst U.S. human trafficking ranking in the eyes of the U.S. State Department.

The upgrade follows international scrutiny and outcry over Malaysian efforts to combat human trafficking after the discovery this year of scores of graves in people-smuggling camps near its northern border with Thailand.

The State Department last year downgraded Malaysia in its annual "Trafficking in Persons" report to Tier 3, alongside North Korea, Syria and Zimbabwe, citing "limited efforts to improve its flawed victim protection regime" and other problems.

But a congressional source with knowledge of the decision told Reuters the administration had approved the upgraded status. A second source familiar with the matter confirmed the decision.

Some U.S. lawmakers and human-rights advocates had expected Malaysia to remain on Tier 3 this year given its slow pace of convictions in human-trafficking cases and pervasive trafficking in industries such as electronics and palm oil.

This year's full State Department report, including details on each country's efforts to combat human trafficking, is expected to be released next week.

State Department spokesman John Kirby said the report was still being finalised and that "it would be premature to speculate on any particular outcome."

Obama visited Malaysia in April 2014 to cement economic and security ties. Malaysia is the current chair of the 10-nation Association of Southeast Asian Nations. It is seeking to promote unity within the bloc in the face of China's increasingly assertive pursuits of territorial claims in the South China Sea, an object of U.S. criticism.

In May, just as Obama's drive to win "fast-track" trade negotiating authority for his trade deal entered its most sensitive stage in the U.S. Congress, Malaysian police announced the discovery of 139 graves in jungle camps used by suspected smugglers and traffickers of Rohingya Muslims from Myanmar.

Malaysia hopes to be a signatory to Obama's legacy-defining Trans-Pacific Partnership (TPP), which would link a dozen countries, cover 40 percent of the world economy and form a central element of his strategic shift towards Asia.

On June 29, Obama signed into law legislation giving him "fast-track" power to push ahead on the deal.

MALAYSIAN GRAVES

Lawmakers are working on a compromise that would let Malaysia and other countries appearing on a U.S. black-list for human trafficking participate in fast-tracked trade deals if the administration verified that they have taken concrete steps to address the most important issues identified in the annual trafficking report.The graves were found in an area long known for the smuggling of Rohingya and local villagers reported seeing Rohingya in the area, but Malaysia's Deputy Home (Interior) Minister Wan Junaidi Tuanku Jaafar has said it was unclear whether those killed were illegal migrants. The discovery took place after the March cut-off for the U.S. report.

The State Department would have needed to show that Malaysia had neither fully complied with minimum anti-trafficking standards nor made significant efforts to do so to justify keeping Malaysia on Tier 3, which can lead to penalties such as the withholding of some assistance.

In its report last year, the State Department said Malaysia had reported 89 human-trafficking investigations in the 12 months to March 2014, down from 190 the previous year, and nine convictions compared with 21 the previous year.

In the latest year to March, Malaysia's conviction rate is believed to have fallen further, according to human-rights advocates, despite a rise in the number of investigations. That reinforced speculation Malaysia would remain on Tier 3.

"If true, this manipulation of Malaysia's ranking in the State Department's 2015 TIP report would be a perversion of the trafficking list and undermine both the integrity of this important report as well as the very difficult task of confronting states about human trafficking," said Democratic Senator Robert Menendez, who had pushed to bar Tier 3 countries from inclusion in the trade pact.

Phil Robertson, deputy director of Human Rights Watch's Asia division, said he was "stunned" by the upgrade.

"They have done very little to improve the protection from abuse that migrant workers face," he said. "This would seem to be some sort of political reward from the United States and I would urge the U.S. Congress to look long and hard at who was making the decisions on such an upgrade." Malaysia has an estimated 2 million illegal migrant labourers, many of whom work in conditions of forced labour under employers and recruitment companies in sectors ranging from electronics to palm oil to domestic service.

Last year's report said many migrant workers are exploited and subjected to practices associated with forced labour. Many foreign women recruited for ostensibly legal work in Malaysian restaurants, hotels, and beauty salons are subsequently coerced into prostitution, the report said.

An administration official told Reuters in June that the White House had been working closely with the Malaysian government and stakeholders to fight the problem.

Among the 12 TPP countries, Brunei has also come under attack by human-rights groups for adopting Islamic criminal law, which includes punishing offences such as sodomy and adultery with death, including by stoning. Vietnam's Communist government has been criticized for jailing dissidents.

(Additional reporting by David Brunnstrom; Writing by Jason Szep; Editing by Stuart Grudgings, Eric Walsh and Lisa Shumaker)

http://www.wsj.com/articles/u-s-canada-dairy-spat-sours-trade-talks-1436544890

U.S.-Canada Dairy Spat Sours Trade Talks

Negotiators threaten to exclude Ottawa if no concessions are made on farm issues

The Wall Street Journal
By WILLIAM MAULDIN And PAUL VIEIRA
July 10, 2015

Milk may do a body good, but it's giving trade negotiators fits.

Because of a decades-old dispute between the U.S. and Canada, dairy is emerging as the thorniest issue souring final talks to conclude a sweeping trade agreement, known as the Trans-Pacific Partnership, linking 12 countries around the Pacific.

The U.S. wants Canada to loosen a decades-old system for protecting dairy farmers from imports, seeing the severe restrictions on milk products as a piece of unfinished business from earlier negotiations on the 1994 North American Free Trade Agreement and an earlier free-trade deal with Canada. Some officials involved in the Pacific talks are even threatening to sign a deal without Canada if Ottawa doesn't make concessions on dairy and related agricultural issues.

"The Canadians need to step it up and get serious about agriculture and dairy," said Rep. Paul Ryan, the Republican who leads the House committee that oversees trade. Mr. Ryan's state produces three times as much cheese as Canada, and in January he brandished a Gouda-style wedge in part to protest Canada's stance.

Like many countries, Canada instituted measures to protect dairy farmers that remain politically popular because of the large number of small farms. Prime Minister Stephen Harper is walking a delicate balance ahead of an election in October and doesn't want to lose support in Ontario and Quebec, which benefit from the high prices for milk products the Canadian system all but guarantees.

At the heart of the dispute is what Canada calls its supply-management system, in which prices for dairy products are set based on the average costs of production. Production is controlled through a regulated quota system, and competition is thwarted through tariffs.

Other countries in the TPP talks are looking at the U.S.-Canada milk fight closely, especially New Zealand, where dairy is the biggest export of all. New Zealand wants tariffs lifted in the U.S. Meanwhile, Washington officials this week flew to Tokyo to seek a deal that would include greater dairy access to Japan.

"We have made it very clear that we draw the line if we don't get access to those countries," said Jaime Castaneda, senior vice president for the National Milk Producers Federation and the U.S. Dairy Export Council.

President Barack Obama and top officials are seeking to conclude the TPP talks as soon as this month, after narrowly winning special trade powers from Congress in June.

The trade bloc would cover countries comprising two-fifths of the world's gross domestic product, and the U.S. and Japan—the two biggest economies in the group—have narrowed their differences on agriculture and automobiles to within striking distance and could shake hands in coming days, according to officials on both sides.

Also outstanding are final agreements on a minefield of divisive rules included in the deal, ranging from intellectual-property protections for biologic drugs to limits on state ownership in Vietnam and Malaysia.

Agriculture is expected to be the biggest winner among traditional U.S. industries in the trade agreement, and after the near-defeat of so-called fast-track legislation in June the Obama administration is hoping to leverage the support of farm groups for all it's worth when a TPP deal comes up for a vote, possibly in November or December.

After years of focusing on domestic demand, the U.S. dairy industry has started flexing its muscles abroad in recent years, led by large West Coast producers. Exports more than doubled over seven years to $7.25 billion in 2014, according to the U.S. Dairy Export Council. But dairy shipments to Canada, the biggest U.S. trading partner, represent only about a quarter the amount shipped to Mexico, according to the Census Bureau.

In Canada, the average family spends an additional C$276 each to support the supply-management system, which effectively shuts out competition, according to the Conference Board of Canada, an Ottawa-based nonpartisan think tank.

But the milk industry is touting its broader impact. The Dairy Farmers of Canada recent launched a website and social-media campaign to tout the "milkle-down effect" of dairy dollars to hockey and other national priorities, while casting doubt on the safety and environmental stewardship of foreign dairy. The Canadian dairy industry supports 215,000 jobs, adds C$18.9 billion ($14.8 billion) to Canada's economy and contributes C$3.6 billion in taxes, according to the group.

A spokesman for Canadian Trade Minister Ed Fast said Canada continues to be a "committed and constructive" partner at the negotiating table. "The government will continue to promote Canadian trade interests across all sectors of our economy, including those subject to supply management," said the spokesman, Rick Roth.

Canadian officials have yet to address concerns raised by U.S. and other parties on remaining issues related to Ottawa's tariff regime on dairy, poultry and egg production, a person familiar with the TPP talks said.

Canadian officials are waiting until the last possible moment before instructing negotiators on what type of concessions—which could be politically damaging to Mr. Harper's Conservatives—to make to secure participation in the TPP, the person said. The person added

that Ottawa has determined the trade pact is important to pursue given Asia's rising influence in global economic affairs.

U.S. firm sues Canada for $10.5 billion over water

Jul 09, 2015 3:34 PM ET *CBC News*

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- **UPDATED:** Since this story was first published, the federal government has posted a status update on the case on the Foreign Affairs, Trade and Development website stating that despite the initial notice of intent to submit a claim for arbitration, a valid claim was not filed and no Chapter 11 arbitration occurred. There has been no financial settlement either, according to the government.

An American-owned water export company has launched a massive lawsuit against Canada for preventing it from exporting fresh water from British Columbia.

Sun Belt Water Inc. of California is suing Canada for $10.5 billion US, the Canadian foreign ministry said Friday.

The suit has been filed under Chapter 11 of the North American Free Trade Agreement. Sun Belt says it has been "mistreated" by the B.C. government.

The clash over exporting water goes back to 1993, when Sun Belt and Snowcap Waters Ltd., a Canadian partner, sued the B.C. government for banning bulk water exports to California. Snowcap Waters agreed to a settlement of $335,000 (Cdn).

Sun Belt did not settle with the province. The company says the B.C. government's banning of water exports from the province violates the terms and conditions of NAFTA.

The lawsuit has upset environmentalists who are angry that companies wanting to make money exporting water are using NAFTA to override environmental laws. Ottawa has 90 days to examine the Sun Belt lawsuit.

In a related development, at a hearing Thursday night in Montreal, groups concerned about exports of bulk water demanded the International Joint Commission include this recommendation when it reports to Ottawa and Washington early in the new year.

The IJC is the group appointed by the Canada and U.S. governments to manage the countries' shared water.

The problem with NAFTA's Chapter 11 is that it allows water to be regarded simply as a good or product that can be sold or traded between countries. If a country stops its export, the company proposing the commercial use could sue for compensation.

TPP Deal Puts BC's Privacy Laws in the Crosshairs

TPP negotiators aim to enshrine the rights of companies to freely move data -- including records of financial transactions, consumer behaviour, online communications and medical histories -- across borders.

http://thetyee.ca/Opinion/2015/07/16/TPP-and-Personal-Data/

By Scott Sinclair, Today, TheTyee.ca

British Columbia's privacy laws are in the crosshairs of the nearly completed Trans-Pacific Partnership (TPP) agreement. If you're wondering what the heck data privacy protections have to do with trade, you're not alone. Public awareness of the far-reaching, 12-country negotiation is scant, with polls showing three-quarters of Canadians have never even heard of the TPP.

Unfortunately for privacy advocates in B.C. and the rest of the country, the advancement of "digital free trade" is a high priority for the U.S. in the negotiations. This carefully chosen euphemism conjures up the free flow of information, the convenience of cloud computing, even escaping Internet censorship. It all sounds so positive.

The thing is, the TPP e-commerce chapter aims not only to free the movement of digital goods, such as software or downloadable music, but also to enshrine the rights of companies to freely move data -- including records of financial transactions, consumer behaviour, online communications and medical histories -- across borders. This personal data is much sought after by marketers, insurers and intelligence agencies that can build detailed profiles and histories of individuals, frequently without their knowledge or informed consent.

U.S. negotiators are pushing hard to eliminate national laws in TPP countries that require sensitive personal data to be stored on secure local servers, or within national borders. This goal collides with the B.C. Freedom of Information and Privacy Act and similar regulations in Nova Scotia, which are listed as "foreign trade barriers" in a 2015 United States Trade Representative (USTR) report.

According to that report, the B.C. privacy laws "prevent public bodies such as primary and secondary schools, universities, hospitals, government-owned utilities, and public agencies from using U.S. services when personal information could be accessed from or stored in the United States." In practical terms, this means U.S. firms hoping to provide health information management services to the government or online educational software to provincial schools or libraries must guarantee any personal data, such as a person's medical history or academic achievement, is securely stored within Canada and can only be accessed from here, with the express consent of the person involved.

The TPP text is secret, but we can assume the section on data flows will be the same as, or very similar to, the draft e-commerce chapter of another controversial negotiation called the Trade in Services Agreement (TISA). WikiLeaks recently published the TISA text, which reads, "No Party may prevent a service supplier of another Party from transferring, accessing, processing or

storing information, *including personal information*, within or outside the Party's territory, where such activity is carried out in connection with the conduct of the service supplier's business [emphasis added]."

This would give corporations the right to transfer personal data anywhere in the world as they, not public officials, see fit. The Canadian government supports this language in the TISA, according to the leaks, so we must assume they have already agreed to it in the TPP, though it's still unclear whether that deal will outlaw government regulations restricting cross-border data flows in a limited number of sectors or ban them entirely, as U.S. business lobbies are asking.

Lessons from Korea's massive credit card breach

What might the effect be of this language in practice? Well, after signing a comprehensive free trade agreement with the U.S., which included e-commerce rules, South Korea dutifully eliminated its existing laws requiring financial data to be stored within the country. In their place, companies were required to obtain permission from authorities when personal data was stored or transferred outside the country. To further reduce possible leaks of personal information, the new regulations also banned the use of third-party data processors; multinational companies were required to use their own in-house data processing operations, rather than contracting out this work.

U.S. business organizations and the USTR claimed the substitute privacy regulations violated the U.S.-Korea free trade agreement. In early 2014, the country suffered a major breach of personal privacy when the credit card information of 20 million Koreans (half the population) was leaked and sold. This incident heightened public concern and government caution. Nevertheless, the U.S. continued to hammer away and just last month, South Korea gave in, announcing it would replace its data transfer regulations with a toothless after-the-fact notification procedure.

What happened in South Korea can happen in Canada, too. Public officials charged with protecting data privacy are usually playing catch-up in the fast-moving digital era. As Korea's back-pedalling on privacy shows, agreeing to restrict regulatory flexibility in trade treaties can undermine privacy laws. The threat of retaliation and trade sanctions from a major trading partner such as the U.S. is often too powerful to ignore.

For example, current federal contracts for updating communications technology and email systems include requirements that data be stored within Canada. The U.S. government and the information technology industry oppose these conditions because they preclude U.S. companies who rely on cloud computing hosted through U.S. servers. Official documents unearthed by the BC Freedom of Information and Privacy Association reveal a steady stream of meetings, memos and negotiating pressure on Canada to weaken these privacy rules. They confirm the USTR regards the TPP as a golden opportunity to address U.S. industry concerns -- typically the paramount concerns in any trade negotiation.

TPP open to corporate interests, lobbyists

While closed to ordinary citizens, the TPP is very open to influence from corporate special interests, whose lobbyists have special access as cleared advisors to negotiators. The U.S. lead negotiator on e-commerce, Robert Holleyman, is a former high-ranking industry lobbyist. And the lobbyist for IBM, one of the chief proponents of digital free trade, is Chris Padilla, a former U.S. trade official. This chummy relationship between negotiators and corporate special interests is all too common in the field of trade treaties.

Just as U.S. corporate interests dominate their government's negotiating position in the TPP, so too does the U.S. dominate the overall project. The TPP cannot truly be called a multilateral agreement; it is more a series of one-on-one bargains with the U.S. hub. This gives the U.S. government undue influence over the end result, which is particularly true of the chapter on data flows, where other countries might have been inclined to band together against overly corporate-friendly rules.

They would have very good reasons to do so. Thanks to Edward Snowden, the whole world now knows the U.S. is massively violating privacy rights at home and abroad. Whether it is the U.S. goal, or a thoughtless side effect, embedding unrestricted rights to cross-border data flows and cloud computing in trade agreements virtually assures that a vast trove of personal data will be more easily accessible to U.S. intelligence agencies subject to U.S. security laws.

The lack of public awareness in Canada that any of this is happening is quite disturbing. What media coverage there is of the negotiations has focused almost exclusively on the threat to supply management in dairy and poultry -- an important issue, but far from the only one.

The reality is that the TPP negotiations are a perfect cauldron for brewing bad policy. Although the terms are still secret, Prime Minister Stephen Harper insists it is "essential" for Canada to be part of the deal, even if that involves "difficult choices." In this pressure cooker, compromising Canadians' privacy protections is a tempting card for our negotiators to play. It will take greater public awareness and outcry to ensure that privacy protections, including B.C.'s exemplary safeguards, are not sacrificed in the name of digital free trade.

http://www.agri-pulse.com/Yeutter-sees-slim-prospects-for-TPP-agreement-in-Hawaii-07152015.asp

Yeutter sees 'slim' prospects for TPP agreement at Hawaii session

WASHINGTON, July 15, 2015 - Former U.S. Trade Representative Clayton Yeutter said he thinks chances are "slim" that the U.S. and 11other nations trying to forge the Trans-Pacific Partnership (TPP) will reach agreement during the upcoming negotiations in Hawaii in late July.

Earlier this month, U.S. Trade Representative Michael Froman said negotiators had made "considerable progress" in closing gaps on remaining issues. But Yeutter, who served as agriculture secretary under President George H.W. Bush, says some of those gaps - most notably Canada's reluctance to open its dairy market - may be too difficult to close during the scheduled sessions on the island of Maui.

"Closure is hard," Yeutter said at a round-table discussion on TPP at the CATO Institute in Washington. The negotiators, many of whom are new in their jobs, "will find out when they hit Hawaii how hard it is," said Yeutter, now a senior adviser at the Hogan Lovells law firm. His assessment was seconded by Bill Reinsch, the president of the National Foreign Trade Council, the other featured speaker at the discussion.

Both men predicted that there will eventually be an agreement, and put the chances at "better than 50-50" that Congress will approve the deal, possibly sometime next year, but approval won't come easy.

Reinsch said supporters of TPP, which has been under negotiation for five years, are going to have to seek out the businesses and individuals who stand to gain from the free-trade agreement and make sure these "winners" bring their stories to their representatives in Congress. If they don't, Reinsch said he could guarantee that opponents, including labor leaders concerned about job losses and people in the environmental movement, will be highlighting the "losers."

USTR says the effort would be more than worthwhile. On its website, it cites **an** analysis that says TPP could generate an additional $123.5 billion per year in U.S. exports by 2025, with real income benefits estimated at $77 billion annually. With a potential market of nearly 800 million consumers, the combined economic output of the 12 countries involved account for about 40 percent of world GDP.

Beyond its own economic benefits, Yeutter said a successful TPP would lay the groundwork for completion of another ambitious trade agreement, the Trans-Atlantic Trade and Investment Partnership (T-TIP) currently being negotiated with the European Union. And it would bolster U.S. foreign policy and national security interests by countering China's efforts to increase its position as a regional power in the Asian-Pacific region, he said.

TPP, Yeutter said, is "the most important trade negotiations in the world today, by far - in the last 20 years and in the next 20 years."

The chief negotiators for the TPP countries will meet from July 24-27, followed by a meeting of trade ministers scheduled from July 28-31.

https://www.foreignaffairs.com/articles/2015-07-13/tpps-bad-medicine

The TPP's Bad Medicine
The Draft Agreement's Intellectual Property Protections Could Go Too Far
By Fran Quigley

Intellectual property protections for medicines are often overlooked in public discussions of U.S. trade agreements. But they shouldn't be. Negotiations over such intellectual property can mean the difference between antiretroviral medicine that costs over $10,000 per year—the price originally set in the 1990s by monopoly patent holders—and the eventual grudging concessions that dropped the drug prices to less than a dollar a day. For millions of HIV-positive people in the developing world, that price gap is a matter of life and death. The same dynamic applies to patients in need of medicines to treat cancer, heart disease, and any number of other health conditions.

Here's what usually happens: the U.S. trade representative, acting in concert with pharmaceutical companies, proposes extensive patent protections for medicines and daunting barriers that delay generic alternatives from entering markets. Patient-focused civil society organizations, especially those connected to low- and middle-income countries, vigorously object. In the end, though, the prospective U.S. trading partners, looking ahead to increased access to coveted U.S. markets, usually agree to terms that elevate intellectual property rights and restrict affordable access to medicines.

At first glance, the Trans-Pacific Partnership looks to be traveling down this same path. If the agreement is finalized as expected at a late July meeting in Hawaii, the TPP would be largest regional trade agreement in history. The TPP's 12 member nations, the economies of which make up nearly 40 percent of global GDP, have conducted their talks in secret, with no terms officially announced. But leaked draft texts show that the United States is again pushing provisions that would permit new patents for minor revisions of old medicines, a process known as "evergreening," and create delays in getting generic alternatives to market by restricting access to clinical test data for patented medicines, a process known as "data exclusivity."
Other U.S.-drafted TPP terms include patent linkage, which can allow spurious patent filings to delay generic market entry. Further, a proposed investor-state dispute settlement system would allow pharmaceutical corporations to force a government into arbitration over decisions that would reduce the price of medicines. A similar process has served as the platform for corporate challenges to the Canadian government's invalidation of drug patents, antismoking regulations in Australia and Uruguay, and an environmental court ruling in Ecuador. In short, the United States is extending patent holders' monopoly over medicines and, in turn, ensuring higher medicine prices.

Leaks of the draft intellectual property chapter of the TPP confirm that the U.S. proposals to extend medicine monopolies have been met with staunch opposition from nearly all of the other participating nations, with the occasional exception of Japan.
These proposals have attracted criticism. In a 2013 statement, Peru's trade minister

noted that the intellectual property terms elevate the interests of U.S. corporations over the needs of Peruvian citizens, calling for the country to "not go one millimeter beyond what was already negotiated" on intellectual property issues in past agreements. The Australian government, meanwhile, has insisted that no TPP terms are acceptable if they undermine the country's popular pharmaceutical price control program. In a 2013 statement, the Malaysian prime minister condemned any trade agreement restrictions on his government's efforts to provide affordable medicine because it would "impinge on fundamentally the sovereign right of the country to make regulation and policy." The announcements are all the more notable given that they came from high-level government officials rather than the fringes of civil society.

Such pronouncements, and similar concerns expressed by current or former officials in Canada, Chile, Singapore, and New Zealand, are the public reflection of the dynamic that is playing out even more intensely in the private TPP negotiations. Leaks of the draft intellectual property chapter of the TPP—and reports from multiple people familiar with the five-plus years of negotiations—confirm that the U.S. proposals to extend medicine monopolies have been met with staunch opposition from nearly all of the other participating nations, with the occasional exception of Japan. As *Politico* has reported, as of May 11, 2015, the draft chapter was a 90-page document "cluttered with objections from other TPP nations" to U.S.-drafted protections for pharmaceutical companies.

In part, the officials are just reflecting long-standing popular opinion. Ever since the legendary AIDS treatment struggles of the early 2000s, when South African and Brazilian grass-roots AIDS treatment advocates successfully pressured their governments to resist U.S. and pharmaceutical challenges to generic drug distribution, civil societies around the world have launched vigorous campaigns demanding that their leaders not bargain away access to affordable medicines. On the eve of U.S. President Barack Obama's visit to Malaysia in April 2014, 21 health organizations released a joint statement of concern about the TPP, with the message that affordable medicines are a matter of life and death for cancer and AIDS patients, among others. During the visit, Obama and Malaysian Prime Minister Najib Razak faced enough TPP-themed protests in Kuala Lumpur that they felt compelled to address the concerns in a joint press conference. "We have made so much noise about this," Fifa Rahman of the Malaysian AIDS Council told me, "I don't think the TPP issues would have gotten the attention here without civil society pressure."

The good news is that the TPP's critics have some strength in numbers and could help strengthen the resolve of those looking to ease U.S. intellectual property controls in the final talks.

The opposition to TPP's intellectual property terms has been so pronounced in part because other countries believe that the United States is pushing for greater protections than it ever has before. "Some of the TPP terms being proposed by the U.S. go further in their demands for patent protection than any previous trade agreement has ever seen," says Judit Rius Sanjuan of Médecins Sans Frontières. "There is an attempt here to set up norms to be used much more broadly after this agreement." Multiple United Nations health officials have also recently sounded the alarm about trade agreements' potential to handcuff governments' ability to pursue public health initiatives. Groups such as Médecins Sans Frontières, Oxfam, and Public Citizen are particularly worried that the

historic TPP agreement could serve as the benchmark for future deals.
The scope of the TPP and the Obama administration's push for historic levels of intellectual property protection at the TPP negotiating table, including extensive periods of market exclusivity for patented biologic drugs, has even inspired some U.S.-based economists, elected officials, and nongovernmental organizations to lend their voices to the opposition. The powerful AARP, formerly the American Association of Retired Persons, is among them. It argues that TPP terms, such as the barrier to generic alternatives to biologic drugs, could limit future efforts to control domestic drug costs in programs such as Medicare and Medicaid. Other groups cite a 2007 agreement between Congress and the George W. Bush administration designed to limit the negative public health impacts of U.S. trade deals as evidence for why the TPP should not be approved.

The good news is that the TPP's critics have some strength in numbers and could help strengthen the resolve of those looking to ease U.S. intellectual property controls in the final talks, leading to an agreement that protects access to affordable medicines, or at least minimizes the potential damage. Some even harbor hopes of scuttling the agreement altogether. There is some precedent for that outcome: the proposed Free Trade Area of the Americas (FTAA) collapsed after similar disputes about intellectual property terms, the vigorous opposition of the economically strong Brazil, and the public exposure of the once secret draft.

But the TPP talks have progressed much further than the FTAA ever did, and the intellectual property chapter is just one of 29 in the TPP. This month's final talks will lump together patent discussions with negotiations on issues such as agriculture and textile and footwear exports, leaving objections to U.S. intellectual property terms vulnerable to political tradeoffs. We can only hope that those pushing for the protection of access to medicine will be able to hold out for a decent bargain for those in need.

UACT
UNION FOR AFFORDABLE CANCER TREATMENT

UACT Letter to TPP Negotiators

Re: Effects of TPP provisions on cancer patients and their families

July 26, 2015

Dear Trans Pacific Partnership Negotiators,

I am writing to you today on behalf of the Union for Affordable Cancer Treatment (UACT)[1], an international network of people who share the conviction that cancer treatment and care should be available everywhere for everyone, regardless of gender, age, nationality, or financial resources. We are a union of people -- people affected by cancer, their family members and friends, people who take care of people with cancer, health care professionals and cancer researchers -- committed to increasing access to effective cancer treatment and care. I myself am a stage IV HER2 positive breast cancer patient in active treatment since May 2010, and I consider myself extremely fortunate to have access to the most advanced treatment available.

We are particularly concerned about the rapidly escalating cost of cancer medication and we believe that cancer medicines and other essential medical tools, such as diagnostic tests, should be affordable.

We will focus our comments on the effect of some of the proposed TPP language on cancer patients and their families regarding access to the best care available. This includes access to affordable biologic drugs, which are among today's game-changers in cancer treatment.

In this letter to all TPP negotiators we would like to express our concerns regarding proposals that would:

1. Mandate exclusive rights in test data for medicines,
2. Ban statutory limits on remedies including damages for the infringement of patents,

[1] http://cancerunion.org/

3. Create more restrictive standards for using compulsory licenses,
4. Require linkage between drug registration and patent status,
5. Give drug companies access to governments processes for reimbursements, and
6. Create new investors rights, directed against patient interests

A major concern for UACT is a US proposal in the TPP to require the granting of a monopoly on the evidence -- including the data from clinical trials -- that a specific drug is safe and efficacious. The monopoly on data will extend the delays for registration of more affordable products. Biosimilar drugs will be affected by the longest data monopoly in the TPP.

The data monopoly effectively requires generic and biosimilar drug manufacturers to unnecessarily duplicate experiments involving human subjects where the result is known. This conflicts with the Declaration of Helsinki on Ethical Principles for Medical Research Involving Human Subjects.[2]

It is important that the TPP, at a minimum, allows exceptions to rights in test data for cases when prices are excessive and/or a barrier to access, where there are shortages of drugs, when duplicative trials are unethical, or for other legitimate policy reasons.

UACT is also concerned with proposed language that would ban statutory limits on damages for patents on biologic drugs, when drug companies fail to make timely disclosure of assertions that patents are relevant to a biologic drug.[3] This could increase the risk of costly and time-consuming litigation to manufacturers of biosimilar drugs and result in delays in the availability of more affordable drugs. Many cancer patients do not have time to waste.

UACT is concerned that the current TPP text would change the WTO standard for compulsory licensing of drugs, with a new more restrictive standard, and/or create new opportunities for drug companies to challenge compulsory licenses by using the TPP Investor State Dispute Settlement mechanisms (ISDS). The TPP proposes to give drug

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[2] World Medical Association (WMA) Declaration of Helsinki Ethical Principles for Medical Research Involving Human Subjects, as amended most recently in October 2013. http://www.wma.net/en/30publications/10policies/b3/. The WMA is an international organization representing physicians founded on 17 September 1947, when physicians from 27 different countries met at the 1st General Assembly of the WMA in Paris. It was created to ensure the independence of physicians, and to work for the highest possible standards of ethical behaviour and care by physicians, at all times. This was particularly important to physicians after World War II, and therefore the WMA has always been an independent confederation of free professional associations. Funded by annual contributions of its members, now numbering 111 National Medical Associations.

[3] Such as the limitation in the United States, under 5 USC 271 (e)(6)(B), which states "the sole and exclusive remedy that may be granted by a court, upon a finding that the making, using, offering to sell, selling, or importation into the United States of the biological product that is the subject of the action infringed the patent, shall be a reasonable royalty." Compare this to the TPP language in Article QQ.H.4: {Civil Procedures and Remedies / Civil and Administrative Procedures and Remedies}.

companies the right to call for and participate in arbitration over the meaning of WTO provisions, something that is not currently possible in the WTO. We are concerned that this will affect patients in all countries where the ever-increasing cost of cancer treatments results in unnecessary rationing and death.

We agree with the World Medical Association (WMA) that the language in the TPP in Article QQ.E.17: {TPP Patent Linkage} is unacceptable. It creates an unwanted linkage between drug registration and patents, a practice that has been rejected in Europe, and is famously abused in the United States and in every country where linkage has been implemented. Drug registration decisions should be based on evidence of a drug's safety and efficacy and quality only, reflecting standards that support the promotion of the public's health. Assessing the validity, scope and relevance of patents involves assertions of private rights -- complex legal topics that drug regulatory agencies should not be asked to evaluate.[4] When linkage mechanisms are abused, the monopoly on the drug is extended, and prices are higher.

The TPP Transparency Chapter Annex on Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices is also of concern. This Annex will give drug companies undue influence on government policies and decisions regarding the reimbursement of new drugs, and also give pharmaceutical companies new rights to challenge the reimbursement policies and decisions they do not deem favorable to their interests.

Finally, we would like to point out that the standards and investor rights created by the TPP, under the guise of free trade, will make it more difficult for governments to modify intellectual property rules as well as undertake the future health care reforms necessary to restrain and lower the cost of cancer treatments.

We would like to bring to your attention the WMA Council Resolution on Trade Agreements and Public Health Adopted by the 200th WMA Council Session, Oslo, April 2015 which states that the WMA Council members:

> Oppose any trade agreement provisions which would compromise access to health care services or medicines including but not limited to:
>
> - Patenting (or patent enforcement) of diagnostic, therapeutic and surgical techniques;
> - "Evergreening", or patent protection for minor modifications of existing drugs;

[4] The standards proposed by some countries in the TPP draft text go far beyond even the legal mechanisms in the United States. Congress has limited the use of linkage for pharmaceutical drugs, and linkage is not used under the U.S. Biologics Price Competition and Innovation Act.

- Patent linkage or other patent term adjustments that serve to as a barrier to generic entry into the market;
- Data exclusivity for biologics;
- Any effort to undermine TRIPS safeguards or restrict TRIPS flexibilities including compulsory licensing;
- Limits on clinical trial data transparency.

As the world population is aging as well as surviving cancer longer, innovation in AND access to new and effective treatments become even more crucial to many of us. Policies that promote uncontrolled escalation in high prices contribute to unnecessary suffering and death.

As we have stated before to USTR -- and we would like all TPP negotiators to hear us on this -- your time and expertise would surely be better spent designing and advancing trade policies that allow all of us to promote rather than impede access to medicines, while expanding funding for medical R&D, including for better cancer drugs and diagnostic tools. This is in every country's interest.

I am available for any questions you may have.

Sincerely,

Manon Ress

Manon Ress
On behalf of UACT

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Annex 1: World Medical Association (WMA) Council Resolution on Trade Agreements and Public Health

WMA Council Resolution on Trade Agreements and Public Health
Adopted by the 200th WMA Council Session, Oslo, April 2015

PREAMBLE

Trade agreements are sequelae of globalization and seek to promote trade liberalization. They can have a significant impact on the social determinants of health and thus on public health and the delivery of health care.

Trade agreements are designed to produce economic benefits. Negotiations should take account of their potential broad impact especially on health and ensure that health is not damaged by the pursuit of potential economic gain.

Trade agreements may have the ability to promote the health and wellbeing of all people, including by improving economic structures, if they are well constructed and protect the ability of governments to legislate, regulate and plan for health promotion, health care delivery and health equity, without interference.

BACKGROUND

There have been many trade agreements negotiated in the past. New agreements under negotiation include the Trans Pacific Partnership (TPP),[1] Trans Atlantic Trade and Investment Partnership (TTIP)[2] the Trade in Services Agreement (TiSA) and the Comprehensive Economic and Trade Agreement (CETA).[3]

These negotiations seek to establish a global governance framework for trade and are unprecedented in their size, scope and secrecy. A lack of transparency and the selective sharing of information with a limited set of stakeholders are anti-democratic.

Investor-state dispute settlement (ISDS) provides a mechanism for investors to bring claims against governments and seek compensation, operating outside existing systems of accountability and transparency. ISDS in smaller scale trade agreements has been used to challenge evidence-based public health laws including tobacco plain packaging. Inclusion of a broad ISDS mechanism could threaten public health actions designed to effect tobacco control, alcohol control, regulation of obesogenic foods and beverages, access to medicines, health care services, environmental protection/climate change and occupational / environmental health improvements. This especially in nations with limited access to resources.

Access to affordable medicines is critical to controlling the global burdens of communicable and non-communicable diseases. The World Trade Organization's Agreement on Trade-Related Aspects of

Intellectual Property Rights (TRIPS) established a set of common international rules governing the protection of intellectual property including the patenting of pharmaceuticals. TRIPS safeguards and flexibilities including compulsory licensing seek to ensure that patent protection does not supersede public health.[4]

TiSA may impact on eHealth provision by changing rules in licensing and telecoms. Its impact on the delivery of eHealth could be substantial and damage the delivery of comprehensive, effective, cost-effective efficient health care.

The WMA Statement on Patenting Medical Procedures states that patenting of diagnostic, therapeutic and surgical techniques is unethical and "poses serious risks to the effective practice of medicine by potentially limiting the availability of new procedures to patients."

The WMA Statement on Medical Workforce states that the WMA has recognized the need for investment in medical education and has called on governments to "...allocate sufficient financial resources for the education, training, development, recruitment and retention of physicians to meet the medical needs of the entire population..."

The WMA Declaration of Delhi on Health and Climate Change states that global climate change has had and will continue to have serious consequences for health and demands comprehensive action.

RECOMMENDATIONS

Therefore the WMA calls on national governments and national member associations to:

Advocate for trade agreements that protect, promote and prioritize public health over commercial interests and ensure wide exclusions to secure services in the public interest, especially those impacting on individual and public health. This should include new modalities of health care provision including eHealth, Tele-Health, mHealth and uHealth.

Ensure trade agreements do not interfere with governments' ability to regulate health and health care, or to guarantee a right to health for all. Government action to protect and promote health should not be subject to challenge through an investor-state dispute settlement (ISDS) or similar mechanism.

Oppose any trade agreement provisions which would compromise access to health care services or medicines including but not limited to:

- Patenting (or patent enforcement) of diagnostic, therapeutic and surgical techniques;
- "Evergreening", or patent protection for minor modifications of existing drugs;
- Patent linkage or other patent term adjustments that serve to as a barrier to generic entry into the market;
- Data exclusivity for biologics;
- Any effort to undermine TRIPS safeguards or restrict TRIPS flexibilities including compulsory licensing;
- Limits on clinical trial data transparency.

Oppose any trade agreement provision which would reduce public support for or facilitate commercialization of medical education.

Ensure trade agreements promote environmental protection and support efforts to reduce activities that cause climate change.

Call for transparency and openness in all trade agreement negotiations including public access to negotiating texts and meaningful opportunities for stakeholder engagement.

Notes

[1] TPP negotiations currently include twelve parties: the United States, Canada, Mexico, Peru, Chile, Australia, New Zealand, Brunei, Singapore, Malaysia, Japan and Vietnam.

[2] TTIP negotiations currently include the European Union and the United States.

[3] CETA negotiations currently include European Union and Canada.

[4] See World Trade Organization, Declaration on TRIPS and Public Health ("Doha Declaration") (2001)

Annex 2 WMA Declaration of Helsinki - Ethical Principles for Medical Research Involving Human Subjects

Adopted by the 18th WMA General Assembly, Helsinki, Finland, June 1964, and amended, most recently, by the 64th WMA General Assembly, Fortaleza, Brazil, October 2013

(Quoted here are paragraphs 1-10, 16-18. The Declaration includes 37 paragraphs in total.)

Preamble

1. The World Medical Association (WMA) has developed the Declaration of Helsinki as a statement of ethical principles for medical research involving human subjects, including research on identifiable human material and data.

The Declaration is intended to be read as a whole and each of its constituent paragraphs should be applied with consideration of all other relevant paragraphs.

2. Consistent with the mandate of the WMA, the Declaration is addressed primarily to physicians. The WMA encourages others who are involved in medical research involving human subjects to adopt these principles.

General Principles

3. The Declaration of Geneva of the WMA binds the physician with the words, "The health of my patient will be my first consideration," and the International Code of Medical Ethics declares that, "A physician shall act in the patient's best interest when providing medical care."

4. It is the duty of the physician to promote and safeguard the health, well-being and rights of patients, including those who are involved in medical research. The physician's knowledge and conscience are dedicated to the fulfilment of this duty.

5. Medical progress is based on research that ultimately must include studies involving human subjects.

6. The primary purpose of medical research involving human subjects is to understand the causes, development and effects of diseases and improve preventive, diagnostic and therapeutic interventions (methods, procedures and treatments). Even the best proven interventions must be evaluated continually through research for their safety, effectiveness, efficiency, accessibility and quality.

7. Medical research is subject to ethical standards that promote and ensure respect for all human subjects and protect their health and rights.

8. While the primary purpose of medical research is to generate new knowledge, this

goal can never take precedence over the rights and interests of individual research subjects.

9. It is the duty of physicians who are involved in medical research to protect the life, health, dignity, integrity, right to self-determination, privacy, and confidentiality of personal information of research subjects. The responsibility for the protection of research subjects must always rest with the physician or other health care professionals and never with the research subjects, even though they have given consent.

10. Physicians must consider the ethical, legal and regulatory norms and standards for research involving human subjects in their own countries as well as applicable international norms and standards. No national or international ethical, legal or regulatory requirement should reduce or eliminate any of the protections for research subjects set forth in this Declaration.

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Risks, Burdens and Benefits

16. In medical practice and in medical research, most interventions involve risks and burdens.

Medical research involving human subjects may only be conducted if the importance of the objective outweighs the risks and burdens to the research subjects.

17. All medical research involving human subjects must be preceded by careful assessment of predictable risks and burdens to the individuals and groups involved in the research in comparison with foreseeable benefits to them and to other individuals or groups affected by the condition under investigation.

Measures to minimise the risks must be implemented. The risks must be continuously monitored, assessed and documented by the researcher.

18. Physicians may not be involved in a research study involving human subjects unless they are confident that the risks have been adequately assessed and can be satisfactorily managed.

When the risks are found to outweigh the potential benefits or when there is conclusive proof of definitive outcomes, physicians must assess whether to continue, modify or immediately stop the study.

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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 mai contracts;
- Investor-State Dispute Settlements- come to an agr
- Labor and environment- the inclusion of enforceabl
- Pharmaceuticals- resolving the push by large pharm patent protections for expensive drugs;
- Pork- resolving conflicts over the continued use of which is very important to US pork producers;
- Rice- resolving Japan's determination to retain high rice industry;
- State-owned enterprises- limit the unfair use of SOI domestic products through the use of extensive sub
- Sugar- address the relatively large governmental su sugar producers thereby opening the opportunity fo
- Tobacco- determine whether a meaningful tobacco
- Textiles and footwear- address to what extent "rule included.

Historic trade pact could be undone by ... cheese?; (Politi 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 produ
- Japan's intentions to protect its rice farmers; and
- The US being pushed by large pharmaceutical com expensive new drugs.

Prosperity Undermined: The Status Quo Trade Model's 2 Trade Deficits, Job Loss and Wage Suppression; (Public This lengthy paper examines the record pertaining to actua trade agreements. The conclusions include the following:

- US trade deficits have significantly increas eliminating domestic jobs and slowing econ
- US agricultural exports are diminishing whi
- Almost 5 million manufacturing jobs have b
- The offshoring of more technical and highe
- The loss of manufacturing capacity is erodi revenues;
- Some of the recent FTAs such as NAFTA b requirements;
- Middle class wages in the US have remaine
- Privileges accorded to foreign investors hav 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.

Drug and Alcohol Review (November 2006), 25, 567–579

Taylor & Francis
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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 liquour *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

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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

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 cooperation 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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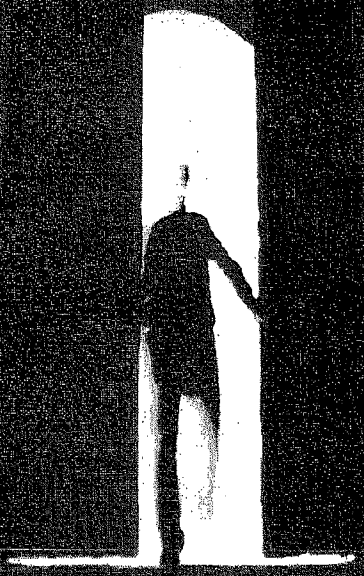
CTPC Staff Note: The following pages were excerpted from a 29 page report issued by the Center for International Environmental Law and authored by CTPC member Sharon Anglin Treat. The entire report can be viewed at the CTPC website:
http://legislature.maine.gov/legis/opla/citpolsums.htm

PREEMPTING THE PUBLIC INTEREST

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



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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 consumers 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 anticipated 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.

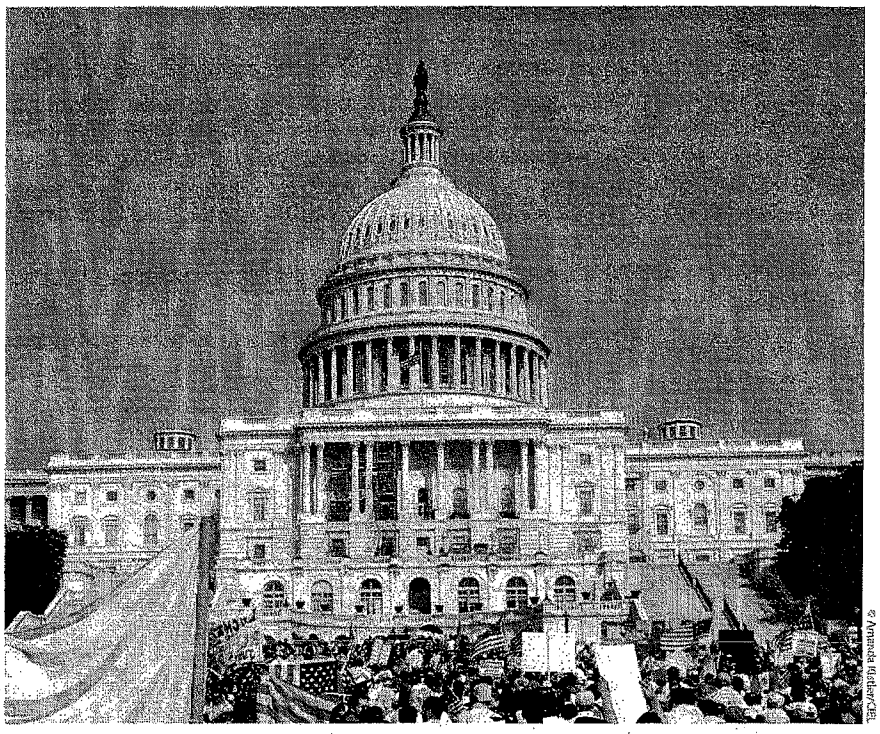
- US states have wide latitude to regulate to protect public health, safety, and welfare under the US Constitution and federal environmental laws, most of which institutionalize a strong role for states as co-regulator. With federal regulation of chemical hazards lax, slow, or simply broken, many states 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.



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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 reflectthe 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.'"

http://www.iatp.org/blog/201507/a-rallying-cry-for-a-better-trade-system

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.rtE1riJ0.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 to 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.

http://www.politico.com/story/2015/07/trans-pacific-partnership-trade-pact-challenges-120600

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.

07/26/15, 06:18 PM EDT

Updated 07/27/15, 09:47 AM EDT

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 ways 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 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 it 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/citpolsums.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

o **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]

o **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]

o **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?

o **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]

o **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]

o **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

o **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]

o **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]

o **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]

o **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.

o **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]

o **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]

o **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

o **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?

o **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]

o **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]

o **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.

o **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

o **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]

o **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

Leave a reply

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 ARL, 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

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

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 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.

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.

http://jama.jamanetwork.com/article.aspx?articleid=2430590

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

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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.

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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

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 negotiationare 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.

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 TTIPare 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.

Write to Tom Fairless at tom.fairless@wsj.com

(END) Dow Jones Newswires

09-16-151431ET

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.

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.

STATE OF MAINE

Citizen Trade Policy Commission

DRAFT AGENDA

Tuesday, October 27, 2015 at 1 P.M.
Room 208, Burton M. Cross State Office Building
Augusta, Maine

I. Welcome and introductions

II. Presentation and Discussion with Matt Jacobson, Executive Director of the Maine Lobster Marketing Collaborative (1:15 PM)

III. Presentations from CTPC member Sharon A. Treat on the current status of the TPP and an update on the proposed Regulatory Chapter of the TTIP

IV. Articles of interest (Lock Kiermaier, Staff)

V. Discussion of possible dates in November for next Public Hearing/Meeting to be held in Bangor

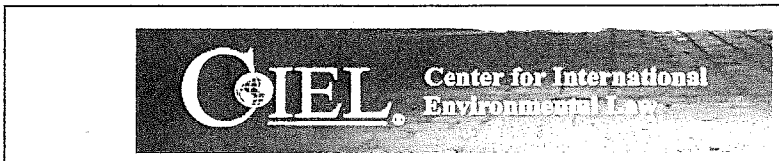
VI. Adjourn (3 PM)

Preempting the Public Interest: How Regulatory Cooperation in TTIP Will Limit US States' Chemical & Pesticide Protections

Sharon Anglin Treat, Trade Project Consultant
National Caucus of Environmental Legislators
TTIP Stakeholder Presentation
Miami, Florida
October 21, 2015

National Caucus of Environmental Legislators

Founded in 1996, NCEL connects over 1000 environmentally committed state legislators from both political parties in every state with their peers to support member's legislation. NCEL educates and connect legislators with policy experts and advocacy organizations to pass successful legislation to protect the environment and prevent anti-environmental legislation.



PREEMPTING THE PUBLIC INTEREST

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

THE EU'S REGULATORY COOPERATION CHAPTER

- "Regulatory cooperation" threatens the continuing viability of US state laws and regulations that are more protective than federal standards & threatens US consumers and the environment with increased exposure to toxics
- US states essentially "co-regulate" pesticides with federal regulators, and state chemical, cosmetics and food policies fill in the gaps where federal regulation is ineffective and outdated

2

EU REGULATORY COOPERATION APPLIES BROADLY TO US STATES

- Applies to most if not all US state laws and regulations – EVEN IF NO TRADE IMPACT
- Fails to preserve any right to regulate outside of federal government
- New procedural requirements apply to both legislatures & executive agencies

NOT JUST "GOOD GOVERNMENT"

The chapter will lead to **regulatory chill** caused by delay, increased costs for government, fear of legal challenges, heightened industry influence & conflicts of interest

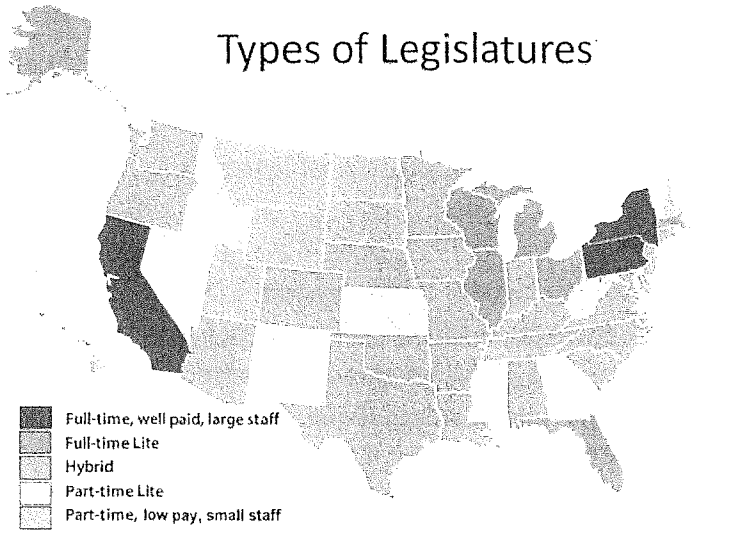
- **EARLY WARNING SYSTEM for foreign trade officials (and industry stakeholders) for proposed laws & regulations**
- **US Federal Gov't MUST ENABLE REGULATORY EXCHANGES between the EU and states on proposed laws**
- **Additional justifications required to regulate, including TRADE & COST-BENEFIT IMPACT ASSESSMENTS**
- **Increased potential for INVESTOR-STATE lawsuits (ISDS)**

3

MORE INDUSTRY INFLUENCE…
… LESS TRANSPARENCY

- Industry associations such as US Council on International Business (USCIB) & American Chamber of Commerce to the EU (Amcham) want regulatory cooperation as a means of preventing regulations by US states
- Focus on industry-driven international standards (CODEX), behind-the-scenes "exchanges"
- US states ill-equipped to influence – don't sit at negotiating table & won't be able to effectively participate in international meetings

BOX 4
Types of Legislation



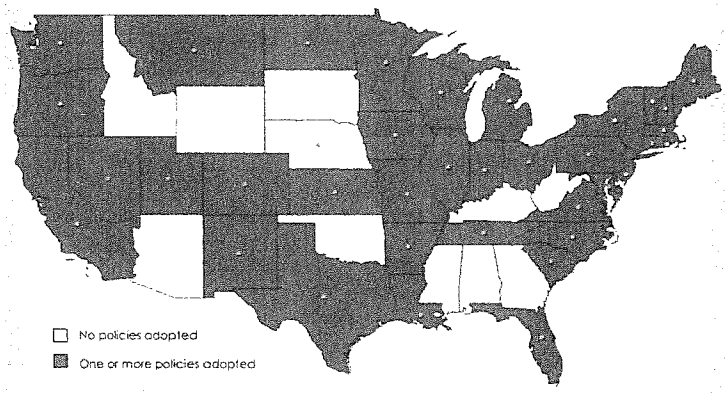
4

STATES' CHEMICAL POLICIES

38 US states have more than 250 laws and regulations to protect the public & environment from toxic chemicals, including measures to:

- Protect children from toys with toxic components
- Ban toxic ingredients from food packaging
- Disclosures of toxic ingredients
- Health warnings
- Impose producer responsibility for disposal or other end-of-life handling
- on manufacturers of products containing mercury and other heavy metals, and to require

BOX 1
Map of State Chemical Policies



5

SOME STATE-REGULATED TOXICS

Mercury, lead, bisphenol-A (BPA), cadmium, formaldehyde, hexavalent chromium, nonylphenol and nonylphenol ethoxylates (potential endocrine disruptors), perchloroethylene, and polybrominated diphenyl ether flame retardants are banned in consumer products in many states

... BUT NOT BY FEDERAL LAW

POLICIES BASED ON THE EU'S REACH

- California, Maine, Minnesota, Oregon, Vermont & Washington have a rigorous process identifying hazardous chemicals of greatest concern to vulnerable populations
- Authorized to require reporting & disclosure
- Product bans based on level of risk
- In 2015, thirteen bills related to chemical prioritization were pending in eight state legislatures.

6

NEONICOTINOIDS

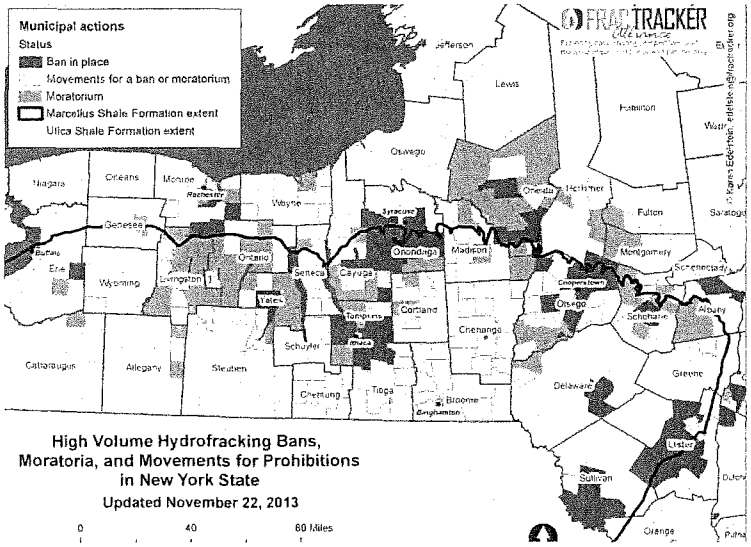
- US states have jumped into a void created by a lack of regulation at the federal level and started regulating bee-killing pesticides that threaten the food supply and ecological balance.
- Minnesota, California, Indiana, Oregon and Vermont are among the states that have already taken action.

FRACKING

- In 2015, there were 226 bills in 33 state legislatures concerning hydraulic fracturing
- Connecticut, California, Maryland, and New York have waste handling, disclosure, moratoria and other policies that go far beyond federal fracking regulations

7

New York Fracking Bans/Moratoria



FOOD LABELING

- 300 food labeling bills introduced in 2014 and 2015 combined
- **Virtually every US state had legislation:**
  - Nutrition and calorie disclosures
  - Identifying foods containing GMOs (already enacted in Vermont, Maine, Connecticut)
  - Warning labels on sugary drinks (proposed in California, New York, Vermont)
  - Identifying locally produced or harvested products including olive oil and seafood

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In Summary ...

- The EU's Regulatory Cooperation chapter & related food safety (SPS) and technical standards (TBT) provisions could negate important existing & future protections in the US at both federal and state levels.
- It fails to recognize the federalist system of government – established in the US Constitution – which gives US states broad authority to regulate in the public interest
- It inserts foreign government influence into domestic state legislative and regulatory procedures and policymaking

Links to Some Resources

- CIEL REPORT, Preempting the Public Interest
  http://www.ciel.org/reports/preempting-the-public-interest-how-ttip-will-limit-us-states-public-health-and-environmental-protections-sep-2015/
- National Caucus of Environmental Legislators, www.ncel.net
- National Conference of State Legislatures, www.ncsl.org
- SAFER States, website on state chemical policies, www.saferstates.com

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Contact Information

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www.ncel.net

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Article notes
Citizen Trade Policy Commission

Articles from September and October 2015

US seen waiving tariff on 80% of Japanese autoparts; (asia.nikkei.com; 9/30/15)- This article reports that under the terms of the proposed TPP, the US will eliminate import tariffs of more than 80% of auto parts that are made in Japan.

Pacific Trade Deal Talks Resume, Under Fire From U.S. Presidential Hopefuls; (New York Times; 9/30/15)- This article reports that, as of late September 2015, that the TPP negotiations are scheduled to resume. The article also reports on criticism of the TPP from Republican presidential candidate Donald Trump and Democratic presidential candidate Senator Bernie Sanders.

Latest TPP Biologics Proposal Is a Step in the Wrong Direction; (AARP; 10/1/15)- This blog piece from the AARP strongly criticizes the inclusion of "monopoly protection for biologic medicines" by arguing that such provisions would prolong high drug prescription costs for consumers.

Overnight suspense over TPP: On verge of completion, big trade deal hit by delay; (National News Watch.com; 10/4/15)- This article reports that, as of early October 2015, the TPP negotiations have almost been finalized but have encountered negotiation snags over issues relating to pharmaceuticals and dairy products.

TPP DONE AT THE DIPLOMATIC LEVEL, NOW GOES TO THE POLITICIANS; (The Nelson Report; 10/5/15)- This article reports that TPP negotiations have been finalized and further reports on the reactions from prominent elected officials and different organizations; these reactions include the following:

- Representative Paul Ryan, House Chair of the Ways & Means Committee- in favor of a strong TPP but reserves final judgment until the text is available for congressional review;
- Representative Sander Levin, ranking Democrat of the Ways & Means Committee- the TPP is to be lauded for the inclusion of a carve-out for tobacco in the ISDS process but other topics including the treatment of currency manipulation are unsatisfactory;
- Senator Orin Hatch, Senate Chair of the Finance Committee- feels that the reported agreement falls *"woefully short"*;
- Senator Ron Wyden, ranking Democrat on the Finance Committee- advocates for close examination of the TPP text and favors a strong agreement; lauds reported provisions on currency manipulation, labor rights and the tobacco carve-out for the ISDS process;
- US-ASEAN Business Council- strongly supports the negotiated agreement;
- Emergency Committee for American Trade- looks forward to reviewing the text and supports an agreement which is *"standard, comprehensive and commercially meaningful"*;

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- Business Roundtable- while the details are unavailable, the TPP has the *"potential to help U.S. businesses, farmers and workers sell more goods and services to 11 countries in the Asia-Pacific region, which would support American jobs and U.S. economic growth";*
- American Apparel & Footwear Association- intends to review the final text and is hopeful that *"that the final agreement contains provisions to enable our members-as well as the millions of U.S. workers they employ and the billions of customers they serve-to benefit from the deal as soon as it is implemented";*
- United States Fashion Industry Association- also looks forward to reviewing the final text of the agreement and is *" hopeful that the TPP will indeed be a high-standard agreement that recognizes the 21st-century global value chain and economic contributions of these companies, which work hard to create high-quality jobs in the United States and affordable, high-quality apparel products for American families";*
- Information Technology Industry Council- the test of a successful TPP will *be "whether it is an agreement that will support jobs, drive sustainable growth, foster inclusive development, and promote 21st century innovation.";*
- U.S. Business and Industry Council- categorically rejects the proposed agreement by objecting to the treatment of currency manipulation and stating that the TPP is *"completely inadequate to serve the interests of American manufacturers, workers, farmers, and other segments of the US economy";*
- Public Citizen's Global Trade Watch- skeptical as to whether the TPP will receive congressional approval and stated that *"There is intense controversy in many TPP countries about the pacts' threats to jobs, affordable medicine, safe food and more.";* and
- Public Citizen's Access to Medicine Program- generally not in favor of the negotiated agreement though the TPP does *"contribute to preventable suffering and death".*

FACT SHEET: How the Trans-Pacific Partnership (TPP) Boosts Made in America Exports, Supports Higher-Paying American Jobs, and Protects American Workers; (White House Press Release; 10/5/15)- This press release from the White House makes the following points favoring adoption of the TPP:

- The agreement eliminates over 18,000 different taxes on Made-in-America exports;
- The agreement includes the strongest worker protections of any trade agreement in history;
- The agreement includes the strongest environmental protections of any trade agreement in history;
- The agreement helps small businesses benefit from global trade;
- The agreement promotes e-commerce, protects digital freedom and preserves an open internet;
- The agreement levels the playing field for US workers by disciplining state-owned enterprises;
- The agreement prioritizes good governance and fighting corruption;
- The agreement includes the first ever Development Chapter; and
- The agreement capitalizes on America's position as the world leader in services exports.

TPP: The end of the beginning; (Brookings Institute; 10/5/15)- This article makes the point that completion of the TPP negotiations is yet the beginning of a long review and approval process by the signatory nations.

The Trans-Pacific Partnership Trade Accord Explained; (New York Times; 10/5/15)- This article provides a useful and comprehensive summary of the various components of the TPP;

Vilsack: TPP text to be released within 30 days; (Politico; 10/6/15)- This article reports that the US Agriculture Secretary Tom Vilsack has stated that the text of the TPP will be publicly released within 30 days and makes the following points about the TPP:

- Agriculture is a *"big winner"* in the TPP;
- Tariff cuts will affect almost every commodity group;
- The TPP will use *"science-based determinations"* with regards to the importation of products;
- The agreement will promote transparency in the biotech regulatory process; and
- US dairy producers will have increased access to the Canadian and Japanese markets.

Trade agreement praised and panned; (Sciencemag.org; 10/6/15)- This article presents two differing perspectives from the scientific community regarding the recently negotiated TPP. One camp holds that the agreement will:

- Lower consumer costs for manufactured goods and agricultural products;
- Enhance labor and environmental protections; and
- Strengthen rules against counterfeiting and intellectual property theft.

Another viewpoint argues that the TPP has serious disadvantages which include:

- Restricting access to biologic drugs through excessive intellectual protection; and
- Despite claims to the contrary, there are fears that tobacco companies could still challenge public health laws through the ISDS process.

Ed Fast says text of TPP trade deal available within days; (cbc.ca; 10/8/15) – This article from the Canadian Broadcast Centre states that Canadian Trade Minister Ed Fast is promising that a *"provisional"* copy of the TPP will be released in the *"next few days"*;

Administration Pushes To Clear Way For TPP Consideration In Congress; (Inside US Trade; 10/8/15)- This article reports that the Obama administration intends to advance the TPP for consideration in Congress as soon as possible and intends to promote it through the use of press conferences, fact sheets and speeches.

Germany mobilizes against EU-U.S. trade deal; (Politicopro.com; 10/9/15)- this article reports on the widespread opposition of many in the German public to the proposed TTIP. The article cites several sources:

- A non-representative survey of some 3,000 app users showed that 88% of the respondents did not believe that Germany would benefit from the TTIP; and
- In a recent poll, 51% of Germans said they opposed the TTIP and 31% were in favor of it.

How the controversy over drug prices could take down Obama's massive trade deal; (Washington Post; 10/9/15)- This article reports that the proposed protections for pharmaceutical patents and subsequent pricing pose a serious threat to Congressional approval of the TPP. Some critics feel that the protections included in the agreement are seriously lacking while other critics feel that the proposed protections are excessive. The opposition from either point of view may combine to threaten adoption of the TPP by Congress.

Why support TPP? Critics should read the agreement and keep an open mind; (The Guardian; 10/11/15)- This opinion piece maintains that critics of the TPP should carefully consider the actual contents of the proposed agreement. The author suggests that the agreement represents a balance of sorts by:

- Giving tobacco companies, pharmaceutical companies and other corporations less than they had advocated for; and
- Providing more provisions than expected that are favorable to environmentalists;

Trading Away Land Rights: TPP, Investment Agreements, and the Governance of Land; (triplecrisis.com; October 2015)- This article reports on the inclusion of certain investment provisions in the TPP and other FTAs that have the potential to significantly impede a government's ability to *"manage land and other natural resources in the public interest"*. The authors suggest that the ISDS provisions could be used to challenge government regulations in this policy sphere.

TPP Drug Reimbursement Rules Likely Deviate From Past U.S. Trade Pacts; (Inside US Trade; 10/15/15)- This article reports that the TPP contains provisions governing the amount of allowable reimbursements for the cost of drugs are significantly weaker than recent FTAs. A significant difference is that the TPP calls for a review process of reimbursement decisions that can be conducted by the pharmaceutical company in question whereas previous FTAs require an independent review to take place.

Letter from Langdon: Farmers Pay the Cost of 'Free' Trade; (dailyyonder.com; 10/12/15)- This opinion piece, written by Richard Oswald, President of the Missouri Farmers Union, maintains that the TPP will result in a situation where, *"American farmers will face upheaval and more dislocation, while corporate agriculture thrives"*.

http://asia.nikkei.com/Features/Trans-Pacific-Partnership/US-seen-waiving-tariff-on-80-of-Japanese-autoparts

September 30, 2015 4:29 am JST
Concession ahead of TPP talks

US seen waiving tariff on 80% of Japanese autoparts

RYOHEI YASOSHIMA, Nikkei staff writer

The U.S. may end tariffs on more than 80% of Japanese autoparts under the proposed Trans-Pacific Partnership.

ATLANTA -- The U.S. is likely to eliminate import tariffs on more than 80% of autoparts made in Japan under the proposed Trans-Pacific Partnership trade pact.

The two nations are finalizing bilateral talks on automotive trade ahead of ministerial-level negotiations by representatives from the 12 TPP nations to start here Wednesday.

Before the last ministerial-level talks in late July, the two countries agreed the U.S. should exempt more than 50% of Japanese-made parts from import tariffs. The American side now appears to be making an even bigger concession.

Japan exports 100 or so key autoparts to America. Seat belts, brakes and exhaust gas filters are among those likely to be exempt from tariffs as soon as the TPP takes effect. But transmissions, gearboxes and other parts for which U.S. companies are more protective would remain subject to duties. Japan wants all autoparts exempted within 10 years.

Japan sends 2 trillion yen ($16.5 billion) in autoparts to the U.S. annually. Removing the tariff on all of them would save Japanese companies around 50 billion yen per year. Tariffs on completed vehicles are expected to be lifted in about three decades.

Automobiles are also a crucial topic in the broader TPP talks. Mexico wants any vehicle receiving a tariff exemption to have a high percentage of its components made in the 12 TPP economies, while Japan sees a lower percentage as appropriate.

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Rice is another major topic of Japan-U.S. negotiations linked to the pact. Japan, which plans to propose exempting 70,000 tons of imported rice a year from tariffs, is considering adding 50,000 tons to its offer.

Concessions from both sides in these two areas would propel the TPP talks. Japan is eager to reach an agreement in Atlanta because missing this opportunity could delay a deal by a year or longer. But it is unclear whether the 12 countries can reach a general agreement this time, amid discord over drug development data protection and dairy trade.

http://mobile.nytimes.com/2015/10/01/business/pacific-trade-deal-talks-resume-under-fire-from-us-presidential-hopefuls.html?hp&action=click&pgtype=Homepage&module=second-column-region&region=top-news&WT.nav=top-news&_r=2&referer=

Pacific Trade Deal Talks Resume, Under Fire From U.S. Presidential Hopefuls

By JACKIE CALMES

September 30, 2015

WASHINGTON — Trade ministers for the United States and 11 other Pacific nations gathered in Atlanta on Wednesday to try to reach agreement on the largest regional free-trade pact ever. But knotty differences persist, and antitrade blasts from American presidential candidates have not eased prospects for any deal.

The talks in a downtown Atlanta hotel are picking up where ministers left off two months ago after deadlocking at a Maui resort, at odds over trade in pharmaceutical drugs, autos, sugar and dairy goods, among other matters. United States negotiators said last week that enough progress had been made in recent contacts to justify hosting another, perhaps final round.

For President Obama, who cited the potential agreement during his address this week to the United Nations, success in a negotiating effort as old as his administration would be a legacy achievement. The proposed Trans-Pacific Partnership would liberalize trade and open markets among a dozen nations on both sides of the Pacific, from Canada to Chile and Japan to Australia, that account for about two-fifths of the world's economic output.

Failure would be just as big a defeat for Mr. Obama, and upset his long-troubled foreign policy initiative to reorient American engagement toward fast-growing Asia and away from the violent morass of the Middle East and North Africa. Yet if the Atlanta talks yield no agreement by the weekend, the Americans are unlikely to declare failure.

Time is not the president's friend, however. Even if agreement is reached this week, Congress will not debate and vote on it until late winter — in the heat of the states' presidential nominating contests — because by law Mr. Obama cannot sign the deal without giving lawmakers 90 days' notice.

He will need bipartisan support, given the resistance of many Democrats and union allies to such trade accords. But presidential candidates in both parties have already registered strong opposition.

The Republican front-runner, Donald J. Trump, the billionaire who boasts of his own deal-making prowess, has called the emerging trans-Pacific agreement "a disaster." While some Republican rivals also are critical, it is the rhetoric of Mr. Trump, given his celebrity appeal, that has Republican leaders more worried that a toxic trade debate could threaten vulnerable

Republicans in 2016. Senator Mitch McConnell of Kentucky, the majority leader, supports a Pacific accord but nonetheless wants to protect his narrow Republican majority — and deny Mr. Obama an achievement.

On the Democratic side, where unions, progressive groups and many members of Congress oppose an agreement, Hillary Rodham Clinton has not taken a stand, though she repeatedly promoted the Pacific accord as secretary of state. In June, Mrs. Clinton told an Iowa audience "there should be no deal" if congressional Democrats' concerns for workers were not addressed, and many in the party, including administration officials, expect she ultimately would oppose a deal, like her rival, Senator Bernie Sanders of Vermont.

The United States trade representative, Michael B. Froman, said before heading to Atlanta, "The president has made clear that he will only accept a T.P.P. agreement that delivers for middle-class families, supports American jobs and furthers our national security."

"The substance of the negotiations will drive the timeline for completion," Mr. Froman added, "not the other way around."

Mr. Obama and Vice President Joseph R. Biden Jr., who has not ruled out a bid for president, showed at the United Nations that they were pressing hard to get an agreement. The president affirmed his support in private meetings with several world leaders, according to administration officials.

In his address to the United Nations, Mr. Obama told foreign leaders the accord would be a model for the world, "an agreement that will open markets, while protecting the rights of workers and protecting the environment that enables development to be sustained." Should a deal come together, central to the White House campaign to sell the agreement to Congress would be the argument that setting economic, labor and environmental standards in the Pacific region would counter China's influence, officials said.

Late Tuesday, Mr. Biden brought Mr. Froman to a Manhattan meeting with Prime Minister Shinzo Abe of Japan, who has made an agreement central to his own economic platform.

The Obama administration has pressed for the Pacific accord for six years, picking up the idea from the George W. Bush administration. Many issues have been all but settled, but nothing is final until everything is decided.

That progress, including tentative agreements on ending tariffs, setting labor and environmental standards, and opening certain markets, has sustained the negotiations despite setbacks.

But several issues continue to block a deal.

Dairy market rules divide the United States, Canada, Australia and New Zealand; this has been especially troublesome for Canada's team, since the nation will hold elections this month.

Also divisive are provisions over auto exports, including requirements that autos have a certain percentage of parts made in countries that are parties to the agreement. Japan has sought a lower percentage of parts in the "rules of origin," with some support from Americans, to allow the export of autos with Chinese parts, while Mexico and Canada demand stricter rules.

Perhaps most contentious are negotiations related to protections for pharmaceutical companies' drugs, especially cutting-edge biologics that are made from living organisms and considered promising against cancer, among other ailments.

Several countries, especially Australia, have opposed the United States and its pharmaceutical industry for insisting that companies' drug data be protected for 12 years to create financial incentives to innovate. Critics say this keeps lower-cost generic drugs and "biosimilars" off the market for too long.

Here, too, the presidential contest has injected a wild card: Mrs. Clinton and Mr. Sanders each have accused drug makers of price gouging.

While there is talk of an eight-year compromise, for many opponents that is too long. Judit Rius Sanjuan, a manager of a campaign by Doctors Without Borders to hasten access to lower-priced drugs and vaccines, said she met with American negotiators last week in Washington, "and they gave me zero indication that they are going to be more flexible on this issue."

Andrew Spiegel, executive director of the Global Colon Cancer Association, said drug makers needed the incentives of strong protections for their intellectual property to encourage their research. He did not offer an answer to the question dividing negotiators: how many years the drug makers' data monopoly should last.

"I leave it to them to pick the magic number," Mr. Spiegel said.

Last week, 156 members of Congress, mostly Democrats, wrote the administration to complain that some parties to the talks, like Vietnam, Singapore and Japan, manipulate their currency values to underprice their products. While discussions are continuing, the administration is counting on reaching a currency deal with the Asian nations that would be a side agreement to any trade pact.

http://www.nationalnewswatch.com/2015/10/04/is-canada-joining-a-big-new-trade-deal-answer-could-be-a-few-hours-away/#.VhIne9Y-DeT

Overnight suspense over TPP: On verge of completion, big trade deal hit by delay

By Alexander Panetta — Oct 4 2015

ATLANTA - A last-minute sprint toward a historic trade agreement has turned into yet another marathon negotiating session, with the suspense rippling from the negotiating table into Canada's federal election campaign.

Negotiators appeared very close to striking the 12-country Trans-Pacific Partnership Agreement on Sunday afternoon, with plans to announce the creation of the world's largest trade zone.

Here's how close: Reporters were brought into a room for a briefing session on the deal, were made to sign confidentiality agreements to keep the details secret until a formal announcement, and ziploc bags were distributed around the table to confiscate cellphones until the news embargo was lifted.

That briefing never happened Sunday.

A planned news conference to announce the deal was rescheduled — from 4 p.m. to 6 p.m., then 8 p.m., and was eventually postponed indefinitely, in a fitting finale to a ministerial meeting marked by all-night negotiations that was intended to last two days, then three, four and finally a supposedly make-or-break fifth day.

"Look, it's not done yet," said Andrew Robb, Australia's trade minister.

The overnight hours into Monday could prove pivotal in determining whether the Canadian election experiences a debate on a deal, or a debate on which party should take over this process after Oct. 19.

The talks appear likely to break up Monday as some ministers planned to leave for a G20 summit. Japan's envoy has warned he can't stick around through the day.

It was supposed to be a quiet day off the campaign trail for Stephen Harper. But his Sunday wound up consumed by trade talks, with the prime minister in Ottawa getting phone briefings from the negotiating team in Atlanta.

Another country's minister confirmed that last-minute snags had delayed a deal. Robb said a struggle over next-generation pharmaceuticals had a cascading effect on attempts to resolve other issues.

One of those issues, insiders say, is Canadian dairy.

Robb explained that the U.S. and Australia had worked all night into Sunday to resolve their differences on cutting-edge, cell-based medicines and made a breakthrough around 3 a.m.

He said they'd succeeded at establishing a model that bridges the gap between two entrenched positions: the more business-friendly, eight-year patent-style protections the U.S. wants for biologics, and the more patient-and-taxpayer-friendly five-year model preferred by Australia and others.

But that triggered a chain-reaction. Some other countries weren't pleased with the compromise, and that discussion became more multi-sided with two or three holdouts remaining, he said.

Canada is not too involved in that skirmish. But the delay, according to Robb, wound up pushing other issues to the backburner until Sunday morningand they're still being worked out.

Insiders say access to Canadian grocery shelves is chief among them. Negotiators have been haggling about how much foreign butter, condensed milk and other dairy products should be allowed into Canada.

New Zealand helped create the TPP project a decade ago and it wants to sell more butter in North America — especially in the United States. It says the U.S., however, won't open its own agriculture sector until getting some assurance that American producers could sell more in Canada and Mexico.

Currently, 90 per cent of the Canadian dairy market is closed to foreign products. The system allows for stable incomes in farming communities, but it limits options and drives up prices at the grocery store.

Representatives of the dairy lobby milled about the convention site late Sunday. They professed to still be in the dark about what market-access offer Canada had made.

In an unusual twist, the evening's drama came with a special soundtrack: a concert by the band Foo Fighters which could be heard throughout the hotel-convention complex hosting the negotiations.

While negotiators hashed out percentages and contemplated the long-term consequences on dairy farms and hospitals, many thousands of concertgoers could be heard chanting nearby, oblivious to the unintentional symbolism, "I swear I'll never give in... Is someone getting the best, the best, the best, the best of you?"

An agreement would complete a decade-long process that began with four countries in Asia and Chile, and spread to the United States, then Canada and other Latin American countries.

The state of play was summarized by New Zealand's trade minister — who easily provided the most-memorable quote of the five-day meetings.

Under pressure to obtain foreign access for his own country's dairy, he told one of his country's newspapers that difficult compromises will have to be made.

He illustrated it with an unappetizing culinary metaphor.

"It's got the smell of a situation we occasionally see which is that on the hardest core issues, there are some ugly compromises out there," Tim Groser told New Zealand's Weekend Herald.

"And when we say ugly, we mean ugly from each perspective — it doesn't mean 'I've got to swallow a dead rat and you're swallowing foie gras.' It means both of us are swallowing dead rats on three or four issues to get this deal across the line."

http://blog.aarp.org/2015/10/01/latest-tpp-biologics-proposal-is-a-step-in-the-wrong-direction-2/

Latest TPP Biologics Proposal Is a Step in the Wrong Direction

by KJ Hertz | Comments: 0 | Print

As negotiators meet on the Trans-Pacific Partnership (TPP) in Atlanta, AARP is again urging them to be mindful of the consumers who depend on prescription drugs to manage their health conditions. We continue to have serious concerns with the direction of the TPP negotiations on key issues that will have long-lasting effects on access to affordable prescriptions in the U.S. and around the world.

One of AARP's main objections centers on the intellectual property provisions in the draft TPP agreement. These provisions would restrict prescription drug competition and result in delaying consumers' access to lower-cost generic drugs. These anti-competitive provisions would extend brand drug patent protections through "evergreening" drug products that provide little to no new value. They also prolong high prescription drug costs for consumers, link approval to market generic or biosimilar drugs to existing patents in a way that protects only brand drugs, and increase data exclusivity periods for biologics that further delays access by other companies to develop generic versions of these extremely high-cost drugs.

We urge the TPP negotiators to reject calls for additional monopoly protection for biologic medicines. We understand that the newest proposal in the TPP includes five years of data protection plus a three-year post-marketing surveillance period that would effectively give biologic manufacturers at least eight years of monopoly protection. This proposal runs counter to the Obama administration's efforts to reduce monopoly protection for biologic drugs, efforts that AARP and many other groups also have long supported.

The U.S. is already witnessing the strain of unsustainable prescription drug spending on consumers, state and federal budgets, and our health care system. We simply cannot afford a trade deal that will unduly restrict competition by delaying consumers' access to lower-cost prescription drugs.

The Nelson Report

Oct. 5, 2015

TPP DONE AT THE DIPLOMATIC LEVEL, NOW GOES TO THE POLITICIANS

...BOTH CAPITOL HILL AND BUSINESS ARE STAYING CAUTIOUS, PENDING "DETAILS"

SUMMARY: echoing the key Capitol Hill reactions, note the business community is being careful with "wait, study and see", if of course positive overall that the deal's been done at the government level.

Now the hard politics begins on Capitol Hill, and we've included all of the reactions received so far, except the opposition press conference organized by Rep. DeLauro going on right now.

Rep. Sandy Levin gives it mixed reviews, some positive, some problems he's still adamant on, like currency and labor rights in Mexico. Lori Wallach is still banking on biologics to gen-up public concern, and actually quotes Don Trump in opposition. Good lord...

On that, we are reminded to stop talking about an "8 year" biologics protection deal, and urged to more accurately call it a "5+3" agreement...

We will confess much interest in seeing the text of the US-Japan bilaterals, now to be folded into TPP, on rice, autos, etc. Send details and comments as soon as you get them!!!

Here are the reactions received by 11 am DC time today:

WAYS & MEANS...

CHAIRMAN RYAN'S STATEMENT:

WASHINGTON, DC - House Ways and Means Committee Chairman Paul Ryan (R-WI) released the following statement in response to the news that negotiators in the Trans-Pacific Partnership have reached agreement.

"A successful Trans-Pacific Partnership would mean greater American influence in the world and more good jobs at home. But only a good agreement-and one that meets congressional guidelines in the newly enacted Trade Promotion Authority-will be able to pass the House. I am reserving judgment until I am able to review the final text and consult with my colleagues and my constituents. In particular, I want to explore concerns surrounding the most recent aspects of the agreement. I'm pleased that the American people will be able to read it as well because TPA requires, for the first time ever, the administration to make the text public for at least 60 days before sending it to Congress for consideration. The administration must clearly explain the benefits of this agreement and what it will mean for American families. I hope that Amb. Froman and the White House have produced an agreement that the House can support."

TRADE SUBC. CHAIR:

WASHINGTON, DC - House Ways and Means Trade Subcommittee Chairman Pat Tiberi (R-OH) released the following statement after negotiators in the Trans-Pacific Partnership reached agreement.

"Today the administration announced there was an agreement reached in the Trans-Pacific Partnership (TPP) negotiations, and I look forward to reviewing the text closely to ensure it follows the objectives Congress laid out in passing Trade Promotion Authority (TPA). TPP has the potential to increase American influence and provide access for American businesses to sell their products and services around the world. However, there are many complex issues involved in this agreement that require careful consideration to ensure that the outcome is beneficial for the U.S. economy and jobs. I am pleased the passage of TPA earlier this year will allow the public to fully review the text of TPP, and I look forward to receiving input from my constituents and other stakeholders."

RANKING DEM SANDY LEVIN:

WASHINGTON, DC - Ways and Means Committee Ranking Member Sander Levin (D-MI) today issued a statement following the conclusion of the Trans-Pacific Partnership (TPP) trade negotiations this week in Atlanta, where United States Trade Representative Michael Froman announced that the 12 TPP countries have reached an agreement:

"Progress has been made on important issues, with the outcome on a multitude of issues still requiring deeper scrutiny, and others falling short of the results we seek. Removing tobacco from investor-state dispute settlement is a vital and welcome step in allowing countries to protect their public health. There has also been substantial progress with Vietnam and Malaysia in the areas of worker rights as we seek to ensure they comply with the enforceable standards in the agreement. Unfortunately, there is still no satisfactory plan to ensure that Mexico - a country where economic competition with U.S. workers is the most intense - changes its laws and practices to comply with its obligations in the agreement. Changing NAFTA has been a top priority - we cannot miss this opportunity and hope to rely on a future dispute settlement panel to do so. The Finance Ministers' plan regarding currency manipulation - an issue with a major impact on U.S. jobs - is also entirely unsatisfactory.

"We will need to see the language to understand the full impact of several issues, including the auto rules of origin, Japan automotive market access, investment, environment, state-owned enterprises and agricultural market access. In the vital area of access to medicines, this issue was discussed until the very last hours, and I pressed to ensure access to generic medicines for developing countries, as well as to avoid locking in policies for the United States and other countries that we may one day decide can be improved. During the 90-day notification period, I look forward to an intense period of Congressional scrutiny, as well as the vital period of public release of the agreement's text. This long-awaited public debate is an important component in evaluating the strengths and weaknesses of this agreement. It will also be important to fully consider the various analyses of the impact of TPP on the U.S. economy and middle class jobs.

"Indeed, at the heart of any trade agreement is its impact on jobs and economic growth. But as we have seen during the course of these negotiations, there are new issues that impact the terms of competition, and others that are vital to the integration of the TPP economies. We have to get this agreement right, which is why no one should be surprised if the 90-day period results in additional changes, particularly since many of these issues are the subjects of bi-lateral negotiations. The most important objective is to get the strongest agreement that benefits American workers and the U.S. economy for generations. The role of Congress now is as important as ever."

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SENATE FINANCE...

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Hatch Statement on Trans-Pacific Partnership Negotiations

WASHINGTON - Senate Finance Committee Chairman Orrin Hatch (R-Utah) today issued the following statement after the United States Trade Representative (USTR) Michael Froman announced that an agreement had been reached between the United States and 11 other nations to close the Trans-Pacific Partnership (TPP) negotiations:

"A robust and balanced Trans-Pacific Partnership agreement holds the potential to enhance our economy by unlocking foreign markets for American exports and producing higher-paying jobs here at home. But a poor deal risks losing a historic opportunity to break down trade barriers for American-made products with a trade block representing 40 percent of the global economy. Closing a deal is an achievement for our nation only if it works for the American people and can pass Congress by meeting the high-standard objectives laid out in bipartisan Trade Promotion Authority. While the details are still emerging, unfortunately I am afraid this deal appears to fall woefully short. Over the next several days and months, I will carefully examine the agreement to determine whether our trade negotiators have diligently followed the law so that this trade agreement meets Congress's criteria and increases opportunity for American businesses and workers. The Trans-Pacific Partnership is a once in a lifetime opportunity and the United States should not settle for a mediocre deal that fails to set high-standard trade rules in the Asia-Pacific region for years to come."

A longtime advocate of breaking down trade barriers, Hatch has championed efforts to enhance America's global competitiveness and increase access for American farmers, workers and job-creators into international markets. Most recently, Hatch co-authored legislation to renew Trade Promotion Authority (TPA) which was signed into law in June.

Wyden Statement on End of TPP Negotiations

WASHINGTON - Sen. Ron Wyden, D-Ore., ranking Democrat on the Senate Finance Committee, issued the following statement on the close of negotiations for the Trans-Pacific Partnership trade agreement between the United States and 11 other Pacific nations.

"As I have said in the past, a good Trans-Pacific Partnership agreement could present important new opportunities for Oregon workers, farmers and manufacturers, and raise the bar for labor rights and environmental protections overseas," Wyden said.

"It's now time for Congress and the public to examine the details of the TPP and assess whether it will advance the nation's interests.

"I'm pleased to hear reports that the deal reached today includes, for the first time, an agreement to curb currency manipulation and new and enforceable obligations on countries like Vietnam and Malaysia to uphold labor rights, including in the case of Malaysia enforceable commitments to address human trafficking. I also understand that the agreement will include commitments to stop trade in illegal wildlife and first-ever commitments on conservation. Importantly, I understand that this deal will ensure that countries that are part of it can regulate tobacco without fearing intimidation and litigation by Big Tobacco. It has been reported the agreement includes enforceable measures to promote the free flow of digital information across borders; if accurate, those provisions could constitute an important win for the Internet and the free speech it facilitates. Importantly, the impact of this deal must result in parties to it providing copyright exceptions and limitations known as Fair Use. I look forward to working with the administration and stakeholders to be sure that is ultimately the case.

"In the weeks ahead, I will be examining the details of this agreement to determine whether it will provide the meaningful economic opportunities that Oregonians deserve, and that it reflects Oregon values. I look forward to the details of this agreement becoming public as soon as possible, so Oregonians and the rest of the American public can weigh in."

Background on what happens next:

Pursuant to the Trade Promotion Authority (TPA) legislation that was coauthored by Senator Wyden, the President may not sign the agreement until 90 days after he notifies Congress that he intends to

sign it. Additionally, TPA requires the President to make the entire text of the agreement public at least 60 days before he signs it. Although TPA provides for a clear timeline for how and when Congress will consider a trade agreement like TPP, such timelines do not begin until the President submits the trade agreement to the Congress. The timing of the submission is negotiated between leaders in Congress and the President.

The TPA legislation that Wyden coauthored included negotiating guidelines championed by Wyden to instruct negotiators to seek strong provisions to curb currency manipulation, protect labor rights and the environment, and promote an open Internet. Wyden recently wrote to the Obama Administration, making clear his views about how the trade agreement should deal with tobacco. A copy of the letter can be found here.

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BUSINESS COMMUNITY...

S-ASEAN Business Council Support for the Completed TPP

/ashington,D.C.) The US-ASEAN Business Council offered its support today for the successful completion the Trans-Pacific Partnership (TPP) negotiations.

Ve congratulate the TPP member governments for concluding this landmark agreement in Atlanta, GA day," said Alexander Feldman, President and CEO of the US-ASEAN Business council. "Almost six years ıo, President Obama announced his intention to pursue this landmark agreement and join the P4 (Brunei ırussalam, Chile, New Zealand and Singapore) in the negotiations. Today, the TPP has grown to include ːarly 40 percent of the world's GDP under a single high standards trade agreement. It will open ıportunities for American companies in 11 important Pacific countries, creating a level playing field for S. businesses looking to break into and/or expand their presence in some of the fastest growing market the world. This agreement will improve intellectual property, environment, labor and eCommerce andards across the region."

ıSEAN (Association of Southeast Asian Nations) countries represent over 30 percent of countries ːgotiating the TPP, including Brunei, Malaysia, Singapore and Vietnam," Feldman continued. "40 ːrcent of the ASEAN nations will be signatories of the TPP and others, including the Philippines, have dicated an interest in joining in the future. The agreement will significantly and positively impact ımmercial relations between the United States and these important countries and is a critical component American's engagement with Southeast Asia in particular and with Asia more generally."

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ECAT LOOKS FORWARD TO FULLY REVIEWING THE JUST-ANNOUNCED TPP AGREEMENT

Washington, D.C., October 5, 2015: Calman J. Cohen, President of the Emergency Committee for American Trade (ECAT), issued the following statement regarding the conclusion of the Trans-Pacific Partnership (TPP) negotiations:

"ECAT looks forward to undertaking a full evaluation of the just-announced TPP agreement that was concluded on Sunday, the 4th of October, at the TPP Ministerial that was held in Atlanta, Georgia. Throughout the negotiations, ECAT's business leaders have advocated the conclusion of a high-standard, comprehensive, and commercially meaningful TPP agreement.

"The fast-growing Asia-Pacific region is of significant economic importance to U.S. business and agriculture interests, who view the TPP as an opportunity to open foreign markets to their products, strengthen the U.S. economy, and support well-paying jobs here at home. Through the TPP, the United States has taken a leading role in writing the rules for 21st-century international trade and investment.

"We are particularly thankful for the leadership of U.S. Trade Representative Michael Froman, Assistant U.S. Trade Representative Barbara Weisel, and the entire team at the Office of the U.S. Trade Representative for their tireless efforts to conclude an agreement which will address longstanding tariff and non-tariff barriers to U.S. goods and services in TPP markets and address 21st-century trading issues.

"The position ECAT takes on the agreement will be determined following a full review of its contents - once they have been made public - and consultations with our member companies."

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BUSINESS ROUNDTABLE:

Statement by America's Business Leaders on Conclusion of TPP Negotiations

Washington - Business Roundtable today released the following statement on the conclusion of the Trans-Pacific Partnership (TPP) negotiations:

"We thank President Obama, Ambassador Froman and the U.S. negotiating team for their tireless work on the TPP negotiations, and we look forward to reviewing the details of this agreement," said Tom Linebarger, Chairman and Chief Executive Officer of Cummins Inc. and Chair of the Business Roundtable International Engagement Committee. "While we don't yet know all the details of today's agreement,TPP holds the potential to help U.S. businesses, farmers and workers sell more goods and services to 11 countries in the Asia-Pacific region, which would support American jobs and U.S. economic growth."

In 2013, U.S. trade with the TPP countries supported 15.3 million American jobs, and 44 percent of U.S. goods exports were bound for these 11 countries. The TPP will help expand existing trade between the United States and six current free trade agreement (FTA) partners - Australia, Canada, Chile, Mexico, Peru and Singapore. The agreement will also open new markets with five countries that are not current U.S. FTA partners - Brunei, Japan, Malaysia, New Zealand and Vietnam.

U.S. trade expansion, including through trade agreements like the TPP, is a key pillar of the Business Roundtable pro-growth policy agenda, *Achieving America's Full Potential: More Work, Greater Investment, Unlimited Opportunity*. Click here for Business Roundtable national and state-by-state fact sheets on the benefits of trade with the TPP countries.

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AAFA STATEMENT ON THE TRANS-PACIFIC PARTNERSHIP

(ARLINGTON, Va.) - October 5, 2015 - The American Apparel & Footwear Association today released the following statement regarding the Trans-Pacific Partnership (TPP) free trade agreement.

Free trade agreements have the potential to help U.S. industries, including ours, access new markets, new suppliers, and new customers.

"The Trans-Pacific Partnership agreement represents nearly 40 percent of the world's economy and could present a tremendous opportunity for our industry. We are hopeful that the final agreement contains provisions to enable our members-as well as the millions of U.S. workers they employ and the billions of customers they serve-to benefit from the deal as soon as it is implemented.

"We welcome the conclusion of the TPP talks. We look forward to reviewing the details of the agreement when they are released. Throughout this process, we communicated what's needed to

create trade opportunities for the clothing and shoe industry. Now we plan to evaluate those provisions that impact the industry, review the details, and consult with our members."

The TPP is the free trade agreement the United States is negotiating with 11 other countries from the Pacific Rim. The negotiations have been in the making for more than five years. Earlier today, negotiators concluded the talks and came to a final agreement. The full text of the agreement is expected to be released later this year.

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U.S. Fashion Industry Recognizes Conclusion of TPP Negotiations, Remains Hopeful Agreement Will Benefit Fashion Industry

Washington, D.C. - The United States Fashion Industry Association (USFIA) recognizes the conclusion of the Trans-Pacific Partnership (TPP) negotiations today in Atlanta.

"The Trans-Pacific Partnership represents an important opportunity for American fashion brands, retailers, importers, and wholesalers, who are already doing significant business in several TPP partner countries," says Julia K. Hughes, President of USFIA. "On behalf of our members, thank you to U.S. Trade Representative Michael Froman and his team for their many years of hard work to conclude this agreement."

"The fashion industry has been eagerly awaiting the completion of this agreement and we look forward to seeing the final text to see how it can benefit our members," continued Hughes. "We remain hopeful that the TPP will indeed be a high-standard agreement that recognizes the 21st-century global value chain and economic contributions of these companies, which work hard to create high-quality jobs in the United States and affordable, high-quality apparel products for American families," she concluded.

According to the 2015 USFIA Fashion Industry Benchmarking Study, which we released in June, we found that our members already source from five TPP partner countries: Vietnam, Peru, Mexico, Malaysia, and the United States. Nearly 80 percent of respondents said they expect the TPP to affect their business practices. However, the level of impact depends on the rules of origin and market access provisions; 83 percent called for abandoning the strict "yarn-forward" rule of origin, and 45 percent hoped the TPP short-supply list would be expanded.

"We understand the final agreement contains a yarn-forward rule of origin and limited short-supply list, though we remain hopeful it also will include many opportunities for fashion brands, retailers, importers, and wholesalers to expand their global businesses," concluded Hughes.

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ITI Welcomes TPP Trade Agreement Announcement for its Potential

to Boost '21st Century Economy'

WASHINGTON - The Information Technology Industry Council (ITI), the global voice for the technology sector, released the following statement from President and CEO Dean Garfield reacting to news that a deal has been reached by negotiators on the Trans-Pacific Partnership (TPP):

"We welcome the news announcing a deal has been reached by TPP Trade Ministers in Atlanta. TPP has the potential to be a new model for trade deals in the 21st century-boosting economies in the United States and around the globe by lowering trade barriers and by promoting transparency and good governance. For the tech sector, the true test of the deal will be whether it is an agreement that will support jobs, drive sustainable growth, foster inclusive development, and promote 21st century innovation. We also look forward to reviewing the text, when it is made public, to ensure that it achieves these goals, and as well to the work ahead with the administration and Congress."

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STATE DEPT:

Successful Conclusion of Trans-Pacific Partnership (TPP) Negotiations

Press Statement

John Kerry
Secretary of State

Washington, DC

October 5, 2015

With today's successful conclusion of the Trans-Pacific Partnership negotiations, the United States and 11 other nations have taken a critical step forward in strengthening our economic ties and deepening our strategic relationships in the Asia-Pacific region.

This historic agreement links together countries that represent nearly 40 percent of global GDP. The TPP will spur economic growth and prosperity, enhance competitiveness, and bring jobs to American shores. It will provide new and meaningful access for American companies, large and small. And by setting high standards on labor, the environment, intellectual property, and a free and open Internet, this agreement will level the playing field for American businesses and workers.

The TPP will provide a near-term boost to the U.S. economy, and it will shape our economic and

strategic relationships in the Asia-Pacific region long into the future.

I am proud of the work that our teams in Washington and at our embassies and consulates around the Pacific have done to bring these negotiations to a successful conclusion. I especially commend our outstanding Ambassador Michael Froman for his leadership and vision.

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ASSOC/NGO OPPOSITION...

Domestic Manufacturers Reject Trans-Pacific Partnership Deal Announced Today

Washington, October 5 - The members of the U.S. Business and Industry Council (USBIC) categorically reject the Trans-Pacific Partnership deal announced this morning as completely inadequate to serve the interests of American manufacturers, workers, farmers, and other segments of the US economy. Additionally, USBIC notes that the Obama administration, by refusing to include enforceable currency manipulation provisions, is offering an open invitation for TPP member countries Japan, Malaysia, and Singapore to continue their unfair, anti-competitive currency practices without fear of consequences.

Kevin L. Kearns, USBIC president, said, "In concluding the TPP deal announced today, the Obama administration has refused to carry out the will of Congress and its specific negotiating instructions to include enforceable currency provisions in the agreement. The omission of meaningful currency language is not only a deal-breaker, but also an open invitation to Japan, Malaysia and Singapore, among others, to continue to use currency cheating to gain competitive advantage over American companies."

Kearns continued, "In addition, the lack of enforceable currency provisions in the TPP signals China and other East Asian non-party manipulators that they are 'home free' and can continue to use currency market interventions to boost sales without fear that the United States will seek any redress. Finally, the lack of currency provisions sets a terrible precedent for the Trans-Atlantic Trade and Investment Partnership trade deal.

Several European nations are currency manipulators as well and now know that they can continue their practices without any consequences."

Kearns concluded, "The TPP is not free trade and it is not fair trade. It is government-managed trade. Witness the horse-trading at the all-night Atlanta negotiating sessions, where executive branch negotiators decided which industries would be sacrificed to achieve a deal and cement the "Obama legacy." Industrial sectors such as autos, dairy, agriculture, and pharmaceuticals are government-designated losers under the TPP.

Today's statements by leading Members of Congress, saying they must study the deal to see what's in it, indicate that the representatives of the American people were not adequately consulted. The Obama administration's penchant for secret negotiations, favoritism, and crony capitalism along with blatant disregard for Congressional

instructions on currency should not be allowed to stand when the TPP comes to Congress for a vote. To preserve the integrity of the trade negotiating process and to force achievement of a better trade deal, Congress must reject this woefully inadequate TPP trade agreement."

FROM LORI WALLACH, PUBLIC CITIZEN:

If There Really Is a Final TPP Deal: Can It Pass Congress? When Does Congress Get to See a Final Text?

Statement of Lori Wallach, Director, Public Citizen's Global Trade Watch

If there really is a Trans-Pacific Partnership (TPP) deal, its fate in Congress is highly uncertain given the narrow margin by which trade authority passed this summer, the concessions made to get a deal, and growing congressional and public concerns about the TPP's threats to jobs, wages, safe food and affordable medicines and more. The intense national battle over trade authority was just a preview of the massive opposition the TPP will face given that Democratic and GOP members of Congress and the public soon will be able to see the specific TPP terms that threaten their interests.

With congressional opposition to TPP growing and the Obama administration basically up against elections cycles in various countries, this ministerial was extended repeatedly because this was the do or die time but it's unclear if there really is a deal or this is kabuki theatre intended to create a sense of inevitability so as to insulate the TPP from growing opposition.

Ten U.S. presidential candidates have pushed anti-TPP messages in their campaigning, stoking U.S. voters' ire about the pact. Democratic candidate Senator Bernie Sanders has repeatedly said that "The TPP must be defeated." GOP frontrunner Donald Trump also has repeatedly slammed the TPP, stating "It's a horrible deal for the United States and it should not pass." The Canadian national election outcome could also rock the TPP talks, as Conservative Prime Minister Harper's political opponents have taken critical views of his approach to TPP.

If there really is a deal, its fate in Congress is at best uncertain given that since the trade authority vote, the small bloc of Democrats who made the narrow margin of passage have made demands about TPP currency, drug patent and environmental terms that are likely not in the final deal, while the GOP members who switched to supporting Fast Track in the last weeks demand enforceable currency terms, stricter rules of origin for autos, auto parts and apparel, and better dairy access for U.S.

producers.

The TPP's prospects will be even worse if the Administration announces a deal today but then does not actually have a final text to provide Congress. There is intense controversy in many TPP countries about the pacts' threats to jobs, affordable medicine, safe food and more.

Useful Resources

- **The Fast Track timeline for a U.S. congressional vote on the TPP: As this memo explains, under the Fast Track bill, various congressional notice and report filing requirements add up to about four and one half months between notice of a final deal and congressional votes being taken. Even if all of the timelines are fudged by the 90-day notice to Congress before signing, a TPP vote cannot occur in 2015.**
- **Congressional Letters Raising Doubts on the TPP's Congressional Prospects: On Sept. 25, 160 House GOP and Democrats sent a letter to Obama demanding enforceable currency disciplines in the TPP. While building that level of support required months when a similar letter was sent in 2013, this letter was in circulation for only a week, starting when the TPP Atlanta ministerial was announced. Meanwhile, at the end of the summer, 19 pro-Fast Track Democrats sent a letterlaying out necessary environmental terms for an acceptable deal, and 18 pro-Fast Track Democrats sent a letter about lack of enforcement in current and future trade agreements and demanding action against Peru for violations of environmental terms in its bilateral U.S. trade deal. Twelve Democrats who supported Fast Track and 12 GOP members were among the 160 representatives signing a letter decrying Malaysia's inclusion in the TPP and the upgrade of Malaysia's human trafficking status. During this week's negotiations, the top Republican and Democrat leaders on trade in the House and Senate sent a letter expressing frustration at the lack of coordination and consultation between USTR and Congress on the remaining issues of the negotiation, and 25 pro-Fast Track Republicans and Democrats from dairy districts sent a letterexpressing their concern that a final deal would not meet their goal for improved dairy market access in Canada and Japan.**
- **Polling: As this memo shows, recent polling reveals broad U.S. public opposition to more-of-the-same trade deals among Independents, Republicans and Democrats. While Americans support trade, they do not support an expansion of status quo trade policies, complicating the push for the TPP. Furthermore,recent Pew polls in many of the TPP nations show that, outside Vietnam, the deal does not have strong support.**

Also from Public Citizen:

Eleventh Hour TPP Deal on Biotech Drugs Still Harms Access to Medications, May Increase Ire Over TPP in Congress

Statement of Peter Maybarduk, Director, Public Citizen's Access to Medicines Program

The deal brokered today by the U.S. Trade Representative (USTR) and the Australian government on biotech drugs, which supposedly paved the way for an overall "deal in principle" for the Trans-Pacific Partnership (TPP), fell short of Big Pharma's most extreme demands but will contribute to preventable suffering and death. The final deal as reported does not seem to adhere to the "May 10th 2007 Agreement" standard on access to affordable medicines and could complicate any eventual final TPP deal's prospects in the U.S. Congress. In biologics and other areas, TPP rules would expand monopoly protections for the pharmaceutical industry at the expense of people's access to affordable medicines. (The May 10th Agreement was brokered in 2007 between Democratic congressional

leadership and the Bush administration to begin to reduce the negative consequences of U.S.-negotiated trade agreements, for health, the environment and labor.)

In recent days, monopoly periods for biologics, which are medical products derived from living organisms and include many new and forthcoming cancer treatments, became the most controversial issue in the attempt to conclude a TPP. The highly technical and confusing biologics deal appears to not guarantee Big Pharma the minimum eight-year automatic monopolies that industry has taken for granted as an eventual TPP outcome. According to informed sources, countries could limit automatic biologics exclusivity to not more than five years, at which point affordable biosimilars could enter the market. (Biologics exclusivity is separate from and independent of patent protection, though the protections may overlap.) Yet the deal also includes mechanisms that would help the USTR browbeat countries, now and in the future, to get what Big Pharma wants, and pull countries toward longer monopoly periods.

This week, U.S. Rep. Sander Levin made clear that May 10 agreement limits exclusivity to five years, with a "concurrent period" mechanism to ensure faster access that is not present in the TPP biologics deal. Several other TPP rules, including those relating to patent term extensions, linkage and evergreening, go beyond the limits of the May 10th Agreement. In late July, 11 of the 28 Democrats who voted for Fast Track legislation warned in a letter that the TPP could fail in Congress if it did not adhere to the May 10 standard with respect to access to medicines.

With respect to other issues in the TPP's Intellectual Property Chapter, the transition periods before developing countries must meet all of the TPP's protections for pharmaceutical corporations and possible exceptions to those rules are not sufficient to protect access to medicines. Transition periods will be very short and apply to only a few of the most harmful rules. Exceptions will be limited to very few rules or countries. Within a few years, most, if not all, harmful TPP rules will apply to all countries.

Controversies over pharmaceuticals and intellectual property, including frequently unanimous resistance from negotiating countries, have held up the TPP for years. Many courageous negotiators and others from developing countries stood up to industry and USTR pressure, consistently, to protect their people's health. A number of harmful rules were eliminated from TPP proposals as a result of this work.

Yet the Obama administration showed itself willing to risk its entire trade agenda to satisfy the avarice of the pharmaceutical lobby. In that respect, people everywhere trying to understand why medicine prices are so high find a disheartening answer in the TPP negotiations: The pharmaceutical industry has purchased tremendous influence with political leaders.

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The White House

Office of the Press Secretary

For Immediate Release

October 05, 2015

FACT SHEET: How the Trans-Pacific Partnership (TPP) Boosts Made in America Exports, Supports Higher-Paying American Jobs, and Protects American Workers

Today, the United States reached agreement with its eleven partner countries, concluding negotiations of the Trans-Pacific Partnership.

The Trans-Pacific Partnership (TPP) is a new, high-standard trade agreement that levels the playing field for American workers and American businesses, supporting more Made in America exports and higher-paying American jobs. By eliminating over 18,000 taxes – in the form of tariffs – that various countries put on Made in America products, TPP makes sure our farmers, ranchers, manufacturers, and small businesses can compete - and win - in some of the fastest-growing markets in the world. With more than 95 percent of the world's consumers living outside our borders, TPP will significantly expand the export of Made in America goods and services and support American jobs.

TPP Eliminates over 18,000 Different Taxes on Made in America Exports

TPP levels the playing field for American workers and American businesses by eliminating over 18,000 taxes that various countries impose on Made in America exports, providing unprecedented access to vital new markets in the Asia-Pacific region for U.S. workers, businesses, farmers, and ranchers. For example, TPP will eliminate and reduce import taxes – or tariffs – on the following Made in America exports to TPP countries:

U.S. manufactured products: TPP eliminates import taxes on every Made in America manufactured product that the U.S. exports to TPP countries. For example, TPP eliminates import taxes as high as 59 percent on U.S. machinery products exports to TPP countries. In 2014, the U.S. exported $56 billion in machinery products to TPP countries.

U.S. agriculture products: TPP cuts import taxes on Made in America agricultural exports to TPP countries. Key tax cuts in the agreement will help American farmers and ranchers by expanding their

exports, which provide roughly 20 percent of all farm income in the United States. For example, TPP will eliminate import taxes as high as 40 percent on U.S. poultry products, 35 percent on soybeans, and 40 percent on fruit exports. Additionally, TPP will help American farmers and ranchers compete by tackling a range of barriers they face abroad, including ensuring that foreign regulations and agricultural inspections are based on science, eliminating agricultural export subsidies, and minimizing unpredictable export bans.

U.S. automotive products: TPP eliminates import taxes as high as 70 percent on U.S. automotive products exports to TPP countries. In 2014, the U.S. exported $89 billion in automotive products to TPP countries.

U.S. information and communication technology products: TPP eliminates import taxes as high as 35 percent on U.S. information and communication technology exports to TPP countries. In 2014, the U.S. exported $36 billion in information and communication technology products to TPP countries.

TPP Includes the Strongest Worker Protections of Any Trade Agreement in History

TPP puts American workers first by establishing the highest labor standards of any trade agreement in history, requiring all countries to meet core, enforceable labor standards as stated in the International Labor Organization's (ILO) Declaration on Fundamental Principles and Rights at Work.

The fully-enforceable labor standards we have won in TPP include the freedom to form unions and bargain collectively; prohibitions against child labor and forced labor; requirements for acceptable conditions of work such as minimum wage, hours of work, and safe workplace conditions; and protections against employment discrimination. These enforceable requirements will help our workers compete fairly and reverse a status quo that disadvantages our workers through a race to the bottom on international labor standards.

In fact, TPP will result in the largest expansion of fully-enforceable labor rights in history, including renegotiating NAFTA and bringing hundreds of millions of additional people under ILO standards – leveling the playing field for American workers so that they can win in the global economy.

TPP Includes the Strongest Environmental Protections of Any Trade Agreement in History

TPP includes the highest environmental standards of any trade agreement in history. The agreement upgrades NAFTA, putting environmental protections at the core of the agreement, and making those obligations fully enforceable through the same type of dispute settlement as other obligations.

TPP requires all members to combat wildlife trafficking, illegal logging, and illegal fishing, as well as prohibit some of the most harmful fishery subsidies and promote sustainable fisheries management practices. TPP also requires that the 12 countries promote long-term conservation of whales, dolphins, sharks, sea turtles, and other marine species, as well as to protect and conserve iconic species like rhinos and elephants. And TPP cracks down on ozone-depleting substances as well as ship pollution of the oceans, all while promoting cooperative efforts to address energy efficiency.

TPP Helps Small Businesses Benefit from Global Trade

For the first time in any trade agreement, TPP includes a chapter specifically dedicated to helping small- and medium-sized businesses benefit from trade. Small businesses are one of the primary drivers of job growth in the U.S., but too often trade barriers lock small businesses out of important foreign markets when they try to export their Made in America goods. While 98 percent of the American companies that export are small and medium-sized businesses, less than 5 percent of all American small businesses export. That means there's huge untapped potential for small businesses to expand their businesses by exporting more to the 95 percent of global consumers who live outside our borders.

TPP addresses trade barriers that pose disproportionate challenges to small businesses, such as high taxes, overly complex trade paperwork, corruption, customs "red tape," restrictions on Internet data flows, weak logistics services that raise costs, and slow delivery of small shipments. TPP makes it cheaper, easier, and faster for American small businesses to get their products to market by creating efficient and transparent procedures that move goods quickly across borders.

TPP Promotes E-Commerce, Protects Digital Freedom, and Preserves an Open Internet

TPP includes cutting-edge rules to promote Internet-based commerce – a central area of American leadership, and one of the world's great opportunities for growth. The agreement also includes strong

rules that make sure the best innovation, not trade barriers and censorship laws, shapes how digital markets grow. TPP helps preserve the single, global, digital marketplace.

TPP does this by preserving free international movement of data, ensuring that individuals, small businesses, and families in all TPP countries can take advantage of online shopping, communicate efficiently at low cost, and access, move, and store data freely. TPP also bans "forced localization" - the discriminatory requirement that certain governments impose on U.S. businesses that they place their data, servers, research facilities, and other necessities overseas in order to access those markets.

TPP includes standards to protect digital freedom, including the free flow of information across borders - ensuring that Internet users can store, access, and move their data freely, subject to public-interest regulation, for example to fight spamming and cyber-crime.

TPP Levels the Playing Field for U.S. Workers by Disciplining State-Owned Enterprises (SOEs)

TPP protects American workers and businesses from unfair competition by State-owned companies in other countries, who are often given preferential treatment that allows them to undercut U.S. competitors. This includes the first-ever disciplines to ensure that SOEs compete on a commercial basis and that the advantages SOEs receive from their governments, such as unfair subsidies, do not have an adverse impact on American workers and businesses.

TPP Prioritizes Good Governance and Fighting Corruption

TPP includes the strongest standards for transparency and anticorruption of any trade agreement in history. As such, TPP strengthens good governance in TPP countries by requiring them to ratify or accede to the U.N. Convention Against Corruption (UNCAC), commit to adopt or maintain laws that criminalize bribing public officials, adopt measures to decrease conflicts of interest, commit to effectively enforce anticorruption laws and regulations, and give citizens the opportunity to provide input on any proposed measures relating to issues covered by the TPP agreement. TPP also requires regulatory transparency policies based on standard U.S. practice.

TPP Includes First Ever Development Chapter

For the first time in any U.S. trade agreement, TPP includes stand-alone chapters dedicated to development and capacity-building, as well as a wide range of commitments to promote sustainable development and inclusive economic growth, reduce poverty, promote food security, and combat child and forced labor.

TPP Capitalizes on America's Position as the World Leader in Services Exports

TPP lifts complex restrictions and bans on access for U.S. businesses – including many small businesses – that export American services like retail, communications, logistics, entertainment, software and more. This improved access will unlock new economic opportunities for the U.S. services industry, which currently employs about 4 out of every 5 American workers.

http://www.nytimes.com/2015/10/06/business/international/the-trans-pacific-partnership-trade-deal-explained.html?emc=eta1

The Trans-Pacific Partnership Trade Accord Explained

By KEVIN GRANVILLE

OCT. 5, 2015

The largest regional trade accord in history, the Trans-Pacific Partnership would set new terms for trade and business investment among the United States and 11 other Pacific Rim nations — a far-flung group with an annual gross domestic product of nearly $28 trillion that represents roughly 40 percent of global G.D.P. and one-third of world trade.

The agreement reached by trade ministers on Monday in Atlanta, the result of five days of round-the-clock talks, came after a dispiriting failure to reach consensus in Hawaii in late July.

The product of 10 years of negotiations, the agreement is a hallmark victory for President Obama who has pushed for a foreign-policy "pivot" to the Pacific rim. But the Trans-Pacific Partnership now takes center stage on Capitol Hill, where it remains politically divisive.

In June, Mr. Obama successfully overcame opposition from Democrats to win trade promotion authority: the power to negotiate trade deals that cannot be amended or filibustered by Congress. He must now convince Congress — his fellow Democrats, in particular — to approve the trade deal. Lawmakers have 90 days to review the pact's details.

The debate in Congress will put all the elements of the trade pact under scrutiny. It would be the final step for United States adoption of the Trans-Pacific Partnership, the most ambitious trade deal since the North American Free Trade Agreement in the 1990s.

Why Has the Pact Been So Divisive?

Supporters say it would be a boon for all the nations involved, that it would "unlock opportunities" and "address vital 21st-century issues within the global economy," and that it is written in a way to encourage more countries, possibly even China, to sign on. Passage in Congress is one of President Obama's final goals in office, but he faces stiff opposition from nearly all of his fellow Democrats.

Opponents in the United States see the pact as mostly a giveaway to business, encouraging further export of manufacturing jobs to low-wage nations while limiting competition and encouraging higher prices for pharmaceuticals and other high-value products by spreading American standards for patent protections to other countries. A provision allowing multinational corporations to challenge regulations and court rulings before special tribunals is drawing intense opposition.

Why This, Why Now?

The pact is a major component of President Obama's "pivot" to Asia. It is seen as a way to bind Pacific trading partners closer to the United States while raising a challenge to Asia's rising power, China, which has pointedly been excluded from the deal, at least for now.

It is seen as a means to address a number of festering issues that have become stumbling blocks as global trade has soared, including e-commerce, financial services and cross-border Internet communications.

There are also traditional trade issues involved. The United States is eager to establish formal trade agreements with five of the nations involved — Japan, Malaysia, Brunei, New Zealand and Vietnam — and strengthen Nafta, its current agreement with Canada and Mexico.

Moreover, as efforts at global trade deals have faltered (such as the World Trade Organization's Doha round), the Trans-Pacific Partnership is billed as an "open architecture" document written to ease adoption by additional Asian nations, and to provide a potential template to other initiatives underway, like the Transatlantic Trade and Investment Partnership.

What Are Some of the Issues Addressed by the Pact?

Tariffs and Quotas Long used to protect domestic industries from cheaper goods from overseas, tariffs on imports were once a standard, robust feature of trade policy, and generated much of the revenue for the United States Treasury in the 19th century. After the Depression and World War II, the United States led a movement toward freer trade.

Today, the United States and most developed countries have few tariffs, but some remain. The United States, for example, protects the domestic sugar market from lower-priced global suppliers and imposes tariffs on imported shoes, while Japan has steep surcharges on agricultural products including rice, beef and dairy. The pact is an effort to create a Pacific Rim free-trade zone.

Environmental, Labor and Intellectual Property Standards United States negotiators stress that the Pacific agreement seeks to level the playing field by imposing rigorous labor and environmental standards on trading partners, and supervision of intellectual property rights.

Data Flows The Pacific trade pact to address a number of issues that have arisen since previous agreements were negotiated. One is that countries agree not to block cross-border transfers of data over the Internet, and not require that servers be located in the country in order to conduct business in that country. This proposal has drawn concerns from some countries, Australia among them, that it could conflict with privacy laws and regulations against personal data stored offshore.

Services A big aim of the Pacific pact is enhancing opportunities for service industries, which account for most of the private jobs in the American economy. The United States has a competitive advantage in a range of services, including finance, engineering, software, education, legal and information technology. Although services are not subject to tariffs, nationality requirements and restrictions on investing are used by many developing countries to protect local businesses.

State-Operated Businesses United States negotiators have discussed the need to address favoritism often granted to state-owned business — those directly or indirectly owned by the government. Although Vietnam and Malaysia have many such corporations, the United States has some too (the Postal Service and Fannie Mae, for example). The final agreement may include terms that seek to insure some competitive neutrality while keeping the door open to China's future acceptance of the pact.

Why Hasn't China Been In on the Talks?

China has never expressed interest in joining the negotiations, but in the past has viewed the pact with concern, seeing a potential threat as the United States tries to tighten its relationship with Asian trading partners. But lately, as the talks have accelerated, senior Chinese officials have sounded more accepting of the potential deal, and have even hinted that they might want to participate at some point. At the same time, the deal provides China some cover as it pursues its own trade agreements in the region, such as the Silk Road initiative in Central Asia.

United States officials, while making clear that they see the pact as part of an effort to counter China's influence in the region, say they are hopeful that the pact's "open architecture" eventually prompts China to join, along with other important economic powers like South Korea.

The Shadow of Nafta, and the Debate in Washington

Nafta, signed by President Bill Clinton in 1993, helped lead to a boom in trade among the United States, Mexico and Canada. All three countries exported more goods and services to the other two, cross-border investments grew, and the United States economy has added millions of jobs since then. But of course not all those trends were attributable to Nafta, and the benefits were not equal: The United States had a small trade surplus with Mexico when the pact was signed, but that quickly became a trade deficit that has widened to more than $50 billion a year.

Critics of Nafta also point out that job growth in the United States does not account for the loss of jobs to Mexico or Canada; the A.F.L.-C.I.O. contends about 700,000 United States jobs have been lost or displaced because of Nafta.

Nafta was a significant victory for President Clinton after a difficult congressional battle, where he won support from just enough fellow Democrats to ensure passage. The votes were 234 to 200 in the House, and 61 to 38 in the Senate.

President Obama may yet win that kind of outcome. Working with Republican leadership in the House and Senate, he gained final approval for trade promotion authority, a critical step that allows the White House to present the trade package to Congress for a straight up-or-down vote, without amendments.

But the tortuous legislative process further soured relations with many fellow Democrats, as well as unions and progressive groups, who vehemently oppose the Trans-Pacific Partnership. Many Democrats said the president would have to address their concerns over labor and environmental standards and investor protections when he returns to Congress seeking approval of the trade deal.

http://www.brookings.edu/blogs/order-from-chaos/posts/2015/10/05-transpacific-partnership-agreement-solis?utm_campaign=Brookings+Brief&utm_source=hs_email&utm_medium=email&utm_content=22594105&_hsenc=p2ANqtz--5dLMDZ4g0fRPipFREaaSVQw1MFvKgk1HZfQ_hf7DYE3JIFRIRcnq6PeuUEPaD-yH46eK37bNOqRDiqZtvce6vV-eBYg&_hsmi=22594105

TPP: The end of the beginning

Mireya Solís | October 5, 2015 4:10pm

Editors' Note: Hammering out the political deal that has now brought Trans-Pacific Partnership (TPP) negotiations to a successful conclusion was a landmark achievement, but as Mireya Solis argues, there are still battles to be fought. This post originally appeared in Nikkei Asian Review.

The Trans-Pacific Partnership (TPP) deal that the United States and 11 other Pacific Rim countries struck in Atlanta today was five years in the making. More than once we heard that the end game had come, only to see deadlines pass us by as the negotiations continued to move at a frustratingly slow pace. The grueling work required to cinch this mega trade deal should not come as a surprise, however, given the sheer complexity of the negotiation agenda and the wide differences in the makeup of the participating countries.

Hammering out the essential political deal that has brought TPP negotiations to a successful conclusion is a landmark achievement. But we should not lose sight of the fact that more battles will need to be won before the TPP morphs from an agreement in principle to an agreement in reality. Success at the Atlanta ministerial, however, delivers immediate and portentous benefits.

TPP-MEMBERS/ - Shows countries in the Trans-Pacific Partnership agreement. (SIN02)

Countries in the Trans-Pacific Partnership agreement. Credit: Reuters.

U.S. leadership: A balance between strength and flexibility

Central to American grand strategy has been updating the international economic architecture to match the realities of 21st-century economy and consolidating the critical role of the United States as a Pacific power as envisioned by the Asian rebalance policy. The TPP has long emerged as a litmus test of the

American will and resolve to rise to these challenges in a world of fluid geopolitics. With success at the TPP negotiating table, the convening power of the United States—as demonstrated by its ability to steward the most ambitious blueprint for trade integration—has received an enormous boost.

But equally important is that in the final TPP deal, the United States has displayed another key trait of international leadership: flexibility. Critics of American trade strategy have frequently complained that the U.S. rigidly pushes for its own free-trade agreement (FTA) template without incorporating the preferences of its counterparts: that de facto, the United States does not "negotiate" in trade negotiations. But the set of final compromises that enabled the TPP deal to be struck at Atlanta shows a different picture, one that in fact makes U.S. leadership more attractive and the TPP project more compelling.

The TPP project is still a promise, not a reality.

In endorsing the principle that TPP countries can opt out of investor-state dispute settlement in their public regulation of tobacco products, and in adopting a hybrid approach that will give up to eight years of data protection for biologic drugs, the United States has shown the strength to compromise without surrendering high standards. In turn, these negotiated compromises cast a favorable light on the TPP as a collective endeavor with a commonality of purpose among founding members: to ensure that protection of foreign direct investment does not hinder public health regulations; and to both promote innovation and access to medicines.

Reviving trade policy

The trade regime has not had a success of this magnitude for the past two decades. Rather, the list of failures and missed opportunities is long, and the prospects of the Doha Round are dim at best.

In powerful ways, the TPP revives a stagnant trade regime. It shows that mega trade agreements can offer a platform to devise updated rules on trade and investment that cover sizable share of the world economy. And it creates an incentive structure for concurrent trade agreements to aim higher if they want to remain competitive.

A genuine re-launch of Abenomics

After a bruising political battle to secure passage of the security legislation, Prime Minister Shinzo Abe announced that the economy would be his utmost priority. In so doing, he disclosed three fresh arrows: a strong economy, raising the fertility rate, and boosting social security to care for the elderly.

Abenomics 2.0, however, has fallen flat, as it lacks specifics on how to achieve the target of 600 trillion yen GDP, and because subsidies for young families and the expansion of nursing homes, while desirable and politically popular, do not make for a strategy of economic revitalization. Instead, the TPP deal boosts Abenomics 1.0 where its true transformative power lies: structural reform.

An informed debate on TPP

After legal scrubbing, the TPP text will be released. This will offer the much-needed opportunity to debate the merits and demerits of the agreement with facts, and not speculation. Full disclosure of the agreement, close public scrutiny, and a spirited discussion on where the agreement has lived up to expectations and where it has fallen short will be essential in shoring up public support.

The TPP project is still a promise, not a reality. Another set of milestones will be required (twelve, to be exact). Each participating country has its own domestic procedures for ratification, and some definitely face an uphill battle: Malaysia is gripped by a major political crisis as Prime Minister Najib Razak fights charges of corruption; and it is anyone's guess what the electoral results in a couple of weeks will mean for Canada's place in the TPP.

For the United States too, the quest for TPP ratification could not come at a more complicated time with a full-blown presidential election race. In wrapping up the TPP negotiations, the United States has demonstrated its leadership in convening a significant and diverse group of countries and in stewarding with success the negotiation of an ambitious blueprint for economic governance. But this will mean little if TPP is voted down in Congress or stays frozen in ratification limbo. Without the power to deliver a TPP in force, past accomplishments will rightfully be brushed aside.

POLITICO: Vilsack: TPP text to be released within 30 days

By Adam Behsudi

10/06/2015 04:13PM EDT

The text of a finalized Trans-Pacific Partnership deal will be released to the public within the next 30 days, Agriculture Secretary Tom Vilsack said in a call with reporters today.

"I think it's fair to say agriculture is a winner in this agreement and we're going to do everything we can to make sure folks understand the historic nature and historic opportunity this represents," he said in the call, which was held after a meeting hosted earlier in the day between President Barack Obama and agriculture industry leaders.

On the call, Vilsack promoted tariff cuts that he said would touch almost every commodity group and regulatory agreement on issues like sanitary and phytosanitary standards. The agreement will also include a special biotechnology annex in which countries agree to use "science-based" determinations with respect to the import of products. The agreement will promote transparency in biotech regulatory processes and advocate the TPP countries "engage in discussions" on appropriate thresholds for low-level presence.

Vilsack said U.S. dairy producers would have increased access in Canada and Japan over the next 10 years for products like cheese, milk powder and fluid milk. In Canada, U.S. producers would be able to sell more yogurt, which Vilsack touted as a "value-added proposition" and one that would spur innovation in those types of products. The access Canada has agreed to offer TPP countries to its largely closed dairy market would represent roughly just 3.25 percent of its domestic milk production.

Additional access for New Zealand dairy producers was balanced against the gains U.S. dairy producers made in Canada and New Zealand, he said.

"The goal here was ... that there was not a disproportionate opening up of our market without a disproportionate opportunity to access market

http://news.sciencemag.org/health/2015/10/trade-agreement-praised-and-panned

Trade agreement praised and panned

By Dennis Normile Kelly Servick

6 October 2015 3:00 pm

The Trans-Pacific Partnership (TPP) announced this week promises to lower the cost of manufactured goods and agricultural products for consumers, enhance labor and environmental protections, and strengthen rules against counterfeiting and intellectual property theft. But experts say that some aspects of the deal—signed by the United States and 11 other Pacific Rim countries representing two-fifths of the global economy—could harm public health.

A major concern is intellectual property (IP) rights for drugs. Pharmaceutical companies had been pushing for enhanced protection for biologics: drugs derived from living organisms that are a hot area of R&D. The United States provides the most generous terms for data exclusivity, which keeps critical information about the drugs out of the hands of generic drugmakers. With biologics, "to [make drugs] safe for the consumer" generics makers need access to information about the drugs' manufacturing, says Tim Mackey, a global health policy analyst at University of California, San Diego. If the makers of "biosimilars"—the term for generic biologics—don't have access, "they just may give up."

The United States currently gives drug companies 12 years of exclusivity before biosimilar manufacturers can access their data for new submissions to the Food and Drug Administration (FDA). TPP partners Australia and Chile offer 5 years of exclusivity, and others none at all. "Most of the countries in the world have zero data exclusivity; this is a new data monopoly that doesn't exist under many national laws," says Judit Rius Sanjuan, a legal policy adviser for Doctors Without Borders (MSF), which opposes the agreement's IP protections.

The United States was reportedly pushing for 8 years of protection. As a compromise, all TPP parties have agreed to provide at least 5 years of data exclusivity. (The United States retains 12 years.) The deal "fell short of Big Pharma's most extreme demands but will contribute to preventable suffering and death," said Peter Maybarduk, an official with the consumer rights group Public Citizen in Washington, D.C. That's not how the drugmakers see it. "We are disappointed that the ministers failed to secure 12 years of data protection for biologic medicines," Pharmaceutical Research and Manufacturers of America President John Castellani said in a statement. "The Ministers missed the opportunity to

encourage innovation that will lead to more important, life-saving medicines that would improve patients' lives."

But pharmaceutical companies may have won additional patent rights. The details are not yet clear, as the TPP wording has not yet been made public. But Brook Baker, a law professor at Northeastern University in Boston, says the agreement likely includes provisions covering patent term extensions to compensate for regulatory and patenting delays and patenting of new uses of known medicines. "With the higher IP protections obtained in the TPP, it will be harder for developing country members to develop their own local capacity," says Baker, who is on the board of the Health Global Access Project, which advocates for people living with HIV/AIDS.

Last spring, a team of Australian and U.S. public health experts looked at the potential impact in Vietnam of provisions in a leaked draft of the TPP agreement. As they reported online in April, under that version of the TPP the cost of treating an HIV-infected person in Vietnam could rise from $304 to $501 per year. Given the country's tight budget, that increased cost could reduce Vietnam's HIV treatment rate from 68% to 30%, depriving more than 45,000 people of life-saving treatment each year, they argued. Study co-author Brigitte Tenni, a public health adviser at the University of Melbourne in Australia, says the team cannot determine to what extent their analysis is still valid because they haven't seen the final agreement. But "any increase in intellectual property protection stands to have devastating consequences for access to medicines especially for people living in developing countries like Vietnam," she asserts.

The TPP offers a partial victory for antismoking efforts. Tobacco companies have used trade agreement clauses known as investor-state dispute settlement (ISDS) provisions to initiate arbitration over plain packaging laws that they say deprive them of their trademark benefits. After losing a court battle against Australia's plain packaging law, Philip Morris Asia Limited relied on an ISDS provision in a 1993 agreement between Australia and Hong Kong to initiate arbitration. A TPP provision says "A Party may elect to deny the benefits of Investor-State dispute settlement with respect to a claim challenging a tobacco control measure of the Party," according to the website of the United States Trade Representative. The U.S.-based antitobacco organization Action on Smoking and Health called this provision a "major victory for public health."

But "the devil is in the details," says Sharon Friel, a public health expert at Australian National University in Canberra. Without examining the agreement's language, she says, "it is hard to tell exactly what is still possible." She thinks tobacco companies could still file ISDS claims, leading in some instances to a "regulatory chill" or to reluctance on the part of governments to enact tobacco control measures that

might invite costly litigation. Australian newspapers have recently reported that the country has run up AU$50 million ($36 million) in legal bills in its dispute with Philip Morris. Avoiding such confrontation, "is of course much more likely to happen in poorer countries, where tobacco smoking is on the rise and hence the risk for public health," Friel says. She adds that tobacco companies will still be able to use ISDS provisions in other trade agreements, such as the one Philip Morris is utilizing.

The TPP's ultimate fate is not decided. In many countries, including the United States, governments must win approval from their legislatures.

http://www.cbc.ca/news/politics/canada-election-2015-fast-vancouver-tpp-1.3262687

Ed Fast says text of TPP trade deal available within days

Canada's trade minister is promising to release a provisional copy of the Trans-Pacific Partnership trade agreement in the next few days — but Ed Fast won't say whether it will include details of the all-important side deals.

"We fully expect over the next few days we'll be able to release a form of the text," Fast said Thursday during a breakfast question-and-answer session being hosted by the Vancouver Board of Trade.

The text is currently being translated into several languages, including Spanish, he added.

"We've asked the TPP partners to allow us ... to release a provisional text. It may not be fully scrubbed but it will confirm the outcomes we've already released in summary earlier this week."

Trade agreements of such scale are very complex documents and it's vital that they be carefully translated to ensure each word correctly reflects the agreement, he added.

"Remember this agreement was only concluded three days ago. You have 1500 pages of legal text," Fast said.

He said he can't commit to releasing the so-called side letters — individual agreements between countries on specific sectors.

"I can't say that (side letters) will be part of the provisional (agreement)," he said. "We're looking at what the 12 TPP partners will agree to release."

Forestry side deal with Japan

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One side letter, he said, would include a deal on processed and unprocessed forestry products between Canada and Japan.

"We have secured outcomes across all the major sectors ... including forestry products, value-added wood products," said Fast. "Markets like Japan are going to much more available to Canadian exporters."

The minister said he didn't know how many side deals there are and referred the question to his staff.

Highlights: What's in the Trans-Pacific Partnership agreement?

Trans-Pacific Partnership: Industry, provincial reaction is mixed

TPP: The disaster that didn't happen for dairy and auto sectors

Trans-Pacific Partnership offers dairy sector good news, bad news and a question mark

Both Fast and Industry Minister James Moore, who also took part in the discussion, were asked about U.S. Democratic presidential hopeful Hillary Clinton, who earlier this week came out against the agreement.

Clinton said that based on what she knows so far about the pact, she can't support it because it doesn't appear to do enough to protect American jobs, wages and national security.

Fast said the Americans are in the midst of a race for presidential nominations and that her comments should be viewed in that context.

"They've got their own silly season they're in. I'm focused on making sure Canadians understand what's in this agreement," he said.

"This cements our position as one of the great free trading nations of the world."

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Fast says he believes the deal, which includes 11 other Pacific Rim countries, is worth about $3.5 billion of additional economic activity to Canada, based on estimates from his officials.

He says it was vital for Canada to be at the table and part of the deal, billed by Conservative Leader Stephen Harper as the biggest trade agreement of its kind in history.

Canada should reject TPP too: Mulcair

Harper was played "like a chump" in the TPP talks, NDP Leader Tom Mulcair said at a town hall meeting Thursday in Toronto.

Mulcair latched onto Clinton's opposition, saying the U.S. democratic presidential hopeful has joined a growing list of "progressives" across North America who see the 12-country deal as bad for jobs and the families those jobs support.

SPIN CYCLE: Are Conservatives the only true free traders as Harper says?

Justin Trudeau says Liberals are 'pro-trade,' offers no promises for auto

Mulcair said the Conservatives were duped into accepting a bum deal and it needs to be rejected in Canada, too.

Tom Mulcair says other countries played Harper "like a chump" in the TPP negotiations.1:57

"Hillary Clinton finds that the bar hasn't been set high enough in the Trans-Pacific Partnership agreement for Americans, and yet we know that the auto deal that the Americans got in the TPP is better than what Stephen Harper was able to get," Mulcair said in front of a room full of supporters in downtown Toronto.

"And you know why? Stephen Harper went into those negotiations two weeks away from a federal general election in an incredibly feeble position," said Mulcair.

"Everyone around that table knew it, and they played him like a chump."

Campaigning in Woodbridge, Ont., Liberal Leader Justin Trudeau emphasized that his party is pro-trade.

"We're committed to bringing this deal before Parliament to have a full airing. And I am resolute in my support for trade as a way of growing our economy and creating good jobs for Canadians," he said.

"We look forward to seeing the full details of this accord."

The Canadian Press Posted: Oct 08, 2015 12:26 PM ET Last Updated: Oct 08, 2015 2:21 PM ET

Administration Pushes To Clear Way For TPP Consideration In Congress

Inside US Trade, Posted: October 08, 2015

Within days of announcing a Trans-Pacific Partnership (TPP) deal, the Obama administration seems determined to advance the agreement as quickly as possible toward signature and congressional consideration while at the same time kicking off a campaign touting its benefits in press conferences, speeches and fact sheets.

Quick action has two potential benefits for the administration, according to private-sector sources. First, it allows the administration to shape the narrative of the TPP, which this week seemed dominated by opponents, particularly after the critical comments by presidential candidate Hillary Clinton.

Secondly, quickly notifying Congress of the president's intent to sign the agreement will put additional pressure on the U.S. International Trade Commission (ITC) to speed up its analysis of the TPP's impact on the U.S. economy. Such assessments have typically been submitted with an FTA implementing bill to Congress.

U.S. Trade Representative Michael Froman last year urged the ITC to begin work on the analysis even before the TPP was completed (Inside U.S. Trade, Feb. 13, 2015).

Overall, moving quickly to notify Congress and release the TPP text helps ensure that -- when an opening for congressional passage arises -- all the procedural hurdles have been met.

In an Oct. 6 speech at the U.S. Department of Agriculture, President Obama said it would be "months" before a congressional vote, and Ways & Means Ranking Member Sander Levin (D-MI) said in a letter to fellow Democrats that day that congressional consideration will not happen before the spring of 2016.

Other sources said the question is whether the agreement could come up sometime between the March 1 primaries on "Super Tuesday" and the nominating conventions in July, or will take place after the elections. In the post-election scenario, the TPP implementing bill could come up in the lame-duck

session of 2016 though it cannot be ruled out that the agreement would not come up until the first half of 2017 after Obama is out of office, one source said.

But the source warned the current turmoil prevailing in the House Republican conference over the election of new leaders makes it hard to predict a timetable for anything, since it is an open question how and if the House will operate next year.

He also said that the White House has to decide whether it wants to push TPP ratification as an Obama legacy issue in 2016 even if that would alienate the Democratic base in advance of the November election, and which may then not rally around a Democratic candidate. The question is what the White House considers a bigger legacy issue: the approval of TPP and or the election of a Democratic president, he said.

The administration is planning to notify Congress formally of its intent to sign the TPP agreement in a matter of days, private-sector sources said early in the week. They said they based this on the message conveyed by USTR officials in briefings as well as one-on-one conversations.

But by mid-week, Senate Finance Committee Chairman Orrin Hatch (R-UT) warned against sending that congressional notification before the full text of the agreement is released. He did so in an Oct. 7 Senate floor speech, two days after he spoke to Froman on the phone, according to a spokeswoman.

Prior to that speech, senior administration officials, including Agriculture Secretary Tom Vilsack, said the administration was working to release the text "within the 30 days or so."

Asked in an Oct. 7 press conference on how he planned to proceed in light of the Hatch comments, Froman would only say that the administration is engaged in consultations with Congress. "We're having ongoing conversations with congressional leadership and congressional partners about the process going forward," he said. "We're still in consultations with members of congress and the leadership about the pathway forward."

Froman noted that the formal notification of the intent to sign is really the first step in the process of advancing the agreement. Froman was scheduled to meet with House Ways & Means Committee Chairman Paul Ryan (R-WI) on Oct. 7, after he had spoken to Hatch on the phone on Oct. 5.

Froman said the U.S. is still working with the other countries to finalize the details of the text and put it through a legal scrub and release as soon as possible. "We're shooting to do it within 30 days following the completion of the negotiations," Froman said.

The release of the full TPP text will likely coincide with the release of the currency side agreement that Treasury has been negotiating with the finance ministries of other TPP countries, according to informed sources. That currency agreement will not formally be part of the TPP and not subject to dispute settlement (see related story).

In a related development, Canadian Prime Minister Stephen Harper on Oct. 5 indicated that the full TPP text would be released in a matter of days. He also said he expected the deal to be signed early next year and ratified during the next two years.

The Trade Promotion Authority law obligates the president to make a formal notification to Congress 90 days before he signs the deal. No later than 30 days after the notification and 60 days before signing the agreement, the administration must publish the text of the deal under the law.

Informed sources said that the administration is determined to beat that deadline and may publish the text of the agreement in about three weeks.

Vilsack said the administration is hoping to release the text "relatively soon" and "within" the 30 day period. He said it will be done "more quickly" than for previous trade agreements because TPP countries started the process of legal review months ago because they knew stakeholders would want the text as quickly as possible.

Late last year, TPP countries were saying they would begin a legal review of chapters that have already been closed prior to reaching a final agreement on an overall deal. They acknowledged this was aimed at minimizing the delay between the conclusion of the negotiations and the signing of the agreement, thereby allowing a speedier ratification by signatories (Inside U.S. Trade, Dec. 19, 2014).

One business source said that U.S. officials during the Atlanta negotiations made clear that they are under enormous pressure to finish up the legal review of the TPP text as soon as possible. But the source cautioned that he did not believe the U.S. would publish the TPP text before others countries are also ready to do so.

https://www.politicopro.com/trade/story/2015/10/germany-mobilizes-against-eu-us-trade-deal-060849

Germany mobilizes against EU-U.S. trade deal

By Janosch Delcker

10/09/2015 12:25 PM EDT

BERLIN - As the German capital prepared for what is slated as its biggest protest yet against the Transatlantic Trade and Investment Partnership Saturday, officials in Berlin and Brussels talked up the benefits of an EU-U.S. free-trade deal.

More than 600 buses and five special trains are scheduled to bring about 40,000 protesters to reinforce tens thousands of locals who are expected to march, according to one of the organizers, Uwe Hiksch of the environmental group Friends of Nature.

Labor unions, environmentalists, social movements and anti-globalization activists like Attac are behind the protest, which goes by the slogan "Stop TTIP and CETA" - referring not just to the EU-U.S. trade deal but also a similar deal with Canada.

Even though the trade deal has been eclipsed in the media by the influx of hundreds of thousands of refugees, German opposition to TTIP shows no signs of abating.

In a non-representative survey of 3,000 app users conducted by public broadcaster ZDF this week, 88 percent of respondents answered "No" to the question "Will the German economy benefit from TTIP?"

In a Eurobarometer poll from May, 51 percent of Germans said they were against a free-trade agreement with the U.S., while only 31 percent were in favor.

TTIP opponents in Germany have been critical of what they perceive as opaque negotiations carried out away from public scrutiny, and of the potential role of arbitration tribunals in disputes between investors and governments.

Although the European Commission has tried to calm such concerns by proposing to give EU governments a greater influence over those tribunals, and by implementing a new Europe-U.S. commercial court, widespread criticism in Germany has not faded and there continue to be fears that standards of social services, environmental regulation and consumer protection will fall.

Politicians from the opposition Greens and Left have encouraged followers to join Saturday's protest while Chancellor Angela Merkel's "grand coalition" of conservatives and Social Democrats are behind the trade deal.

SPD leader Sigmar Gabriel, who is economy minister and vice chancellor, came down clearly in favor of TTIP in an interview Thursday, after sitting on the fence for months and even admitting in June to doubting "if TTIP would ever happen."

"If the negotiations fail, we will have to adapt ourselves to other standards, maybe those that will one day be agreed upon between China and the U.S.," he told business magazine WirtschaftsWoche.

"In that case, there will be arbitration tribunals, there will be no or little standards of consumer protection - and for sure, there will be no social standards," he warned. "Those who now yell 'Stop TTIP,' and oppose any sort of negotiations with the U.S., should think it through."

Merkel defended the trade deal in front of skeptical members of the ver.di trade union late last month, arguing that it could set the standard for trade agreements worldwide, and asserting her belief that Germany should be an "open economy."

Earlier this week, EU Trade Commissioner Cecilia Malmström voiced astonishment at the level of opposition to TTIP among Germans, especially "because the German economy will most likely profit the most from it."

In an interview with Süddeutsche Zeitung, she said the Volkswagen emissions scandal ought to suggest some humility vis-à-vis Europe's U.S. partners.

"I spent much time explaining to the Americans that we have the highest environmental standards in Germany. And now it turns out that we're not perfect," she said.

The next round of TTIP discussions between the European Commission and Washington is scheduled for Oct. 19, 2015.

This article first appeared on POLITICO.EU on Oct. 9, 2015.

To view online:

https://www.politicopro.com/trade/story/2015/10/germany-mobilizes-against-eu-us-trade-deal-060849

http://www.washingtonpost.com/news/wonkblog/wp/2015/10/09/how-the-controversy-over-drug-prices-could-take-down-obamas-massive-trade-deal/

How the controversy over drug prices could take down Obama's massive trade deal

By Carolyn Y. Johnson October 9

A political firestorm is building over the protections for drug companies in Obama administration's massive international trade deal, threatening support for a key piece of the president's legacy.

The chapter addressing the issue, which was posted online Friday by WikiLeaks, grants at least five years of exclusivity to the makers of next-generation biologic medicines for diseases ranging from cancer to rheumatoid arthritis. That's less than what drug companies enjoy in the United States. The language has become a sticking point for both critics and supporters of the industry -- and has even changed the minds of some of the deal's most ardent supporters.

Democratic presidential candidate Hillary Rodham Clinton is worried that the terms provide excessive protections for drug companies and said this week that she now opposes the Trans-Pacific Partnership (TPP). Senator Orrin Hatch (R--Utah), who has been a key GOP backer of Obama's trade agenda, said in a speech this week that he could drop his support partly out of concerns that it provides too little intellectual property protection for drug development.

The biologics issue was among the final sticking points in a deal that was negotiated by the administration for more than five years, with trade ministers haggling over the matter until just hours before President Obama announced they had reached a deal at a news conference on Monday.

Almost immediately, what was known about the biologics provision began to generate controversy. According to the draft leaked Friday, drug companies will get either eight years of protection or "at least five years" plus an ambiguous amount of extra time due to "market circumstances" that will "deliver a comparable outcome in the market." The language is obtuse enough that some are interpreting it as five years, others as eight. In the United States, those drugs enjoy 12 years of exclusivity, through a provision embedded in the Affordable Care Act.

The "data exclusivity" granted by the deal means that competing companies making biosimilar drugs cannot bring their products to market, which could bring down prices. Patient advocates said that the drug industry won monopoly protections it didn't previously have that will hurt patients' access to drugs. The pharmaceutical industry said anything less than 12 years of protection will stymie innovation.

Click here for more information!

The brewing battle over the protections of drug company monopolies is one of the trickiest debates emerging in politics. On one hand, there's the need to provide incentives for drug companies to sink considerable money into the risky business of developing new therapies. On the other, there is growing question over when monopolies produce an unsustainable system in which high prices are no longer linked to value, but to what drug companies can charge.

The U.S. Trade Representative urged all sides to reserve judgment until the final agreement is made public.

"Despite the wide gulf between the U.S. and other TPP partners on this issue we achieved a strong and balanced outcome that incentivizes innovation and ensures that medicines are widely available for those who need them," said Matthew McAlvanah, a spokesperson for the USTR. "TPP will be the first trade agreement that provides minimum standards for an extended period of protection for biologics and will give countries multiple pathways to meet those strong standards."

Henry Grabowski, a professor emeritus of economics at Duke University, said much of the industry anxiety stems from the possible ripple effects this agreement might have.

"I think the fear is that if a large part of the world adopts five years [of exclusivity], then it creates pressure," Grabowski said. Clinton has proposed shortening the period of exclusivity in the United States for biologic drugs from 12 years to seven. The Obama Administration's budget proposal does, too.

"It's part of a broader mosaic that it could come back to kind of create political pressures in the U.S. and Europe to shorten the exclusivity period, which I think would be a tremendous problem for the industry," Grabowski said.

Executives from major drug companies met with the President on Thursday to express their disappointment in the agreement. In a statement, Mark Grayson, a spokesman for the pharmaceutical trade organization, PhRMA, confirmed the meeting, but declined to name the companies that attended.

"We emphasized that strong intellectual property protection is necessary for the discovery and development of new treatments and therapies for the world's patients and are disappointed that the TPP, which, by failing to secure 12 years of data protection for biologic medicines, will compromise the next wave of innovation and disrupt the development of new, critically-needed medicines," Grayson said.

Both PhRMA and BIO, the trade group for the biotechnology industry, said they would not comment on the leaked draft.

"The Congress set 12 years as the appropriate period to both foster innovation and provide access to biosimilars in a reasonable timeframe. While the TPP agreement will not impact the U.S. data protection period, we believe the failure of our Asian-Pacific partners to agree to a similar length of protection is remarkably short-sighted and has the potential to chill global investment and slow development of new breakthrough treatments for suffering patients," Jim Greenwood, the president of BIO said in a statement released this week.

Public Citizen, a patient advocacy group, has argued that the deal is major concession to pharmaceutical companies. Biologics currently do not have any exclusivity protection in many countries, while in others, such as Chile, New Zealand, Singapore and Australia, they only have five years of protection.

"This is a huge win for pharma and a huge loss for us," said Burcu Kilic, a policy director at Public Citizen. "That is why we are quite confused. They won this game; they got five years, and they are building the pathway to eight now -- they are putting the bricks there. Pharma shouldn't play this as, ' We are the losers, we wanted 12 years.'"

Politicians haven't hesitated to critique the deal, for diametrically opposed reasons.

In a speech on the Senate floor, Hatch lambasted the Obama Administration for failing to get intellectual property protections comparable to those that exist in the U.S.

"This is particularly true with the provisions that govern data exclusivity for biologics," Hatch said. "As you know, biologics are drugs that are on the cutting edge of medicine and have transformed major elements of the healthcare landscape thanks, in large part, to the efforts and investments of American companies."

In an interview with PBS, Clinton voiced her objections to the agreement, for the opposite reason:

"I'm worried that the pharmaceutical companies may have gotten more benefits and patients and consumers fewer. I think there are still a lot of unanswered questions," she said.

Staff writer David Nakamura contributed to this story.

A previous version of this story incorrectly stated that Peru was among the countries that have five years of exclusivity for biologic drugs.

http://www.theguardian.com/business/2015/oct/11/why-support-tpp-critics-read-agreement-keep-open-mind

Why support TPP? Critics should read the agreement and keep an open mind

In light of vociferous opposition to the trade deal, the TPP that emerged is a pleasant surprise – so much so that some Republicans threaten to oppose it

Jeffrey Frankel

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Agreement among negotiators from 12 Pacific rim countries on the Trans-Pacific Partnership (TPP) represents a triumph over long odds. Tremendous political obstacles, both domestic and international, had to be overcome to conclude the deal. And now critics of the TPP's ratification, particularly in the US, should read the agreement with an open mind.

Many of the issues surrounding the TPP have been framed, at least in US political terms, as left versus right. The left's unremitting hostility to the deal – often on the grounds that the US Congress was kept in the dark about its content during negotiations – carried two dangers: A worthwhile effort could have been blocked; or President Barack Obama's Democratic administration could have been compelled to be more generous to American corporations, in order to pick up needed votes from Republicans.

In fact, those concerned about labour rights and the environment risked hurting their own cause. By seeming to say that they would not support the TPP under any conditions, Obama had little incentive to pursue their demands.

Seen in this light, the TPP that has emerged is a pleasant surprise. The agreement gives pharmaceutical firms, tobacco companies, and other corporations substantially less than they had asked for – so much so that the US senator Orrin Hatch and some other Republicans now threaten to oppose ratification. Likewise, the deal gives environmentalists more than they had bothered to ask for.

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Perhaps some of these outcomes were the result of hard bargaining by other trading partners (such as Australia). Regardless, the TPP's critics should now read the specifics that they have so long said they wanted to see and reconsider their opposition to the deal.

The most controversial issues in the US are those that are sometimes classified as "deep integration" because they go beyond the traditional easing of trade tariffs and quotas. The left's concerns about llabour and the environment were accompanied by fears about excessive benefits for corporations: protection of the intellectual property of pharmaceutical and other companies, and the mechanisms used to settle disputes between investors and states.

So what, exactly, is in the finished TPP? Among the environmental features, two stand out. The agreement includes substantial steps to enforce the prohibitions contained in the Convention on International Trade in Endangered Species (Cites). It also takes substantial steps to limit subsidies for fishing fleets – which in many countries waste taxpayer money and accelerate the depletion of marine life. For the first time, apparently, these environmental measures will be backed up by trade sanctions.

I wish that certain environmental groups had devoted half as much time and energy ascertaining the potential for such good outcomes as they did to sweeping condemnations of the negotiating process. The critics apparently were too busy to notice when the agreement on fishing subsidies was reached in Maui in July. But it is not too late for environmentalists to get on board.

Similarly, various provisions in the area of labour practices, particularly in south-east Asia, are progressive. These include measures to promote union rights in Vietnam and steps to crack down on human trafficking in Malaysia.

Perhaps the greatest uncertainty concerned the extent to which big US corporations would get what they wanted in the areas of investor-government dispute settlement and intellectual property protection. The TPP's critics often neglected to acknowledge that international dispute-settlement mechanisms could ever serve a valid purpose, or that some degree of patent protection is needed if pharmaceutical companies are to have sufficient incentive to invest in research and development.

There was, of course, a danger that such protections for corporations could go too far. The dispute-settlement provisions might have interfered unreasonably with member countries' anti-smoking campaigns, for example. But, in the end, the tobacco companies did not get what they had been demanding; Australia is now free to ban brand-name logos on cigarette packs. The TPP also sets other new safeguards against the misuse of the dispute-settlement mechanism.

Likewise, the intellectual property protections might have established a 12-year monopoly on the data that US pharmaceutical and biotechnology companies compile on new drugs (particularly biologics), thereby impeding competition from lower-cost generic versions. In the end, these companies did not get all they wanted; while the TPP in some ways gives their intellectual property more protection than they had before, it assures protection of their data for only 5-8 years.

The focus on new areas of deep integration should not obscure the old-fashioned free-trade benefits that are also part of the TPP: reducing thousands of existing tariff and non-tariff barriers. Liberalisation will affect manufacturing sectors such as the automotive industry, as well as services, including the internet. Liberalisation of agriculture – long a stubborn holdout in international trade negotiations – is noteworthy. Countries like Japan have agreed to let in more dairy products, sugar, beef, and rice from more efficient producers in countries like New Zealand and Australia. In all these areas and more, traditional textbook arguments about the gains from trade apply: new export opportunities lead to higher wages and a lower cost of living.

Many citizens and politicians made up their minds about TPP long ago, based on seemingly devastating critiques of what might emerge from the negotiations. They should now look at the outcome with an open mind. They just might find that their worst night-time fears have vanished by the light of day.

http://triplecrisis.com/trading-away-land-rights/

Trading Away Land Rights: TPP, Investment Agreements, and the Governance of Land

Rachel Thrasher and Timothy A. Wise

In 2009, the government of Mozambique put a moratorium on large-scale land acquisitions, a belated response to a wave of protests triggered by so-called "land grabs" by foreign investors. The moratorium, which lasted two years and restricted only land deals larger than 25,000 acres (10,000 hectares), calmed tensions while the government sought to resolve the inconsistencies between the great land giveaway and the country's progressive land law, which recognizes farmers' land rights even when they do not hold formal titles.

Some of those investors were from the United States, and it is a wonder that they didn't sue the Mozambican government for limiting their expected profits. They could have under the Bilateral Investment Treaty (BIT) between the United States and Mozambique.

As U.S. trade negotiators herd their Pacific Rim counterparts toward the final text of a long-promised Trans-Pacific Partnership Agreement (TPP), the investment chapter remains a point of contention. Like the 1994 North American Free Trade Agreement (NAFTA) and most U.S. trade agreements since, the TPP text includes controversial provisions that limit the power of national governments to regulate incoming foreign investment and give investors rights to sue host governments for regulatory measures, even those taken in the public interest, that limit their expected returns. A host of BITs with a far wider range of countries, including Mozambique, contain similar provisions.

The impact of such agreements on land grabs and land governance has received scant attention until recently. As new research from the International Institute for Environment and Development (IIED) and Tufts University's Global Development and Environment Institute (GDAE) shows, the kinds of investment provisions in the TPP and in most BITs can severely limit a government's ability to manage its land and other natural resources in the public interest. They can also interfere with the implementation of newly adopted international guidelines on land tenure.

As GDAE's research shows, there are alternatives to such restrictive investment rules. Mozambique, for example, could withdraw from its BIT with the United States and instead draw on the less constraining investment provisions offered by the Southern African Development Community (SADC).

The Threats to Land Governance

GDAE's new background paper, "Trade Agreements and the Land," by Rachel Thrasher, Dario Bevilaqua, and Jeronim Capaldo, examines the implications of proposed agreements, such as the TPP, for regulating land grabs. Lorenzo Cotula of IIED, in his report, "Land Rights and Investment Treaties: Exploring the Interface," looks beyond land grabbing to consider other important aspects of land governance, including land redistribution. Both identify key provisions common to U.S. investment treaties that constrain land governance.

Perhaps most well known is the Investor-State Dispute Settlement (ISDS) process whereby private investors can sue states in a private arbitral tribunal – a glaring exception to the traditional sovereign immunity granted to states. Land grabs have not yet been the subject of dispute under these treaties, but other land conflicts show how they might in the future.

Beyond the onerous ISDS provisions, investment treaties universally require compensation in the case of expropriation. Traditionally, that compensation must be "prompt, adequate and effective." Countries have faced claims for expropriation in a wide variety of land-related cases – mostly in response to state efforts to correct past injustices or reform land tenure. Zimbabwe, in the wake of its fast-track land-redistribution program, Albania's privatization in the transition from socialism, and South Africa's mining legislation to benefit disadvantaged groups after apartheid all faced investor disputes claiming expropriation.

The standard for compensation in these treaties is often based on the market value of the investment and does not take into account a fair balance between interests. Indeed, in the draft TPP several negotiating countries have explicit footnotes and annexes specifying that the compensation must be at market value (Art. 11.7, Annex II-C). As Cotula points out, investors can demand such compensation even if they got the land at low prices and even if government action simply interferes with or delays their profit-making activities.

Treaties also often require that foreign investors be treated with "full protection and security." In some cases, where domestic individuals or groups have taken action against foreign investors, the countries have been on the hook for not acting with "due diligence" to protect them.

Many investment agreements also demand "fair and equitable treatment" for foreign investors. In investment jurisprudence this has come to include the "legitimate expectations" of the investor based on negotiations with governments. Any promise of access to land and resources, or even the speedy handing over of such land, can be disputed as a violation by investors.

Sometimes, even before an investor enters the country, these investment treaties threaten land governance by extending the "right of establishment" to investors from partner countries. This means that under the TPP and most modern BITs, host countries must treat foreign investors on par with domestic investors, giving no priority to nationals even in sensitive areas such as land, minerals, and other natural resources.

These investment provisions can have a marked "chilling effect" on governments. Cotula points out, for example, that many provisions of investment treaties would conflict with efforts by a government to implement the Voluntary Guidelines on the Governance of Land Tenure (VGGT) from the FAO, now the gold standard for appropriate recognition of land rights. The guidelines call for the restitution of land to those from whom it was taken and the redistribution of land in land reform efforts. To the extent those efforts impede the profitability or expected profitability of a foreign investment, the government may find itself liable for unaffordable market-rate compensation in settlements that can include the recouping of expected profits by investors. Such agreements therefore make it more difficult for governments to implement this groundbreaking new international land tenure agreement.

Notably, many of Cotula's recommendations involve ways that governments can protect themselves by legislating the VGGT in national law and ensuring that investment treaties recognize such obligations.

TPP – No Way Forward

The TPP is expected to be finalized in the coming months. For countries like Viet Nam, which was not previously bound by any international investment treaties, this could create large unexpected obstacles to domestic land regulation. Currently, the United States is negotiating investment treaties with what amounts to 80 percent of global GDP. Between the TPP, the TTIP, and BITs with India and China, U.S.

style investment treaties are poised to become the de facto international legal regime for the treatment of foreign investors.

AS GDAE's background paper shows, there are other investment treaty models out there. The Southern African Development Community drafted a model BIT with some of these threats to governance in mind. Its Model BIT begins by explicitly recommending that countries not extend rights to investors before establishment. Instead, countries are encouraged to admit investments in a good faith application of their laws. The model also limits ISDS provisions, recommending either that disputes should be kept between States, or at the very least, that States should be able to bring counterclaims against the investor in the same tribunal.

Expropriation is approached differently as well. Rather than a standard of non-discrimination and "prompt, adequate and effective" compensation, it acknowledges that almost all expropriations are discriminatory and suggests a "fair and adequate" standard for determining compensation. This is more in line with other approaches looking to create an "equitable balance" between interests in deciding how much compensation is owed.

Finally, the language of "full protection and security" and "fair and equitable treatment" is downgraded such that it requires only "fair administrative treatment." By doing this the SADC text emphasizes that this is a procedural, rather than a substantive standard and reserves the rights of states to make regulatory changes in response to important public policy.

As Cotula concludes, "Protecting the land claims of some, without also taking action to protect different and potentially competing land claims, can entrench imbalances in both legal rights and power relations. In the longer term, solutions should lie less in legal arrangements that insulate foreign investment from shortcomings in national legal systems, and more in establishing fair and effective land governance that can cater for the needs of all."

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Daily News IUST

TPP Drafting, Legal Scrub Continues In Tokyo; Few Details For Cleared Advisers

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Officials from the 12 Trans-Pacific Partnership (TPP) countries are drafting parts of the final text of the agreement and conducting a legal review of completed chapters at a meeting this week in Tokyo, according to informed sources. This meeting comes as the Obama administration is facing pressure from trading partners such as Canada, as well as members of Congress and stakeholders, to release the TPP text as soon as possible.

The work in Tokyo also includes drafting one or two side letters to the agreement, as well as technical work on the tariff schedules, according to one informed source.

The tariff schedule work, which is very detailed and technical to begin with, will be further complicated by the fact that the TPP negotiations were conducted on the basis of a 2007 version of the Harmonized Tariff Schedule, one source said. This means negotiators need to ensure that items are placed under the correct tariff lines in the 2012 version of the HTS, he said.

One former U.S. trade official involved in previous trade negotiations said this week that the work to finalize the tariff schedules is very time consuming due to its technical nature.

Similarly, a source close to the negotiations said it will likely take several meetings to finalize the TPP text, not just the one underway in Tokyo.

U.S. Trade Representative Michael Froman said on Thursday that TPP countries are currently "working to finalize the details of the text." Speaking on an Oct. 15 conference call organized by the Council on

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Foreign Relations, he said the Obama administration is "very eager" to get the text finalized and get it out in the public "as soon as possible."

Without a final text, the administration has been reluctant to provide very detailed briefings to business representatives and other stakeholders, and revealed few new details at an all-day briefing for cleared advisers on Oct. 14, sources said.

Participating in that briefing were members of the Advisory Committee for Trade Policy and Negotiations, the Labor Advisory Committee, the Industry Technical Advisory Committees, and some agriculture cleared advisers. The Agriculture Technical Advisory Committee as well as the Agriculture Policy Advisory Committee have a separate briefing on TPP scheduled for Oct. 22, according to informed sources.

Froman said during the CFR call that administration officials have been briefing stakeholders, Congress and the public on how the key TPP issues were resolved, so there is a full understanding ahead of the congressional debate.

The administration has shared some elements of the TPP deal with members of Congress, though not to cleared advisors, sources said. This has led to questions among congressional staff whether the texts shown to members of Congress now should also be shown to cleared advisers, sources said.

At this point, cleared advisers only have access to the TPP text that reflects the state of play at the July Maui ministerial.

Canadian Trade Minister Ed Fast on Oct. 14 expressed doubt that any TPP text will be publicly available to Canadians before the Oct. 19 federal election in that country. "We're working with our eleven other partners to secure at least a provisional [TPP] text," he said in the interview with the Canadian Broadcasting Corporation. He noted that any TPP country needs the consent of all the other participants to release "any form of the text."

He said that Canada is pressing the other TPP nations "very hard" to release that text so Canadians can see for themselves. "I can tell you, we've been very, very assertive with our partners explaining to them that Canadians in the middle of an election have a right to know what's in the text, and that's why we've

provided a summary to provide them with essentially a clearer understanding of what the overall terms of the text are," he said.

Amidst the difficulties of coming up with a text, the administration seems to have backed off its initial plan to notify Congress of its intent to sign the TPP within a matter of days after announcing a deal, according to informed sources. Finance Committee Chairman Orrin Hatch (R-UT) last week warned President Obama to refrain from notifying Congress of its intent to sign the TPP before Congress has access to the text.

At the same time, President Obama and Froman have been in close contact with members of Congress. After the TPP deal was announced, President Obama called a number of members, and Froman reached out to the 28 House Democrats who voted for the renewal of fast-track earlier this year as well as the 13 Senate Democrats who voted for cloture on the Trade Promotion Authority (TPA) bill, sources said.

These most recent outreach efforts come on top of the attention administration officials have paid on these members after the fast-track vote, including providing updates during the Atlanta TPP negotiations, one informed source said.

The administration has clearly decided that dominating the TPP discussion with positive messages requires that level of senior official involvement at this early stage, this source said. As part of this concerted campaign to shore up support for the TPP, the administration has generated letters of support for TPP from former government officials and five former chairmen of the Democratic National Committee.

Froman during the CFR call said Obama has already been out there "aggressively" talking about the TPP in public, including during his Oct. 10 weekly address, and that cabinet members will be making appearances around the country to tout the benefits of the deal.

Some stakeholder sources said this week that the absence of the text may favor the administration's current campaign to garner support for the TPP. Specifically, it allows Froman to tout the benefits of the agreement without critics being able to contradict him based on the details of a text, these sources said.

In a related development, AFL-CIO President Richard Trumka urged Obama in an Oct. 9 letter to release the text in the "very near future" as a way of proving the administration claims about the benefits of the TPP. "In my experience, when there is such good news to share, there is no need for secrecy," Trumka wrote. "If the TPP will do for the American middle class all that USTR claims, releasing the text would be the single best way to prove that."

He said that creating the level playing field for American workers includes equal access to information, and the only way to ensure that is to give all Americans access to the text "right now," not after the administration has done its "public relations spin."

Once the text is released, there will be a better sense of the political tensions around the TPP agreement because stakeholders will reveal more of their positions based on the details of the deal, sources said this week. For example, the U.S. dairy industry will likely want to review U.S., Canadian and Japanese tariff schedules before taking a position, they said.

At the same time, the absence of a final text means the administration cannot take the procedural steps, such as the notification, which will ultimately lead to a congressional vote. The administration is clearly pursuing a strategy of fulfilling all the necessary requirements in order to be ready to take any opportunity for a congressional vote should it arise, sources said. However, two congressional aides have said the congressional consideration of the deal could slip to the lame duck session following the 2016 election, which is more than 13 months from now.

Gauging when and how an opportunity for a vote would arise is particularly hard to predict in light of the turmoil in the House Republican caucus that has delayed the election of a speaker. Without a House speaker, it will be hard to tell how and if the House will operate and how much energy and inclination there will be to tackle any major issues, sources said.

Once the notification is submitted, the administration has 90 days to sign the TPP deal, though it could opt to sign it later. The administration is required to publish the TPP text at least 60 days before signature, which would be no later than 30 days after notification. Cleared advisers have 30 days after the notification to provide their written assessments of the TPP text, according to the fast-track law.

Inside U.S. Trade - 10/16/2015

TPP Drug Reimbursement Rules Likely Deviate From Past U.S. Trade Pacts

Posted: October 15, 2015

An annex in the Trans-Pacific Partnership (TPP) agreement that sets disciplines for decisions by government bodies on reimbursements for drugs and medical devices does not appear to go as far as similar annexes included in the U.S. free trade agreements with Australia and South Korea, in two respects, according to fact sheets issued by the Australian and New Zealand governments and a joint summary written by all 12 participants.

The first departure is that the TPP annex only requires parties to establish a review process of prior decisions on reimbursement, while the U.S.-Australia FTA and the KORUS required an "independent review process."

An Oct. 9 fact sheet by the New Zealand government makes clear that New Zealand is interpreting this obligation as allowing for the review to take place by the same body which made the initial decision, which is PHARMAC in the case of New Zealand.

"An internal review process is sufficient to meet the obligation. In other words, the decision maker, PHARMAC, may undertake the review," the fact sheet said. It added that the result of the review does not carry the requirement to change funding decisions.

The second departure from previous trade pacts is that the obligations in the drug reimbursement annex will not be subject to dispute settlement. This is made clear by the New Zealand fact sheet, an Oct. 6 Australian fact sheet on health outcomes and the joint summary of the agreement. Provisions on national pharmaceutical reimbursement policy within both KORUS and the Australia-U.S. FTA are subject to government-to-government dispute settlement.

In lieu of dispute settlement, the annex appears to set up a government-to-government consultation mechanism to discuss issues covered in the annex, according to the New Zealand fact sheet. This consultation mechanism appears in neither the Australia FTA nor KORUS.

A leaked text of this annex -- released by Wikileaks on June 10 and dated December 17, 2014 -- contains language stating that dispute settlement shall not apply to the annex and includes consultation mechanism.

The leaked text also shows discord over the requirement that the review process must be done by an independent body, which is a provision the U.S. has pushed for in its previous trade agreements (Inside U.S. Trade,June 6).

Sources following negotiations on the annex said the lack of dispute settlement was an expected outcome, but still represents a deviation in preferences the U.S. laid out in KORUS and the Australian FTA.

U.S. drug companies have complained that PHARMAC's listing and pricing determination process is opaque and unpredictable, claiming that PHARMAC aims to drive down drug prices at the expense of intellectual property protections and transparency. U.S. drug companies hoped that provisions the U.S. had initially proposed within the annex - such as requiring an independent review process - would put tighter rules on PHARMAC.

Deborah Gleeson, a professor at the School of Psychology and Public Health at Australia's La Trobe University and a critic of TPP, said she believed the U.S. backed down significantly from its initial aims for the annex, "primarily because Australia simply refused to go further than the AUSFTA provisions."

Gleeson went on to say that "battles" over Australia's national healthcare program had already been fought during the negotiations for that deal and that the Australian government determined it would be "politically unacceptable" to sign a deal requiring further changes to the program.

Another source following the negotiations said that, when Australian officials negotiated the Australia-U.S. FTA, they believed that the independent review provisions did not require the review to be done by a group outside of their government's public health department.

That source said that Australian negotiators may have therefore sought less strict language in the TPP that did not explicitly require this review process to be independent.

Two TPP critics agreed that the annex's departures from previous FTAs are positive in terms of mitigating the agreement's impact on access to medicines and drug prices. But they made clear that these changes were not sufficient to alleviate the worries previously raised by skeptics of the trade pact about the annex and TPP's overall impact on public health.

Gleeson and Peter Maybarduk, director of Public Citizen's Global Access to Medicines Program, both said the final wording of the annex may be ambiguous enough that it will still allow governments or pharmaceutical companies to use the language to put pressure on reimbursement bodies to change their behavior.

They also argued that despite the changes to water down the annex, countries and the pharmaceutical industry still have a variety of indirect methods to apply pressure to TPP members if they feel as though their drug reimbursement policies are not being carried out in a favorable manner.

In addition, they contended that pharmaceutical companies could still launch an investor-state claim under the investment chapter arguing that an action by the reimbursement body violated the obligation by governments to provide fair and equitable treatment to investments. Critics of the annex had sought explicit language stating that reimbursement decisions by government bodies could not be challenged under investor-state dispute settlement.

One critic said U.S. trade officials had explicitly acknowledged last year that excluding the reimbursement annex from dispute settlement does not preclude a pharmaceutical company from challenging how drugs are reimbursed through the investment chapter.

Maybarduk said another way to circumvent the changes would be for members to hold back on the implementation of other parts of TPP if they perceive another member to not be strictly following the text or "spirit" of the health transparency annex.

The government-to-government consultation mechanism also provides a route to constantly pressure governments over their national health reimbursement policies and advocate for the pharmaceutical industry, he argued.

Gleeson said PHARMAC will have to make changes to its current process in order to comply with the obligations in the annex, specifically by establishing a specified period of time for completing review as well as establishing a review process.

The New Zealand fact sheet hinted at these new obligations, but insisted they would not require New Zealand to "change the PHARMAC model." However, it estimated that implementing the annex's obligations would involve up to $4.5 million in one-off establishment costs for PHARMAC, and $2.2 million per year in operating costs.

On the specified period of time, the fact sheet noted that the period can be determined by each TPP party and there is an exception that allows this timeframe to be extended provided the reason for the extension is disclosed. "This exception is noteworthy given PHARMAC may assess applications over multiple budget cycles or defer a final decision until funding is available," it said.

It also noted that PHARMAC does not currently offer a specific review process for drugs that it has declined to list for reimbursement.

The New Zealand fact sheet also points to an additional victory for the Kiwis: the exclusion of medical devices from its obligations in the health transparency annex. Gleeson expects that this exclusion arose from the fact that Australia had successfully managed to obtain a de facto medical devices exception based on the most recent leaked text of the annex by limiting the application of the annex to the Pharmaceutical Benefits Scheme, which does not cover medical devices.

The Australia-U.S. FTA provisions on national pharmaceutical reimbursement policy do not cover medical devices while the provisions laid out in KORUS do.

http://www.dailyyonder.com/letter-from-langdon-farmers-pay-the-cost-of-free-trade/2015/10/12/9060/

Letter from Langdon: Farmers Pay the Cost of 'Free' Trade

By Richard Oswald

October 12, 2015

The Trans Pacific trade pact promises us cheaper food with sketchier ingredients. American farmers will face upheaval and more dislocation, while corporate agriculture thrives.

If China assembles my Apple iPhone with its global mixture of ingredients, shouldn't Asians at least eat Washington apples? Maybe not while China produces nine times as many apples as the U.S.

And if my chore tractor came from Italy, (Europe is where most small farm tractors are manufactured today) shouldn't Italians buy my corn?. Probably not, while they're the eighth largest corn grower in the world.

That brings U.S. farmers to another crossroads, having bought into the idea that to be successful and make a lot of money, we need full unfettered access to consumers around the world. But those consumers, almost without exception, would rather have food grown at home. Their farmers want it that way too.

Maybe that's why we've been told the answer to consumer resistance is trade agreements like Trans Pacific Partnership (TPP) that lock trading partners into commitments to buy stuff no matter what. Those agreements always seem to come with a few years of doing business the old way, giving our best new buddies protection and a chance to adapt to doing business the new way. But, as is too often the case, by the time new markets are phased in, they've already disappeared via geopolitical corporate hustles and revalued currencies.

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It's pretty nigh onto impossible to pick up the family farm and move it one piece at a time, the way industry seems to do. We've already seen how easy it is to set up manufacturing plants in Asia or Mexico for everything from cars and washing machines to cotton T-shirts. And while benefits to farms are always touted, most of the trade agreements we farmers are exhorted to support are already designed to aid floating factories around the world owned by shadow companies looking for cheap labor and ingredients, a tax break, and easily adjustable money.

Farmers are no strangers to market access. Over the years we've seen markets come and go via embargoes, farm programs, or transformed into world trade deals more about whipping us than helping us. That's the way it's gone for poultry and hog farmers in America as corporations have cemented themselves into virtually every aspect of production from eggs and artificial insemination, chicks and pigs, all the way up to fresh wrapped meat in the grocer's case.

Monopolies like those have come to be viewed by leaders (who most of us unenthusiastically refer to as politicians) as just another cost of doing business for highly efficient "agriculture."

But here lately, one of the biggest costs to one efficient branch of U.S. "agriculture" has been a virus called PED, short for porcine epidemic diarrhea. First discovered in Europe, PED spread through Asia mysteriously finding its way to America and Canada. After years of searching for the source, USDA now attributes PED's origins, responsible for killing 8 million baby pigs in the U.S., to contaminated shipping bags used to deliver bulk commodities to the U.S. from – take a wild guess – our trading partners in Asia.

That's where avian flu originated, resulting in the destruction of close to 50 million U.S. chickens and turkeys this year costing close to $1 billion and driving up the price of eggs.

Now USDA has approved chicken imports from China. And beef from South America, even though parts of countries there still harbor the scourge of cattlemen everywhere, hoof and mouth disease. That one microscopic bug can wipe out an American beef herd faster than you can say "shipping container."

But, we're told, it will be good for "agriculture."

Instead of facing the truth of policies favoring cheap commodities and cheaper food ingredients for corporate processors, "agriculture" as a whole talks about broad benefits to America and rural communities through profitable farms with access to global markets.

More times than not we've seen rural population centers, those clusters of agrarian association that once served as our support group, eroded by indifference or failure to understand the real meaning of the words "sustainability" and "community."

These days instead of coming from Main Street, most of the things big farms buy come from tens or hundreds, if not thousands, of miles away. Communities have gotten smaller, farms have gotten bigger, and the roads that hook us all together have gotten longer.

So when we hear that global corporate aggregators of all things bought and sold are good for "agriculture," we farmers tend to think that means us. The problem is that we are only one small step, the bottom rung, of a long and torturous climb to consumers everywhere. Calling us "agriculture" is a little like calling an engine the whole car. But it's the engine that makes the whole thing go. And when we consider money collected along the way, the best any farmer can hope for is maybe 15 cents on the dollar.

That leaves a lot of benefit to "agriculture" up for grabs.

Many times it is actions by agriculture as a whole that leads to problems on the family farm when trade and other government deals hurt us through importation of disease, contaminated food, or perhaps just a market manipulating higher corporate power holding no compassion for us, our consumers, or perhaps the world in general.

That's what happens when everyone forgets that the agriculture we hear so much about in America isn't always family farms, but all the gigantic corporations surrounding us, doing what they do for better or sometimes worse.

When billion dollar trade deals are at stake, it's that blurring of the line between us and them that makes it difficult for family farmers to be heard. So when agriculture and unfair free-trade deals are

debated in Congress later this year or the next, keep in mind that most importantly to us, family farmers feed America.

The "Agriculture" they'll all be talking about isn't who we are, but it's certainly what we do.

Richard Oswald, president the Missouri Farmers Union, is a fifth-generation farmer from Langdon, Missouri. "Letter From Langdon" is a regular feature of The Daily Yonder.