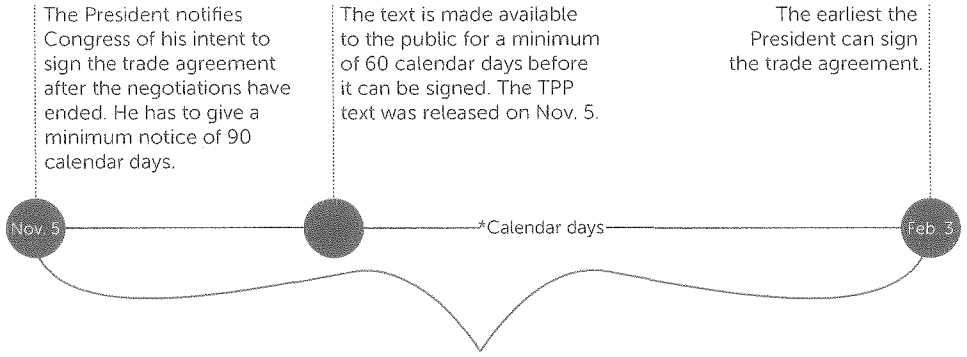
FAST TRACK TIMELINE FOR TPP

The timelines dealing with the Trans-Pacific Partnership (TPP) trade agreement for the President and Congress as governed by the trade promotion authority (TPA), aka Fast Track.

PHASE I: PRESIDENT'S TIMELINE

As governed by Fast Track, the executive branch negotiates the trade agreement, prepares a list of changes to U.S. laws needed to implement the agreement (the implementing legislation) and the President signs the trade agreement.



Executive branch develops the list of required changes in U.S. laws.

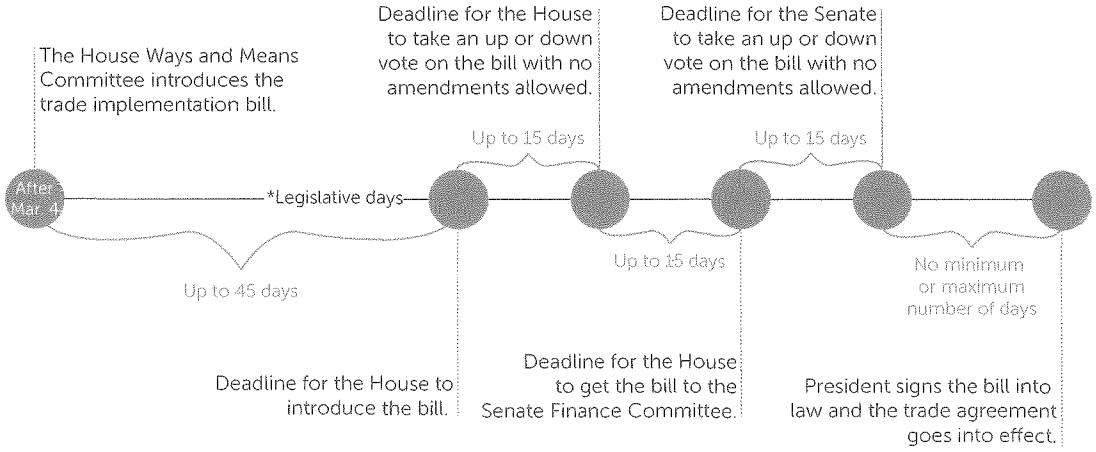
PHASE II: IN BETWEEN THE PRESIDENT AND CONGRESS

Once signed, there is a minimum of 30 days before the implementing legislation can be submitted to Congress. It could be longer.

During that period, the House Ways and Means and Senate Finance Committees can hold "mock mark-ups" on the draft bill to give feedback to the Administration.

PHASE III: CONGRESS' TIMELINE

Unlike most bills, no amendments are allowed and the implementation bill must be authorized by a straight "up or down vote" in the House and Senate. What follows is the maximum number of days allowed, but it could also be shorter.



*Timeline measured in legislative days, i.e., the number of days they are convened in Washington, D.C. working and meeting.

INSTITUTE FOR AGRICULTURE AND TRADE POLICY
iatp.org

http://www.nytimes.com/2015/10/06/business/international/the-trans-pacific-partnership-trade-deal-explained.html?emc=eta1&_r=0

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

Daily News

TPP Text Needs Further Work After Japan; Release Not Expected For Weeks

Posted: October 29, 2015

Trans-Pacific Partnership (TPP) officials will not be able to finalize the text of the agreement by Oct. 30, when a drafting and legal scrub session is slated to wrap up in Tokyo, meaning the release of the final text is still several weeks away, according to informed sources.

Two U.S. industry sources said they expect the release will not happen until around theNov. 26 Thanksgiving holiday or later, although a source close to the negotiations said he believed the release would happen before then.

Felipe Lopeandia, Chile's chief negotiator for TPP, was non-committal on the timing of the text release in an Oct. 22 briefing for Chilean stakeholders. "Our interest is that these [texts] be published as soon as possible and we are working so that happens within the coming weeks," he said, according to an Oct. 22 press release from Direcon, Chile's trade agency.

One source close to the negotiations said he expects TPP countries to hold another meeting soon to continue work on the text, but that no date has been set yet. In the meantime, TPP officials will continue working to finalize the text through electronic communication, this source said.

Several sources said the work to finalize the TPP text is time-consuming and taking longer than expected, although they differed on the reasons. Some said translation problems have occurred with respect to Vietnam.

One informed source said additional complications have come up because some TPP countries are only now becoming aware of the substantive commitments that were agreed bilaterally between other parties and that is creating some discontent. At the Atlanta TPP ministerial, all countries provided to all 12 parties a list of the side letters they had negotiated bilaterally, but did not share the letters themselves.

An industry source said officials were also running into cases where TPP parties had slightly different understandings about the deals that were actually cut, on top of less substantive problems like mistakes in the text. But he characterized both types of issues as the "usual snafus."

The source close to the negotiations downplayed suggestions by U.S. officials that the change in government in Canada poses a further delay to efforts to release the text as the incoming Liberal Party needs to time to review the agreement that was reached. Instead, this source said he did not view the Canadian issue as a "problem."

U.S. Trade Representative Michael Fromanearlier this week said Canadian trade bureaucrats have been briefing the newly elected Liberal government on the contents of the TPP agreement, but stopped short of saying whether the change in government would delay the release of the TPP text.

the WTO so that they are likely to pose even greater threats to domestic food policy. A draft TBT chapter for TTIP seeks to "ensure that products originating in the other Party that are subject to technical regulation can be marketed or used across all the territory of each Party on the basis of a single authorisation, approval or certificate of conformity."[6] Labeling rules are specifically targeted. The TBT chapter would also impose a "necessity test" such that labeling requirements "should be limited as far as possible to what is essential and to what is the least trade restrictive to achieve the legitimate objective pursued."[7] In addition, a proposed special annex on prepackaged food in the TPP may prevent detailed ingredient listings on labels, even on sensitive products such as infant formula, and would make it more difficult for consumers to make healthy choices.[8]

State food labeling laws are clearly vulnerable under these provisions. State standards that differ from federal rules could be challenged, even if U.S. law allows for those differences. Would Vermont's GMO labels, for example, meet the "necessity test," when U.S. federal regulatory agencies have established no disclosure requirements? Legal scholars suggest that U.S. states should be concerned about how such a necessity test would operate.[9]

Health warnings are also at risk. In 2015, bills were introduced in three states--California, New York and Vermont—to require safety warnings on sugary drinks.[10] The US Trade Representative (USTR) has opposed such laws in other countries, objecting to Chilean nutrition warning labels because they might discourage consumption of imported processed foods.[11] Business groups have openly stated their interest in using these trade agreements to thwart state regulations. The U.S. Council for International Business testified that "[s]ubsidiary political units, such as EU Member States or US States should be prohibited from seeking to impose separate requirements for approval or local restrictions on sale or use,"[12] and the U.S. National Confectioners Association has stated that "US industry also would like to see the US-EU FTA achieve progress in removing mandatory GMO labeling and traceability requirements."[13]

Investment provisions give corporations a preferential forum in which to challenge state laws

The Investor-State Dispute Settlement (ISDS) procedures in trade agreements allow foreign investors to sue governments directly in private investment tribunals, bypassing the courts or allowing a "second bite" if the investors do not like the results of domestic court decisions. Although the investor-state tribunal has no power to directly nullify U.S. laws, in practice, when a country loses to an investor, it will change the offending law, pay damages or both. Under ISDS, transnational corporations could sue for claimed lost profits due to food labeling requirements or GMO disclosure rules that companies claim will lower sales of GMO-containing products.

ISDS clauses in other trade agreements have been used repeatedly to attack environmental and public health measures. Even unsuccessful challenges take years to resolve, cost millions to defend and have a chilling effect on the development of new legislation. U.S. state and Canadian provincial policies, including laws banning toxic gasoline additives and a moratorium on fracking permits, have already been targeted in challenges under the North American Free Trade Agreement (NAFTA). TPP and TTIP would exponentially increase the number of corporations that could take advantage of these special rights to challenge consumer standards.[14] Additionally, government-prepared impact assessments analyzing state regulations proposed in the regulatory cooperation provisions of these agreements could provide support for these legal attacks.

Conclusion

The U.S. government has refused to make negotiating proposals for the TPP and TTIP public. Trade law and policy is complex and can seem far removed from the day-to-day challenges facing state governors, legislators and regulatory agencies. But state policymakers ignore trade policy at their peril. State government officials must take steps to get as informed as possible, as quickly as possible, and then communicate their views to the USTR and to Congress, which will soon be reviewing the final agreements under an abbreviated "fast track" process. If they do not, they could see important state health and consumer protections, including food labeling, undermined and likely rendered moot by these international agreements masquerading as trade facilitation.

Endnotes

1. National Conference of State Legislatures' databases of state legislation on environmental health and agriculture and rural development. Last accessed July 30, 2015.

2. *Preempting the Public Interest: How TTIP Will Limit US States' Public Health and Environmental Protections*, Center for International Environmental Law (September 2015) at p. 9-12, and the EU Regulatory Cooperation chapter.

3. Ibid., p.14-20.

4. TTIP Regulatory Cooperation text. An early leaked draft of the Regulatory Coherence chapter in TPP includes similar provisions.

5. *Eyes on Trade Blog, WTO Orders U.S. to Gut U.S. Consumer Country-of-Origin Meat Labeling Policy, Further Complicating Obama Fast Track Push*, Public Citizen, May 18, 2015.

6. See initial proposal for legal text on "Technical Barriers to Trade", Article 4

7. EU TBT Chapter, Article 8

8. Sonya Reid Smith, Third World Network, "Some other WTO plus aspects of the TPP's TBT chapter," provided to author.

9. "Health warnings on junk food," Albert Alemanno (March 25, 2013). See also TRADE POLICY ASSESSMENT prepared for the Maine Citizen Trade Policy Commission (June 25, 2012) at p. 8.

10. See, CA S 203 (2015), Sugar-Sweetened Beverages: Safety Warnings, Senator Monning; NY A 2320 (2015) Labeling of Sugar Sweetened Beverages, Assembly member Dinowitz; VT H 89 (2015), Health and Safety Warnings on Sugar Sweetened Beverages, Representative Stevens.

11. USTR 2014 Report on Technical Barriers to Trade, p. 55.

12. U.S. Council for International Business Submission to USTR)

13. Public Citizen, TAFTA as Monsanto's Plan B: A Backdoor to Genetically Modified Food

14. TTIP alone could "quadruple" the number of newly empowered investors, see TAFTA Corporate Empowerment Map, Public Citizen.

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.

★ ★ ★

Overall U.S. Benefits

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. 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. Right now, car engines manufactured in Michigan face tariffs up to 55 percent in TPP countries. Thanks to TPP, those taxes will drop to zero. As part of TPP, we have also reached agreement with Japan to remove the non-tariff barriers that have kept U.S.-made autos, trucks and parts

out of that important market.

- **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 - which include, for example, devices, including smart phones; and equipment, including routers and computers.

- **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. Most U.S. farm product exports will receive duty-free treatment immediately; over 50 percent of U.S. farm products (by value) will enter Japan duty free once the agreement is implemented.

  - **Poultry:** American farmers exported $2.7 billion to TPP countries in 2014, despite significant barriers. These include tariffs of 20 percent on American poultry to Vietnam, whether it's from Arkansas or Delaware. TPP eliminates those tariffs.

  - **Beef:** Japan places tariffs of 38.5 percent on American beef, whether it's from Texas, Montana, or Nebraska. These tariffs will be reduced to 9 percent. With over $1.6 billion in annual sales in 2014, Japan is our largest export market for beef. Under the TPP agreement, Japan will eliminate duties on 74 percent of its beef and beef product tariff lines within 15 years. Tariffs will be cut on the remaining tariff lines.

  - **Pork:** Japan accounts for almost $2 billion in pork exports in 2014—about one-third our pork exports - despite tariff barriers. Under the TPP agreement, Japan will eliminate 80 percent of its pork tariffs in 11 years, and make steep cuts in those that remain. Under TPP, we're going to reduce Japan's tariff on all pork and eliminate the current 20 percent tariff on ground seasoned pork, worth $435 million annually to U.S. exporters.

  - **Dairy:** Japan has a tariff of 40 percent on cheese from the United States, which will be eliminated in TPP. The United States exported $3.6 billion of dairy to TPP countries in 2014. In the case of Canada, passing TPP means renegotiating NAFTA, which didn't provide any direct benefits for dairy. Under TPP, we'll be able to sell more than 4,000 additional tons of butter, nearly 14,500 additional tons of cheese, and more than 50,000 additional tons of liquid milk to Canada. Plus more to Japan, Malaysia, and Vietnam.

INTERNATIONAL TRADE ADMINISTRATION

Trans-Pacific Partnership

Maine: Supporting Made-in-America Exports and Jobs

TPP Countries* are Important for Maine's Exporters

- $1.8 Billion in goods exports from Maine to TPP countries in 2014, including $105 Million to Malaysia, $98 Million in goods exports to Japan, and $6 Million to Vietnam
- 67% of Maine's goods exports went to TPP countries in 2014
- 1,001 companies from Maine exported goods to TPP countries in 2013 – 86% were small and medium sized companies

TPP Will Eliminate All Foreign Import Taxes on Industrial and Consumer Goods, Benefiting Maine's Top Export Sectors

	Information and Communication Technologies	Fish and Fish Products	Health Products	Transportation Equipment	Forest Products
Before TPP	**$100 Million** State's Exports to New TPP Countries** in 2014	**$28 Million** State's Exports to New TPP Countries** in 2014	**$20 Million** State's Exports to New TPP Countries** in 2014	**$16 Million** State's Exports to New TPP Countries** in 2014	**$15 Million** State's Exports to New TPP Countries** in 2014
Before TPP	**35%** Current Maximum Tariff in Sector	**35%** Current Maximum Tariff in Sector	**30%** Current Maximum Tariff in Sector	**25%** Current Maximum Tariff in Sector	**40%** Current Maximum Tariff in Sector
With TPP	**99.6%** of U.S. Goods Exports will be **Duty-Free Immediately** in the New TPP Countries	**93.0%** of U.S. Goods Exports will be **Duty-Free Immediately** in the New TPP Countries	**99.9%** of U.S. Goods Exports will be **Duty-Free Immediately** in the New TPP Countries	**99.9%** of U.S. Goods Exports will be **Duty-Free Immediately** in the New TPP Countries	**98.2%** of U.S. Goods Exports will be **Duty-Free Immediately** in the New TPP Countries

* **TPP Countries:** Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam

** **New TPP Countries:** Countries with which the United States currently does not have preferential market access – Brunei, Japan, Malaysia, New Zealand, and Vietnam

www.trade.gov/fta/TPP
October 2015

Additional New Market Access Benefits for Maine

Agriculture: TPP will provide new and commercially meaningful market access for U.S. exports of food and agricultural products; eliminate the use of agricultural export subsidies; discourage countries from imposing export restrictions; and ensure food safety, animal health, and plant health measures are developed and implemented transparently and in a science-based manner.

For more information, please visit:
www.fas.usda.gov/TPP

Services: TPP will expand market access and investment opportunities in a number of services sectors, including entertainment, telecommunications, software licensing, the Internet industry, retailing, and logistics/express delivery. TPP will bar discrimination against digital provision of services and prevent customs duties on electronic transmissions.

For more information, please visit:
www.trade.gov/fta/TPP

TPP Works for Maine

Saves Money, Increases Competitiveness

Intellectual Property Rights: Establishes strong protections for patents, trademarks, copyrights, and trade secrets, including safeguards against cyber-theft of trade secrets, as well as robust enforcement that will protect innovation and the good jobs it supports.

Technical Barriers to Trade (TBT) and Regulatory Coherence: Enhances transparency, reduces unnecessary testing and certification costs, and promotes greater openness as standards are developed. Establishes sector-specific TBT commitments on medical devices, pharmaceuticals, cosmetics, information and communication technologies, food and food additives, organics, and distilled spirits that strive to align standards and regulations across the TPP region.

Customs and Rules of Origin: Creates transparent and predictable rules to facilitate the quick release of goods and promote TPP regional supply chains. Promotes common rules of origin and customs procedures to ensure that TPP benefits go to the United States and other TPP countries, not countries like China.

Government Procurement: Increases access to government procurement markets in TPP countries and ensures fair, transparent, and non-discriminatory rules.

Digital Economy: Establishes requirements that support a single, global Internet, including ensuring a free flow of data across borders. Promotes non-discriminatory treatment of digital products transmitted electronically, including a commitment that TPP countries will not impose customs duties on digital products.

Promotes Fairness & American Values

Environment: Creates strong and enforceable environment obligations and includes new provisions on wildlife trafficking, illegal logging, and illegal fishing practices.

Labor: Establishes enforceable obligations, including adherence to fundamental labor rights as recognized by the International Labor Organization.

State-Owned Enterprises (SOEs): Develops rules to ensure that U.S. private sector businesses and workers are able to compete on fair terms with SOEs engaged in commercial activity.

Investment: Ensures that U.S. investors have the same kinds of protections in TPP markets that the United States already provides to investors here at home.

Enforcement: Establishes fair and transparent dispute settlement mechanism that applies to all chapters and procedures to settle disputes in a timely manner.

Maine Companies and Workers Depend on World Markets

17,120
U.S. Jobs Supported by Goods Exported from Maine in 2014

$2.7 Billion
2014 Total Goods Exports from Maine

2,264
Companies Exported Goods from Maine in 2013

85%
SME share of Goods-Exporting Companies from Maine in 2013

55%
SME share of Maine's Goods Exports in 2013

Metropolitan Exports in 2014

- Portland – South Portland **$1.1 Billion**
- Bangor **$114 Million**
- Lewiston – Auburn **$114 Million**

https://www.politicopro.com/trade/story/2015/11/ag-groups-largely-positive-about-tpp-text-075369

Ag groups largely positive about TPP text

Politico

By HELENA BOTTEMILLER EVICH and JENNY HOPKINSON

November 5, 2015 at 9:01pm

The transpacific trade deal released Thursday continues to unfold as a goody bag for agriculture interests, including new tools to tackle disputes over animal and plant product safety, clearer biotechnology policies and better market access for beef and pork.

So far, commodity groups are either praising what they're seeing in the agreement's 1,000-plus pages or, at least for now, holding their peace.

"Before the text of the deal was released, most of the ag folks were leaning in to a 'yes,' " said House Agriculture Committee Chairman Mike Conaway. "[A]t this point I haven't seen any specific push-back from any of the ag groups."

With thousands of product tariffs to examine, farm groups are still poring over the finalized Trans-Pacific Partnership text. Conaway said he's leaning toward voting for the deal when it comes up for congressional approval as soon as next spring, but he's consulting with his constituents for their take.

However, happiness over the deal isn't universal. The National Farmers Union, a group that represents smaller farms, panned the agreement, saying it will hurt ranchers because of increased competition from beef imports and doesn't include enforcement mechanisms on currency manipulation.

"This agreement has been peddled to farmers and ranchers as a potential goldmine for farm exports," NFU President Roger Johnson said in a statement. "But as with other trade deals, these benefits are likely to be overshadowed by increased competition from abroad, paired with an uneven playing field that will not only reduce revenues for farmers and ranchers, but will also speed the loss of U.S. jobs."

U.S. rice and dairy groups have long been lukewarm on the deal because of provisions that they say hinder full market access for exports. The industries have raised concerns about policies that still limit exports to Japan, the world's third-largest economy, and dairy groups have taken issue with Canada's refusal to open its market fully. The National Milk Producers Federation, U.S.

Dairy Export Council and USA Rice, as well as the American Farm Bureau Federation, all said Thursday that they're waiting to review the agreement before commenting.

SPS, friend or foe?

The sanitary and phytosanitary, or SPS, chapter, which sets new rules aimed at reducing unfair trade barriers raised under the guise of safety or pest concerns, is almost universally liked by industry groups.

The chapter sets rules requiring countries to base food safety and related regulations in science and outlining how to manage risks. It also sets up a TPP-specific SPS committee and encourages countries to move toward establishing equivalency between one another's regulatory systems.

The chapter allows countries to question each other's import checks to make sure requirements are based on real risks. The deal also requires nations to notify importers or exporters within seven days if they're blocking shipments because of an SPS issue.

If countries disagree about such things as blocked shipments or drug residue sampling and can't solve the problem bilaterally through the usual channels, then they can use what the chapter calls cooperative technical consultations, or CTC — basically a consultation process with related agencies to help resolve the dispute. Once an issue is raised, the two parties have to meet within 30 days, with the aim of resolving the disagreement within 180 days.

The consultation system creates another avenue for arbitration beyond the often drawn-out and high-profile dispute-settlement system under the World Trade Organization, although the 180-day goal for resolving disputes is hardly a quick turnaround.

The additional tools to resolve SPS disputes are of great interest to an array of commodity groups, whether pork producers that have struggled with ractopamine restrictions, chicken exporters that have gone up against Russia's ban on antimicrobial chlorine wash, or produce companies facing concerns over pesticides and pests.

Western Growers President Tom Nassif said the SPS chapter was one of the most important for the produce industry.

"The effectiveness of new mechanisms TPP provides for producer recourse when unfair SPS measures are imposed will be the greatest indication of TPP's long-term success for the fresh produce industry," Nassif said in a statement Thursday.

The Office of the U.S. Trade Representative said in its summary of the chapter that it in no way weakens food safety in the U.S.

"On the contrary, it will help TPP partners better ensure the health and safety of their food," the agency contends.

Rep. Ron Kind (D-Wis.), a strong supporter of the trade deal, emphasized to POLITICO that it goes further than any trade agreement in making sure that food-safety standards are based on science — a key point of interest for U.S. agricultural exporters.

But consumer groups are railing against the chapter, calling it worse than expected —— and they have been slamming the deal for deal for months over concerns about what would be in the final text.

Lori Wallach, director of Public Citizen's Global Trade Watch, blasted the deal, saying it would lead to a "flood of unsafe imported food."

"When the administration says it used the TPP to renegotiate [NAFTA], few expected that meant doubling down on the worst job-killing, wage-suppressing NAFTA terms, expanding limits on food safety and rolling back past reforms on environmental standards and access to affordable drugs," she said.

Democratic presidential candidate Sen. Bernie Sanders (I-Vt.) toed a similar line, saying the TPP was worse than he thought it would be.

"The agreement would threaten American laws that protect the safety of the drugs we take, the seafood we feed our families and the toys our kids play with every day," Sanders said in a statement Thursday.

In a 17-page take-down of the deal, Public Citizen eviscerated the SPS chapter as a threat to the very basis of U.S. food-safety protections.

The group takes issue with, among other things, a provision that gives companies a right to challenge trade-enforcement actions, including things like import alerts, detentions and even lab analyses, which they say "second-guesses U.S. inspectors and creates a chilling effect that would deter rigorous oversight of imported foods."

Patrick Woodall, research director at Food and Water Watch, said the SPS chapter gives the industry just what it wanted, providing "a more powerful weapon to use against food-safety rules than the WTO. That's what the industry asked for, they wanted stronger, more binding SPS rules to attack food-safety regulations they thought were restrictive trade barriers."

Woodall also takes issue with the way the No. 1 objective of the chapter is worded: to "protect human, animal or plant life or health in the territories of the parties while facilitating and expanding trade by [utilizing] a variety of means to address and seek to resolve sanitary and phytosanitary issues."

"It really puts the commercial piece on par the food safety piece," he said, arguing that the WTO's SPS provisions treat food safety and consumer protection with greater importance and make providing a level playing field being a secondary objective.

Seafood is one of the biggest concerns for consumer and food-safety advocates wary of the lower sanitation and production standards in developing countries like Vietnam, a major player in the global aquaculture market.

"I'm especially worried about this related to antibiotics and fungicide residues on fish from Vietnam or Malaysia," Woodall added. "The U.S. position on unapproved antibiotics being illegal [a reason for a large portion of import actions against seafood] ... Vietnam could conceivably challenge that."

Biotech

The TPP marks the first time that biotechnology has been given a mention in a trade agreement, something agriculture groups say is an important step in harmonizing international approval standards and ensuring market access for new products.

The deal calls for countries to try as much as possible to align regulations for approving and importing biotech crops and make approval documents publicly available. Member countries also have agreed to communicate when low levels of unapproved GE crops are detected in imports and to work to reduce those occurrences.

While the provisions are largely voluntary, crop groups are optimistic that they will help align the countries' rules, set a precedent to address biotech issues in future trade deals and put pressure on nearby countries, including China, to fall in line with the policies if they want easier access to TPP member economies.

"For these 12 member countries, we really are not having a lot of challenges with biotechnology, but if you've got another country like China that has expressed some interest" in joining the deal, "they will have to agree to those principles on biotechnology," Floyd Gaibler, the U.S. Grains Council's director of trade policy and biotechnology.

Increased market access

Expanding market access remains among the most important outcomes for ag groups. The United States is highly efficient at producing food, feed and fiber and already exports huge quantities, making it one of the few U.S. sectors with a trade surplus.

Dave Warner, spokesman for the National Pork Producers Council, called the text a 99.9 percent win for the U.S. pork industry.

Under the agreement, tariff and non-tariff barriers will be eliminated for pork products in almost every TPP country, but they will be phased out differently depending on the country, Warner said. For Japan — where pork is highly sensitive but is the biggest market by value for U.S. pork producers — most tariffs will vanish after 10 years.

For Malaysia, tariffs will drop the moment TPP is enacted. And in New Zealand, tariffs on hams and shoulders will phase out in three years, Warner said.

"No free-trade agreement is perfect, but this is pretty darn close," Warner said. "This is going to be huge for the U.S. pork industry and big for the U.S. agriculture economy."

Agriculture commodity groups are largely happy with the deal, at least at first glance. The TPP will eliminate the few remaining tariffs in the region on things like corn and expand the market for commodities used in animal feed and fuel.

"Trade agreements are essential for us ...," Gaibler said. "And I think TPP is probably the most comprehensive agreement that we have."

By and large, agriculture groups are preparing to make the case to lawmakers that, while there may be some problems with the deal, its approval will be a boon to farmers.

"We always know this agreement is coming awfully close to presidential politics and things like that, so I have to think the grumbling you are seeing right now is the posturing they have to do," a corn industry source said. "Lawmakers have to ask themselves what's the alternative here if we don't do this. What is our world going to look like ...? While not perfect, we are a lot better off with this type of agreement in place."

Adam Behsudi, Chase Purdy and Victoria Guida contributed to this report.

INSIDE US TRADE

Business Coalition Urges Congress To Subject TPP Deal To Close Scrutiny

Posted: November 05, 2015

Following the release of the nearly final text of the Trans-Pacific Partnership (TPP), the U.S. Coalition for TPP on Thursday (Nov. 5) urged members of Congress to examine the text closely to ensure it opens markets of the Asia-Pacific region and effectively tackles the challenges and barriers prevailing in the global economy now.

In a letter sent to lawmakers Thursday morning, the business coalition also urged members to "hear directly" from business representatives, workers and the public on how they evaluate the deal.

"The final agreement is worthy of serious review and understanding," the group said. "If it meets our high expectations, it has tremendous potential to help improve America's competitiveness and create a more level playing field for our industries and workers."

"We respectfully ask that you review the agreement's text in full and hear directly from workers, families and job creators in your states and districts about their views of the negotiated agreement," the letter added. "An economic agreement covering 40 percent of the world's GDP deserves nothing less."

The letter stopped far short of endorsing the deal and sticks to conditional statements about TPP. The go-slow approach it advocates to members of Congress is most likely a reflection that members of the coalition are divided on the final deal, sources said.

The TPP Coalition represents companies and associations across a broad spectrum, including agriculture, manufacturing, information and communications technology, merchandising, processing, retailing and services, according to the letter.

Separate from its letter to members of Congress, the Coalition for TPP issued a public statement that is less detailed, but makes the same point that the text needs to be closely scrutinized.

"While it will take some time to examine and absorb the agreement, the U.S. Coalition for TPP is encouraged to see many chapters that address trade barriers and the type of rules that are important to create a level playing field and advance American competitiveness in the 21st century," the statement said." The final agreement is worthy of serious review."

Separately, Cal Cohen, the president of the Emergency Committee for American Trade (ECAT), which is the secretariat for the coalition, said that members of the business community are giving

"a very careful read to the text and hope to be able to indicate their positions within the next few weeks."

By taking a wait-and-see attitude, the coalition and other associations facing a similarly divided membership have time to try to fix their problems. This could include trying to appease the opponents by either getting marginal improvements in TPP through side letters or getting the administration to address some other priority these companies have, sources said.

Businesses that have taken the most critical view of the TPP deal as negotiated include brand-name pharmaceutical companies unhappy with the terms of the market exclusivity for biologic drugs, tobacco companies opposing the carveout of anti-tobacco regulations from the investor-state dispute settlement, and the Ford Motor Company, which opposes the deal in the absence of enforceable currency provisions.

The currency issue has been addressed in a joint declaration by TPP countries on exchange rate policies that was released along with the TPP text, which future members of TPP would have to sign to participate in the trade deal.

Following the release of the currency declaration by the Treasury Department, a Ford spokeswoman said the company's opposition to the deal has not changed since the currency forum does nothing to change the status quo. "It falls outside of TPP, and it fails to include dispute settlement mechanisms to ensure global rules prohibiting currency manipulation are enforced," Ford said in a statement.

"To ensure the future competitiveness of American manufacturing, we recommend Congress not approve TPP in its current form, and we ask the Administration to renegotiate TPP and incorporate strong and enforceable currency rules," the spokeswoman said in an e-mail. "This step is critical to achieving free trade in the 21st century."

The administration has been pushing for business endorsements of TPP, so holding off on offering them will likely increase the leverage of groups in any potential conversation with the U.S. government, sources said.

Other major business groups also offered a very measured response to the release of the text. For example, a Business Roundtable statement applauds the public release of the full text, and says the group is looking forward to reviewing the details and better understanding the benefits the deal would provide for American companies, farmers and workers.

"The TPP agreement holds the potential to expand trade and investment opportunities for countries on both sides of the Pacific Ocean," the statement said. "U.S. trade expansion, including through trade agreements like the TPP, is a key pillar of the Business Roundtable pro-growth policy agenda."

These very carefully worded statements are the latest example of what private-sector sources said thisweek has been a message to Congress from some business representatives that it should go slow in handling the TPP text. -- *Jutta Hennig*

http://www.nytimes.com/2015/11/06/business/international/vietnam-tpp-trade-agreement-labor-reaction.html

NEW YORK TIMES

Labor Reform in Vietnam, Tied to Pacific Trade Deal, Depends on Hanoi's Follow-Up

By KEITH BRADSHERNOV. 5, 2015

HONG KONG — A pact between Washington and Hanoi to strengthen labor unions in Vietnam could give workers more bargaining power, but the impact will depend on how Vietnam carries out the agreement, longtime Vietnamese government advisers and other specialists said on Thursday.

The side agreement to the Trans-Pacific Partnership calls for Vietnam to pass legislation that would legalize independent unions, allow them to strike and let them seek help from foreign labor organizations like the A.F.L.-C.I.O.

The overall trade agreement faces a contentious debate in Congress. The Obama administration is aiming to win over Democrats who have expressed concern about the potential for free trade to shift jobs to countries where unions and workers' rights are weak.

Vietnam's Constitution enshrines the right of workers to strike and engage in organized protests, said Le Dang Doanh, a prominent economist and a former top official at a government research organization in Hanoi. But until now, Vietnam has adopted few laws to codify and protect those rights.

Consequently, the labor accord "is a very positive step for Vietnam," said Mr. Doanh, a longtime advocate of market changes who has advised his country's top leadership through its gradual relaxation of many government controls over the economy in the last quarter-century.

Pham Chi Lan, the former secretary general of the Vietnam Chamber of Commerce and Industry and a former senior adviser in the office of the prime minister, also portrayed the agreement as an important concession.

"This is a big compromise, for Vietnam to agree to do this," she said.

But Tony Foster, the managing partner of the Hanoi and Ho Chi Minh City offices of Freshfields Bruckhaus Deringer, a big global law firm, said that the labor provisions of the Trans-Pacific Partnership had been expected, and that it was unclear how much change they would bring to Vietnam.

For Immediate Release
November 5, 2015

Contact: Michael Byerly
(202) 225-6306

Poliquin's Statement On The Release Of The TPP Text

WASHINGTON – Maine's Second District Congressman, Bruce Poliquin, released the following statement after President Obama released the final text of the Trans-Pacific Partnership (TPP):

"I have often said that this secretive process of negotiation major deals is not right and it isn't fair to the American People.

"That's why I joined my colleagues in sending a letter to President Obama urging him to release the final text of the Trans-Pacific Partnership. Mainers deserve to know what is in the final text of the Trans-Pacific Partnership.

"Now that the text has finally been released, I look forward to carefully reviewing the details of this proposed trade deal. Additionally, as I travel throughout the Second District, I look forward to meeting with Mainers and listening to their thoughts on the Trans-Pacific Partnership."

The following is the full text of the letter to President Obama:

November 04, 2015

President Barack Obama
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Mr. President:

On October 5th, you announced that negotiations on the Trans-Pacific Partnership (TPP) had concluded. Your statement at that time noted, "we can help our businesses sell more Made in America goods and services around the world, and we can help more American workers compete and win." We share those goals but believe if that is truly what the TPP will achieve it is time for the American people to have the opportunity to fully review the agreement.

Americans are rightly concerned about the secretive nature of TPP trade negotiations, especially given the significant economic impact the deal would have across many sectors of our economy. Just like TPP, past trade agreements were sold on their economic benefits. However, since the passage of the North American Free Trade Agreement, thousands of factories have closed and millions of manufacturing jobs have been lost all across the U.S.

Just 15 years ago, our country had more than 17.1 million Americans employed in the manufacturing sector. Today, that number has fallen by nearly five million. Given that the TPP has been sold to Congress and the American people based on its ability to change this trajectory and strengthen economic opportunity here at home, the American people deserve the chance to judge the full text of the deal for themselves.

Thank you for your attention to these concerns. We look forward to reviewing the full text of the TPP agreement, to ensure that it maintains the interests of U.S. businesses and workers, without further delay.

http://www.nytimes.com/2015/11/06/business/international/trans-pacific-trade-deal-tpp-vietnam-labor-rights.html?_r=0

Trans-Pacific Partnership Text Released, Waving Green Flag for Debate

By JACKIE CALMESNOV. 5, 2015

WASHINGTON — The release on Thursday of the full text of President Obama's trade accord with 11 Pacific Rim nations brought out opponents and supporters and officially opened what may be the last big battle of the president's tenure: winning congressional approval of the largest regional trade deal in history.

The opposition mainly came from the left, as an array of unions, environmental groups and public advocacy organizations that typically resist global trade agreements registered their dismay. But some businesses, like Ford Motor, also joined the emerging resistance to the Trans-Pacific Partnership.

The reaction confirmed that in this final fight, Mr. Obama will have to rely on the Republicans who control Congress if he is to sell the legacy-making agreement in the months before the House and Senate vote next spring. Republican leaders were withholding endorsements for now, leaving the president to make the case on his own.

Mr. Obama immediately sought to do so. Early Thursday, the White House posted the text of the deal on Medium, a social media sharing website, along with the president's statement hailing the agreement as a "new type of trade deal that puts American workers first."

The accord ties together countries from Canada to Chile and Japan to Australia that account for 40 percent of the world's economy. While the 12 nations' trade ministers concluded the agreement a month ago, after years of negotiations, Mr. Obama said that the disclosure of the details now should build support. He cited the agreement's labor and environmental protections, the end of many tariffs and trade barriers among the countries, and expanded markets for American goods and services.

"It eliminates 18,000 taxes that various countries put on American goods," Mr. Obama said. "That will boost Made-in-America exports abroad while supporting higher-paying jobs right here at home. And that's going to help our economy grow."

He cited the strategic as well as economic advantages of a trade alliance that would counter a rising China, which is not a party to the agreement.

"When it comes to Asia, one of the world's fastest-growing regions, the rule book is up for grabs. And if we don't pass this agreement — if America doesn't write those rules — then

countries like China will," Mr. Obama said. "And that would only threaten American jobs and workers and undermine American leadership around the world."

The president's post on Medium came hours after the United States trade representative first released the 30 chapters, side agreements and other attachments that make up the voluminous accord in the middle of the night, simultaneous with other nations doing so.

Also on Thursday, he officially notified Congress of his intent to sign the agreement in 90 days, a period specified by law to give the House and Senate time to begin deliberating over its terms. Congress has additional time beyond that to debate and vote on legislation to enact the agreement.

Final action is expected by perhaps May, ensuring that Congress's debate will occur against the backdrop of a presidential campaign in which leading candidates of both parties already have gone on record against the accord.

Senator Bernie Sanders of Vermont, who is challenging Hillary Rodham Clinton for the Democrats' nomination, said the trade text was proof that the accord "is even worse than I thought" — a threat to American jobs, food and product safety and access to affordable drugs, for the benefit of international corporations and third-world countries.

Without naming Mrs. Clinton, who last month announced her opposition to the agreement, Mr. Sanders summoned the phrase she once used as secretary of state to hail the emerging Pacific accord. "It is clear to me that the proposed pact is not, nor has it ever been, the gold standard of trade agreements," Mr. Sanders said.

The agreement also must be approved in the other 11 nations. Besides Chile, Canada, Japan and Australia, they are Mexico, Peru, New Zealand, Singapore, Vietnam, Malaysia and Brunei.

The Obama administration is hoping that the accord's labor protections, along with separate bilateral agreements on labor and human rights between the United States and Vietnam, Malaysia and Brunei, will help persuade some Democrats to back the deal. The administration is especially eager to promote its agreement with Vietnam, which commits its communist government to change its laws to allow workers to freely unionize and to strike, not just for better wages and hours but also for improved working conditions and other rights.

"Without reservation, I think this is the best opportunity we've had in years to encourage deep institutional reform in Vietnam that will advance human rights, and it will only happen if T.P.P. is approved," Tom Malinowski, the assistant secretary of state for democracy, human rights and labor, said in an interview.

The organization where Mr. Malinowski formerly worked, Human Rights Watch, is among the skeptics who say Vietnam's commitments are unenforceable, especially given the track record of the United States trade office. John Sifton, the group's Asia advocacy director, said workers

should have been given the same right that corporations have under this trade agreement and others: to take complaints about a country's compliance directly to a dispute settlement panel.

"Are trade unionists who actually produce all the capital that we're talking about here allowed to bring complaints against a country for violations?" he asked. "No, of course not."

For the first time as part of a trade accord, the Pacific partners agreed in a "joint declaration" to avoid manipulating the value of their currencies for trade advantage, to report interventions in foreign exchange markets and to meet annually to hold one another accountable. The language did not persuade some Democrats — or Ford, which broke with other big businesses supporting the agreement — that it would prevent Japan and other countries from intervening to underprice their exports unfairly.

The annual currency forum "does nothing to change the status quo," Ford said in a statement, adding, "It fails to include dispute settlement mechanisms to ensure global rules prohibiting currency manipulation are enforced."

While the Obama administration played up environmental standards included in the accord as precedent-setting, the Sierra Club and the Natural Resources Defense Council were among groups that came out in opposition, calling the language weaker than in trade pacts negotiated during the George W. Bush administration.

Other advocacy groups, including Doctors Without Borders, cited language that would give pharmaceutical companies up to eight years of intellectual property protections before their data is available for production of lower-cost generic drugs.

That has put the administration in a bind: Those protections, while too long for health care advocacy groups, are shorter than the 12 years the big drug companies currently enjoy. That has angered drug company allies in Congress, especially Senator Orrin G. Hatch of Utah, the chairman of the Senate Finance Committee, which has jurisdiction over trade. Without Mr. Hatch's support, Senate approval could be impossible.

The senator was noncommittal on Thursday, promising only a "rigorous review" of the pact. Also staying neutral was the new House speaker, Representative Paul D. Ryan of Wisconsin.

"We do not rubber-stamp anything around here, let alone trade agreements," Mr. Ryan told reporters at the Capitol.

https://www.washingtonpost.com/news/wonk/wp/2015/11/06/how-the-five-most-contentious-issues-in-obamas-big-trade-deal-turned-out/

How the five most contentious issues in Obama's big trade deal turned out

While advocacy groups acknowledged some improvements from previous drafts, they're still worried that even the best provisions won't be enforced.

The Washington Post

By Lydia DePillis

November 6, 2015

The full text of the Trans Pacific Partnership became public Thursday, and there's a lot we still don't know about it. This deal isn't really about lowering tariffs, after all — much more importantly, it's the rulebook for trade across a giant region, and 2,000 pages of dense legalese can hide a lot of stuff. We don't yet have a comprehensive overview of how the agreement would change global commerce, but we did go looking for answers on a few issues that have been particular bones of contention for public interest groups, which until Thursday were mostly hypothetical, and have since become concrete. Here's what we know so far.

1. Intellectual property protection

To companies that sell creative content — from record labels to drug makers — it's very important to ensure that their intellectual property won't simply get copied and resold when they sell it abroad. Those companies won strong protections in this deal, many of them replicating U.S. laws, which were already quite accommodating.

For example: Party nations agreed to protect copyright for 70 years beyond the death of the author, and trademarks for a total period of 10 years. The agreement criminalizes the circumvention of "digital rights management" software, and requires countries to allow their law enforcement authorities to destroy infringing goods.

The agreement does commit parties to "endeavor to achieve balance" in their copyright protection regimes, giving "due consideration" to uses such as news reporting and commentary. But while acknowledging some improvement from earlier drafts, groups like Fight for the Future and the Electronic Frontier Foundation found these and other provisions — such as legal

"safe harbors" for Internet service providers that take down copyright-infringing material — to be excessively protective of copyright, at the expense of the public's ability to share and repurpose content.

The chapter also protects a newer kind of pharmaceutical called "biologics" for five to eight years. That's less than what the drug industry had sought, on the grounds that companies need a long period of exclusivity in order to cover the high cost of research; Senate Finance Committee Chairman Orrin Hatch (R-Utah) is so unhappy about it that he thinks the deal might have to be negotiated. But it's much higher than what groups advocating access to medical care wanted. For that reason, they fear the agreement "will deepen the global crisis of exorbitant drug prices here in the United States as well as abroad," said Judit Rius, of Doctors Without Borders.

2. Investor-State Dispute Settlement (ISDS)

This provision, which allows companies to sue foreign governments in an international court for violations of their rights to equal treatment under the agreement, became a flashpoint in congressional debate over the summer. Critics worried that it would chill governments' attempts to pass laws that might negatively impact the return on a corporation's investment.

The U.S. Trade Representative says the final draft made some improvements, including making the ISDS proceedings accessible to the public, allowing courts to quickly throw out frivolous claims, and ensuring that damage to a company's expected returns doesn't in and of itself constitute a violation of the agreement. It also includes a provision that protects governments' ability to regulate in the interest of health, safety, and the environment.

Lise Johnson, head of investment law and policy at the Columbia Center for Sustainable Investment, isn't impressed. She says the protections on regulating in the public interest are undermined by a clause saying those laws must be "otherwise consistent with" the rest of the investment chapter, and that even considering damage to expected investor returns as a relevant consideration in dispute settlement increases government liability relative to the rules under the North American Free Trade Agreement.

"The fundamental concern still exists that ISDS is a mechanism that generally allows disproportionate deregulatory pressure to be put on a government, and can sideline domestic concerns in developing and defining domestic law," Johnson says.

Also, while the agreement excludes tobacco products from the ISDS process, some advocates think that's only proof that it's dangerous for public health and the environment. "If a carveout exists for tobacco, why shouldn't it exist for environmental policies?" asks Ilana Solomon, director of the Sierra Club's Responsible Trade Program. "It's not sufficient to carve out one sector and leave exposure to risks in so many others."

3. Labor and human rights provisions

The agreement extends commitments made in some of the U.S.' most recent trade deals to all countries in the TPP, including a requirement that their domestic laws allow labor unions to form and freely operate, eliminate forced and child labor, and prohibit employment discrimination.

In addition, the U.S. has negotiated side agreements with Vietnam, Malaysia, and Brunei that spell out exactly which laws need to change before the TPP goes into effect in order to achieve those goals, and what resources must be committed to enforce them. There are some important advances, such as a prohibition against weakening labor protections in "special economic zones" around export facilities. The Malaysia agreement also provides that outsourcing and subcontracting — which has undermined the effectiveness of previous labor chapters — not be used to evade new requirements.

Labor and human rights groups acknowledge the language all sounds nice on paper, but they're still concerned that the provisions won't be enforced. Although this chapter is subject to the same dispute settlement mechanisms available for the rest of the chapters, and the U.S. Trade Representative's fact sheet promises that the U.S. "will not hesitate to take action against any country that fails to live up to their obligations in the labor chapter," there's no guarantee that party nations will invest time and money into policing their neighbors if there isn't a strong commercial interest in doing so. Labor rights cases in previous agreements have taken years to build and adjudicate, which is why labor unions had pressed for provisions that would give workers the same rights that investors have to sue governments themselves for failing to uphold the agreement.

"There's no stick or carrot hanging over these countries to make them show progress on trafficking or forced labor," says John Sifton, Asia advocacy director for Human Rights Watch. "It's good that Malaysia's going to fix this problematic law. But then you realize if they don't do it, nothing's going to happen."

4. Environmental provisions

Similar to the labor chapter, the environmental provisions of TPP appear an improvement upon previous trade agreements, but their effectiveness likely will depend on vigorous enforcement.

Fundamentally, the agreement requires parties to uphold pre-existing international agreements protecting endangered flora and fauna. It also provides for countries to stop subsidizing illegal fishing activity, promotes trade in environmental goods and services, and commits parties to combating the illegal wildlife trade. "It's an important tool that can be used to enhance and augment other tools to try and address the problem," U.S. Trade Representative Michael Froman told National Geographic, which has an in-depth dissection of the chapter.

But in contrast to many of the chapters taking down barriers to trade, the language in the environmental provisions is overwhelmingly vague, with lots of clauses like "shall endeavor to," "may include," and "recognize the importance" of various priorities. Even the availability of trade sanctions may not prove very effective in enforcement of such unspecific commitments. "The environment chapter is weak and fails to provide the necessary requirements and stronger penalties desperately needed to better fight poaching, protect wildlife habitat and shut down the illegal wildlife trade," said Defenders of Wildlife CEO Jamie Rappaport Clark.

In addition, environmentalists such as the World Wildlife Fund are concernedthat the text does not explicitly mention climate change. The closest it comes is a couple paragraphs committing parties to "engage in cooperative and capacity-building activities related to transitioning to a low emissions economy." Although climate change is being addressed through other fora, environmental groups are disappointed that the TPP doesn't do more to support those efforts.

5. Currency

Prior to the TPP's conclusion, labor unions, domestic manufacturers, and lawmakers from production-heavy states had demanded that the agreement prohibit countries — most importantly Japan — from devaluing their currencies in order to make their exports cheaper. The White House pushed back, saying it was addressing the problem through bilateral pressure, and that binding commitments could constrain the U.S.' control over its own money supply.

In the end, the TPP parties did sign a separate agreement promising that they wouldn't manipulate their currencies for commercial advantage, and committed to publishing information about their exchange rates and foreign reserves. So now, if a country does try to devalue its currency, at least it will be easier to find out.

http://www.npr.org/sections/thesalt/2015/11/08/455054676/how-obama-s-trrade-deal-might-change-your-dinner

How Obama's Trade Deal Might Stir Up Your Dinner

November 08, 201510:28 AM ET
Tracie McMillan

When President Obama announced the details of the Trans-Pacific Partnership on Thursday — and released them on Medium.com — there was a lot of talk about labor, the environment and manufacturing. But trade deals have a way of changing the way we eat, too.

Consider NAFTA, which boosted the availability of cheap avocados and winter tomatoes for Americans, while expanding Wal-Mart and processed food in Mexico. So now that we know the details of this new Pacific Rim trade deal, what might it mean for dinner — both in the U.S. and the 11 other nations party to the treaty? Herewith, a cheat sheet on the 2,000-plus-page deal:

Food Safety

Supporters of the TPP highlight the fact that the chapter on food safety and inspections will bring other countries up to U.S. standards, and set rapid deadlines for resolving disputes over rejected shipments. Critics say the agreement gives countries new power to challenge food safety laws, which could be framed as "barriers to trade."

"It's hard right now for inspectors to make sure everything is safe," said Karen Hansen-Kuhn, director of trade, technology and global governance for the Institute for Agriculture and Trade Policy. Currently, about2 percent of food imported to the U.S. is inspected. With more imports coming in, pressure to resolve disputes quickly, and no mandate for more regulatory staff, says Hansen-Kuhn, it's unlikely that inspections will improve.

GMOS

Since rules on genetically modified foods differ from country to country, the agreement's market access chapter includes a section on "products of biotechnology" — think engineered corn and soy — and sets up a protocol for importing countries to decide on product safety. It also establishes a working group for the topic, suggesting that there's plenty more to be worked out.

Dairy, Meat And Booze

The TPP does away with more than 18,000 tariffs in the countries party to the deal. American producers will gain access to new markets — and foreign producers will get access to ours. That includes a lot of food, much of which could become cheaper here, as low-cost imports intensify competition on price.

Dairy: After significant battle during negotiations, Canada and New Zealand agreed to modest tariff reductions on dairy, opening their markets to American milk and cheese. In return, Americans may see more New Zealand milk — apple bircher "yogurt suckies", anyone? — on shelves.

Pork: The American pork industry has become a net exporter in the last 20 years, says Nick Giordano, vice president for global government affairs at the National Pork Producers Council. The TPP will pave the way for exports to continue to grow. But America also imports a significant amount of pork. Tariff reductions on imports here could make all that foreign pork cheaper, and push prices down in the U.S. — but also potentially threaten the livelihood of hog farmers.

Beef: The agreement doesn't do much for American beef producers, says the National Farmer's Union, because Japan won a provision that would push tariffs back up if imports surged. Smaller beef producers in the U.S. say that increased competition from imports will put more farmers out of business.

Booze: California's Wine Institute has been supportive of the TPP, as have most American drink industry groups — think Kentucky bourbon — because the deal opens the massive Pacific market to their products. It also should mean lower prices here for Pacific Rim wines and spirits, like New Zealand's sauvignon blancs and Japanese shochu — though the Office of the U.S. Trade Representative notes that American wine tariffs are already pretty low.

Labeling Issues

Junk food: Prepackaged food companies can be required to list all ingredients in their foods and additives, but regulators are required to provide importer companies the same confidentiality afforded domestic ones — i.e. no requesting, say, the formula for

Coca-Cola to verify nutrition information and then sharing it with a local producer. So those food labels should still tell you whether or not you can pronounce what you're eating.

Organic Products: Countries can enforce organic standards and are encouraged to come up with a way to unify them across borders. But there's no provision about whether stricter or looser standards should prevail. According to the agreement's draft text, if a country "maintains requirements relating to the production, processing, or labeling of products as organic, it shall enforce such requirements." the U.S.T.R. was unable to provide specifics by press time.

Challenging other nations' laws: The Investor State Dispute Settlement provision — which Elizabeth Warren called "the TPP clause everyone should oppose" — gives member states the power to challenge other states' laws that impact trade and sales. This provision gives member states the power to challenge other states' laws that impact trade and sales. The clause is similar to the provision in NAFTA that overturned a Mexican tax on high-fructose corn syrup in favor of American companies' right to sell it, though the TPP does contain explicit language giving countries the right to "regulate in the public interest." No word yet from USTR on whether labeling provisions for genetic modification and country of origin would reach that standard, or who defines "public interest."

Tracie McMillan is the author of The American Way of Eating, *a* New York Times *best-seller, and a senior fellow at the Schuster Institute for Investigative Journalism at Brandeis University. You can follow her on Twitter @tmmcmillan.*

http://www.politico.com/tipsheets/morning-trade/2015/11/230-235-house-votes-for-tpp-211188

230-235 House votes for TPP

By Doug Palmer

11/10/15 10:00 AM EST

PREDICTION: 230 TO 235 HOUSE VOTES FOR TPP — That's the word out west in Seattle, where the Washington Council on International Trade held a day-long conference on Monday to explore how Boeing, Microsoft and many other Washington state exporters would benefit from the Trans-Pacific Partnership. Chief U.S. agricultural negotiator Darci Vetter briefed the group on the agricultural, labor and environmental provisions of the pact.

"If I were a betting man, I'd say if there were 218 votes in the House for TPA, I think there's probably somewhere in the range of 230 to 235 votes in the House for TPP, assuming something crazy doesn't happen," WCIT President Eric Schinfeld told POLITICO Pro.

Schinfeld said he expected the state's business community to push hard for approval of the agreement. "Is it a perfect deal? No," Schinfeld admitted. "But is it a really, really good deal for Washington state businesses? Absolutely … There is no world in which Washington state employers won't embrace the TPP … We're 100 percent behind it."

Three of Washington's ten-member House delegation - Democratic Reps. Adam Smith, Denny Heck and Jim McDermott - voted against trade promotion authority this summer. But Schinfeld said he believed it would be easier for both Democrats and Republican to support the TPP deal since it offers much more tangible benefits than the TPA bill.

IT'S TUESDAY, NOV. 10! Welcome to Morning Trade, where "something crazy" is our middle name! Like, man, I wish I was in Sheffield, England, where my son's band Sheer Mag is playing a club called The Lughole tonight. According to its Facebook page, the club is "run by the punks for the punks." Yep. That sounds just like me. Any other crazy suggestions? Send them to dpalmer@politico.com or @tradereporter, although I'm kind of lazy on Twitter.

U.S. FOOTWEAR GROUP EAGER FOR TPP TARIFF CUTS: Meanwhile, the Footwear Distributors and Retailers of America trade association, which includes companies such as Walmart, Foot Locker and Payless ShoeSource, was also busy on Monday talking up the benefits of the agreement, which it estimated could save importers $450 million in import duties in just the first year and at least $6 billion over 12 years.

Almost all of those savings would come from lower duties on footwear from Vietnam, FDRA President Matt Priest told reporters. Even without the agreement, imports from Vietnam are up 21 percent this year by volume and almost 26 percent by value. Historically, most of those imports have been athletic shoes, reflecting the presence of big U.S. shoe companies like Nike,

Adidas and ASICS in Vietnam. But now there's "also mass footwear being produced there for places like Payless, Walmart and Target," Priest said.

The industry is hoping newly installed House Ways and Means Committee Chairman Kevin Brady will become a champion for TPP and also looks for support from new House Speaker Paul Ryan, who was instrumental in passing TPA this year, Priest said.

BLUEGREEN ALLIANCE TO SOUND OFF ON PACT - Labor and environmental groups haven't been shy about criticizing the TPP agreement. But they promise to go into more detail today in a phone call with reporters "to discuss specifically how the trade deal falls short in protecting workers and the environment." United Steelworkers President Leo Gerard and Sierra Club Executive Director Michael Brune will join the call hosted by BlueGreen Alliance.

BERGSTEN BACKS TPP CURRENCY PACKAGE: Fred Bergsten, director emeritus of the Peterson Institute for International Economics, was one of the most vocal advocates of including enforceable currency provisions in the Trans-Pacific Partnership. Now, Bergsten has endorsed the TPP currency side agreement unveiled last week, even though it would not be subject to binding dispute settlement that could lead to trade sanctions.

"While not legally enforceable, the commitments in the declaration are far-reaching in ruling out competitive devaluations and persistent exchange rate misalignments. In addition, the requirements for more transparency and public disclosure of data on exchange rate policies, including currency intervention, should make the 'naming and shaming' of manipulators more effective," Bergsten said in a blog post, which can be read here: http://bit.ly/1MkVuSp

CURRENCY JOB IMPACT SAID TO BE SMALLER NOW: Meanwhile, another Peterson scholar, Joseph Gagnon, said U.S. job losses caused by currency manipulation are not as high now as they were in 2012, when he and Bergsten estimated the United States would have 1 million to 5 million more jobs if currency manipulation were eliminated.

"The effect of currency manipulation on U.S. employment is much smaller today for two reasons," Gagnon said in a separate blog post. "First, many former manipulators appear to have stopped buying foreign currency assets recently, and some are even selling them (e.g., China). Second, the US economy is getting close to full employment." To read more, click here: http://bit.ly/1NFVrox

FROMAN REQUESTS ITC STUDY ON TPP: In another sign the White House could send the Trans-Pacific Partnership to Congress next year for a vote, U.S. Trade Representative Michael Froman has formally requested the International Trade Commission to begin a study of the impact of the trade deal on U.S. economy, consumers and various industrial sectors.

The recently passed trade promotion authority law requires the White House to give details of the deal to the ITC at least 90 days before signing the TPP pact, so the trade panel can prepare an economic impact report that is due 105 days after signing. Under those guidelines, the earliest countries could sign the agreement is in early February, which would set the stage for the ITC to release its report by the second half of May.

http://www.theguardian.com/business/2015/nov/10/tpps-clauses-that-let-australia-be-sued-are-weapons-of-legal-destruction-says-lawyer

TPP's clauses that let Australia be sued are weapons of legal destruction, says lawyer

Leading arbitration lawyer says there are critical loopholes in the Trans-Pacific Partnership's investment chapter that leave Australia wide open

Jess Hill

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When the text of the Trans-Pacific Partnership was finally released last Friday morning, many supporters and detractors went straight to one of its most controversial provisions: so-called investor state dispute settlement (ISDS). This provision, opposed by Labor and the Greens in Australia, gives foreign investors the power to sue the Australian government for introducing legislation that harms their investment.

Andrew Robb, the Australian trade minister, was quick to defend the agreement from its detractors. He lauded Australia's efforts to secure significant exemptions, which he said would make it impossible for foreign corporations to sue the Australian government for enacting environmental policy. "It's a trade agreement which looks at issues relating to trade that can affect public policy in the environmental area … It does provide safeguards, the best safeguards that have ever been provided in any agreement in this regard."

Robb said critics were just the usual suspects "jumping at shadows", "peddling lines they've been peddling for years without having a decent look at what's been negotiated".
But George Kahale III is not one of the usual suspects. As chairman of the world's leading legal arbitration firm – Curtis, Mallet-Prevost, Colt & Mosle LLP – his core business is to defend governments being sued by foreign investors under ISDS. Some of his clients are included in the TPP, and he says the trade minister's critics are right: "There are significant improvements in this treaty, but they do not immunise Australia from any of these claims. If the trade minister is saying, 'We're not at risk for regulating environmental matters', then the trade minister is wrong."

Speaking via Skype from his office in New York, Kahale thumbs through the investment chapter, pointing out the critical loopholes that leave Australia wide open. "The one where all the discussion should be focused is 9.15," he says, referring to one of the "safeguards". "That's a very nice provision, which I imagine the trade minister points to as, 'We've really protected ourselves on anything of social importance.' I think that's nonsense, frankly."

Here's what 9.15 says: "Nothing in this chapter shall be construed to prevent a party from adopting, maintaining or enforcing any measure otherwise consistent with this chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives."

This entire provision is negated, says Kahale, by five words in the middle: "unless otherwise consistent with this chapter". "So at the end of the day, this provision, which really held out a lot of promise of being very protective, is actually much ado about nothing."
Kahale says many provisions in the TPP investment chapter are a vast improvement on previous trade deals. But he says all this hard work could be for nothing because of another provision. "Why would you spend so much time and effort doing a great job in negotiating narrow provisions to this treaty, when you have a 'most favoured nation' clause?"

This is where things get a little technical. Essentially, an MFN clause is tantamount to a classic wipeout move. It would enable foreign corporations from TPP states to make a claim against Australia based on the ISDS provisions in *any other trade deal* Australia has signed, no matter which country it was signed with. That means it does not matter how carefully the TPP is drafted: foreign investors can cherrypick another treaty Australia has signed, and sue the Australian government based on the provisions included in that treaty. Kahale has described MFN as "a dangerous provision to be avoided by treaty drafters whenever possible" because it can turn one bad treaty into protections "never imagined for virtually an entire world of investors".

Including an MFN clause in the TPP was a "major mistake", Kahale argues, and another reason Australia is still wide open to being sued for legislating to protect the environment.

If you are curious about what this might look like, take Germany, for example. The German government has had two claims brought against it by the same corporation, Vattenfall, a Swedish energy company.

First, Vattenfall sued the government for €1.4bn over the Hamburg provincial government's decision to place extra environmental restrictions on a coal-fired power plant the company was planning to build along the river Elbe. To settle this case, Germany had to remove the restrictions.

In 2012, Vattenfall announced it was suing the German government again, this time over its decision to phase out nuclear power after the Fukushima nuclear disaster. This was in breach of its contract to allow the company to build and operate nuclear power plants, claimed Vattenfall, which has lodged another claim against Germany, reported to be worth €4bn.

Billion-dollar claims are becoming the norm, says Kahale, citing a recent case in Ecuador, where the government now owes more than $1bn to the multinational oil company Occidental. "That is a huge number for Ecuador! From my reading of the facts, and my reading of the decision, terrible mistakes were made. The decision was 2-1 to begin with, with a very strong dissent. Now you can be sure, if they'd had a different panel of arbitrators, that could just as easily have been 2-1 the other way."

The problem with ISDS is not just that corporations can sue governments, says Kahale, but that its entire legal framework is fundamentally flawed. ISDS claims are not heard in a standing court staffed by independent judges. Instead, claims can proceed in ad hoc courtrooms – a hotel room, for example – by three arbitrators hand-picked by the parties. Unlike a traditional court of law, these arbitrators are not obliged to refer to precedent and, since their decisions are not open to appeal, they are free to rule according to their personal opinion. The arbitrators can also be

severely conflicted, says Kahale, because they may act as a judge one day and as a lawyer for a party the next.

Kahale's criticisms have been echoed by Robert French, the chief justice of Australia's high court. In a speech last July, he said: "Arbitral tribunals set up under ISDS provisions are not courts, nor are they required to act like courts, yet their decisions may include awards which significantly impact on national economies and on regulatory systems within nation states."

Kahale believes the ISDS system is so badly flawed it should be abolished, and started again from scratch. Australia, he warns, should think very carefully before signing up to it in the TPP.

"What I would say to Australians is that while the system is in the state it's in right now, signing any new treaty is a very serious mistake. You have to weigh the benefits against the burdens. Somebody at some point might be able to explain to me where all the benefits are, but I certainly haven't seen any."

http://www.centralmaine.com/2015/11/11/benton-protestor-at-it-again-opposing-trans-pacific-partnership-outside-new-balance/

Benton protester at it again, opposing Trans-Pacific Partnership outside New Balance

Kim Cormier, who was convicted with other members of Occupy Augusta in 2012, said trade deal outsources American jobs.

By Doug Harlow Staff Writer
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NORRIDGEWOCK — No more toxic trade deals that outsource American jobs.

That was the message Wednesday outside the New Balance Athletic Shoe factory in Norridgewock, where longtime activist Kim Cormier, of Benton, stood with placards opposing the Trans-Pacific Partnership.

"The Trans-Pacific Partnership is the dirtiest trade deal that no one has ever heard of," Cormier, a former Benton selectwoman and a member of the Occupy Augusta movement, said. Cormier was among those convicted of criminal trespass in 2012 for refusing police orders to leave the grounds of the governor's residence in November 2011.

"It's been negotiated in secret for about four years and Congress just got the full text recently," Cormier said. "Obama supports — it's like a death knell — like NAFTA times 10."

The Trans-Pacific Partnership is a 12-nation agreement intended to create jobs in the U.S. by increasing exports of industrial goods, agricultural products and textiles to parts of Asia and the Pacific Rim. However, the agreement also could lift some tariffs, or import duties, on goods including athletic footwear, making imported, foreign-made shoes cheaper to buy than those made in the U.S., a move that would affect New Balance directly.

Officials at Massachusetts-based New Balance, which has factories in Skowhegan, Oxford and Norridgewock, said in June they remain cautiously optimistic that the trade pact will have provisions to protect U.S. jobs after the Senate passed "fast track" legislation that makes it easier for the president to negotiate the deal.

President Barack Obama this week published an editorial essay outlining his support of the trade pact, saying "it's a trade deal that helps working families get ahead."

The president said his top priority is to grow the economy and strengthen the middle class, and the TPP does just that. He said 95 percent of potential customers of American goods live outside the U.S., and the agreement will open up new markets for made-in-America goods and services.

Exports support 11.7 million American jobs, the president said.

"Companies that sell their goods around the world tend to grow faster, hire more employees and pay higher salaries than companies that don't," he said. "On average, export-supported jobs pay up to 18 percent more than other jobs."

U.S. manufacturers oppose the trade pact because it is likely to increase imports, such as athletic shoes made in Vietnam, and therefore increase competition for American-made goods.

U.S. Commerce Secretary Penny Pritzker and U.S. Trade Representative Michael Froman plan to hold an on-the-record news conference call at 1:30 p.m. Thursday to highlight the importance of the Trans-Pacific Partnership to the economies of each of the 50 states, according to a White House news release.

Outside New Balance on Wednesday, Cormier, with fellow protester Clark Miller, waved to workers ending their shift at 3 p.m. Many workers in turn tooted their horns supporting their opposition to the trade pact.

Cormier's sign read "Flush the TPP," referring employees to a website and urging them to join the opposition by emailing or calling members of the Maine congressional delegation.

"It has great potential to shift American jobs overseas, especially manufacturing jobs," Miller said. "New Balance is a local manufacturer. They employ our friends and neighbors. It's not only New Balance; it's any manufacturing facility we have in Maine and everywhere else."

New Balance makes more than 1.6 million pairs of athletic shoes per year. The company employs about 900 workers in Maine. It is the last major footwear manufacturer still making some of its product line in the U.S.

Matt LeBretton, vice president of public affairs at New Balance corporate offices in Boston, said the company was not going to comment Wednesday. He said in June that Maine's congressional delegation — past and present — has helped make progress with the Obama administration on the company's concerns, but the company continues to reserve judgment on the agreement until the final document is released.

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http://www.bostonglobe.com/opinion/2015/11/11/jeffrey-frankel-congress-should-approve-tpp/Y5gKGNk0SLf0iIxqp404WP/story.html?s_campaign=8315

Congress should give TPP a thumbs up

By Jeffrey A. Frankel November 11, 2015

Now that the long-awaited text of the Trans-Pacific Partnership agreement has been released, Congress will have to decide whether to ratify it. It should vote thumbs up.

Many who are concerned about labor and environmental issues are fervently opposed to TPP, but they should read the text with an open mind. It seems unlikely that they did so, judging by the speed with which some nongovernmental organizations and others reacted negatively to the document within a few hours of its release last week.

Supporters and opponents alike correctly describe TPP as different from past trade agreements in that it is more about "deep integration" than about removing good old-fashioned tariffs and quotas against merchandise trade. It establishes enforceable rules among the 12 signature members in areas that have traditionally been considered the exclusive province of each country's own sovereignty, areas such as labor and the environment. Americans should appreciate that they are US-style rules.

As for labor, the deal includes cracking down on human trafficking in Malaysia and promoting union rights in Vietnam, which would allow for independent labor unions for the first time.

On the environment, TPP includes steps to protect the ocean from ship pollution; bans on national subsidies to fishing boats, especially subsidies for overfishing in such depleted species as tuna and swordfish; stronger enforcement of the Convention on International Trade in Endangered Species, or CITES. Endangered species likely to benefit from such enforcement include rhinos, elephants, tropical birds, and rare reptiles.

For the first time in a regional agreement, these environmental and labor provisions are subject to a dispute settlement process backed by the threat of economic penalties. Some NGOs believe the penalties will not be fully enforced. Only time will tell whether they are. Regardless, what is the argument for opposing the agreement? Surely a step in the right direction is better than none at all. Would opponents prefer no measures to establish union rights for Vietnamese, protect the oceans, and end subsidized depletion of fish stocks?

What alternatives do critics offer? We already have CITES, but its enforcement is too weak. Environmentalists have long said they want to put protection of endangered species into a trade agreement because it has more teeth than a multilateral environmental agreement. Now here it is. So how can an environmentalist not support TPP?

Although it is correct that TPP goes beyond previous trade agreements, it also reduces traditional tariffs and quotas. It is true that the United States will not be lowering many such import barriers under TPP, because we don't have many. But other members around the Pacific Rim have lots. TPP will lower their trade barriers and so allow new opportunities for US exports.

American exporters who will benefit include such industries as machinery, automotive products, and information and communications technology hardware. US farmers will be able to export dairy products to Canada, poultry to Vietnam, and beef, pork, soybeans, and wine to Japan. And US service firms will be able to enter fields where they have a comparative advantage such as engineering, education, software, express delivery services, and much more. These are important wins for the US economy.

Some big US corporations did not get what they were expecting out of TPP. The tobacco industry is unhappy that Australia can ban corporate logos on cigarette packs as part of its domestic antismoking campaign, unimpeded by the new Investor-State Dispute Settlement mechanism that the agreement creates. Pharmaceutical and biotech companies did not get extension to other TPP member markets of the full 12-year period of protection that they get at home for the data that they compile on new drugs (biologic medical products, in particular), but rather an effective eight years.

President Obama has now lost support for TPP among some Republican lawmakers over those issues. He will be looking to more members of his own party for votes. Democrats who were fearful of what would come out of the negotiations should now reconsider and give the final text a fresh read. They may be pleasantly surprised.

Jeffrey A. Frankel is professor of capital formation and growth at the Harvard Kennedy School.

INSTITUTE FOR AGRICULTURE AND TRADE POLICY
COMMENTARY

The TPP SPS chapter: not a "model for the rest of the world"

About Steve Suppan

Steve Suppan has been a policy analyst at IATP since 1994. Much of Steve's work is to explain U.S. agriculture, trade and food safety policy to foreign governments and nongovernmental organizations, especially farmer organizations. Steve has also represented IATP at meetings of the Codex Alimentarius Commission, the UN Commission on Sustainable Development, and the UN Food and Agriculture Organization.

About IATP

Institute for Agriculture and Trade Policy works locally and globally at the intersection of policy and practice to ensure fair and sustainable food, farm and trade systems. IATP is headquartered in Minneapolis, Minnesota with an office in Washington D.C..

KEY FINDINGS

- "Trade in products of modern biotechnology" has been located in Chapter 2, "National Treatment and Access for Market Goods," so that controversies over GMOs or synthetic biology would
- be judged based on criteria of market access rather than risk assessments of their safety for human health or the environment.
- Provisions establishing an SPS consultative committee led by trade officials will further weaken and possibly conflict with global standards setting bodies on food and plant safety.
- Weakness in the U.S. regulatory agencies to provide the "appropriate level of sanitary and phytosanitary protection" required in the Chapter will be exacerbated by the confidentiality requirements that already hobble U.S. scientific peer review of food and agricultural products.

Overview

MINNEAPOLIS, NOVEMBER 12, 2015 — Proponents of the Trans-Pacific Partnership (TPP) Agreement, and particularly the White House, have insisted that the TPP is a "high standards" agreement. The Sanitary and Phytosanitary (SPS) "measures" affecting food safety and animal and plant health of agricultural trade are part of these "high standards." Indeed, the TPP and the Transatlantic Trade and Investment Partnership (TTIP) are characterized as a "model for the rest of the world" by U.S. Trade Representative Michael Froman.[1] Far beyond any changes in tariffs, the most important U.S. export in the TPP is the making and enforcement of rules by which all TPP members, and any other countries that wish to export to the United States, must abide.

If the U.S. regulatory system and its scientific underpinnings had not been captured by the regulated industries,[2] it might be credible to claim that repeating the mantra of "high standards" might help lead to improvements in public and environmental

health and worker safety. TPP proponent support for Congressional regulatory "reform" and lawsuits for "regulatory overreach"[3] indicates to us that what is being exported is a framework for regulatory capture that will be legitimated by reference to binding trade commitments and, in the case of the TPP SPS chapter, by "science."

The TPP chapter on SPS measures is a mere 18 pages of the total 6,194.[4] Following the Obama administration's November 5 release of the TPP text[5], the U.S. Congress and the public have 90 calendar days to review the text before President Barrack Obama can sign the TPP. Then the clock begins to tick on implementing legislation to accept or reject the 6,194 pages, perhaps as early as May 2016.[6] No amendments are allowed to U.S. trade agreements, according to the Trade Promotion Authority (TPA) that Congress granted to the Obama administration on June 29.[7]

What follows is a critical interpretation of parts of the SPS chapter in the context of how the U.S. regulatory structure operates. Like the confidential USTR-industry dialogue and the intergovernmental negotiations that produced the chapter, the text alone reveals very little about how governments will provide the "appropriate level of sanitary or phytosanitary protection" promised in the World Trade Organization SPS Agreement (Article 5.3). The TPP chapter promises to "build upon and reinforce" (Article 7.2b) that Agreement and the thousands of pages of SPS texts and numerical standards of international organizations referenced in the appendices to the WTO SPS Agreement. But textual explication alone reveals nothing of the capacity of U.S. regulatory agencies to implement and enforce the text to protect public, animal, plant and environmental health and life, per their obligations under U.S. law.

In addition, the negotiators decided to locate provisions on "Trade in Products of Modern Biotechnology" for agricultural trade (Article 2.29) in Chapter 2, "National Treatment and Market Access for Goods," apparently believing that "modern biotechnology" does not pose SPS issues about which there might be controversy. Since the text neglects to reference the relationship of Article 2.29 to the SPS chapter, we are obliged to explain the reference in this short analysis.

The "economic feasibility" of protecting consumers and plant and animal health and life

Although the *Washington Post* has made the TPP keyword searchable[8], there are almost no controversial SPS issues in the chapter—or anywhere else in the agreement—that a keyword search reveals. *Growth hormones, food and agricultural nanotechnology, endocrine disrupting chemicals, antimicrobial resistance to anti-biotics, plant synthetic biology* and so many others. Nothing about them—among other controversial food safety, and animal, plant and environmental health issues or technologies—appears in the SPS chapter. Instead, the chapter describes administrative procedures and consultative arrangements for resolving SPS "issues" insofar as they might impede agricultural trade. "Science," or "scientific principles" or "science-based" rules (Article 7.9), provided they are "economically feasible," are to transcend any one controversy over any one food or agricultural technology or over any one SPS rule.

However, it is crucial to understand how scientific evidence is subordinated and occulted as Confidential Business Information to realizing trade objectives through the regulatory process. Under the TPP rules and trade policy more generally, what trade and regulatory officials deem to be "appropriate" levels of protection are judged on whether SPS measures to provide that protection are potential or "disguised" trade barriers. Such judgments require a use and understanding of "science" that is filtered through confidentiality requirements, which are antithetical to the peer review that scientific consensus methodologically requires. TPP SPS Committee consultations about the science underlying SPS measures "shall be kept confidential unless the consulting Parties agree otherwise" (Article 7.17.6). The applicability of "science" to SPS measures is further qualified according to whether trade and regulatory officials decide the SPS measures are economically feasible.

The "economic feasibility" of the science-based SPS measures to provide the appropriate level of protection is formulated in this provision: "Each Party shall . . . select a risk management option that is not more trade restrictive than necessary to achieve the sanitary or phytosanitary objective, taking into account technical and economic feasibility" (Article 7.6c). "Economic feasibility" provides TPP members with a crucial loophole against providing SPS measures that are science-based.

For example, since the Congress refuses to fund the Food Safety Modernization Act (FSMA), including its import provisions, inadequately funded and staffed SPS measures of the FSMA are not "economically feasible" to implement and enforce. Because the food and agribusiness industry does not want to pay the fees to expedite trade under the FSMA, they appeal to the presidential Office of Management and Budget to do a "cost-benefit" analysis to delay levying of fees.[9] In the meantime, "science" cools its heels, waiting for lawyers and economists to decide which SPS measures are "necessary" and to what extent, according to cost-benefit analysis, to provide the appropriate level of protection.[10] Cost benefit analysis routinely underestimates the benefits of regulation and overstates the costs. [11]

What the chapter says it aims to do

The chief objective of the chapter is to "protect human, animal and plant life or health in the territories of the Parties while facilitating and expanding trade by a variety of means to seek to address and resolve sanitary and phytosanitary issues" (Article 7.2a). Contrast this objective with the objective of the principles of risk analysis of the Codex Alimentarius, to which the SPS chapter is, in theory at least, legally bound:

> While recognizing the dual purposes of the Codex Alimentarius are protecting the health of consumers and ensuring fair practices in the food trade, Codex decisions and recommendations on risk management should have as their primary objective the protection of the health of consumers. Unjustified differences in the level of consumer health protection to address similar risks in different situations should be avoided.[12]

While the Codex advises its member governments to avoid "unjustified differences in the level of consumer health protection," the primary emphasis in the Codex principles of risk analysis remains consumer health protection, not trade facilitation or expansion.

However, the objective of the TPP chapter is not to improve the "protection of human, animal and plant life or health" itself. Rather, such protection only applies insofar as SPS measures facilitate and expands cross-border trade of food and agricultural goods. So the issues to be resolved are not how best to protect, but how to eliminate or modify any SPS measures (laws, rule-making processes, rules, implementation and enforcement practices, even judicial rulings) that impede food and agricultural trade, if those measures cannot be justified in terms of the trade negotiators' peculiar understanding and use of "science."

"Scientific principles" in the TPP: a practical U.S. regulatory application

Even when the use of scientific principles in determining appropriate standards is discussed in the TPP, the integrity of the science behind the standards is subordinated to the goal of facilitating and expanding trade. The TPP SPS chapter would have citizens, who have been denied access for more than five years to the texts negotiated between the USTR, its industry advisors and foreign trade officials, rely on "scientific principles" and "risk analysis" to protect public and environmental health from whatever application of whichever technology that has products being traded. So, for example, "The Parties recognize the importance of ensuring that their respective sanitary and phytosanitary measures are based on scientific principles" (Article 7.9.1) But there is no definition of "scientific principles." And to judge by current U.S. regulatory practice, the "science" referred to in the text could be the kind of the unpublished corporate science studies that frequently justify U.S. rulemaking and commercial approvals and yet remain "Confidential Business Information."[13]

For example, in June, the U.S. Environmental Protection Agency (EPA) relied on 27 studies by Monsanto, most of them unpublished, to renew the commercial approval for Monsanto's RoundUp, the trademark for glyphosate.[14] There is a long history of U.S. regulatory approval of genetically modified organisms and their accompanying pesticides, using the applicant's unpublished research or a summary thereof without test data and experimental design.[15] Some of the Monsanto studies on glyphosate reviewed by the EPA were from the 1970s, before scientists discovered that glyphosate was an endocrine disrupting chemical that damaged normal human development. (Five independently funded studies were also considered.) In July, the International Agency for Research on Cancer (IARC) released its full report that characterized glyphosate as a "probable human carcinogen,"[16] after having vigorously debated whether the globally used herbicide should be classified as a "known human carcinogen."[17]

The EPA, using Monsanto's unpublished "science" authorized a continuation of U.S. commercialization, and yet just in time to ignore the full IARC findings and without referring to the preliminary IARC summary released in March. The EPA will be able to claim, without fear of a TPP legal challenge, that its risk assessment was based on "scientific principles," whatever they are. But the EPA is far from the only agency battered into submission by members of Congress at the behest of industry.[18] Indeed, White House risk managers will ignore scientific evidence in risk assessments, if industry concerns about "economic feasibility" of both SPS and non-SPS regulatory measures are brought to their attention with sufficient persistence.[19]

Agricultural biotechnology in the TPP

Perhaps because of the negative international publicity over Monsanto's genetically modified seeds, RoundUp and other EPA approved pesticides,[20] the USTR negotiators decided not to include an annex to the SPS chapter on the biotechnology plant varieties that are modified to withstand multiple applications of RoundUp and other herbicides. Instead, "Modern biotechnology" appears in the "National Treatment and Market Access for Goods" chapter, with a definition that limits the application of "modern biotechnology" to agricultural goods (Article 2.21). Article 2.29, "Trade in Products of Modern Biotechnology," is displaced from the SPS chapter, as if there were no SPS issues involved in the genetic modifications of agricultural crops, whether or not they are modified to withstand ever more toxic pesticides.

However, the terms of Article 2.29 indicate that "modern biotechnology" should be logically located within the SPS chapter, e.g. the reference to the Annex 3 of the "Codex Guideline for the Conduct of Food Safety Assessment of Foods Derived from Recombinant-DNA Plants (CAC/GL 45-2003)" (Article 2.29.6b)iii and footnote 13). This reference concerns how TPP parties are to prevent the import of the undefined, "inadvertent low level presence" of GMOs unauthorized for import. Logically, TPP's SPS "competent authorities" would agree to the definitions, sampling and testing methods and numerical amount of "inadvertent low level presence" during negotiations for bilateral SPS "equivalency" negotiations among TPP members (Article 7.8).

For example, the USDA's grain inspection service would inform the "competent authorities" for grain and oilseed imports that the Grain Inspection and Stockyards and Packers Administration (GIPSA)

> does not assess the effectiveness of different detection methods for biotechnology-derived traits nor does it determine the characteristics of fortified samples to a particular degree of accuracy, such as what is performed in the preparation of certified reference materials.[21]

Importing authorities would have to decide whether the GIPSA standards for detecting unauthorized GMOs for import would be adequate to provide the appropriate level of protection for their citizens.

But by putting "modern biotechnology" within the chapter on "National Treatment and Market Access for Goods," the TPP negotiators are able to discuss issues about "trade in products of modern biotechnology" without any reference to the SPS chapter requirements. Instead, any SPS concerns about these products will be discussed in the "Committee on Agriculture Trade (Working Group)," which has no requirement for experts to discuss or demonstrate risk assessment or risk analysis for GMOs. What is particularly remarkable about this Trans-Pacific regulatory evasion is that Article 2.29 will apply to products derived from synthetic biology, the next generation of "trade in products of modern biotechnology." The techniques of synthetic biology are of an order of magnitude more complex than the transgenic plant varieties engineered to withstand multiple applications of a pesticide.

For example, the plant synthetic biology varieties that have received USDA field trial permits do not yet have a reliable safeguard against Horizontal Gene Transfer of DNA or RNA sequences foreign to agricultural or wild plants. According to one research team

> Synthetic biology and other new genetic engineering techniques will likely lead to an increase in the number of genetically engineered plants that will not be subject to review by USDA [U.S. Department of Agriculture], potentially resulting in the cultivation of genetically engineered plants for field trials and commercial production without prior regulatory review for possible environmental or safety concerns.[22]

Three scientific committees reported to the European Commission in early 2015 that

> [c]urrently available safety locks used in genetic engineering such as genetic safeguards (e.g. auxotrophy and kill switches) are not yet sufficiently reliable for SynBio. Notably, SynBio approaches that provide additional safety levels, such as the genetic firewalls, may improve containment compared with classical genetic engineering. However, no single technology solves all biosafety risks and many new approaches will be necessary.[23]

TPP negotiators, such as former Biotechnology Industry Organization vice president Sharon Bomer Lauritsen, likely do not care that NGOs or academics point out the logical incoherency of excluding "modern biotechnology" from the purview of the SPS chapter and hence from that of the WTO SPS Agreement. No matter how logically inconsistent it is to put "modern biotechnology" and its synthetic biology successors outside of the SPS chapter, doing so means that trade disputes over the products of "modern biotechnology" will have to be filed with reference to the non-scientific framework of the "National Treatment and Market Access for Goods" chapter.

The most disingenuous provision within Article 2.29 is this: "Nothing in this Article shall require a Party to adopt or modify its laws, regulations, and policies for the control of products of modern biotechnology within its territory." (Article 2.29.3) This provision will certainly be invoked ad nauseam to try to make "modern biotechnology" less controversial among the TPP countries' civil society. However, the passage should come with a footnote, perhaps something such as:

> Expect a visit from the U.S. State Department officer for biotechnology and/or the Foreign Agricultural Service representative in your Embassy to discuss how you can adopt our regulations or modify your laws and regulations to better expedite the import of our agricultural products of modern biotechnology. If you refuse the visit, either expect to look for a new job or expect market entry problems for your country's exports.

The likelihood of the realization of this footnote is documented in about 900 Wiki-leaked State Department cables from 2005-2009 analyzed by Food and Water Watch.[24] In these cables, the power of the State Department to cause "voluntary" changes in laws and import regulations to increase trade in agricultural biotechnology products is on full display.

In the current low price environment for agricultural commodities, Monsanto and other biotechnology companies are laying off thousands of employees, cutting research and development budgets and buying back the shares of their equity stock to keep share prices high enough to enable share price-based bonuses.[25] It is only a slight exaggeration to say that without U.S. government intervention share prices would be tanking.

The genetic resources that modern biotechnology modify receive a mention only in the TPP chapter on Exceptions. "Article 29.8: Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources Subject to each Party's international obligations, each Party may establish appropriate measures to respect, preserve and promote traditional knowledge and traditional cultural expressions." It is fitting that the TPP ignore the genetic resource base of modern biotechnology, since the U.S., together with the EU and Japan, have resisted all efforts, to amend the WTO intellectual property agreement on genetic resources and traditional knowledge, to require patent holders of modern biotechnology, both medical and agricultural to disclose the origin of the genetic resources used in their products.[26]

Building on the WTO SPS Agreement or building a TPP Caucus to lobby the WTO SPS Committee?

The Foreign Agriculture Service of the U.S. Department of Agriculture reviews hundreds of foreign SPS measures to determine whether and how they might be inhibiting an expansion of U.S. agricultural exports.[27] In 2012, the World Trade Organization's SPS Committee reported 16 "SPS-specific trade concerns," i.e. SPS measures enacted by WTO members that appeared to violate the WTO SPS agreement.[28] U.S. food and agriculture exporters and importers are unhappy that the putative SPS violations they report to U.S. officials are not resolved more quickly in the WTO process. As a result, the agribusiness lobby has advocated a "WTO plus" SPS agreement that would emulate the U.S. regulatory process, in which their products are invariably approved for commerce.[29]

The "appropriate level of sanitary and phytosanitary protection" in the WTO SPS agreement, adopted in the TPP (Article 7.1 et passim) will be determined by the "competent authorities" in U.S. regulatory agencies. However, in the TPP, the "primary representative" (Article 7.1.2) for the implementation of TPP will not be the "competent authorities," much less the scientists, but in the case of the United States, the Office of U.S. Trade Representative, which has no scientific competence.

The TPP SPS Chapter, purported to "reinforce and build on the SPS Agreement," (Article 7.2b) in fact, may well detract from the use of the WTO SPS Committee to inform WTO members about SPS issues that may result in trade barriers. TPP members will be obliged to participate in the TPP Committee on Sanitary and Phytosanitary Measures "to improve the Parties' understanding of sanitary and phytosanitary issues that relate to the implementation of the [WTO] SPS Agreement and this Chapter" (Article 7.5.3a). The TPP SPS Committee may also develop positions for "meetings held under the auspices of the Codex Alimentarius Commission, the World Organisation for Animal Health and the International Plant Protection Convention" (Article 7.5.3g). This latter provision is ostensibly optional ("may consult") but in a Chapter with so many "shalls" and opportunities for cooperation, it would be a brave, even foolhardy, "competent authority" who did not obey the orders of the TPP "primary representative" (i.e. the trade minister) to not consult.

The status of the WTO SPS Committee and the WTO recognized international standards setting organizations (which are already subject to considerable political pressure by commercial interests) is further weakened in the TPP SPS chapter. The TPP Parties will merely "take into account" the "standards, guidelines and recommendations" of the World Animal Health Organization and International Plant Protection Convention concerning plant and agricultural animal diseases in the TPP territories. (Article 7.7.2) "The [TPP] Parties may cooperate on the recognition of pest- or disease-free areas" (Article 7.7.3). Or they may not, if doing so would harms the trade or investment of a U.S. firm. The relationship of the TPP SPS Chapter to the WTO SPS Agreement and to the international organizations referenced in the Agreement is opportunistic, like that of a parasite.

Dispute Settlement in the TPP SPS Chapter

U.S. agribusiness lobbyists have long complained to their Members of Congress that the WTO dispute settlement system was too slow and does not "fully enforce" SPS related rulings. Members of Congress, in turn, pressed the U.S. Trade Representative for a TTP (and TTIP) SPS chapter that would be "fully enforceable."[30] Did they get their wish fulfilled?

The mention of the TPP state to state dispute settlement chapter is fairly short in the SPS chapter, just two paragraphs. TPP parties to an SPS disagreement are supposed to first resolve their differences through Cooperative Technical Consultations (CTC) with "the appropriate involvement of relevant trade and regulatory agencies" (Article 7.17.5). A note from U.S. horticulture industry advisors to the USTR concerning the U.S.-Chile Free Trade Agreement gives some insight into how the CTC might use "science" to resolve horticulture SPS disputes:

> U.S. negotiators must recognize this factor [the need for U.S. export access to Chilean markets] and seek SPS agreements that are flexible enough to ensure phytosanitary mitigation while at the same time being commercially sound. Simply basing SPS agreements on sound science is not enough.[31]

"Flexibility" will presumably include resolving disputes by "various means" that are not simply invocations of "science," though confidential to be sure.

In keeping with the spirit of Confidential Business Information, "All communications between the course of CTC, as well as all documents generated for the CTC, shall be kept confidential unless the consulting Parties agree otherwise" (Article 7.17.6). Thus the "science" to justify an SPS measure, even if it bears directly on public, animal, plant or environmental health, will remain disclosed only to the "relevant trade and regulatory officials." The disputing Parties cannot proceed to use of the dispute settlement chapter without first having attempt to resolve their differences through CTC meetings (Article 7.17.8). Thus far, it is difficult to see how this dispute settlement procedure is different from that of the application of WTO dispute settlement to SPS disputes.

However, the SPS chapter exempts certain paragraphs and subparagraphs from application of the dispute settlement process (Article 7.18), e.g. as outlined in footnotes two, concerning equivalence of SPS measures and four, concerning risk analysis. There is no clear logic as to why these paragraphs, and not others, are not subject to dispute settlement. Nor is it clear as to whether SPS measures could be subject to the Investor State Dispute Settlement (ISDS) chapter, given the extremely broad definition of what comprises an "investment" in the Investment Chapter.[32]

Parties to a TPP dispute get to choose the forum in which they may settle the dispute, just as they would for an ISDS settlement. (Article 28.4) Perhaps U.S. agribusiness lobbyists and Members of Congress will have their wish for "fully enforceable" fulfilled on the assumption that the World Bank forum, just down the road, will be more attentive to their concerns than a WTO dispute panel in Geneva.

However, because the TPP does include an appellate body (as does the WTO dispute settlement process), to double check that the dispute panelists have correctly interpreted the dispute settlement procedures, the TPP process will be quicker—just 15 months from the panel hearing to its final report (Article 28.18). Furthermore, compensation under the TPP dispute settlement chapter will be more rapid. (Article 28.19 and 28.20). No more malingering or legislative refusal to pay WTO authorized retaliation, as in the U.S. Upland Cotton Subsidies case![33] So if the dispute settlement cases are decided in favor of U.S. agribusiness and compensation is paid in full and/or offending SPS measures are modified or eliminated, perhaps the agribusiness lobby will consider SPS measures, finally, to be "fully enforceable."

Conclusion

The complexity of the SPS text, as well as its relationship to other provisions in the agreement on Regulatory Cooperation, Investment and Dispute Settlement, to name just a few issues, will require additional analysis. For example, the status of "import checks" and inspection and testing is not treated here, though I have discussed inspection and testing bans proposed by the European Commission in the TTIP SPS chapter.[34] The weakened capacity of the Food and Drug Administration to inspect foreign food facilities, in lieu of port of entry import inspection and testing,[35] surely calls into question the contribution of "import checks" to the "appropriate level of sanitary and phytosanitary measures."

Likewise the "transparency" measures and the relation of the SPS chapter to the Regulatory Cooperation and Technical Barriers to Trade chapters certainly will require additional study. Will "transparency" requirements burden smaller governments with endless industry demands for comments to revise and delay regulations until regulations are so riddled with exemptions, exclusions, waivers and postponements as to be ineffective? These and other issues in the TPP deserve a fuller public debate in the next few weeks, before President Obama can sign what he hopes will be a "legacy making" trade deal that is largely about removing regulatory "irritants" to trade.

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Froman Seeks ITC TPP Analysis As Soon As Possible In Request Letter

Inside US Trade, Posted: November 12, 2015

U.S. Trade Representative Michael Froman last week urged the International Trade Commission to complete as soon as possible its assessment of the impact of the Trans-Pacific Partnership (TPP) on the U.S. economy mandated under the 2015 fast-track law, which requires the ITC to deliver its report no later than 105 days after the deal is signed.

In a Nov. 5 letter to the commission requesting the study, Froman said he would "greatly appreciate it if the Commission could issue its report as soon as possible." He also said he had instructed his staff to be available to answer questions and provide additional information to the ITC as needed.

If the ITC takes the full time, it would deliver its analysis in mid-May. This is because signing can take place no earlier than Feb. 3, 2016, which is 90 days after President Obama notified Congress on Nov. 5 of his intent to sign the TPP. The fast-track law mandates this 90-day layover period for Congress to review an agreement before the president signs it.

Froman had previously urged the ITC to begin its economic assessment even before TPP was concluded (*Inside U.S. Trade*, Feb. 13).

However, the ITC has not committed to finishing its analysis in fewer than the 105 days it has under the law, which has led to some private-sector sources to speculate that it may well take the full allotted time (*Inside U.S. Trade*, Nov. 6). The ITC's analysis of a trade agreement's impact on the U.S. economy traditionally accompanies the implementing bill when it is sent to Congress.

Meanwhile, the president's Nov. 5 notification to Congress of his intent to sign the TPP also kicked off a 30-day clock for U.S. trade advisory committees to provide their reports on the TPP agreement. This means the deadline for the committees to deliver the reports is Dec. 5.

Several trade advisory committees already held in-person meetings prior to the text release that are a formal step under U.S. law for their reports to be official. Members can submit comments electronically to the committee chair, who is responsible for producing a draft report.

If the in-person meeting has already taken place, the committees do not have to meet again to approve the report, and can instead do so over the phone. If all committee members do not agree with the report, they can refrain from signing it and may produce a dissenting report.

http://ttip2015.eu/blog-detail/blog/TTIP%20US%20State%20legislators.html

12 November 2015

US State legislators 'shocked' by EU trade deal implications

Rules envisioned under TTIP could give EU officials power to interfere in US State affairs

Simon McKeagney, Editor

When State Senator Virginia Lyons thought it would be wise to develop legislation to reduce harmful electronics waste in her state of Vermont, the last complaint she expected to receive was from the People's Republic of China. The Chinese it seemed, had issue with how new E-Waste reduction measures for Vermont would impact their sales of electronics to the USA.

"I was taken aback" said Senator Lyons at a meeting of the Vermont Commission on International Trade and State Sovereignty. "Why was an issue like better recycling causing such a fuss? They pushed hard on us to change our minds. In the end we implemented the changes, and I'm pretty sure the Chinese are still selling electronics."

This small anecdote might sound innocuous to some, but it raises compelling questions about the intrusion of other countries into legislators work at state-level. On health and environmental issues, Vermont is known for setting the bar high, and is well versed in the pushback that comes from the powers that be. They were the first state to ban Fracking in 2012, and have worked hard to protect waterway systems and develop coherent environmental and consumer protection policies. This year the state is being sued by a consortium of agri-industry giants lead by the Grocery Manufacturers of America, for introducing labeling requirements for genetically engineered (GE) foodstuffs.

Many of the same companies involved in the legal action are also advocating for a strong "comprehensive" trade agreement between the EU and US, a discussion on which brought together the Vermont Commission on International Trade and State Sovereignty, the Vermont Council on World Affairs, the National Caucus of Environmental Legislators (NCEL) and members of the European Parliament to Burlington VT, on November 6.

While TTIP has been overshadowed in the US by its sister agreement, the recently concluded Trans-Pacific Partnership (TPP), an all out war of words is raging across the Atlantic, as European citizens grapple with scope and manner by which the negotiations have been orchestrated. In October, a petition advocating against TTIP reached 3.2 million signatures, and polling shows a majority against it in countries like Austria, Luxembourg and Germany.

"The main issue driving the anti-TTIP sentiment in Europe is the power of corporations," explained Reinhard Bütikofer, Member of the European Parliament from Germany. "When some

of the most powerful business lobbyists have been involved in co-writing the deal to suit themselves, it doesn't bode well for ordinary people or the environment, whether in Europe or the US."

Freedom of information requests revealed in 2013 that 93% of the preliminary meetings the EU Commission had on TTIP were held with corporate lobby groups, while in the US, the trade advisory system is dominated by industry pressure groups, accounting for 85% of seats.

Interfering with democracy

With the big players in driving-seat, social and environmental considerations have been viewed more as "burdensome" trade irritants that should be stymied, rather than important societal choices. Nowhere is this more apparent in the "regulatory cooperation" chapter proposed in TTIP.

"This is a completely new thing, and state legislators need to watch out." explained Sharon Treat, former state-legislator from Maine and member of the Maine Citizen Trade Policy Commission. "It's not even in the TPP, and could have a real effect on how US states make decisions."

In effect, Treat explains, the deal sees the creation of a new oversight body, that would act as an early-warning system for both sides when states or countries plan to introduce new laws or regulations. This body will assess the proposals for their trade impact, through a limited perspective that would demand the "least trade restrictive" measures are finally adopted, regardless of the intention of the proposal.

Effectively, instead of getting a call from the Chinese, TTIP will require US states to call ahead to Europe to check they can proceed with any new laws. That means more time, and more avenues for big business to frustrate and derail progressive public policy:

"When you're crafting a new law on an important issue, such reducing toxics in food packaging as an example, you don't go first to those forces you know will organize to oppose it, like a chemical company and say 'hey look- this is what we're working on.' That's just common sense. So why would we allow that in a trade deal?"

Regulatory Chill

"TTIP might be negotiated in Washington, but all states will be party to the agreement," says Treat. "The regulatory cooperation chapter could apply to most if not all of US state laws and regulations, even if they're not directly related to trade. The potential for companies to slow down or stop progressive policy making in the US is huge."

Treat also explained the interests involved behind the scenes. Industry associations like the US Council on International Business (USCIB) and the American Chamber of Commerce to the US (Amcham) want regulatory cooperation as a means of preventing regulations by US states. And the pressure is two-sided. In Europe, EU politicians are already feeling it:

"TTIP is a huge prize for big corporations, and they know it." Bart Staes, Belgium MEP said "We in the European Parliament have seen first hand the pressure TTIP has created to change our laws, especially when it comes to GMOs. The US side are working extremely hard to press us to allow greater access of GM crops, based on requests by agri-industry and despite many EU countries being dead set against them."

Change 'Buy America' to 'Buy Transatlantic'?

The EU also wants greater state-level access for procurement in the US, which could mean substantially altering US state's procurement criteria. Whether supporting small companies, or sourcing workers and produce locally and sustainably, EU companies have an interest in undermining those rules for great access to state markets, from wholes cities, to hospitals and universities.

"Local purchasing programs, such as farm to school programs, source healthy locally sourced food for 23.5 million students in the US." Karen Hansen-Kuhn, Director of Trade at the Institute for Agriculture and Trade Policy explained. "Bodies like the Los Angeles Food Policy Council, and 200 other similar bodies across the US, are setting the bar high when it comes to good food purchasing programs. We don't want these initiatives undermined by the new criteria set in trade negotiations like TTIP."

Hansen-Kuhn noted the comments of former French minister for Foreign Trade Nicole Briqc, who said in 2013, "Why not replace "Buy American" which penalizes our companies with "Buy transatlantic" which reflects the depth of our mutual commitment?"

But is it a given that US states would be willing to compromise their local commitments to suit the Europeans?

"Buy America might have some problems, but in my mind, if you're using public money, it should be for the public good, like local employment" says Karen Hansen-Kuhn. "Fewer and fewer states are willing to sign on to binding procurement provisions that appear in trade deals. It's not by coincidence. Who would decide if a state university or public hospital is bound under the procurement criteria in TTIP?"

Transatlantic dialogue

New Hampshire State Representative Bob Backus said he was grateful for the attendance of representatives from the European Parliament, and "shocked" by implications to some of the proposals under the EU-US trade deal.

MEPs Bart Staes and Reinhard Butikofer noted that legislators from US states and EU member countries shared many concerns, and needed to work closer together to expose the threats of TTIP and the corporate interests pushing these agreements.

Reuters

As Obama heads to Malaysia, human trafficking stance questioned

KUALA LUMPUR/WASHINGTON | BY KANUPRIYA KAPOOR, JASON SZEP AND MATT SPETALNICK

November 19, 2015

Inus bin Abul Baser, an 18-year-old from Myanmar's persecuted Rohingya Muslim minority, believed he'd escaped the worst when he managed to buy his freedom from human traffickers in Thailand and enter Malaysia in search of security and work.

But within weeks, he was cooped up in a filthy, overcrowded detention center near Kuala Lumpur's international airport, squatting or sleeping on the floor in a hall with scores of other men. During his fourth month, wardens ordered them not to move or talk, he says, and beat them with belts if they did.

"There was no rest. You couldn't sit or lie down without touching someone else," he said, pointing to a welt on his forearm that he says he received when a guard beat him for arguing with another detainee over space. Reuters was unable to independently confirm his allegations. Interviews with six former detainees revealed similar treatment.

U.S. President Barack Obama's visit to Malaysia on Friday for a Southeast Asia leaders' summit comes amid allegations by U.S. lawmakers and rights groups that his administration ignored Malaysia's abuse of trafficking victims such as Baser to secure the country's help sealing a high-profile trade deal and strengthen ties to offset China's growing political clout.

As Reuters previously reported, a U.S. State Department office set up by Congress to independently grade global efforts to fight human trafficking had recommended keeping Malaysia on the bottom grade in its annual Trafficking in Persons Report this year. That status, known as Tier 3, is reserved for countries with the worst trafficking records.

But senior officials instead in July upgraded Malaysia to the Tier 2 Watch List, freeing the country from potential sanctions and international condemnation, and paving the way for the ambitious 12-nation Trans-Pacific Partnership trade agreement. If Malaysia remained a Tier 3 country, the Obama administration would have had to exclude it from the deal under the fast-track negotiating authority it had from Congress, potentially torpedoing the agreement.

Starkly worded criticism of Malaysia was excised from the final report, according to internal documents seen by Reuters that have not been previously made public.

Malaysian government officials did not respond to requests for comment on the country's trafficking record or detention centers such as the one where Baser stayed, but Deputy Prime Minister Ahmad Zahid Hamidi told a news conference on Thursday that conditions in the facilities had improved.

Secretary of State John Kerry denied on Aug. 6 that there was any link between Malaysia's human trafficking ranking and the trade deal, which was concluded in October.

"FUNDAMENTALLY FLAWED"

At the heart of concerns by the State Department's human trafficking experts are Malaysia's immigration detention facilities where people who had already suffered at the hands of human smugglers and traffickers faced more problems and abuse, according to rights groups and Reuters interviews with multiple former detainees.

"It did not reform its fundamentally flawed victim protection regime," the State Department's human trafficking experts wrote in their recommendation to keep Malaysia on Tier 3, according to internal documents reviewed by Reuters.

"Proposals to reform the grossly inadequate victim protection regime did not result in concrete improvements despite sustained high-level USG (U.S. government) engagement," they added. "The GOM (government of Malaysia) punished trafficking victims by forcibly detaining them in government facilities."

The analysts were overruled by senior American diplomats at the State Department, according to sources with direct knowledge of how the report was compiled. By the time the report was published, much of the tougher criticism of Malaysia's detention facilities was removed. The final text was softened to, "the government increased efforts to improve Malaysia's victim protection system."

The State Department declined to comment on what it described as "alleged internal documents that purport to be part of the deliberative process." It also denied that the country-by-country ratings in the latest report had been politicized.

In response to questions on Malaysia's ranking, a State Department official said Malaysia's current ranking means that Malaysia does not fully comply with minimum standards as defined by U.S. Congress but "is making significant efforts to do so".

"It is a ranking that sends a strong message to Malaysia that they must continue to make significant efforts to combat human trafficking," said the official, who requested anonymity. Washington remains "concerned about a disproportionately low conviction rate for trafficking crimes," the official said.

After Reuters revealed on July 8 the State Department's plans to upgrade Malaysia, more than 160 U.S. lawmakers wrote to Kerry urging him to keep the country on the list of worst offenders and saying any upgrade due to external factors such as trade would undermine the Trafficking in Persons report's credibility.

But the significance of Washington's relationship with Malaysia goes well beyond trade at a time of regional tensions over China's territorial claims in the South China Sea. Malaysia, a Muslim majority country of 30 million people with an ethnic Chinese minority, is influential in a region

where Washington needs to court allies to counter Beijing's expanding diplomatic and military muscle.

Malaysia is especially important this year as chair of the 10-nation Association of South East Asian Nations.

"I SAW PEOPLE AROUND ME DYING"

Pongram Konglang, 30, one of an estimated two million undocumented foreign workers in Malaysia, says he witnessed people dying in overcrowded immigration facilities while detained for two years.

A Christian from Myanmar's northern Kachin State, he says he fled his remote village in January 2012 during fighting between Kachin rebels and the military. When smugglers offered to help him leave Myanmar, they didn't tell him where he was going. He was held by force for three weeks at a camp on the Thai-Malaysia border until paying a 3,000 Malaysian ringgit ($690) ransom. He was then spirited by jeep into Malaysia.

Smuggling, done with the consent of those involved, differs from trafficking, which is the trapping of people by force or deception into labor or prostitution.

Once in Malaysia, Pongram says he worked temporary jobs for several months. In September 2012, as he was attempting to register as an asylum-seeker with the United Nations, he was stopped and asked for identification by two plainclothes police officers in Kuala Lumpur, the capital. When he failed to produce any, they arrested him and took him to one of the country's 12 immigration detention facilities.

He spent the next two years in detention. He said officials would not respond quickly to pleas for medical attention. "I saw people around me dying, and I thought, 'when will it be my turn?'"

He can't say why specifically he was allowed out in May this year but he received an appointment with the local office of the United Nations High Commissioner for Refugees. He still has no legal papers and works odd jobs in cafes and shops.

Reuters was unable to independently confirm details of his detention.

The Malaysian government declined to comment on individual cases involving the detention centers.

Malaysia has said it is taking steps to combat human trafficking, including amendments passed in June to a 2007 anti-trafficking law aimed at improving care for human trafficking victims.

"We have followed the international practice to provide them with basic needs that meets humanitarian benchmark that are imposed by the international community," Zahid, the deputy prime minister, said. "We respect this, although extra budget has to be created to take good care of them."

The country, however, has faced criticism from Human Rights Watch and other rights organizations for failing to implement or enforce amendments to its anti-trafficking law.

Refugees are highly vulnerable to economic exploitation in Malaysia, say rights groups. Labor abuses such as coercion and debt bondage are rife in the Malaysian electronics industry, the plantation sector and construction, the groups contend.

Nearly a third of some 350,000 workers in Malaysia's electronics industry suffer from conditions of modern-day slavery such as debt bondage, according to a study released last year that was funded by the U.S. Department of Labor.

(Additional reporting by Praveen Menon and Trinna Leong in Kuala Lumpur; Editing by Martin Howell)

https://www.washingtonpost.com/news/monkey-cage/wp/2015/11/30/investors-have-controversial-new-rights-to-sue-countries-heres-why-this-matters-for-the-u-s/

Investors have controversial new rights to sue countries. Here's why this matters for the U.S.

By Rachel Wellhausen November 30 at 4:00 PM

On Oct. 5, the U.S. finished negotiating a complex and controversial free-trade agreement with 11 other countries, called the Trans-Pacific Partnership, or TPP. Congress is gearing up to vote yes or no on the treaty. And one provision is especially contentious: ISDS, or Investor-State Dispute Settlement.

Some 3,000 international treaties already exist that allow foreign investors to sue the government of a sovereign country, legally challenging its actions, but outside the country's own courts. Foreign investors have sued at least 120 different countries more than 650 times between 1990 through 2014.

Ezra Klein at Vox writes, "The ISDS system isn't likely to have much effect on Americans at all." It's true that the U.S. has prevailed in the 13 lawsuits brought to judgment against it thus far. So is the outcry over ISDS – from Sen. Elizabeth Warren (D-Mass.) on the left to the Cato Institute on the right – much ado about nothing?

No, it isn't.

First of all, while one putative justification for ISDS is that it encourages investment, it isn't at all clear that it does. Second, it hurts to get sued, even if you don't lose. Third, ISDS doesn't depoliticize investors' disputes, as it was supposed to.

Here's what the research says about the politics around foreign investment, and how it has consequences for the United States, too.

1. ISDS doesn't do what it's supposed to.

The purported justification for ISDS is that it's risky for businesses to set up shop in another country's sovereign territory. They might find their property confiscated or their investments undermined by government action. However, countries can really benefit from foreign investment, and thus governments want to reassure potential investors. That's why they sign treaties to promise fair treatment to foreign investors. ISDS is designed as a failsafe: if the government behaves badly, the foreign investor can sue and get compensation.

If ISDS did help soothe the fears of foreign investors, leading them to invest more, it might be worth the tradeoffs. The problem is that there is no clear evidence that these agreements do attract investors. Many scholars have used sophisticated statistical techniques to show, in the end, that investment treaties generate little or no increase in foreign direct investment. Others find some hope. For example, U.S. firms investing in factories, infrastructure, and other physical assets invest a little more abroad when the U.S. has an investment treaty with the partner country. But that's a far cry from ISDS increasing investment everywhere.

Even if ISDS did work as it was supposed to, it wouldn't do much for investment into the United States. Investment treaties and ISDS were initially supposed to help very risky developing countries reassure investors that they weren't stuck if they got tangled up in the developing nations' unreliable domestic legal systems. Because the United States has a well-functioning legal system, that rationale for ISDS is irrelevant here.

2. Countries that get sued lose future investment and rethink regulations.

For the United States, the real upside of ISDS in the TPP is that American firms get the right to sue other TPP governments. Reasonable people can disagree about whether that justifies the downsides of ISDS.

One key downside to consider is that the right to sue goes both ways. While we know that democracies like the United States interfere with firms' property rights less often, they still interfere sometimes. And under the TPP, more frustrated investors from more places can sue the U.S.

The problem is that countries that get sued get less future investment in aggregate, including less investment from compatriots of the firm doing the suing. Just getting sued is enough to scare off other investors: It might not matter whether the U.S. wins its lawsuits or not.

If it is costly to get sued, then rational governments will behave in ways that minimize the risk of getting sued. This is the root of the worry about what ISDS might do to regulation. The U.S. government might think twice about setting regulations that trigger lawsuits.

For instance, what if TransCanada uses the NAFTA ISDS provision to sue the United States for unfair treatment over the Keystone Pipeline? The international law rumor mill is buzzing that such a lawsuit could be filed, even though TransCanada probably wouldn't win. But being sued might be bad enough to discourage the U.S. from making other controversial regulatory decisions.

This said, in new research we find that ISDS might be good at getting investment from at least one source: reinvestment from the aggrieved investor itself. Well over one-third of investors reinvest after they win a lawsuit, and a quarter of investors reinvest even after they lose a lawsuit—suggesting that some investors may respect the rule of law even if they don't like the outcome.

3. ISDS doesn't get the U.S. government off the hook for American firms' disputes.

Historically, ISDS was supposed to "de-politicize" investment. At the World Trade Organization, governments sue each other. So, firms with trade disputes have to complain to their diplomats first.

ISDS was supposed to keep diplomats from getting pulled into private investment disputes, because firms file their own lawsuits instead. That hasn't happened. In fact, I wrote a book about how diplomats and national origins shape investors' political risks today. ISDS made it easier for me to do my research, because disputes that used to be hidden behind closed doors are now heard in public, international tribunals.

Investors want their home governments to remain involved in their disputes abroad for good reason: These disputes can get politically tricky. Countries in general did not know what they were in for when ISDS spread around the world in the last decades. Getting sued can be a real shock. Lawsuits have been centerpieces of political campaigns in countries like South Africa, Ukraine, Indonesia, Bolivia, and so on. Some disillusioned governments have delayed ratifying, renegotiated, or withdrawn from treaties. In short, ISDS can stir up anger that diplomats have to quell.

A large body of research suggests real consequences to a system that, for better or worse, has become part and parcel of modern trade treaties. ISDS seems obscure, but it is already shaping the behavior of American actors. And the TPP doubles-down on it.

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SUMMARY OF KEY ISSUES IN THE TRANS-PACIFIC PARTNERSHIP (TPP) AGREEMENT
Sharon Anglin Treat, Attorney and Policy Consultant
December 1, 2015

LACK OF TRANSPARENCY & ACCOUNTABILITY

Negotiated in complete secrecy over a period of six years, the 12-country TPP is now in final form and cannot be changed. Congress can only vote to accept or reject it. *Nonetheless, this agreement is a "living agreement" that additional countries can join in the future, and will put into place roughly 20 committees to manage trade in agriculture, government procurement, the Internet, food safety, financial regulation, and other topics covered in the deal.* Some committees have narrow authority, but others are open-ended in scope. Like the negotiation process that created TPP, many of these ongoing committees, even those dealing with public health and food safety, will be subject to confidentiality provisions that will hamper scientific peer review of their activities and limit public and consumer oversight of their activities. And, unlike a state or federal law that can be repealed when new information comes to light or conditions change, trade agreements require the agreement of all parties to commence negotiations to make changes, which as a practical matter will not occur.

JOBS

Will exports exceed imports, when the imported goods are produced with substandard wages and in some cases, slave labor? For example, will Maine's sustainably sourced seafood be able to compete with tariff-free Asian seafood that's been demonstrated to rely on forced labor? How will all the provisions of TPP work together, including provisions that open up procurement and turn "Buy American" provisions into "buy TPP", discourage border checks of imports, and encourage food safety standards to be deemed equivalent between the U.S. and other TPP countries? Although the U.S. Department of Commerce has issued "fact sheets" extrapolating data based on current exports, these calculations fail to include the effect of imports, which will also see tariffs reduced. A careful and complete analysis of TPP's economic impacts must critically examine imports as well as exports, and job losses as well as gains, in order to understand the economic impact of the trade agreement.

ENVIRONMENT & NATURAL RESOURCES

There are two ways that the TPP will impact natural resources and environmental protections. *First*, through Chapter 20, "Environment," which lays out *pro-environment* standards that TPP signatory countries should comply with. Second, through the 29 other chapters, which are mostly intended to speed up and reduce costs and regulatory barriers to trade. These include Market Access, Procurement, Technical Barriers to Trade, and Investment, and could have significant *negative environmental consequences*, so only looking at the provisions of the Environment chapter to a large degree misses the point.

The major U.S. environmental organizations have completed their analysis of the TPP, and their conclusion is that the pro-environment chapter is weak, and that the other chapters include many provisions that could weaken environmental protections, open the door to trade challenges of pollution control and environmental standards, and accelerate climate change.

- ***The Environment Chapter does not live up to the Obama Administration's hype, and is in many ways weaker than prior trade agreements negotiated by the Bush Administration.***

While the range of conservation issues mentioned in the TPP may be wide, the obligations – what countries are actually required to do – are generally vague and combined with weak enforcement. *The chapter does not meet even the basic requirement set forth in the 2015 Congressional fast-track legislation that the TPP meet commitments agreed to by Congress and the Bush Administration in 2007, that seven core international Multilateral Environmental Agreements (MEAs) be included.* Only one of the MEAs is fully enforceable in the TPP - the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)- even though all TPP parties are signatories to three of the agreements and the U.S. and at least one other TPP party has signed the remaining four. Among other MEAs, TPP fails to include enforceable provisions for the longstanding Montreal Protocol on ozone depletion, MARPOL on pollution from ships, and the International Convention for the Regulation on Whaling – even though TPP signatory Japan is a major commercial whaling nation.

- ***Climate protections are missing.*** The Environment chapter fails to even mention "climate change," even though other provisions of TPP will increase climate-disrupting emissions through more shipping and consumption, and increased fossil fuel exports. Of particular concern, there is no protection from rules that would allow foreign investors and governments to challenge climate and clean energy policies in unaccountable ISDS trade tribunals.

- ***TPP locks in natural gas exports and encourages fracking.*** TPP will require the U.S. Department of Energy to automatically approve all exports of liquefied natural gas to all TPP countries. This will facilitate climate- and natural resource-destructive fracking, and increase reliance on fossil fuels infrastructure including wells, storage facilities, pipelines and train transport at a time when we should be shifting to renewable energy.

- ***Other TPP chapters will harm the environment.*** The investment chapter (discussed below) does not include adequate protections to insure that environmental and public health measures, which are overwhelmingly the subject of ISDS challenges under other trade pacts, will not be undermined. TPP also lacks safeguards for green jobs programs that could run afoul of its procurement rules.

HEALTHCARE & PHARMACEUTICAL COSTS

- ***Monopoly rights.*** Chapter 18, Intellectual Property, includes new monopoly rights for pharmaceutical companies that will keep prices high for especially pricey biological drugs and delay generic equivalents.

- ***Legal challenges.*** Chapter 9, Investment, has new provisions enabling drug companies to challenge measures that reduce their profits, even when those measures are non-discriminatory and designed to promote public health or other public interest goals.

- ***Procedural roadblocks to affordability.*** Annex 26-A includes "transparency" provisions for pharmaceutical and medical devices in could increase healthcare costs in the Medicare Part A and B programs, which cover drugs administered in a hospital or a physician's office and durable medical equipment. Under this annex, Center for Medicaid and Medicare (CMS) determinations would be subject to a series of principles and procedures, including new appeal rights, which will make it more difficult to negotiate prices. These

provisions may also constrain future policy reforms aimed at curbing rising and unsustainable drug prices in the Medicare Part D program. Pharmaceutical costs are an increasing share of state budgets, and even though Medicare is a "federal" program, states are legally obligated to share in paying for most "dual eligibles" (Medicare beneficiaries who are also eligible for some level of Medicaid assistance). Maine is among a number of states that provide wraparound programs to assist the elderly, including Medicare enrollees, in paying for medicines. A recent AARP Public Policy Institute report found the *average annual cost per person* of specialty medication used to treat chronic diseases and conditions rose to more than $53,000 -- more than the U.S. median income and more than twice the $23,500 median income of people on Medicare. Specialty drugs that treat complex, chronic conditions are commonly used by older people and often require special administration - exactly the programs within Medicare that would be subject to the new disciplines of this Annex 26-A.

PROCUREMENT

TPP undermines one of the most important job-creation tools, using government purchasing to invest in jobs. Under TPP, the federal government must treat TPP countries as if they were U.S. bidders – taking America out of "Buy American."

- In several TPP countries – Mexico, Vietnam, Malaysia, and Brunei - workers face ongoing and systemic abuse with either the complicity or direct involvement of the state, with significant issues including child labor, human trafficking, and forced labor.
- Chapter 15, Government Procurement, isn't sufficiently clear about whether responsible bidding criteria, such as a requirement that a bidder not have outstanding environmental cleanup obligations, can't be challenged as a barrier to trade.
- Although state government procurement is not covered at this time, the agreement *requires* all TPP countries to commence negotiations within 3 years to include "sub-federal" coverage, which would include U.S. states.

FOOD SAFETY

TPP could reduce food safety and disadvantage responsibly sourced local products. Contrary to claims the TPP is a "high standards" agreement, safeguards intended to protect the food supply have in effect been lowered and oversight given over to the very industries that the standards are meant to regulate.

- New language on border inspection allows exporters to challenge border inspection procedures, which must be "limited to what is reasonable and necessary" and "rationally related to available science," allowing challenges to the manner inspections and laboratory tests are conducted.
- New language encourages the use of private certifications of food safety assurances — either third party certifications or potentially even self-certification. Third party or self-certified food safety claims are considerably worse than independent government oversight because there is a financial incentive to certify the food as safe. Several U.S. food safety outbreaks have occurred at facilities that received private certifications that attested to their food safety (the companies behind the 2009 peanut butter salmonella outbreak, 2010 egg salmonella outbreak and the 2011 cantaloupe listeria outbreak all received outstanding ratings from their third-party certifier).
- Existing weaknesses in U.S. regulatory agencies' oversight of food safety will be exacerbated by the expanded confidentiality requirements in the SPS chapter.

- Provisions relating to "trade in products of modern biotechnology," are located in in the chapter on market access and not in the food safety chapter, so controversies over GMOs or synthetic biology will be judged based on market access criteria (encouraging access to markets) rather than risk assessments of safety for human health or the environment. This provision encourages authorization of these products and will be overseen by a committee that lacks expertise in risk assessment and science.

FOOD LABELING & CONSUMER PRODUCTS SAFETY

Chapter 8, Technical Barriers to Trade (TBT), could limit effective labeling of consumer products and packaging and interfere with U.S. states' actions to go beyond federal environmental protections even where the U.S. Constitution and federal statutes authorize such regulation.

- A first-time Annex 8-F "Proprietary Formulas for Prepackaged Foods and Food Additives," imposes the burdensome "necessity test" and additional confidentiality protections on government regulators seeking information to regulate food ingredients, and could hinder the timely development of stronger federal standards relating to junk food warnings, GMO labeling and detailed information about "proprietary" food additive formulas.
- Annex 8-D on cosmetics includes language downplaying the risk to human health or safety from cosmetics, limiting required reassessments of the product's safety in future, and encouraging voluntary oversight.
- U.S. trade officials must inform other countries of state regulations with a "significant impact" on trade, and engage in "technical exchanges" concerning state regulations with the goal of harmonizing U.S. and other TPP countries' standards – with no role for state regulators nor language supporting state laws that go beyond weak or missing federal standards on food, chemicals, and consumer product safety.

A PRIVATE LEGAL SYSTEM JUST FOR CORPORATIONS

The Investor-State Dispute Settlement (ISDS) procedures in TPP are of particular concern. ISDS allows foreign investors the right to sue governments for lost profits caused by regulations in offshore private investment tribunals, bypassing the courts or allowing a "second bite" if the investors do not like the results of domestic court decisions. Policies can be challenged under ISDS even if they apply to both foreign and domestic firms – in other words, even if they do not discriminate against trading partners. ISDS clauses in other trade agreements including NAFTA have been used repeatedly to attack environmental and public health measures. Even unsuccessful challenges take years to resolve, cost millions to defend, and have a chilling effect on the development of new legislation. The cost just for defending a challenged policy in an ISDS forum is $8 million *on average*; Phillip Morris's ISDS challenge to Australia's tobacco regulations has already racked up litigation costs of over $50 million for the Australian government, and the case is still in preliminary stages.

- TPP would double the number of corporations that could use ISDS. More than 1,000 additional corporations in TPP nations, which own more than 9,200 subsidiaries in the U.S., could newly launch ISDS cases against the U.S. government.
- The "reforms" to ISDS touted by the Obama Administration are largely cosmetic. ISDS tribunals would not meet standards of transparency, consistency or due process common to TPP countries' domestic legal systems or provide fair, independent or balanced venues for resolving disputes. There is still no appeals mechanism; the arbitration panels would still be staffed by private sector lawyers paid by the hour and allowed to rotate between

judging and advocating for investors; and problematic "minimum standard of treatment" and "indirect expropriation" language from past trade agreements is largely replicated.

- The TPP investment chapter actually *expands* ISDS liability by widening the scope of domestic policies and government actions that could be challenged:
  - Financial regulations for the first time could be subject to "minimum standard of treatment" claims under the investment chapter.
  - Pharmaceutical firms could demand cash compensation under the investment chapter for claimed violations of World Trade Organization rules on creation, limitation or revocation of intellectual property rights.

TOBACCO

There is one significant improvement in TPP's investment chapter compared to NAFTA and other trade pacts – countries can opt out of having their tobacco control regulations challenged in ISDS cases. While this is an important safeguard, it highlights the major deficiencies and unfairness of the ISDS system, which has been successfully used to challenge legitimate, reasonable, non-discriminatory health and environmental laws and regulations. This one exclusion from ISDS in no way rebalances TPP so that the continued use of ISDS to challenge virtually any other domestic policy is acceptable.

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AFL-CIO's 10 CRITICAL PROBLEMS WITH THE TPP

These critical flaws make the TPP a bad deal for America's working people.

1. **The TPP allows currency-manipulating countries to kill U.S. jobs.** The current TPP text doesn't contain enforceable currency manipulation rules. Countries that intentionally devalue their currency cheat U.S. manufacturers and undermine any benefits from tariff reductions. Enforcing currency manipulation rules is probably the single most effective thing the United States could do to create jobs; in fact, doing so could add as many as 5.8 million jobs.[1]

2. **The TPP lets foreign corporations bypass U.S. law.** The current TPP text allows multinational companies to challenge U.S. laws, regulations and safeguards through a provision called investor-to-state dispute settlement (ISDS), a private justice system that undermines our democracy. Through ISDS, foreign investors can seek compensation from the United States for enforcing regulations and safeguards designed to protect America's working families. In fact, multinational companies currently are using ISDS to attack democratic policies and laws in Australia, Canada, Egypt, Peru and Uruguay, among many others.

3. **The TPP allows climate change to go unchecked.** The current TPP text doesn't contain any enforceable climate change commitments or "border fees" to offset the cost of environment-damaging imports. This undermines our efforts to address climate change and jeopardizes the important U.S.-China bilateral agreement on climate change and clean energy. [2] It does *nothing* to discourage U.S. manufacturers from moving their factories to TPP countries with weak climate regulations. This damages both U.S. jobs and our efforts to address climate change.

4. **The TPP doesn't strengthen international labor rights protections.** There are extensive, well-documented labor problems in at least four TPP countries (Mexico, Vietnam, Brunei and Malaysia),[3] but the administration has not committed to requiring all countries to be in full compliance with international labor standards before they get benefits under the agreement. Worker rights obligations have never been fully enforced under existing free trade agreements, which have provided too much discretion for worker complaints to be delayed for years or indefinitely (e.g., Honduras, Guatemala). A progressive TPP would eliminate this shortcoming, not repeat it. Given that no administration has ever self-initiated labor enforcement under a free trade agreement, any promise to "strongly enforce" the TPP should be met with skepticism.

5. **The TPP could allow public services to be permanently outsourced.** Public services such as sanitation, transit and utilities should be carved out of trade deals—but the TPP puts them at risk. The current TPP text does not ensure that governments can pull out of wasteful and failing public service privatization efforts without shelling out taxpayer dollars or otherwise compensating foreign firms or trading partners.[4]

6. **The TPP allows foreign state-owned enterprises to continue to undermine small business.** The current TPP text doesn't adequately protect small businesses from the predatory tactics of foreign state-owned and state-subsidized companies. Often, these enterprises benefit from government support and drive their American competitors out of business or put pressure on our companies to ship American jobs overseas. While the TPP contains some limited provisions to address state-owned enterprises, it's not clear it would level the playing field and provide the fast action small firms need to stay in business when faced with unfair competition.

7. **The TPP's weak rules of origin benefit China and other non-TPP countries.** The rules of origin in the current TPP text are weak and allow China and other nonparticipating countries to reap the agreement's benefits without having to follow its rules. In fact, the TPP's auto content requirement allows the majority of the auto content to be Chinese and manufactured outside the trade agreement's rules. This has the effect of promoting jobs in China while destroying U.S. auto supply-chain jobs.

8. **The TPP takes America out of "Buy American."** The current TPP text will require the U.S. government to treat Vietnamese, Malaysian and other TPP firms exactly the same as U.S. firms for many purchasing decisions—even when "Buy American" rules apply. This will send U.S. taxpayer dollars overseas and undermine U.S. job creation efforts. The TPP also could mean government purchasing contracts might not be able to include low carbon, "clean hands," living wage or other responsibility requirements in their bids.

9. **The TPP gives global banks even more power.** The current TPP text could make it even harder for countries facing an economic crisis to stabilize their economies. Not only can large international banks still sue countries in crisis using the "prudential exception," the TPP expands the rights of international banks to use ISDS to challenge bank regulations in front of private tribunals. Giving global banks more power makes another global financial meltdown more likely, not less.

10. **The TPP makes affordable medicines harder to find.** Quality, affordable and accessible health care is a human right and trade policy should not interfere with public health care choices, nor should it threaten public health. Unfortunately, the current TPP text threatens access to affordable medicines by including new monopoly rights for pharmaceutical companies—delaying competition by affordable generics—and allowing companies more opportunities to interfere with government cost-saving efforts.

We need a trade agreement that works for America's working families. Help us stop the TPP!

- Call your representative and tell him or her to reject TPP unless it's drastically reformed.
- Work with your community to pass a local resolution opposing bad trade deals that threaten jobs and democracy.
- Text TPP to 235246.

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AFL-CIO

Chamber Policy Panel Recommends TPP Support, But Hints At Need For Changes

Inside US Trade

Posted: December 01, 2015

The U.S. Chamber of Commerce on Monday (Nov. 30) moved one step closer to coming out in support of the Trans-Pacific Partnership (TPP) agreement when its international policy committee agreed in principle to send a policy recommendation to the board of directors that will generally endorse the deal but include language hinting at the need for changes, according to industry sources.

These sources provided differing characterizations of this additional language, which is still being drafted by Chamber staff. One source described it as laying forth "qualifications" to the Chamber's support for TPP, while another signaled it would not go that far.

This source said the language would likely state that the Chamber will continue to work with the Obama administration, Congress and other TPP governments to get the most commercially meaningful deal possible.

The international policy committee agreed in principle on its recommendation despite divisions within the Chamber's membership on the TPP deal reached on Oct. 5.

Tobacco companies, brand-name pharmaceutical manufacturers, financial services firms and the Ford Motor Company made clear during the meeting that they are unable to support the TPP deal in its current form, while other companies such as Cargill conveyed their enthusiastic support, according to industry sources. Still other Chamber members fall in between those two extremes.

Chamber Executive Vice President and Head of International Affairs Myron Brilliant made reference to these divisions during the meeting, saying he did not remember the Chamber's members ever having been this divided over a free trade agreement, sources said.

Some members who do not support the agreement as negotiated believe that if the Chamber comes out in support of the TPP too early, it would give up its leverage with the administration to secure changes to the provisions of the agreement that they oppose, according to industry sources.

But other Chamber members are pressing for an early statement of support because they believe coming out in favor of the deal may buy the business group more leverage to push for changes, as the administration may be more likely to listen to an ally than an adversary, one industry source said.

Even some of the biggest business cheerleaders for the TPP agreement say that the deal in its current form would be unlikely to garner sufficient votes to secure congressional passage, given the objections voiced by Senate Finance Committee Chairman Orrin Hatch (R-UT) and other lawmakers historically supportive of trade deals.

Sources differed on whether the final language of the Chamber's policy recommendation would need to be approved by the international policy committee before being presented to the board. It is also unclear when the Chamber's board might consider the recommendation and make a decision on it, although that is considered to be a pro-forma step.

The administration has already begun engaging with U.S. financial services firms about their objections to two aspects of the TPP.

The first is that fact that language in the TPP prohibiting governments from requiring data be stored on local servers does not apply to the financial services sector. The second is a provision that allows Malaysia to maintain a screening mechanism under which it can block foreign investments in financial services on the broad grounds that they are not in the best interest of Malaysia.

Officials from the Treasury Department and the Office of the U.S. Trade Representative met with financial services industry representatives on Nov. 20 for a discussion that focused on the server localization ban, but did not provide any indication whether the administration was willing to change its opposition to the ban in TPP or future trade agreements, sources said.

Treasury has opposed the inclusion of language in trade agreements that would ban server localization requirements for the financial services sector, under the argument that it wanted to preserve space to impose such requirements in the future.

The meeting consisted largely of industry representatives rehashing their objections to the U.S. approach, and U.S. officials offering an explanation of why they believed they had been addressed, according to these sources.

Industry representatives offered a mixed reaction to the meeting, with some expressing frustration that the case of the industry had already been laid out multiple times, while others viewing it as a positive development that the administration is engaging on the issue, sources said.

USTR has historically been more sympathetic to the industry's position than Treasury, although sources said the administration officials delivered a common position at the Nov. 20 meeting, sources said.

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, DC 20436

December 2, 2015

Dear Sir or Madam,

The purpose of this letter is to invite and encourage you to participate in a public hearing of the United States International Trade Commission (Commission) associated with its ongoing fact-finding investigation (No. TPA-105-001), "Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors." The hearing will be held in our main hearing room at 500 E Street SW, Washington, DC, beginning at 9:30 a.m. on Wednesday, January 13, 2016.

The Commission's investigation is required under the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (TPA). Section 105 (c)(2)-(3) of TPA requires the Commission to submit its report to the President and the Congress no later than May 18, 2016. The report assesses the likely impact of the Trans-Pacific Partnership (TPP) Agreement on the U.S. economy as a whole, on specific industry sectors, and the interests of U.S. consumers. Other parties to the Agreement include Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

The Commission welcomes your views at the hearing. The deadline for submitting a request to appear at the hearing is December 22, 2015. Further, in order to appear at the hearing, pre-hearing briefs and statements summarizing the testimony must be filed no later than December 29, 2015. Information on how to file documents for this investigation is set out in the enclosed Federal Register notice. If you have questions regarding the hearing procedures, please contact the Office of the Secretary at 202-205-2000.

The Commission invites interested parties to file a written submission in lieu of participating in the hearing. All written submissions for investigation No. TPA-105-001 should be addressed to the Secretary and should be received no later than 5:15 p.m. on February 15, 2016. Please see the Federal Register notice for complete instructions on how to file a written submission.

If you have further questions about the investigation or the hearing, please feel free to contact Project Leaders Jose Signoret at 202-205-3125 or jose.signoret@usitc.gov and Laura Bloodgood at 202-708-4726 or laura.bloodgood@usitc.gov.

We appreciate your consideration of this invitation.

Sincerely

Catherine DeFilippo
Director of Operations

Enclosures

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC

Investigation No. TPA-105-001

Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors

AGENCY: United States International Trade Commission.

ACTION: Institution of investigation and scheduling of public hearing.

SUMMARY: Following receipt on November 5, 2015 of a request from the U.S. Trade Representative (USTR), the Commission has instituted investigation No. TPA-105-001, *Trans-Pacific Partnership Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors*, under section 105(c) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (19 U.S.C. 4204(c)), for the purpose of assessing the likely impact of the Agreement on the U.S. economy as a whole and on specific industry sectors and the interests of U.S. consumers. In addition to the United States, the Agreement includes Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

DATES:
December 22, 2015: Deadline for filing requests to appear at the public hearing.
December 29, 2015: Deadline for filing pre-hearing briefs and statements.
January 13, 2016: Public hearing.
January 22, 2016: Deadline for filing post-hearing briefs and statements.
February 15, 2016: Deadline for filing all other written submissions.
May 18, 2016: Anticipated date for transmitting Commission report to the President and Congress.

ADDRESSES: All Commission offices, including the Commission's hearing rooms, are located in the United States International Trade Commission Building, 500 E Street SW, Washington, DC. All written submissions should be addressed to the Secretary, United States International Trade Commission, 500 E Street SW, Washington, DC 20436. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov*.

FOR FURTHER INFORMATION CONTACT: Project Leader Jose Signoret (202-205-3125 or *jose.signoret@usitc.gov*) or Deputy Project Leader Laura Bloodgood (202-708-4726 or *laura.bloodgood@usitc.gov*) for information specific to this investigation. For information on the legal aspects of this investigation, contact William Gearhart of the Commission's Office of the General Counsel (202-205-3091 or *william.gearhart@usitc.gov*). The media should contact Margaret O'Laughlin, Office of External Relations (202-205-1819 or *margaret.olaughlin@usitc.gov*). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202-205-1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000.

BACKGROUND: On November 5, 2015, the Commission received a letter from the USTR stating that the President notified Congress, also on November 5, 2015, of his intent to enter into the Trans-Pacific Partnership Agreement with the countries of Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. As requested by the USTR and as required by section 105(c) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (2015 Act), the Commission will submit to the President and Congress a report assessing the likely impact of the Trans-Pacific Partnership (TPP) Agreement on the U.S. economy as a whole and on specific industry sectors and the interests of U.S. consumers. In assessing the likely impact, the Commission will include the impact the agreement will have on the U.S. gross domestic product; exports and imports; aggregate employment and employment opportunities; and the production, employment, and competitive position of industries likely to be significantly affected by the agreement. In preparing its assessment, the Commission will also review available economic assessments regarding the Agreement, including literature concerning any substantially equivalent proposed agreement. The Commission will provide a description of the analytical methods used and conclusions drawn in such literature, and a discussion of areas of consensus and divergence between the Commission's analyses and conclusions and other economic assessments reviewed.

Section 105(c)(2) of the 2015 Act requires that the Commission submit its report to the President and the Congress not later than 105 days after the President enters into the agreement. The USTR requested that the Commission provide the report as soon as possible. Section 105(c)(4) of the 2015 Act requires the President to make the Commission's assessment under section 105(c)(2) available to the public.

PUBLIC HEARING: The Commission will hold a public hearing in connection with this investigation at the U.S. International Trade Commission Building, 500 E Street SW, Washington, DC, beginning at 9:30 a.m. on January 13, 2016, and continuing on additional days, if necessary. Requests to appear at the public hearing should be filed with the Secretary no later than 5:15 p.m., December 22, 2015. All pre-hearing briefs and statements must be filed not later than 5:15 p.m., December 29, 2015; and all post-hearing briefs and statements, which should focus on matters raised at the hearing, must be filed not later than 5:15 p.m., January 22, 2016. In order to appear at the hearing, all interested parties and other persons appearing must file a pre-hearing brief or statement that sets forth the information and arguments they intend to present at the hearing. An extension of time for filing requests to appear, pre-hearing and post-hearing statements, and all other written submissions will not be granted unless the Chairman determines that the condition for granting an extension of time in section 201.14(b)(2) of the *Commission Rules of Practice and Procedure* (19 C.F.R. 201.14(b)(2)) is met. All requests to appear and all pre-hearing and post-hearing briefs and statements should otherwise be filed in accordance with the requirements in the "Written Submissions" section below. In the event that, as of the close of business on December 22, 2015, no witnesses are scheduled to appear at the hearing, the hearing will be canceled. Any person interested in attending the hearing as an observer or nonparticipant should contact the Office of the Secretary at 202-205-2000 after December 22, 2015, for information concerning whether the hearing will be held.

WRITTEN SUBMISSIONS: In lieu of or in addition to participating in the hearing, interested parties are invited to file written submissions concerning this investigation. All written submissions should be addressed to the Secretary. Except in the case of requests to appear at the hearing and pre-hearing and post-hearing briefs and statements, all written submissions should be received not later than 5:15 p.m., February 15, 2016. All written submissions must conform with the provisions of section 201.8 of the *Commission Rules of Practice and Procedure* (19 C.F.R. 201.8). Section 201.8 and the Commission's Handbook on Filing Procedures requires that interested parties file documents electronically on or before the filing deadline and submit eight (8) true paper copies by 12:00 p.m. eastern time on the next

business day. In the event that confidential treatment of a document is requested, interested parties must file, at the same time as the eight paper copies, at least four (4) additional true paper copies in which the confidential information must be deleted (see the following paragraph for further information regarding confidential business information). Persons with questions regarding electronic filing should contact the Secretary (202-205-2000).

Any submissions that contain confidential business information (CBI) must also conform with the requirements of section 201.6 of the *Commission Rules of Practice and Procedure* (19 C.F.R. 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the "confidential" or "non-confidential" version, and that the confidential business information be clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available for inspection by interested parties.

Any confidential business information received by the Commission in this investigation and used in preparing this report will not be published in a manner that would reveal the operations of the firm supplying the information.

SUMMARIES OF WRITTEN SUBMISSIONS: The Commission intends to publish summaries of the positions of interested persons in an appendix to its report. Persons wishing to have a summary of their position included in the appendix should include a summary with either their pre-hearing or post-hearing brief or another written submission, or as a separate written submission, and the summary must be clearly marked on its front page as being their "summary of position for inclusion in the appendix to the Commission's report." The summary may not exceed 500 words, should be in MSWord format or a format that can be easily converted to MSWord, and should not include any confidential business information. The summary will be published as provided if it meets these requirements and is germane to the subject matter of the investigation. In the appendix the Commission will identify the name of the organization furnishing the summary, and will include a link to the Commission's Electronic Document Information System (EDIS) where the full written submission can be found.

By order of the Commission.

Lisa R. Barton
Secretary to the Commission

Issued: November 17, 2015

For Immediate Release: Contact:

Dec. 7, 2015 Nicholas Florko, nflorko@citizen.org, (202) 454-5108

WTO Authorizes Over $1 Billion in Sanctions Unless U.S. Guts Popular Country-of-Origin Meat Labels,

Disproving Obama Claim That Trade Pacts Can't Undermine Public Interest Policies

Ruling Further Complicates Prospect for Controversial Trans-Pacific Partnership

WASHINGTON, D.C. — Today's World Trade Organization (WTO) ruling against the U.S. country-of-origin meat labels (COOL) that consumers rely on to make informed choices about their food provides a glaring example of how trade agreements can undermine U.S. public interest policies, Public Citizen said today. How the Obama administration responds to the WTO ruling will have a significant impact on its efforts to build congressional and public support for the controversial Trans-Pacific Partnership (TPP).

In his May 2015 speech at Nike headquarters, President Barack Obama said that critics' warnings that the TPP could "undermine American regulation – food safety, worker safety, even financial regulations" was "just not true." He said: "They're making this stuff up. No trade agreement is going to force us to change our laws."

"Today's ruling makes clear that trade agreements can – and do – threaten even the most favored U.S. consumer protections," said Lori Wallach, director of Public Citizen's Global Trade Watch. "We hope that President Obama stands by his claim that 'no trade agreement is going to force us to change our laws,' but in fact rolling back U.S. consumer and environmental safeguards has been exactly what past presidents have done after previous retrograde trade pact rulings."

In response to previous WTO rulings, the United States has rolled back U.S. Clean Air Act regulations on gasoline cleanliness rules successfully challenged by Venezuela and Mexico and Endangered Species Act rules relating to shrimping techniques that kill sea turtles after a successful challenge by Malaysia and other nations. The U.S. also altered auto fuel efficiency (Corporate Average Fuel Economy) standards that were successfully challenged by the European Union. After the final WTO ruling against the policy in May, Obama's Agriculture Secretary

Tom Vilsack also contradicted Obama's claim, announcing: "Congress has got to fix this problem. They either have to repeal or modify and amend it."

COOL requires meat sold in the United States to be labeled to inform consumers about the country in which animals were born, raised and slaughtered. COOL is supported by 92 percent of Americans, according to a recent poll, but has been under attack by Mexican and Canadian livestock producers and the U.S. meat processing industry.

The Canadian and Mexican governments challenged the policy and in 2011 won an initial WTO ruling. In 2013, the Obama administration altered COOL to remedy the WTO violations. The new rules provided consumers more information. Mexico and Canada had sought to weaken COOL and obtained a WTO ruling against the new policy. Today, the WTO authorized those nations to impose over $1 billion in trade sanctions annually against the United States until it weakens or ends COOL.

Past administrations have repealed or weakened U.S. policies to comply with trade agreements. Today's ruling comes two weeks after the WTO ruled that U.S. "dolphin-safe" tuna labeling, which allows consumers to choose tuna caught without dolphin-killing fishing practices, was a "technical barrier to trade" that must be eliminated or weakened.

The WTO's ruling comes at an inopportune time for the Obama administration, as it attempts to sell the recently completed TPP. The recent release of the final TPP text reveals that it would impose limits on food safety that extend beyond the WTO rules. This includes requirements that the United States permit food imports from exporting countries that claim their safety regimes are "equivalent" to our own, even if doing so violates key principles of U.S. food safety policy. These rules effectively would outsource the inspection of food consumed by Americans to other countries. The TPP also would allow new challenges of food safety border inspections.

Background: Congress enacted mandatory country-of-origin labeling for meat in the 2008 farm bill. This occurred after 50 years of U.S. government experimentation with voluntary labeling and efforts by U.S. consumer groups to institute a mandatory program.

Canada and Mexico claimed that the program violated WTO limits on what sorts of product-related "technical regulations" WTO signatory countries are permitted to enact. In November 2011, the WTO issued an initial ruling against COOL. Canada and Mexico demanded that the

United States drop its mandatory labels and return to a voluntary program that would not provide U.S. consumers the same level of information as the current labels. The United States appealed.

In June 2012, the WTO Appellate Body affirmed that COOL violated WTO rules. In response, the U.S. government altered the policy. However, instead of watering down the popular program as Mexico and Canada sought, the U.S. Department of Agriculture's new May 2013 rule strengthened the labeling regime. By providing more information to consumers, the new rule remedied the violations cited in the WTO ruling. Mexico and Canada then challenged the new U.S. policy. In May 2015, the WTO ruled that the new U.S. policy still violated WTO rules. Mexico and Canada initiated a WTO process to determine the level of trade sanctions that they could impose on the United States until it eliminated or weakened COOL.

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Columbia Center
on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

CCSI Policy Paper

Lise Johnson, Lisa Sachs*
November 2015

The TPP's Investment Chapter:

Entrenching, rather than reforming, a flawed system

Introduction

During and following the negotiations of the Trans-Pacific Partnership (TPP), the USTR assured stakeholders that novel features in the TPP's investment chapter would respond to legitimate concerns about the investor-state dispute settlement mechanism (ISDS). Indeed, in our analysis on *Investor-State Dispute Settlement, Public Interest, and US Domestic Law*, we highlighted a number of serious shortcomings of investment treaties and their ISDS protections, including the impact that ISDS has on the development, interpretation, and application of domestic law. Now that the TPP has been publicly released, we can see that unfortunately none of these shortcomings has been resolved. In fact, in some areas, we even see a further evisceration of the role of domestic policy, institutions, and constituents. In their current form, the TPP's substantive investment protections and ISDS pose significant potential costs to the domestic legal frameworks of the US and the other TPP parties without providing corresponding benefits.

In "Upgrading & Improving Investor-State Dispute Settlement," the USTR highlights how the "TPP upgrades and improves ISDS" and "closes loopholes and raises standards higher than any past agreements." Below, we respond to the USTR's claims, showing that ISDS in TPP has not been improved as USTR suggests. There are a number of problems from previous trade agreements that have been carried over into the TPP, and new provisions added to the TPP that do not appear in other US FTAs and that raise additional concerns. A forthcoming brief will discuss those issues in more depth; this note focuses specifically on the particular improvements that the USTR claims to have made to ISDS.

*Lise Johnson is the head of investment law and policy at CCSI, and Lisa Sachs is the Director.

Claims and Responses

USTR Claim: "Right to regulate. New TPP language underscores that countries retain the right to regulate in the public interest, including on health, safety, the financial sector, and the environment." (Point 1).

Unfortunately, while the TPP might "underscore" that countries retain the right to regulate in the public interest, the agreement does not actually protect that right.

In article 9.15, the TPP states, "Nothing in [the Investment Chapter] shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure *otherwise consistent with this Chapter* that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives." (emphasis added)

That article provides no real protection. Rather, it simply notes that the government can regulate in the public interest as long as, when doing so, the government complies with the Investment Chapter's requirements regarding treatment of foreign investors and investments. The words, "otherwise consistent with this Chapter," thus negate any protections otherwise purported to be given under that article. Consequently, and as under other investment treaties with ISDS, good faith measures taken in the public interest can still be successfully challenged under the agreement as violating the TPP's investor protections. That means a continued risk of claims that we've seen, such as claims seeking damages for:

- efforts to strengthen and enforce environmental obligations;
- efforts to restrict imports of adulterated drug products;
- efforts to regulate and restrict smoking;
- zoning measures relating to investment in or near protected areas;
- measures regarding location and design of hazardous waste facilities, and transport of hazardous waste;
- efforts to restrict profits of pharmaceutical companies;
- application of bankruptcy law;
- judicial decisions interpreting domestic intellectual property law and policy; and
- government efforts to regulate tariffs and terms of service for essential public utilities.

Notably, the provision here can be contrasted with the TPP's treatment of other specific measures and policy issues. In the article on exceptions, for example, the TPP parties agreed to prevent investors from arguing that taxation measures violate the infamously vague and problematic fair and equitable treatment ("FET") obligation (discussed further below). That decision to carve out taxation from the FET obligation evidences the state parties' unwillingness to trust ISDS tribunals with the broad powers such tribunals otherwise have to interpret that potentially expansive FET obligation. Environmental,

health, and safety measures – while similarly complex and important of matters of law and policy – are not similarly safeguarded from the uncertainties of ISDS decisions.

Likewise, when investors challenge certain measures relating to financial services regulation, officials of the state parties to the treaty have the right to decide whether a "prudential measures" exception applies. Any determination the government officials make is binding on the tribunal. Again, this evidences the states' unwillingness to permit ISDS tribunals to decide complex issues with significant policy implications. In contrast, there is no such filter mechanism in the TPP for other areas of public interest regulation, such as environmental protection and public health, which would help to preserve the policy space of the state parties.

A third narrow issue that the TPP protects against ISDS challenges is liability for "tobacco control measures". This provision, adopted in response to the particularly controversial cases Philip Morris and its affiliates have filed against Australia[1] and Uruguay[2] to challenge those countries' anti-tobacco regulations, aims to protect government action in one important area of health policy; in so doing, it implicitly recognizes that the TPP's investment protections and ISDS mechanism can be used to challenge good faith, non-discriminatory measures taken to address undeniably serious issues of public concern, despite the language in article 9.15. While "tobacco control measures" are indeed deserved of protection from investor claims, so, too, are other measures to address environmental, health, and safety concerns, which necessarily remain vulnerable to challenge.

With the TPP, we thus see governments taking some steps to protect their ability to take action in certain discrete areas. Given the specific exclusions and filter mechanisms for taxation, financial services, and tobacco-related measures, the omission of other public-interest related measures from those explicit carve outs means that other measures remain exposed to claims. So despite the claim that the TPP preserves the right of states to regulate in the public interest, many crucial areas of law such as environmental and health-related measures, which been targets of a number of ISDS cases filed to date, are not similarly safeguarded from investors' challenges.

USTR Claim: "Burden of proof. TPP explicitly clarifies that an investor bears the burden to prove all elements of its claims, including claims on the minimum standard of treatment (MST)." (Point 2).

USTR Claim: "Expectations of an investor. TPP explicitly clarifies that the mere fact that a government measure frustrates an investor's 'expectations' does not itself give rise to an MST claim."(Point 4).

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[1] Philip Morris Asia Limited v. Australia, UNCITRAL, PCA Case No. 2012-12. More information about this case is available at http://www.italaw.com/cases/851.

[2] Philip Morris Brands Sàrl v. Uruguay, ICSID Case No. ARB/10/7. More information about this case is available at http://www.italaw.com/cases/460.

These two changes ostensibly try to narrow tribunals' interpretations of the "fair and equitable treatment" or "FET" obligation.[3] The FET obligation has morphed over roughly the last 15 years from a relatively unknown and unused protection into the most common standard on which investors initiate and succeed on challenges to conduct by all branches (executive, legislative, and judicial) and levels (local, state, and federal) of government.

Many of the concerns about how investment treaty protections and ISDS favor foreign investors' rights and expectations over broader public interest aims are based on the increasing use of the FET standard, so improvements to this provision are essential. Unfortunately, the language added to the TPP text fails to address these concerns.

As the text of the TPP itself recognizes, the first "change" is language that merely confirms the standard rule in ISDS disputes: the investor bears the burden of establishing its claims. This is nothing new. It simply reiterates what is generally understood, so as hopefully to limit disputes on this point.

Importantly, however, expansive interpretations of the FET provision are not due to a failure by tribunals to impose a burden of proof *on the claimant*, but are due to the common practices of tribunals to treat that burden as being satisfied with only minimal evidence.[4] In light of the ease with which arbitrators have determined that they can identify the elements of an FET claim, merely reiterating the standard rule that the claimant has the burden to establish those elements will likely have little effect on reducing tribunal overreach.

The second change regarding the FET obligation not only fails to constitute an improvement but actually represents a step backward from previous US positions. In previous cases, the US has clearly asserted that investors' "legitimate expectations" are not elements of the FET obligation[5] and "impose no obligations on the State" under that provision.[6] In contrast, the new language, which states that a breach of an investor's "expectations" does not *alone* give rise to an MST claim, implicitly recognizes that "expectations" may in fact be relevant to establishing a violation of the FET standard.

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[3] Because the treaty states that the "FET" obligation incorporates and does not require conduct beyond that mandated under the "minimum standard of treatment", this note uses the terms "FET" and "MST" interchangeably.

[4] This can be seen in recent cases decided under US treaties in which the tribunals determined that the FET obligation prohibits "arbitrary" conduct, vaguely defined. *See, e.g.*, Teco v. Guatemala, ICSID Case No. ARB/10/23, Award, December 19, 2013, para. 454; Bilcon v. Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, paras. 442-444. This can also be seen in cases in which tribunals have determined that the FET obligation protects investors' "expectations". *See, e.g.*, Bilcon, paras. 427-454. *See also*, Mesa v. Canada, PCA Case No. 2012-17, Second Submission of the United States, June 12, 2015, paras. 14-19 (stating that the tribunal erred in determining the contents of the FET obligation based on reference to other tribunal decisions rather than state practice and opinio juris).

[5] Spence Int'l Inv. LLC v. Costa Rica, ICSID Case No. UNCT/13/2, Submission of the United States of America, April 17, 2015, para. 17.

[6] *Id.* para. 18. *See also* Mesa v. Canada, PCA Case No. 2012-17, Second Submission of the United States, June 12, 2015, para. 18.

This new language codifies – rather than corrects – problematic decisions such as the March 2015 NAFTA award in *Bilcon v. Canada.*[7] In that case, the majority of the tribunal[8] indicated that interference with investors' economic "expectations", standing alone, would not violate the FET obligation but was a factor to take into account in determining whether there had been a breach of that treaty provision.[9] Applying that approach, the tribunal gave disproportionate legal significance to the allegedly "reasonable expectations" of the investors that had been generated by non-binding statements of certain Canadian officials and general promotional materials designed to help the region attract new mining investments. Those "reasonable expectations", the tribunal determined, were later frustrated by federal and provincial environmental approvals processes, which ultimately resulted in decisions by federal and provincial officials to deny the investors their requested environmental permits. That the governments' actions frustrated the investors' "legitimate expectations" led the tribunal to conclude that Canada violated the NAFTA's FET obligation.

This case is instructive for assessing the TPP's "improvement": while the TPP states that the interference with an investor's "expectations" will not, *on its own*, constitute a violation of the FET obligation, it leaves the door wide open for future application of the *Bilcon* approach. Under that approach, a tribunal identifies what it considers to be reasonable or legitimate expectations – which may have been generated by a wide range of even non-binding government conduct and need not rise to the level of actual "rights" – and then strictly scrutinizes government actions or inactions to determine whether the investors' expectations were wrongly frustrated.[10] Frustration of investor "expectations" thus remains a key factor that can be used by tribunals to distinguish between government conduct that does, and does not, violate the FET obligation.

In summary, while there are two minor changes to the text of the FET obligation in the TPP, those changes are far from being adequate to ease – much less resolve – valid

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[7] Bilcon v. Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015

[8] One arbitrator in this case dissented, critiquing the majority's review of the facts and its application of the FET obligation. According to the dissenting arbitrator, the majority's approach is a "significant instruction into domestic jurisdiction," "will create a chill on the operation of environmental review panels," and will result in investors being able to "import[] a damages remedy that is not available under Canadian law." (para. 49). Even more problematically, the dissenting arbitrator stated, the majority's decision was an "intrusion into the environmental public policy of the state." (*Id.*). Bilcon v. Canada, Dissenting Opinion of Professor Donald McRae, March 10, 2015.

[9] *Id.*

[10] *See also Bilcon*, para. 572. In *Bilcon*, the tribunal added that when investor "expectations" are frustrated, that is considered to be a "special circumstance[]" in which changes in or application of government law and policy are more likely to be successfully challenged. The tribunal noted that some tribunals "express a cautious approach about using investor expectations to stifle legislative or policy changes by state entities that have the authority to revise law or policy." It added, however, that such authority is "not absolute; breaches of the [FET obligation] might arise in some special circumstances" such as when they are "contrary to earlier specific assurances by state authorities that the regulatory framework would not be altered to the detriment of the investor." Tribunals' protection of *expectations* (as opposed to *rights*) generated by "specific assurances" provides investors greater protection against regulatory change than they are provided under US domestic law. See Lise Johnson and Oleksandr Volkov, *Investor-State Contracts, Host-State "Commitments" and the Myth of Stability in International Law*, 24 AM. REV. INT'L ARB. 361 (2013)

concerns about the risk that investors will continue to be able to use this provision to expand the strength of their economic "expectations" at the expense of broader public interests.

The FET obligation has only figured in ISDS jurisprudence for 15 years, but has inspired disproportionate ire, uncertainty, litigation, and liability in that time. With the TPP, it is crucial to avoid entrenching and exacerbating well-recognized existing problems, and to seize the opportunity to make real improvements.

One such improvement would be to exclude the FET obligation altogether, or to exclude it from ISDS and leave it only subject to state-to-state dispute resolution. Alternatively, the TPP could clearly rein in the standard so that it is expressly limited to a protection against denial of justice after exhaustion of local remedies – a much narrower, but still significant protection.[11]

USTR Claim: "Dismissal of frivolous claims. TPP includes a new standard permitting governments to seek expedited review and dismissal of claims that are manifestly without legal merit." (Point 3).

USTR Claim: "Expedited review and dismissal of claims. As in U.S. courts, TPP allows panels to review and dismiss certain unmeritorious claims on an expedited basis." (Point 12).

USTR Claim: "Attorney's fees for frivolous claims. A panel may award attorney's fees and costs in cases of frivolous claims." (Point 13).

These three provisions attempt to address the same problem: how to prevent, or ensure relatively prompt dismissal of, frivolous or meritless investor claims. While it is better to

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[11] Indeed, this narrower view of the FET obligation would be consistent with positions taken by the United States in ISDS disputes, in which US attorneys have stated that the FET obligation does not reach far, if at all, beyond the obligation not to deny justice to foreign investors. In *Spence v. Costa Rica*, for example, the United States explained:

> Currently, customary international law has crystallized to establish a minimum standard of treatment in only a few areas. One such area, which is expressly addressed in Article 10.5, concerns the obligation to provide "fair and equitable treatment," which includes, for example, the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings.

Spence, Submission of the United States of America, April 17, 2015, para. 13. *See also* Apotex Holdings Inc. v. United States, ICSID Case No. ARB(AF)/12/1, Counter-memorial on Merits and Objections to Jurisdiction of Respondent United States of America, December 14, 2012, para. 353. ("Sufficiently broad State practice and opinio juris thus far have coincided to establish minimum standards of State conduct in only a few areas, such as the requirements to provide compensation for expropriation; to provide full protection and security (or a minimum level of internal security and law); and to refrain from denials of justice. In the absence of an international law rule governing State conduct in a particular area, a State is free to conduct its affairs as it deems appropriate.").

Experience with ISDS disputes to date illustrates that unless the treaty itself clearly limits the scope of the FET obligation, arbitrators are willing to interpret it expansively.

have such provisions than not, these provisions, as drafted, will not have an appreciable effect on limiting such claims.

First, some other agreements, including the US-DR-CAFTA[12] and US-Peru FTA,[13] already have very similar provisions regarding dismissal of meritless claims, as do ICSID's Arbitration Rules, which govern many ISDS cases.[14] The US-DR-CAFTA and US-Peru FTA, for example, state:

> ... a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 10.26 [Awards].[15]

In the TPP, the text adds the words in bold:

> ... a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 9.28 [Awards] **or that a claim is manifestly without legal merit**.[16]

The minor change in wording in the TPP does not represent a significant improvement over previous treaties.

Second, although the USTR states that the TPP's mechanisms for early dismissal of frivolous claims are based on the US Federal Rules of Civil Procedure, the TPP's protections for governments are actually significantly narrower than those provided under the Federal Rules.[17]

Third, even without the language in the TPP expressly stating that tribunals may award attorneys' fees and costs against investors that file frivolous claims (and respondent states that assert frivolous defenses), tribunals already had this power.[18] As data show, however, tribunals have been reluctant to use this authority.[19] Typically, tribunals order each side – the investor and the state – to bear its own costs (which on average amount to roughly $4.5 million for each side),[20] irrespective of who wins or loses. In some cases, such as when a claim or defense is obviously frivolous, the tribunals have ordered the losing

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[12] Art. 10.20(4)-(6).
[13] Art. 10.20(4)-(6).

[15] US-DR-CAFTA, art. 10.20(4); US-Peru FTA, art. 10.20(4).
[16] Art. 9.22(4) (emphasis added).
[17] See discussion in LISE JOHNSON, NEW WEAKNESSES: DESPITE A MAJOR WIN, ARBITRATION DECISIONS IN 2014 INCREASE THE US'S FUTURE EXPOSURE TO LITIGATION AND LIABILITY 10-12 (CCSI January 2015), http://ccsi.columbia.edu/files/2014/03/Brief-on-US-cases-Jan-14.pdf.
[18] *See, e.g.*, ICSID Convention, art. 61(2); 2010 UNCITRAL Arbitration Rules, art. 42. Other US treaties pre-dating the TPP have also included this provision. See US-DR-CAFTA, art. 10.20(6).
[19] Matthew Hodgson, *Counting the Costs of Investment Treaty Arbitration*, 9 GLOBAL ARB. REV., March 24, 2014. http://globalarbitrationreview.com/news/article/32513/.
[20] *See id.* (finding that average costs for respondent states were US$ 4,437,000 and US$ 4,559,000 for claimants).

party to pay the legal fees and costs of the winning party. Tribunals, however, have been more likely to require losing states to cover the costs of winning investors, than to require losing investors to cover the costs of winning states.[21] Simply reiterating the power of tribunals to award costs in favor of states is not likely to change these trends.

USTR Claim: "Arbitrator ethics. TPP countries will provide detailed additional guidance on arbitrator ethics and issues of arbitrator independence and impartiality." (Point 5).

This is a very important potential development. Private arbitrators are not bound by the same rules of independence, impartiality, and public integrity that domestic systems require of judges. And despite the fact that very serious concerns have been raised about arbitrator ethics in ISDS disputes for years,[22] there has been no serious effort among the arbitration community to commit to any meaningful self-regulation. As the TPP does not actually resolve this issue but punts it back to the parties to address in the future, it remains to be seen whether this provision will actually help to resolve these concerns about arbitrators.

USTR Claim: "Clarifying rules on non-discrimination. TPP explicitly clarifies that tribunals evaluating discrimination claims should analyze whether the challenged treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives." (Point 6).

Recent NAFTA decisions such as *Bilcon v. Canada* and *Apotex II v. United States*[23] illustrate the very real need to prevent continued abuse of treaties' non-discrimination standards (i.e., the national treatment obligation and the most-favored nation treatment obligation). The TPP, however, does not provide an adequate solution.

The non-discrimination obligations in investment treaties aim to prevent states from discriminating against covered foreign investors/investments, whether that discrimination is in favor of domestic investors/investments (the national treatment obligation) or in favor of other foreign investors/investments (the most-favored nation treatment obligation). However, rather than using those non-discrimination obligations to protect against and recover for *nationality-based discrimination*, foreign investors and investments are using those treaty provisions to challenge *any* disparate government treatment.

In *Bilcon v. Canada*, for example, the investors successfully argued to the tribunal that Canada had violated the national treatment obligation because officials had denied their environmental permit for a controversial mining project, while other mining projects had been allowed to proceed. As Canada highlighted, those other environmental approvals

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[21] *Id.*

[22] NATHALIE BERNASCONI-OSTERWALDER ET AL., ARBITRATOR INDEPENDENCE AND IMPARTIALITY: EXAMINING THE DUAL ROLE OF ARBITRATOR AND COUNSEL (IISD 2010).

[23] Apotex Holdings and Apotex Inc. v. United States, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014 [hereinafter "*Apotex II*"]. This case is discussed *infra*, n.26.

had involved proposals for projects of different scope, in different locations, and raising different concerns. Those differences, Canada, argued, meant that the Bilcon project was not in "like circumstances" with other mining projects, and that the government was justified in treating the Bilcon project differently than other mining projects.

The tribunal, however, disagreed with Canada. The tribunal determined that the "adverse treatment" accorded to the Bilcon investment as compared to other "similar" extractive industry projects was not "a rational government policy," and was inconsistent "with the investment liberalizing objectives of the NAFTA."[24] The tribunal therefore found that Canada had violated the national treatment obligation. Notably, the tribunal reached this conclusion even though it declined to conclude that Canada's decisions denying the Bilcon project's environmental permits were motivated by any intent to discriminate against the investors based on their nationality.[25]

This case evidences how non-discrimination obligations can be used by investors and tribunals to second-guess regulatory decisions and prevent strengthening of environmental and other standards over time.[26] Even in cases where there is no evidence of nationality-based discrimination, states can be held liable.

The risk of claims is particularly high in the context of administrative enforcement actions that often and, in some cases, necessarily result in disparate treatment of different actors. As Judge Richard Posner has explained, public agencies must use their resources efficiently.[27] Depending on the context, this may mean that an agency will prioritize

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[24] *Bilcon*, para. 724.

[25] *Bilcon*, paras. 685-731.

[26] Another dispute raising these issues was *Apotex II v. United States*, ICSID Case No. ARB(AF)/12/1. In *Apotex II*, the Canadian claimant alleged that the US Government violated the most-favored nation treatment obligation when the Food and Drug Administration (FDA) restricted imports of its pharmaceutical products due to sub-standard manufacturing practices. The Canadian company did not dispute that it had in fact violated relevant manufacturing standards; rather, it argued that the US violated the NAFTA's non-discrimination obligation by restricting its imports but not similarly restricting imports from other overseas drug manufacturers that had similarly violated required manufacturing standards.

Reviewing Apotex's claims, the ISDS tribunal agreed that US regulators did treat foreign drug manufacturers differently when taking enforcement actions against various problem companies located in different parts of the world. Based on that finding of disparate treatment, and despite the lack of any evidence of government intent to discriminate on account of nationality, the tribunal stated it *would find* the US Government liable for breaching its non-discrimination obligations unless the Government could establish that the various companies were not in "like circumstances" and that the Government therefore could legitimately accord them different treatment.

Ultimately, the tribunal agreed with the US Government that the companies were not in "like circumstances"; nevertheless, the tribunal's willingness to second guess the Government's action absent any allegation that the FDA's enforcement decisions were erroneous, and absent any evidence that they were motivated by the investor's nationality, highlights how vulnerable states are to litigation and potential liability arising out of enforcement actions taken against foreign-owned companies. Given the reality that governments lack the resources to investigate and prosecute all violations of the law, and must exercise their discretion regarding when, how, and against which company or companies to take action, these types of claims may become common strategies for companies trying to frustrate enforcement decisions.

[27] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 662-665 (5th ed 1998).

taking action based on such factors as how easy or cost-effective the case will be to prove (which may also depend on the resources the defendant is willing to expend to defend the case), how important the case is for setting precedent, the severity of the violation, and/or the gains to the agency that will be generated through enforcement. Allowing a foreign investor to challenge any instance of disparate treatment on the ground that other projects were allowed to proceed or were not sanctioned (or not sanctioned as severely) for violations of the law, and allowing tribunals to scrutinize enforcement decisions based on their (unreviewable) conceptions of what is "rational" or "legitimate", undermines the very nature and means of administrative enforcement.

In order to prevent future similar cases, one approach for the TPP could have been to clearly specify that a foreign investor seeking to recover on a non-discrimination claim must establish that the government *discriminated against it on account of its nationality*. Yet the language in the TPP contains no such requirement.

Rather, the TPP's language is similar to that in previous US treaties. The national treatment obligation, for example, states:

> Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[28]

In order to purportedly clarify interpretation and application of the Investment Chapter's non-discrimination obligations, the TPP text adds a footnote stating that, when determining whether different groups of investors or investments are in "like circumstances" and are, therefore, entitled to equal treatment, the tribunal is to look at the "totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives."[29]

This new language will not be effective in preventing future *Bilcon*- and *Apotex II*-[30] type cases. Instead of requiring investors to establish nationality-based discrimination, this language invites foreign investors to pressure governments by bringing speculative claims through ISDS and asking tribunals for a second opinion on whether they agree that government actions or policies differentiating between investors (on grounds other than nationality) were "legitimate".

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[28] Ch. 9, art. 9.4(2).

[29] Ch. 9, n.14. There is also a "Drafter's Note on Interpretation of 'In Like Circumstances' under Article II.4 (National Treatment) and Article II.5 (Most-Favoured-Nation Treatment)." That note, however, similarly fails to clearly indicate that discrimination on account of nationality is a required element to establish a breach. Moreover, the legal force of this "Drafter's Note" is unclear. Unlike, for example, Annex 9-A, which clarifies the TPP parties' "shared understanding" on the meaning of "customary international law," and Annex 9-B, which confirms the parties' "shared understanding" on the meaning of an expropriation, the "Drafter's Note" is not made part of the TPP's text.

[30] *See supra* n.26.

Notably, this standard under the TPP differs markedly from the standard for establishing discrimination on account of race or nationality in violation of the Equal Protection Clause of the US Constitution. To establish that a facially neutral law that has disparate impacts on different individuals or entities violates Constitutional protections against race- and nationality-based discrimination, a plaintiff must prove an intent or motive to discriminate on those grounds.[31] The US Supreme Court has also explained that discriminatory intent or motive is more than an "awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[32]

Under these standards, if there were a US environmental law that, on its face, equally applied to all foreign- and domestic-owned firms, but that resulted in more domestic-owned firms being granted environmental permits than foreign-owned firms, the foreign firms could argue that the government's disparate treatment of their applications violated the Equal Protection Clause. To succeed on their claim, they would need to establish that the disparate treatment was motivated by the government's intent to discriminate against the firms based on their nationality. Under the TPP, in contrast, no such showing would need to be made. In contrast to the claim by USTR that the protections in investment treaties "are designed to provide no greater substantive rights to foreign investors than are afforded under the Constitution and U.S. law,"[33] the rights given to foreign investors to challenge any law, regulation, or action that affects it differently from other investors are substantially greater than the rights provided all investors under US domestic law.

USTR Claim: "Scope of available damages. TPP explicitly limits damages that an investor can recover to damages that an investor has actually incurred in its capacity as an investor, to address concerns about claimants seeking ISDS damages arising from cross-border trade activity." (Point 7).

This is a useful clarification. The United States, Mexico, and Canada had already made this argument before NAFTA tribunals; but, despite agreement by all three NAFTA parties on this point, at least one tribunal has rejected their position.[34]

Through this clarification, the TPP states prevent future tribunals from similarly adopting their own idiosyncratic interpretations and disregarding states' intent.

USTR Claim: "TPP also includes a range of important additional ISDS safeguards. Many of these safeguards go beyond what was included in past trade deals like NAFTA. These key ISDS safeguards include:

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[31] Washington v. Davis, 426 U.S. 229, 243-245 (1976).
[32] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (internal citations omitted).
[33] USTR, "Fact Sheet: Investor-State Dispute Settlement" (March 2015), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds.
[34] *See* Cargill v. Mexico, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, pp. 125-160; *see also* Mexico v. Cargill, Court File No. C52737, Factum of the Intervenor of the United States of America, December 31, 2011 (Ont. Ct. App.), pp. 12-14.

Transparency. TPP requires ISDS panels to 'conduct hearings open to the public' and to make public all notices of arbitration, pleadings, submissions, and awards. (Point 8).

Public participation. Members of the public and public interest groups—for example, labor unions, environmental groups, or public health advocates— can make amicus curiae submissions to ISDS panels 'regarding a matter of fact or law within the scope of the dispute.'" (Point 9).

Since the NAFTA was concluded over ten years ago, there have been significant improvements in a number of treaties to increase transparency of ISDS. Nevertheless, the language on transparency in the TPP represents a step backward as compared to other recent US trade agreements. Moreover, the fact remains that ISDS is a process that excludes a range of interested and affected stakeholders.

First, the TPP adds language not contained in other US trade agreements which states that each government "should endeavor to apply [its laws on freedom of information] in a manner sensitive to protecting from disclosure information that has been designated as protected information" in ISDS proceedings. This provision can potentially be used to prevent information submitted or issued in the ISDS proceedings from being disclosed to the public even if such information could otherwise be released to the public under the US Freedom of Information Act.

Second, in the US (as in many other countries), agreeing to ISDS in the first place represents a significant shift of power to the federal executive branch (the "Government") to decide how to litigate and resolve investor-state disputes. This shift of power comes at the expense of a wide variety of other stakeholders both within and outside of that branch, including state and local governments, and citizens impacted by investments.

Given the myriad effects any given ISDS dispute can have on a wide range of government agencies, private sector industries, and various non-governmental organizations, there is a legitimate concern about whether the Government is actually willing and able to represent adequately all of those stakeholders' interests.[35] Indeed, as US courts have stated, when an individual's or entity's "concern is not a matter of 'sovereign interest,' there is no reason to think the government will represent it."[36]

Under domestic law, to ensure that such diverse concerns are in fact represented in US court cases, US statutes and court doctrines guarantee that, in appropriate cases, private individuals and entities can actually intervene in and become party to a case involving the Government in order to protect their own interests.[37] ISDS, however, provides no such

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[35] Kleissler v. United States Forest Serv., 157 F.3d 964, 974 (3d Cir. Pa. 1998); *see also* Am. Farm Bureau Fed'n v. United States EPA, 278 F.R.D. 98, 111 (M.D. Pa. 2011).

[36] Mausolf v. Babbitt, 85 F.3d 1295, 1303 (8th Cir. Minn. 1996).

[37] FED. R. CIV. P. 24(a) (under which a moving party can intervene in a dispute as a matter of right if it "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest"), and 24(b) (under which a court may

safeguards. There is no right for interested or affected domestic constituents to intervene in those Government-defended arbitrations. Under the language of the TPP, the only avenue that interested or affected individuals or entities can pursue to ensure their positions are raised before an ISDS tribunal is to try to make a submission to the tribunal as an *amicus curiae*, a potentially useful, but relatively powerless option that the tribunal has significant latitude to allow or disallow.[38] Consequently, the vast range of constituents that may be affected by ISDS disputes must simply hope that the Government represents their interests in ISDS cases when adopting litigation strategies or settlement options.

As has been recognized by US courts and commentators, giving the government such broad powers to unilaterally determine what arguments to make and what settlements to adopt can significantly – and negatively – impact the rights and interests of non-parties to the litigation.[39] Indeed, it has been often noted that the government's efforts to dispose of cases through settlements are not always consistent with public interests.[40] In this context, as one academic has noted, "consent of the *Government*" to resolve a case is not necessarily the same as "consent of the *governed*."[41] Accordingly, some mechanisms exist in US law for public and court oversight of settlement agreements and consent decrees. These include state and federal rules requiring the Government to give the public notice of and an opportunity to comment on certain settlement agreements the

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permit a moving party not covered by 24(a) to intervene if it "has a claim or defense that shares with the main action a common question of law or fact.").

[38] Federal legislation implementing US trade agreements also include provisions regarding the relationship between state and federal law. Implementing legislation for the NAFTA, for example, states that "the States will be involved (including involvement through the inclusion of appropriate representatives of the States) to the greatest extent practicable at each stage of the development of United States positions regarding matters [that directly relate to, or will have a direct impact on, the States] ... that will be addressed ... through dispute settlement processes provided for under the Agreement." 19 U.S.C.S. § 3312(b)(5). Such provision, however, does not constitute a guarantee that the affected US state's positions will prevail.

[39] *See, e.g.*, Michael T. Morley, *Consent of the Governed or Consent of the Government? The Problems with Consent Decrees in Government-Defendant Cases*, 16 U. PA. J. CONST. L. 637, 647-649 (2014); *see also* Kleissler v. United States Forest Serv., 157 F.3d 964 (3d Cir.1998); United States v. Union Elec. Co., 64 F.3d 1152 (8th Cir. 1995).

[40] Recognizing this reality, there are federal and state law checks over certain settlement agreements entered into by the government; these require government settlements of disputes to be in the public interest, and permit judicial review of settlements to ensure that requirement is satisfied. *See, e.g.*, 42 U.S.C.S. § 9622 (requiring settlement agreements under the Comprehensive Environmental Response, Compensation, and Liability Act to be in the public interest); United States v. Akzo Coatings of Am., 949 F.2d 1409, 1435 (6th Cir. 1991) ("[I]n addition to determining whether a [consent] decree is rational and not arbitrary or capricious, we must satisfy ourselves that the terms of the decree are fair, reasonable and adequate -- in other words, consistent with the purposes that CERCLA is intended to serve.' ... Protection of the public interest is the key consideration in assessing whether a decree is fair, reasonable and adequate."). New Jersey Dep't of Envtl. Protection v. Exxon Mobil Corp., UNN-L-3026-04, 23, Super. Ct. N.J. (August 25, 2015) ("New Jersey caselaw concerning settlements shows that New Jersey courts generally review settlements to ensure fairness, reasonableness, consistency with the governing statute, and public interest."). *See also* Morley, *supra* n.39 (discussing concerns regarding consent decrees and settlement agreements).

[41] Morley, *supra* n.39 (emphasis added).

Government might enter into,[42] and doctrines preventing enforcement of settlement agreements that try to skirt or otherwise violate the law.[43]

The rules of ISDS in the TPP, however, do not include those protections. There is no mechanism for public oversight of proposed or actual settlement agreements agreeing to pay funds or to reverse existing laws or policies. Indeed, even if the Government's commitment in a settlement agreement were illegal or unconstitutional under US law, the Government would still likely be bound to that settlement agreement as a matter of international law and could be held liable under the TPP for violating the settlement.[44] The power of the Government to determine whether and how to try to settle ISDS claims, therefore, is largely unchecked.

One can imagine, for example, a decision by the Government to settle an ISDS case brought by a foreign investor challenging a state environmental law banning use of a particular chemical deemed harmful.[45] In that settlement, the company would agree to drop its case if the Government conceded that the chemical was in fact safe, and committed to take action against the state to invalidate the state's law if the state did not do so itself.[46] The state (and/or entities within it such as environmental groups or the environmental protection agency), might maintain serious legitimate concerns regarding the safety of the chemical, and contend that the measure was in fact consistent with the TPP. Nevertheless, those entities would not have been a party to the ISDS arbitration, nor would they have been able to control the Government's defense of the ISDS case or its

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[42] See *supra* n.40.

[43] Morley, *supra* n.39, at 644, 683-688.

[44] *Id.* If US law governed the settlement agreement, several doctrines may result in the settlement agreement being deemed void or unenforceable. If entered into in the context of the TPP, however, the parties could presumably decide to have the settlement agreement controlled by non-US law. Yet even if governed by and illegal under domestic law, ISDS cases decided to date indicate that that would not prevent a tribunal from attempting to hold the Government to the terms of the settlement agreement. (Railroad Development Corp. v. Guatemala, ICSID Case No. ARB/07/3, Award, June 29, 2012, para. 234; Kardassopolulos v. Georgia, Decision on Jurisdiction, July 7, 2007, paras. 182-184). If the settlement agreement were invalidated by a domestic court, the investor would then likely be able to pursue damages against the Government.

[45] *See, e.g.*, Jeremy Sharpe, *Representing a Respondent State in Investment Arbitration, in* LITIGATING INTERNATIONAL INVESTMENT DISPUTES: A PRACTITIONER'S GUIDE (Chiara Giorgetti ed., 2014) (citing the example of *Dow Agrosciences LLC v. Canada*, a NAFTA case, in which the parties agreed to a settlement agreement "memorializing withdrawal of [the investor's] arbitration claim and [the] Government of Quebec's statements concerning the safety of a certain pesticide." (*Id.* n.104). Like the TPP, the NAFTA contains language limiting arbitral awards to monetary remedies or restitution of property. This example is therefore also useful to show that different forms of relief can be agreed to in the context of settlement agreements.

[46] The settlement agreement could be embodied in an order issued by the tribunal. Although the TPP states that final *awards* may only award monetary damages or, in some cases restitution, the TPP recognizes that *orders* could order injunctive relief or other remedies. If the state ultimately failed to comply with the settlement agreement, an ISDS tribunal could also presumably issue an award of damages against the respondent state if the tribunal retained jurisdiction over the dispute or if the investor brought a separate case based on breach of the settlement agreement. As illustrated *supra*, note 45, there is also authority for the proposition that the treaties' provisions stating that awards may only order monetary damages or restitution do not prevent governments from agreeing to provide other forms of relief.

settlement decision.[47] If the state did not agree to comply with the terms of the order, the federal Government could potentially sue the state based on preemption grounds.[48] There is also a risk that the Government could withhold federal funds appropriated by Congress in order to try to compel compliance with the order. [49]

It is possible to envision many other cases in which the Government could sacrifice disfavored domestic laws or policies through decisions on how to defend and resolve ISDS cases. In short, the provision in the TPP calling for greater transparency and input by interested parties as *amicus curiae* is a step better than the total confidentiality of many ISDS cases under other treaties; but the provisions calling for governments to defer to tribunals' determinations on confidentiality are a step backward on transparency as compared to other recent US agreements and, overall, the ISDS mechanism continues to fall far short of ensuring that the interests of the various affected parties are represented.

USTR Claim: "Remedies. A government can only be required to pay monetary damages. ISDS does not and cannot require countries to change any law or regulation." (Point 10).

The US's investment treaties have long contained provisions stating that ISDS tribunals may only order payment of monetary damages or, in some cases, restitution. Thus, this is not a new development. Nevertheless, it is important to highlight some limits of this assertion.

First, while this may be technically true, the awards may be such that the government is effectively required to abandon or change its laws or regulations.

Second, as the TPP expressly recognizes, the tribunal can order other types of relief as "interim measures" while the dispute is pending.[50]

Third, respondent states defending the cases could presumably consent to provide other forms of relief as part of a settlement agreement recorded as part of a tribunal's order or award.[51]

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[47] See *supra* n.38 (referring to US requirements to consult).

[48] Implementing legislation of the NAFTA and other US agreements recognize the ability of the United States to sue US states to declare a law or its application invalid. *See, e.g.*, 19 U.S.C.S. § 3312(b).

[49] See William S. Dodge, *Investor-State Dispute Settlement between Developed Countries: Restrictions on the Australia-United States Free Trade Agreement*, 39 VANDERBILT J. INT'L L. 1, 20-21 (2006):

> The National Conference of State Legislatures (NCSL) has sought assurances "that the federal government will not shift the cost of compensation under a Chapter 11 award to states whose measures are challenged and will not withhold federal funds otherwise appropriated by the Congress to a state as a means of enforcing compliance with provisions of NAFTA." The NCSL has also asked the federal government not to "seek to preempt state law as a means of enforcing compliance with NAFTA without expressly stated intent to do so by the Congress." The federal government has provided only the latter assurance.

(Internal citations omitted).

[50] Ch. 9, art. 9.22(9).

[51] *See supra* n.45.

Fourth, if the challenged measure is a measure taken by a local or state government entity, federal preemption may require the local or state government to actually abandon that measure.

USTR Claim: "Challenge of awards. All ISDS awards are subject to subsequent review either by domestic courts or international review panels." (Point 11).

Review and enforcement of international arbitral awards is primarily governed by two treaties – the New York Convention and the ICSID Convention – and the TPP does not change that.

Under each of those treaties, arbitral awards can only be challenged on narrow grounds. Errors committed by an ISDS tribunal when reviewing the facts or interpreting the law, for example, are not bases for overturning awards under either the New York Convention or the ICSID Convention.

The New York Convention allows challenges to arbitral awards to be brought before domestic courts, and also allows awards to be challenged on the grounds that they are inconsistent with public policy. The ICSID Convention, in contrast, does not permit challenges to be brought before domestic courts. Challenges must be brought before a new panel of private arbitrators. And unlike under the New York Convention, under the ICSID Convention, there is no possibility to challenge awards on the ground that they violate public policy.

Under both the New York Convention and ICSID Convention, challenges to awards are only very rarely successful. There is no system of appeals similar to what exists in domestic courts.

Notably, however, what is not reflected in the USTR's claim is that the TPP contains a new annex to the investment chapter, Annex 9-L, which further expands the role of arbitration and enforcement of arbitral awards under the New York and ICSID Conventions, and minimizes the role of domestic courts. More specifically, new provisions added in that annex dictate that certain contracts between the federal government and investors or investments[52] must be decided through arbitration.[53] Even if

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[52] Article 9.18 of the TPP allows investors to arbitrate claims that the government has violated an "investment agreement." An "investment agreement" is defined in Article 9.1 as the following (explanatory footnotes omitted):

> **Investment agreement** means a written agreement that is concluded and takes effect after the date of entry into force of this Agreement between an authority at the central level of government of a Party and a covered investment or an investor of another Party and that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 9.24(2) (Governing Law), on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, and that grants rights to the covered investment or investor:
> (a) with respect to natural resources that a national authority controls, such as oil, natural gas, rare earth minerals, timber, gold, iron ore and other similar resources, including for their exploration, extraction, refining, transportation, distribution or sale;

the contract required litigation of any contract dispute in domestic courts, the investor would be able to override that provision and take its claim to international arbitration instead. If the foreign investor opts for arbitration, the government will have to comply with that choice, losing its right to defend the case before domestic courts, as well as its rights under domestic law to appeal decisions that incorrectly interpret applicable contract law or make errors in reviewing the relevant facts.

Looking at implications for US law, these new requirements are a significant change from current practice and inconsistent with longstanding federal policy embodied in the Tucker Act. That law requires claims against the federal Government seeking compensation for contract breach to be litigated in the Court of Federal Claims and reviewed in the Federal Circuit.[54] To help enforce that policy, other courts scrutinize plaintiffs' claims to ensure that they do not seek to avoid "the Court of Federal Claims' exclusive jurisdiction" by artfully framing their complaints as tort instead of contract suits.[55]

(b) to supply services on behalf of the Party for consumption by the general public for: power generation or distribution, water treatment or distribution, telecommunications, or other similar services supplied on behalf of the Party for consumption by the general public; or
(c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams or pipelines or other similar projects; provided, however, that the infrastructure is not for the exclusive or predominant use and benefit of the government.

[53] Annex 9-L(A)(1). This provision provides that, even if the contract between the federal government entity and foreign investor/investment had a contractual provision that required litigation of any or all disputes in US courts, the TPP would override that exclusive forum selection clause and mandate arbitration of the dispute.

Annex 9-L(A) states:

1. An investor of a Party may not submit to arbitration a claim for breach of an investment agreement under Article 9.18.1(a)(i)(C) (Submission of a Claim to Arbitration) or Article 9.18.1(b)(i)(C) if the investment agreement provides the respondent's consent for the investor to arbitrate the alleged breach of the investment agreement and further provides that:
(a) a claim may be submitted for breach of the investment agreement under at least one of the following alternatives:
(i) the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the Party of the investor are parties to the ICSID Convention;
(ii) the ICSID Additional Facility Rules, provided that either the respondent or the Party of the investor is a party to the ICSID Convention;
(iii) the UNCITRAL Arbitration Rules;
(iv) the ICC Arbitration Rules; or
(v) the LCIA Arbitration Rules; and
(b) in the case of arbitration not under the ICSID Convention, the legal place of the arbitration shall be:
(i) in the territory of a State that is party to the New York Convention; and
(ii) outside the territory of the respondent.

[54] See 28 U.S.C. §§ 1491(a)(1), 1346(a)(2). This law is referred to as the "Tucker Act". Tucker Act claims for $10,000 or less may also be litigated in federal district courts. Those claims, however, may only be reviewed on appeal in the Federal Circuit. See Union Pac. R.R. Co. v. United States ex rel. United States Army Corps of Eng'rs, 591 F.3d 1311, 1314-1315 (10th Cir. 2010).

[55] *Union Pac. R.R. Co.*, *supra* n.54, at 1314.

This policy and practice of centralizing judicial authority "has an obvious purpose—uniformity" in interpretation, application, and development of principles and norms of US contract law.[56] This enables the federal government to "use the same language in its contracts … and be confident that it will have the same contractual rights and obligations everywhere."[57]

The ISDS provisions in the TPP, however, abandon that policy, and allow international arbitral tribunals – not judges of the Federal Court of Claims – to interpret and apply US contract law. This gives ISDS tribunals the ability not even granted to other US state or federal courts to shape the meaning of US contract law and to issue decisions without any possibility of having their erroneous decisions appealed.

Other "Additions"

Many of the "upgrades and improvements" referred to by the USTR have been expressly or implicitly included in agreements since at least the NAFTA. These include the following:

> **USTR Claim: "Expert reports. A panel can consult independent experts to help resolve a dispute." (Point 14).**
>
> Similar language can be found in other treaties including the NAFTA (art. 1133), and US-Peru FTA (art. 10.24).
>
> **USTR Claim: "Binding interpretations. TPP countries can agree on authoritative interpretations of ISDS provisions that 'shall be binding on a tribunal.'" (Point 15).**
>
> This has been a common feature of US treaties since NAFTA (art. 1131), and can be an important mechanism for states to exert some control over arbitral tribunals. There appear, however, to be limits to its actual use. For example, although the provision has been included in the NAFTA and all other investment treaties/investment chapters concluded by the US since the NAFTA, this mechanism has only been used *once* to clarify the interpretation of a substantive protection. (It was used to clarify the meaning of FET under the NAFTA in 2001).
>
> **USTR Claim: "Consolidation. A panel can consolidate different claims that 'arise out of the same events or circumstances.' This protects against harassment through duplicative litigation." (Point 16).**

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[56] *Id.* at 1315.
[57] *Id.*

While a useful provision, this was also included in the NAFTA (art. 1126) and has been a common feature of other US agreements concluded since that treaty (see, e.g., US.-Peru FTA, art. 11.25).

Conclusion

Overall, the US claims to have made a number of improvements to the ISDS system and investment protection standards included in the TPP. While reforms would of course be welcome, the changes that have been made to the TPP do not address the underlying fundamental concerns about ISDS and strong investment protections; in some cases, the changes represent just small tweaks around the margins, while in other cases, the provisions represent a step backwards. At their core, ISDS and investor protections in treaties establish a privileged and powerful mechanism for foreign investors to bring claims against governments that fundamentally affect how domestic law is developed, interpreted and applied, and sideline the roles of domestic individuals and institutions in shaping and applying public norms. For this reason, the TPP should drop ISDS altogether, or replace it with a new and truly reformed mechanism that addresses the myriad concerns that are still lurking in the TPP.

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Secret TPP Text Unveiled: It's Worse than We Thought

As one would expect for a deal negotiated behind closed doors with 500 corporate advisors and the public and press shut out:

- **The TPP would make it easier for corporations to offshore American jobs.** The TPP includes investor protections that reduce the risks and costs of relocating production to low wage countries. The pro-free-trade Cato Institute considers these terms a subsidy on offshoring, noting that they lower the risk premium of relocating to venues that American firms might otherwise consider.
- **The TPP would push down our wages by throwing Americans into competition with Vietnamese workers making less than 65 cents an hour.** The TPP's labor rights provisions largely replicate the terms included in past pacts since the "May 2007" reforms forced on then-president George W. Bush by congressional Democrats. A 2014 Government Accountability Office report found that these terms had failed to improve workers' conditions. This includes in Colombia, which also was subjected to an additional Labor Action Plan similar to what the Obama administration has negotiated with Vietnam.
- **The TPP would flood the United States with unsafe imported food**, including by allowing new challenges of border food safety inspections not provided for in past trade pacts.
- **The deal would raise our medicine prices, giving big pharmaceutical corporations new monopoly rights to keep lower cost generics drugs off the market.** The TPP would roll back the modest reforms of the "May 2007" standards with respect to trade pact patent terms.
- **The TPP includes countries notorious for severe violations of human rights, but the term "human rights" does not appear in the 5600 pages of the TPP text.** In Brunei LGBT individuals and single mothers can be stoned to death under Sharia law. In Malaysia, tens of thousands of ethnic minorities are trafficked through the jungle in modern slavery.

This initial analysis compiles contributions by labor and public interest experts. For more info on labor, jobs, wages, ROO, SOEs and more, contact: Celeste Drake, AFL-CIO and Owen Herrnstadt, Machinists Union; on climate, environment, and ISDS challenges to such policies contact Ben Beachy and Ilana Solomon, Sierra Club; on food safety and ag issues, contact Patrick Woodall and Tony Corbo, Food and Water Watch; on copyright issues, contact Maira Sutton and Jeremy Malcolm, EFF and Burcu Kilic, Public Citizen; on Investment/ISDS, Financial Services, Accession, National Security and Other Exception Texts contact Lori Wallach and Robijn van Giesen, Public Citizen's Global Trade Watch; on access to medicines, patent and medicine pricing rules, contact Peter Maybarduk and Burcu Kilic, Public Citizen's Access to Medicines program.

ACCESSION OF NEW COUNTRIES/ FINAL PROVISIONS CHAPTER:

Congress Not Guaranteed A Meaningful Role in Docking/Accession Regime that Lets Not Just China, but Nations Beyond Pacific Rim Join

- The TPP is open to be joined by any nation or separate customs territory that belongs to the Asian Pacific Economic Cooperation (APEC) Pacific Rim bloc ***AND "such other State or separate customs territory as the Parties may agree..."*** if the country is prepared to comply with the TPP's obligations and meet extra terms and conditions that may be required by existing signatories. **(Article 30.4.1)**

- **The executive branch alone gets to decide whether to initiate accession negotiations with a country seeking to join the TPP.** Congress would only be given any role in deciding whether negotiations about any country's prospective TPP accession *should even begin* if Congress explicitly requires this in legislation implementing the TPP. Absent such a requirement, under the TPP text the executive branch alone would decide for the United States. **(Article 30.4.3-4)**
  - The TPP text calls for establishment of a working group to negotiate the terms and conditions for a new country to join the TPP. The U.S. administration and any current TPP country can participate. The working group is considered to have agreed on terms if either all countries that are members of the working group have indicated agreement, or if a country that has not so indicated fails to object in writing within 7 days of the working group's consideration.
  - Once this working group completes negotiating accession terms with a new country, it is to report to the "TPP Commission" with a recommendation for accession and terms. The Commission is the TPP governance body (Article 27.1) on which the executive branch represents the United States.
  - The TPP Commission is deemed to have approved the terms if all countries agreed to the establishment of the working group in the first place or if a country that did not indicate agreement when the Commission considers the issue does not object in writing within seven days.

- **Congress would only be guaranteed a vote to approve new TPP entrants if such a congressional role is explicitly required in the U.S. legislation implementing the TPP.** A country's entry into TPP only goes into effect after "approval in accordance with the applicable legal procedures of each" existing TPP country and prospective new entrant. **(Article 30.4.1)** The World Trade Organization has similar accession rules, requiring approval by two-thirds of existing WTO members for a new country to join (Agreement Establishing the WTO, Article XII: Accession). **However, U.S. administrations have systematically denied Congress a role in approving new countries' admission to the WTO *unless changes to specific U.S. tariff lines or laws are required.***
  - As with the TPP, at the WTO the United States government is represented by the executive branch. Congress has no vote on whether the United States approves new countries' admission to the WTO. Because a change to U.S. tariff policy was required, Congress voted on whether to grant China Permanent Most Favored Nation status in 2000 when it sought to join the WTO. But, before and after that successive **administrations have approved the WTO accessions of scores of countries that already enjoyed U.S. Permanent Most Favored Nation status and Congress had no say**. Yet admission of a country to the TPP, even if under the same terms and tariffs as current prospective signatories, is a major decision Congress must control.
  - U.S. administrations also have systematically denied Congress a role in approving new WTO agreements, such as the WTO's Financial Services Agreement and Telecommunications Agreement using this logic: unless a U.S. law or tariff requires alternation, Congress has no role.

- A new country is considered a TPP member, subject to the terms and conditions approved in the Commission's decision, on the later date that either the new country deposits an instrument of accession indicating that it accepts the terms and conditions; or the date on which all existing TPP countries have sent notice that they have completed their respective applicable legal procedures. (Article 30.4.5) An administration factsheet states that the applicable U.S. legal procedures "would include Congressional notification before entering into negotiations with a potential new entrant, Congressional notification of intent to sign, consultation with Congress throughout the process, and final Congressional approval." Yet, in fact this is not the process that any administration has followed with respect to dozens of new countries entering the WTO, even including China for which Congress did have to vote to alter an existing U.S. statute. And, the administration factsheet makes clear that it would be the administration alone that would select new countries for TPP admission with the only obligation to Congress being notification of such a decision and the commencement of access talks.

ENVIRONMENT CHAPTER: The TPP Would Increase Risks to Our Air, Water, and Climate

- **Multilateral Environmental Agreements (MEAs) Rollback:** The TPP actually takes a step back from the environmental protections of all U.S. free trade agreements (FTAs) since 2007 with respect to MEAs. Past deals have required each of our FTA partners to "adopt, maintain, and implement laws, regulations, and all other measures to fulfill its obligations under" ***seven*** core MEAs. The TPP, however, only requires countries in the pact to "adopt, maintain, and implement" domestic policies to fulfill ***one of the seven*** core MEAs – the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). This regression violates:
    - The bipartisan "May 2007" agreement between then-President George W. Bush and congressional Democrats;
    - The minimum degree of environmental protection required under the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, also known as "fast track;" and
    - The minimum obligation needed to deter countries from violating their critical commitments in environmental treaties in order to boost trade or investment.

- **Weak Conservation Rules:** While the range of conservation issues mentioned in the TPP may be wide, the obligations – what countries are actually required to do – are generally very shallow. Vague obligations combined with weak enforcement, as described below, may allow countries to continue with business-as-usual practices that threaten our environment.
    - Illegal Trade in Flora and Fauna: Rather than *prohibiting* trade in illegally taken timber and wildlife – major issues in TPP countries like Peru and Vietnam – the TPP only asks countries "to combat" such trade. To comply, the text requires only weak measures, such as "exchanging information and experiences," while stronger measures like sanctions are merely listed as options.
    - Illegal, Unreported, and Unregulated (IUU) Fishing: Rather than *obligating* countries to abide by trade-related provisions of regional fisheries management organizations (RFMOs) that could help prevent illegally caught fish from entering international trade, the TPP merely calls on countries to "endeavor not to undermine" RFMO trade documentation – a non-binding provision that could allow the TPP to facilitate increased trade in IUU fish.

- Shark Finning and Commercial Whaling: Rather than *banning* commercial whaling and shark fin trade – major issues in TPP countries like Japan and Singapore – the TPP includes a toothless aspiration to "promote the long-term conservation of sharks…and marine mammals" via a non-binding list of suggested measures that countries "should" take.

- **Climate Change Omission:** Despite the fact that trade can significantly increase climate-disrupting emissions by spurring increased shipping, consumption, and fossil fuel exports, the TPP text fails to even *mention* the words "climate change" or the United Nations Framework Convention on Climate Change – the international climate treaty that all TPP countries are party to.

- **Lack of Enforcement:** Even if the TPP's conservation terms included more specific obligations and fewer vague exhortations, there is little evidence to suggest that they would be enforced, given the historical lack of enforcement of environmental obligations in U.S. trade pacts. The United States has never once brought a trade case against another country for failing to live up to its environmental commitments in trade agreements – even amid documented evidence of countries violating those commitments.
  - For example, the U.S.-Peru FTA, passed in 2007, included a Forestry Annex that not only required Peru "to combat trade associated with illegal logging," but included eight pages of specific reforms that Peru had to take to fulfill this requirement. The obligations were far more detailed than any found in the TPP environment chapter, and were subject to the same enforcement mechanism. But after more than six years of the U.S. – Peru trade deal, widespread illegal logging remains unchecked in Peru's Amazon rain forest. In a 2014 investigation, Peru's own government found that 78 percent of wood slated for export was harvested illegally. For years, U.S. environmental groups have asked the U.S. government to use the FTA to counter Peru's extensive illegal logging. Yet to date, Peru has faced no formal challenges, much less penalties, for violating its trade pact obligations. It is hard to imagine that the TPP's weaker provisions would be more successful in combatting conservation challenges.

- **New Rights for Fossil Fuel Corporations to Challenge Climate Protections**
  - The TPP would undermine efforts to combat the climate crisis, empowering foreign fossil fuel corporations to challenge our environmental and climate safeguards in unaccountable trade tribunals via the controversial investor-state dispute settlement system.
  - The TPP's extraordinary rights for foreign corporations virtually replicate those in past pacts that have enabled more than 600 foreign investor challenges to the policies of more than 100 governments, including a moratorium on fracking in Quebec, a nuclear energy phase-out in Germany, and an environmental panel's decision to reject a mining project in Nova Scotia.
  - In one fell swoop, the TPP would roughly double the number of firms that could use this system to challenge U.S. policies. Foreign investor privileges would be newly extended to more than 9,000 firms in the United States. That includes, for example, the U.S. subsidiaries of BHP Billiton, one of the world's largest mining companies, whose U.S. investments range from coal mines in New Mexico to offshore oil drilling in the Gulf of Mexico to fracking operations in Texas.

- **Locking in Natural Gas Exports and Fracking:** The TPP's provisions regarding natural gas would require the U.S. Department of Energy (DOE) to automatically approve *all* exports of liquefied natural gas (LNG) to *all* TPP countries – including Japan, the world's largest LNG importer. This would:

- Facilitate Increased Fracking: Increased natural gas production would mean more fracking, which causes air and water pollution, health risks, and earthquakes, according to a litany of studies.
- Exacerbate Climate Change: LNG is a carbon-intensive fuel with significantly higher life-cycle greenhouse gas emissions than natural gas. LNG dependency spells more climate disruption.
- Increased Dependence on Fossil Fuel Infrastructure: LNG export requires a large new fossil fuel infrastructure, including a network of natural gas wells, terminals, liquefaction plants, pipelines, and compressors that help lock in climate-disrupting fossil fuel production.

EXCEPTIONS CHAPTER: National Security Exception Weakened, No New Safeguards for Environmental, Health, Human Rights Policies

- **The final text reveals a significant roll back of the standard Security Exception that has been part of U.S. trade agreements over the past decade.** (See Article 29.2) Following a major port security concern relating to the U.S.-Oman Free Trade Agreement, U.S. trade pacts since have included a footnote making explicit that a country raising a national security defense for a policy that otherwise violates a trade pact obligation is empowered to determine in its sole discretion what are its essential security interests. While the language of the Security Exception in the TPP is otherwise identical to past U.S. pacts, the footnote has bene eliminated. Yet the footnote was inserted in past pacts to ensure that trade pact tribunals could not substitute their judgement for that of governments with respect to what policies were deemed "necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests." The footnote missing in the TPP text required: " For greater certainty, if a Party invokes Article 23.2 in an arbitral proceeding initiated under Chapter Eleven (Investment) or Chapter Twenty-Two (Institutional Provisions and Dispute Settlement), the tribunal or panel hearing the matter shall find that the exception applies."

- **The language touted as an "exception" to defend countries' health, environmental, and other public interest safeguards from TPP challenges is nothing more than a carbon copy of past U.S. free trade agreement language that "reads in" to the TPP several World Trade Organization (WTO) provisions that have already proven *ineffective* in more than 97 percent of its attempted uses in the past 20 years to defend policies challenged at the WTO.**
  - In two decades of WTO rulings, Article XX of the WTO's General Agreement on Tariffs and Trade (GATT) and Article XIV of the WTO's General Agreement on Trade in Services (GATS **have only been successfully employed to actually defend a challenged measure in one of 44 attempts**. Incorporating the GATT/GATS "general exception" means TPP governments must clear a list of high hurdles to successfully use the "exception" to defend a challenged measure.

- **This ineffective general exception does not even apply in the case of Investor-State challenges. Indeed, the General Exception explicitly does not apply to the entire Investment chapter of the TPP.** Many other TPP countries demanded that the exception apply to ISDS cases, and leaked drafts of TPP text included such proposals. The U.S. government strenuously opposed such reforms. The exception language included in the investment chapter is circular, applying only to countries whose policies do not conflict with the other rules of the agreement.

FINANCIAL SERVICES CHAPTER: First U.S. Pact Negotiated Since Global Financial Crisis Fails to Remedy Past Pacts' Deregulatory Terms and Grants Firms New Rights to Challenge Financial Policies

Although the TPP is the first U.S. trade deal to be negotiated since the 2008 financial crisis that spurred a global recession, it would impose on TPP signatory countries the pre-crisis model of extreme financial deregulation that is widely understood to have spurred the crisis. After nearly six years of negotiations under conditions of extreme secrecy, the Obama administration has only now released the text of the controversial deal after it has been finalized and it is too late to make any needed changes. The TPP financial services and investment chapters provide stark warnings about the dangers of "trade" negotiations occurring without press, public or policymaker oversight.

- **Unlike Past Pacts, the TPP Would Empower Financial Firms to Use Extrajudicial Tribunals to Challenge Financial Stability Measures that Do Not Conform to their "Expectations."** The TPP's Financial Services chapter "reads in" Investment Chapter provisions that would grant multinational banks and other foreign financial service firms expansive new substantive and procedural rights and privileges not available to U.S. firms under domestic law to attack our financial stability measures. For the first time in any U.S. trade pact, the TPP would grant foreign firms new rights to attack U.S. financial regulatory policies in extrajudicial investor-state dispute settlement (ISDS) tribunals using the broadest claim: the guaranteed "minimum standard of treatment" (MST) for foreign investors. MST is the basis for almost all successful ISDS challenges of government policies under existing pacts. Past U.S. trade pacts allowed ISDS challenges of financial regulatory policies, but limited the substantive investor rights that applied to the Financial Services Chapter, and thus the basis for such attacks. The TPP explicitly grants foreign investors new rights (Article 11.2.2) to launch attacks on financial policies using the extremely elastic MST standard that ISDS tribunals regularly interpret to require compensation if a change in policy undermines an investors' expectations.

- **Despite the pivotal role that new financial products, such as toxic derivatives, played in fueling the financial crisis, the TPP would impose obligations on TPP countries to allow new financial products and services to enter their economies if permitted in other TPP countries.** (Article 11.7)

- **The TPP constrains signatory governments' ability to ban risky financial products, including those not yet invented, via rules designating a regulatory ban to be a 'zero quota' limiting market access and thus prohibited.** (Article 11.5) TPP rules also would jeopardize efforts to keep banks from becoming too big to fail and to firewall the spread of risk between financial activities.

- **The TPP would be the first U.S. pact to empower some of the world's largest financial firms to launch ISDS claims against U.S. financial policies. The TPP would greatly expand U.S. liability for ISDS attacks because currently these firms cannot resort to extrajudicial tribunals to demand taxpayer compensation for U.S. financial regulations.** Among the top banks in the world based in TPP countries are: Mitsubishi UFJ, Mizuho, ANZ, Commonwealth Australia, West Pac, National Australia Bank, Bank of Tokyo, Sumutomo, Royal Bank of Canada, and Toronto Dominion. These multinational firms own dozens of subsidiaries across the United States, any one of which could serve as the basis for an ISDS challenge against U.S. financial regulations if the TPP were to take effect. Under current U.S. pacts, none of the world's 30 largest banks may bypass domestic courts, go before extrajudicial tribunals of three private lawyers, and demand taxpayer compensation for U.S. financial policies. The TPP would allow foreign firms to challenge policies that apply to domestic and foreign firms alike and that have been reviewed and affirmed by U.S. courts. And not

only foreign financial firms but foreign subsidiaries of U.S. firms operating in TPP nations could demand taxpayer compensation for financial regulations and g regulatory actions. Meanwhile, the TPP would newly empower U.S. banks, four of which rank among the world's 30 largest, to launch ISDS claims against domestic financial regulations in TPP countries that do not already have an ISDS-enforced pact with the United States (Australia, Brunei, Japan, Malaysia, New Zealand and Vietnam).

- **A provision touted as a "prudential filter" would fail to effectively safeguard financial policies from ISDS challenges under the TPP.** The provision (Article 11.11.1) states that if a foreign investor uses ISDS to challenge a government's financial measure, and if the government invokes a highly-contested provision for defending prudential measures, financial authorities from the challenged government and from the firm's home government, rather than the ISDS tribunal, will aim to determine whether the prudential defense applies (Article 11.22). *But if those officials cannot agree within 120 days, meaning officials from the challenging corporation's home country opt not to shut down their investor's claims, the decision goes back to the ISDS tribunal.*

- **The use of capital controls and other macro-prudential financial policies that regulate capital flows to promote financial stability are forbidden and subject to compensation demands by foreign corporations.** Like past U.S. free trade agreements (FTA), the TPP text requires that governments "shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory" (Article 9.8). This obligation restricts the use of capital controls or financial transaction taxes, even as the International Monetary Fund, many prominent economists and world leaders have shifted from opposing capital controls to endorsing them as a tool for preventing or mitigating financial crises. Strong concerns about the TPP's ban on the use of such policies resulted in inclusion of a new "temporary safeguard" provision (Article 29.3) despite years of U.S. opposition. But unfortunately, the language that was ultimately agreed would not adequately protect governments' ability to regulate speculative, destabilizing capital flows. The safeguard is subject to a litany of constraining conditions, largely replicating the narrow GATS Article XII "Restrictions to Safeguard the Balance of Payments" terms. But, the TPP provision adds two *further* constraints: capital controls are subject to ISDS challenges as indirect expropriations. Thus, while the temporary safeguard may permit a TPP country to enact a capital control for a limited amount of time, the country may also be required to compensate a foreign investor if doing so results in a significant reduction in the value of an investment. There is no comparable obligation to compensate private investors in the GATS. And, in TPP capital controls "shall not apply to payments or transfers relating to foreign direct investment," a significant limitation. As a result, Chile, which has in place policies that allow long term limits on capital flows, had to negotiate for a separate carve-out of its policies so as to be able to preserve them.

- **The United States, unlike most other TPP countries, has chosen to subject sovereign debt restructuring to ISDS challenges.** An annex in the Investment Chapter seeks to ensure that disputes related to sovereign debt and sovereign debt restructuring are not subject to the full range of investment chapter disciplines (Annex 9-G). But a footnote states that the partial safeguards for sovereign debt restructuring "do not apply to Singapore or the United States." That is, were Singapore or the United States to negotiate a restructuring of its sovereign debt that applied equally to domestic and foreign investors, foreign investors alone would be empowered under the TPP to challenge the non-discriminatory restructuring before an ISDS tribunal, claiming violations of any of the broad substantive foreign investor rights provided by the TPP Investment Chapter.

These deregulatory rules were written under the advisement of Wall Street firms before the financial crisis. Some are included in one of the most extreme World Trade Organization (WTO) agreements *to*

which most TPP nations are not signatories. Rather than update these terms to reflect the post-crisis consensus on the importance of robust financial regulation, the TPP would expose an even wider array of financial stability measures to challenge as violations of the 1990s-era rules. With few exceptions, TPP governments have bound existing and future financial policies to these deregulatory rules, curtailing their policy space to respond to emerging financial products and risks if the deal takes effect.

INTELLECTUAL PROPERTY CHAPTER – PATENT PROVISIONS:

TPP Rolls Back "May 10th Agreement" Reforms, Undermines Access to Medicines in Developing Countries

- **The TPP does not conform to the "May 10" access to medicine reform standards, and it will harm access to medicines in developing countries. TPP provisions require patent term extensions and marketing exclusivity for new uses and forms of old drugs that clearly exceed the bounds of May 10 and will contribute to preventable suffering and death.** On May 10, 2007, Democratic leaders in the U.S. House of Representatives brokered a deal with the George W. Bush Administration designed in part to reduce the negative consequences of U.S. trade agreements for global access to medicines. The May 10 Agreement placed limits on the new monopoly powers that would be granted to pharmaceutical companies in trade agreements, including those with Peru and Panama. This would facilitate the continued generic competition on which many people depend for access to affordable medicine.

- **TPP Final Text vs. May 10th standard: In contrast to the TPP,** the May 10 standard made patent term extensions optional for pharmaceuticals and provided important limitations on data exclusivity rules for developing countries. There were no transition periods by which developing countries were expected to adopt the more pro-monopolistic rules that applied to developed countries.

  - **Exclusivity**: Marketing and data exclusivity rules delay generic drug registration for a specified period of time by limiting the ability of generics manufacturers and regulatory authorities to make use of an originator company's data.

    ✓ **May 10th standard**: Exclusivity normally runs for a five-year concurrent period, meaning that the clock runs on exclusivity from the date of first marketing in the United States or agreement territory. This expedites generic entry.

    ✓ **TPP rule**: Exclusivity runs for a minimum five years. Countries must choose between offering an extra three years exclusivity for new uses, forms and methods of administering products, or five years exclusivity for new combination products. Only Peru may run the exclusivity clock by the concurrent period measurement. Other countries must provide at least five years exclusivity from date of marketing approval in their country, which may be considerably later than the first marketing approval, including cases that are purely a result of the pharmaceutical company moving slow to register a product in a developing country. Biologics exclusivity includes USTR insistence that countries adopt "other measures" toward providing a market outcome comparable to (presumably) eight years. A TPP Commission shall review the biologics exclusivity period, under likely industry pressure to lengthen it. Malaysia and Brunei will have an "access window," allowing them to foreclose marketing exclusivity if a company waits more than eighteen months to begin product registration.

- **Patent Term Extensions**: Patent term adjustments (typically called extensions) significantly delay market entry of generic medicines and restrict access to affordable medicines. While they are allocated ostensibly for "delays" in regulatory review or patent prosecution, variance in review periods is a normal part of each system, and patent terms are not shortened when review proceeds more quickly than usual.

  - ✓ **May 10th standard**: Patent extensions are optional. Countries may choose whether or not to make available patent term extensions for pharmaceuticals.

  - ✓ **TPP rule**: Patent extensions are required for regulatory review periods or patent prosecution periods deemed "unreasonable" (regulatory review) or beyond a period of years (prosecution periods) – five years from application or three years from examination request.

- **Transition Periods, Exemptions:** Undermining the core premise of the May 10 Agreement standard, the TPP would require developing countries to transition to the same patent rules that apply to developed countries. The transition periods are short and only apply to a few rules while the rest would apply immediately to all signatories. Some countries have negotiated exemptions from one or two TPP rules. But again, the rules are beyond the limits of May 10, and will apply to the rest of the TPP parties, including developing countries that may join this aspired "living agreement" in the future.

- **Additional ways the TPP extends monopoly rights relative to the May 10 standard**: While the May 10 Agreement did not make express reference to patent evergreening or other intellectual property rules that can compromise access to medicines, many health advocates take the content of the U.S.-Peru Trade Promotion Agreement as the standard. That agreement did not, for example, require the grant of patents for new uses of old medicines. In contrast, the TPP does. This would allow pharmaceutical firms to "evergreen" their patents, maintaining a monopoly and high prices.

- **The most controversial TPP provision concerns biotech drugs, or biologics – medical products derived from living organisms – for which the pharmaceutical industry obtained new exclusivity periods.** Many TPP countries provided for no special exclusivity rights for such drugs. While TPP countries refused to agree to an automatic monopoly term longer than five years, USTR insisted on text that will allow the U.S. government to pressure and pull countries towards a longer period - eight or even more years of protection. The eight-year position is dangerous, will likely cost lives, and contravenes the May 10 Agreement. Since the text was released,, administration officials have stated explicitly that the deal requires more than five years of monopoly.

PHARMACEUTICAL PRODUCTS AND MEDICAL DEVICES ANNEX:

Opportunities for Drug Firms to Contest Medicine Purchasing and Pricing Decisions

- **The TPP "Annex on Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices," which sets rules that TPP country health authorities would be required to follow regarding pharmaceutical and medical device procurement and reimbursement, expressly names the Centers for Medicare & Medicaid Services (CMS) as covered by its text.** "...with respect to CMS's role in making Medicare national coverage determinations." 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

- **Under the TPP CMS 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 may potentially constrain future policy reforms, including the ability of the U.S. government to curb rising and unsustainable drug prices.

- **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. Might this conditional appeal process be construed as insufficient, if companies argue the TPP grants them an unconditioned right to review?

  - 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."

- **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. 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.

- **Inclusion of Annex Could Bolster Case of a Pharmaceutical Company Suing the U.S.. Under the TPP's ISDS Regime. A** foreign pharmaceutical company that has launched an investor-state suit against a government for a reimbursement decision could use the Annex to demonstrate the basis for establishing legitimate expectations for certain treatment that a government decision has frustrated.

INTELLECTUAL PROPERTY - COPYRIGHT PROVISIONS:

Undermines Internet Freedom, Privacy By Tipping Balance Away from Users and Public Interest

- **The final TPP text threatens to lock United States into its current broken copyright rules that undermine access to knowledge, creativity, and autonomy over digital devices and content, and the TPP will export these rules around the world.**

- **TPP copyright provisions will create even more legal uncertainty over the right of anyone to tinker with their devices that contain software or digital content.**

- **Communities that will be most adversely affected: students, teachers, librarians, archivists, researchers, hobbyists, students, journalists and whistleblowers.**

- **Fair use is left out of the TPP**: Instead, there are weak provisions on upholding the public interest. There is no binding requirement that signatory countries enact necessary safety valves to copyright's restrictions. This further tips the balance away from public interest concerns and towards the interests of rightsholders, undermining general rights to access knowledge and participate in and comment on existing cultural works.

- **Expansion of excessive copyright terms**: **the TPP extends copyright terms for six of the 12 negotiating countries by another 20 years.** This comes as a huge cost for public access to culture, while there has been no empirical evidence that this incentivizes the creation of creative works. This eats away at the public domain, which is critical as a cultural commons from which people can adapt and build upon existing works. This would exacerbate the orphan works problem, where works whose authors has deceased or have gone missing become difficult or nearly impossible to find or access.

  - **Bans tinkering with software and digital devices**: Digital rights management (DRM), also known as technological protection measures, is encryption that comes on an increasing number of digital devices and content. DRM is designed to restrict their owner from tampering with or changing the underlying product. The TPP prohibits the circumvention of DRM and criminalizes those who share the knowledge or tools to do so. Such provisions impact people's ability to tinker with or repair their own phones, video game counsels, computers, and increasingly on everyday machines like kitchen appliances and cars. Similar prohibitions against the removal of rights management information are also enforced, making life more difficult for those who quote, reference or sample existing works.

- **Heavy-handed criminal enforcement and civil damages**: Countries will be compelled to enact or maintain high penalties and damages that are grossly disproportionate to the actual loss to the rightsholders. It also empowers law enforcement to seize or destroy "materials or implements" used in the alleged infringing activity. Excessive penalties lead to a chilling effect on innovators and everyday people who wish to try and access or use existing copyrighted works. This could lead to a family's home computer becoming seized simply because of its use in sharing files online, or for ripping Blu-Ray movies to a media center.

  - **Dangerously vague, severe punishment for trade secrets revelations**: Provisions criminalize anyone who gain access to or disclose a trade secret held in a computer system. There are no exceptions for cases where the disclosed information may serve the public interest. This could be used to criminalize investigative journalists or whistleblowers who reveal corporate wrongdoing through

any online or digital means. Such provisions echo the draconian Computer Fraud and Abuse Act law in the U.S.

- **Undermining online privacy and helping trademark owners to seize domains**: The U.S. has repeatedly committed to an open, multi-stakeholder model of Internet governance for domain name policy; yet the TPP undermines this by requiring countries to provide databases of contact information of domain name registrants, and to adopt an extrajudicial system for resolving disputes over domain names that privileges trademark owners over users. This means owners of websites would be unable to shield themselves from identity thieves, scammers, harassers, and copyright and trademark trolls. It also overrides the bottom-up processes that TPP countries have evolved to manage their own processes for resolving domain name disputes.

- **Further enforcing rules that enable censorship by copyright takedown**: The United States already has a system for dealing with infringement allegations of live online content—the copyright holder sends a notice to the website or platform, and the service must remove it immediately and enable the user to contest the takedown. The burden of proof is on the user to show that their use of the work is not infringing. Provisions requiring ISPs to take measures to combat infringement may compel increasing use of algorithms or "bots" to scan works for its inclusion of copyrighted content, where even non-infringing uses of works (such as when it is a fair use) are taken down from the Internet. Overall, it incentivizes web platforms to take down content in order to avoid liability, despite legality of the contested content.

INVESTMENT CHAPTER: Expanded List of Policies Exposed to Attack by 9,200 Foreign Firms Newly Empowered to Use ISDS Against the U.S.

- **Contrary to administration claims that the TPP's Investment Chapter would limit the uses and abuses of the controversial investor-state dispute settlement (ISDS) regime, much of the text replicates, often word-for-word, the most provocative terms found in past U.S. ISDS-enforced pacts.** Worse, **the** TPP would expand the controversial ISDS regime that elevates individual foreign investors to equal status with the 12 sovereign governments signing the deal. Many fixes and reforms included in a 2012 leaked draft version of the Investment Chapter have been eliminated. The final TPP text does include some new verbiage seemingly designed to counter the growing political blow back against ISDS. While the tone is different in some provisions, in practice the TPP's binding legal language does not constrain ISDS tribunals from making ever-expanding interpretations of the rights countries owe foreign investors and thus the compensation they can be ordered to pay foreign firms.

- **Contrary to Fast Track negotiating objectives, the TPP would grant foreign firm greater rights that domestic firms enjoy under U.S. law and in U.S. courts.** One class of interests – foreign firms – could *privately enforce* this public treaty by **skirting domestic laws and courts** to challenge U.S. federal, state and local decisions and policies on grounds not available in U.S. law and do so before extrajudicial tribunals authorized to order payment of unlimited sums of taxpayer dollars. Under the TPP, compensation orders could include the "expected future profits" a tribunal surmises that an investor would have earned in the absence of the public policy it is attacking.

- **TPP would expand U.S. ISDS liability by widening the scope of domestic policies and government actions that could be challenged.** ***For the first time in any U.S. free trade agreement***:

- **The provision used in most successful investor compensation demands would be extended to challenges of financial regulatory policies.** The TPP would extend the "minimum standard of treatment" obligation to the TPP Financial Services Chapter's terms, allowing financial firms to challenge policies as violating investors' "expectations" of how they should be treated. The "safeguard" that the U.S. Trade Representative (USTR) claims would protect such policies repeats an ambiguously written World Trade Organization (WTO) provision that has not been accorded significant deference in the past.
- **Pharmaceutical firms could use TPP to demand cash compensation for claimed violations of World Trade Organization rules on creation, limitation or revocation of intellectual property rights.** Currently, WTO rules are not privately enforceable by investors.

- **With Japanese, Australian and other firms newly empowered to launch ISDS attacks against the United States, the TPP would *double* U.S. ISDS exposure. More than 1,000 additional corporations in TPP nations, which own more than 9,200 subsidiaries here, could newly launch ISDS cases against the United States.** Currently, under ALL existing U.S. investor-state-enforced pacts, about 9,500 U.S. subsidiaries for foreign firms have such powers. Almost all of the 50 past U.S. ISDS-enforced pacts are with developing nations with few investors here. That is why the United States has managed largely to dodge ISDS attacks to date. But, the TPP would subject U.S. policies and taxpayers to an unprecedented increase in ISDS liability at a time when the types of policies being attacked and the number of ISDS case are surging. Just 50 known cases were launched in the regime's first three decades combined while about 50 claims were launched in *each* of the last four years.
  - **The TPP also would newly empower more than 5,000 U.S. corporations to launch ISDS cases against other signatory governments on behalf of their more than 19,000 subsidiaries in those countries.** (These are firms not already directly covered by an ISDS-enforced pact between the United States and other TPP governments.)

- **U.S. negotiators succeeded in pressuring other TPP nations to empower foreign investors to bring certain sensitive contract disputes with TPP signatory governments to ISDS tribunals, instead of resolving such matters in domestic courts.** This includes disputes with the federal government about natural resource concessions, government procurement projects for construction of infrastructure projects and contracts relating to the operation of utilities. **TPP ISDS tribunals would not meet standards of transparency, consistency or due process common to TPP countries' domestic legal systems or provide fair, independent or balanced venues for resolving disputes.** (Section B) ***Contrary to claims that the process was "reformed":***
  - **TPP tribunals would still be staffed by three private sector attorneys allowed to rotate between acting as "judges" and as advocates for investors** launching cases. Such dual roles would be deemed unethical in most legal systems.
  - **The TPP text has no requirement for tribunalists to be independent or impartial.** Rather, the text relies on weak impartiality rules set by the arbitration venues themselves.
  - **The text does not include new conflict of interest rules for tribunalists.** TPP negotiators punted a so-called "Code of Conduct" for ISDS tribunalists to a side agreement to be created and put in place before the pact goes into effect (Article 9.21.6). Whether such rules will be effective with respect to tribunalists' direct conflicts of interest is an open question. It seems improbable that Congress and the public will get to evaluate the rules and how enforceable they will be before votes to approve the pact. However, even if the Code of Conduct were to stop the outrageous practice of lawyers with direct financial interests in the companies and issues involved being allowed to serve as "judges," the TPP text does not address the bias inherent in the ISDS system

and underlying the business model of lawyers engaged in this field: ISDS tribunalists have a structural incentive to concoct fanciful interpretations of foreign investors' rights and order compensation to increase the number of investors interested in launching new cases and enhance the likelihood of being selected for future tribunals.

- **The provisions on expedited dismissal of "frivolous" cases replicate the language included in U.S. pacts since the Bush II administration with respect to timelines for such claims and tribunals' authority to order claimants to pay costs for dismissed cases.** The only new term makes explicit a factor (that a claim is "manifestly without legal merit") that is inherent in the standard for expedited dismissal that has been included in past U.S. pacts and in the TPP: that "a claim submitted is not a claim for which an award in favour of the claimant may be made…"
- **There is no system of outside appeal on the merits of a decision. Nor is an appellate body established within TPP.** The text retains tribunalists' full discretion to determine how much a government must pay an investor. This can include claims for the "expected future profits" the tribunal surmises would have earned in the absence of the policy under attack. ISDS tribunals have ordered billions in compensation under existing U.S. pacts alone for toxic bans, land-use policies, financial stability measures, forestry rules, water services, economic development policies, mining restrictions and more. Pending claims under U.S. pacts total more than $25 billion.
- **There is no "exhaustion" requirement – that foreign firms seek redress in domestic legal and administrative venues before resorting to ISDS.** Instead, foreign investors can forum shop.
- **Even when governments win, under TPP rules they can be ordered to pay for the tribunal's costs and legal fees, which average $8 million per case.**

- **TPP does not include the promised "reforms" of the substantive foreign investor rights underlying egregious past rulings.**
  - **The TPP retains the "Minimum Standard of Treatment" and "Indirect Expropriation" language from past U.S. pacts that grants foreign investors** "rights" to not have expectations frustrated by a change in government policy. Under the TPP, it does not matter if the changed policy came in response to a new financial crisis or health discovery or environmental catastrophe, *or if it applies to domestic and foreign firms alike.*
  - **There are no new safeguards that limit ISDS tribunals' discretion to issue ever-expanding interpretations of governments' obligations to investors and order compensation on that basis.** The text reveals virtually identical "limiting" annexes and terms that were included in U.S. pacts since the 2005 Central America Free Trade Agreement (CAFTA) that have failed to rein in ISDS tribunals. CAFTA tribunals have simply ignored the "safeguard" annexs that are replicated in the TPP and as with past pacts, in the TPP such tribunal conduct is not subject to appeal.
  - **The TPP includes an overreaching definition of "investment" that would extend the coverage of the TPP's expansive substantive investor rights far beyond "real property," permitting ISDS attacks over government actions and policies related to financial instruments, intellectual property, regulatory permits and more.** Proposals to narrow the definition of "investment," and thus the scope of policies subject to challenge, that were included in an earlier version of the text that leaked have been eliminated.
  - **The lack of robust "denial of benefits" provisions would allow firms from non-TPP countries and firms with no real investments to exploit the extraordinary privileges the TPP would establish for foreign investors.** This includes firms from non-TPP countries that have incorporated in a TPP signatory country. Thus, for instance, one of the many Chinese state-owned

corporations in Vietnam and Malaysia (that also have U.S. investments), could "sue" the U.S. government under this text. Language limiting investors to those that have "substantial business activities" is not defined, and tribunals have been willing to consider very minimal investments in host states as conferring nationality for the sake of gaining treaty protections.

- **Proposals included in leaked earlier drafts to extend even the TPP's weak general exceptions for environmental and health policies to the Investment Chapter were rejected.** Instead of real safeguards to stop attacks on nations' environmental, health and other regulatory policies, the TPP text replicates the same self-cancelling provision included in past U.S. pacts, although with more Policy types listed. The provision, which limits the rule of construction to only environmental and other policies that *already are consistent* with the agreement makes the measure meaningless. A safeguard is only needed to protect policies that would otherwise violate the agreement's rules. The relevant provision (Article 9.15) reads "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure **otherwise consistent** with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives." (emphasis added)

- **The only meaningful new ISDS safeguard included in the final TPP text is a carve-out for tobacco-related public health measures that allows countries to elect to remove such policies from being subject to ISDS challenges, either in advance or once a policy is attacked.** Leading health groups, pro-free-trade former New York City mayor Michael Bloomberg and TPP nations like Malaysia pushed for years for more expansive terms. These proposals would have prevented all TPP challenges to tobacco-related health policies, including by other governments and would have excluded tariff cuts on unprocessed tobacco and tobacco products that would result in the lowering of the price of cigarettes. The final tobacco provision makes clear that government-to-government challenges to tobacco control measures are allowed as is tariff elimination on tobacco and tobacco products. But even with these unfortunate limitations, the final provision is considerably better than past ISDS tobacco control exception proposals. It provides an example of how a meaningful trade pact safeguard against ISDS attacks could be structured. That said, because the TPP's Investment Chapter includes a Most Favored Nations provision, a tobacco company could demand the better investor rights provided in other ISDS-enforced investment agreements the regulating country has enacted. (Indeed, the TPP tobacco language was motivated in part by various subsidiaries of Phillip Morris using the ISDS clauses of various countries' ISDS-enforced agreements to attack Australian and Uruguayan tobacco control policies.) However, even with those not insignificant caveats, this real carve-out from ISDS liability for various forms of health-related tobacco control policies makes apparent how ineffective and meaningless the chapter's language advertised by the White House as protecting other health policies and the environment actually is (Article 9.15). The tobacco provision also begs the question why only tobacco control policies are excluded from ISDS attacks, given no other provision of the Investment Chapter nor the TPP's General Exceptions Chapter provides any meaningful safeguard or effective exception to stop ISDS attacks on other public health measures, from toxins bans to patent policies to pollution cleanup requirements. (For more on the TPP's tobacco-related provisions, see the text analysis from Action on Smoking and Health.)

LABOR CHAPTER: Vietnam, Malaysia Side Agreements a New Low, Labor Text Does not make Significant, Meaningful improvements Over Bush Standards that Have Not Improved Conditions

- Firms that can operate in conditions in which ILO core labor standards are not respected drive down wages and working conditions, drawing in additional investment, enabling social dumping of lower-priced goods, and suppressing wages and working conditions in other markets against which producers everywhere are forced to "compete."

- **Past trade agreements, even those that contain the so-called "May 10" provisions, failed to protect labor rights and reverse the race to the bottom. The TPP Labor Chapter does not make significant, meaningful improvements over the nearly decade old George W. Bush era standard.** Rather, the side arrangements made with Vietnam, Malaysia and Brunei represent a new low. The "achievements" touted by USTR appear to be of limited value.

- **The vast majority of the recommendations made by organized labor were completely ignored. A sampling of labor asks omitted from the TPP:**
  - To improve compliance and enforceability, define the core labor standards, e.g., by referring to ILO Conventions
  - To protect workers and raise wages, require 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
  - To protect workers and raise wages, define "acceptable conditions of work" more broadly to include such concepts as payment of all wages and benefits legally owed and compensation in cases of occupational injuries and illnesses
  - To increase compliance with labor obligations, include commitments aimed at ensuring effective labor inspections
  - To increase compliance with labor obligations, allow a petitioner to make a complaint based on a single egregious violation, rather than waiting for a "sustained or recurring course of action" to occur
  - To remove requirement that violations must be in a manner affecting trade or investment between the parties", which leaves out most public sector workers.
  - To prevent abuse of vulnerable workers and a spiral to the bottom in wages and working conditions, ensure migrant workers receive the same rights and remedies as a country's nationals
  - To prevent human trafficking and forced labor, establish enforceable rules for international labor recruiters
  - To ensure timely enforcement and reduce unwarranted delays, establish clear, universal timelines for consideration of labor complaints
  - To reduce excessive discretion to ignore or delay labor complaints, require that a Party that has received a meritorious complaint will promptly and zealously pursue the case (to avoid years-long delays like those confronted in the Guatemala and Honduras cases)
  - To help raise standards across the region, create an independent labor secretariat that researches emerging labor issues and reports on best practices and establish Trans-Pacific works councils for firms operating in more than one TPP country

- **Instead, the USTR made minor changes likely to have little impact:**
  - The commitment to "discourage" trade in goods made with forced labor is not equivalent to a commitment to prohibit trade in such goods. It could be met by hanging a poster, for example.

- The commitment to have laws regarding acceptable conditions of work fails to set standards for such laws. The minimum wage in Brunei could be a penny an hour, for example.
- The commitment not to waive or derogate from laws implementing acceptable conditions of work in an Export Processing Zone leaves most TPP workers unprotected. The commitment is too narrow to be of clear value to workers.
- Too much of the new text (vis a vis "May 10") relies on legally imprecise language like "may" and "endeavor to encourage". Such language, which is aspirational rather than obligatory, does not provide the clear protections workers in the region need to organize, collectively bargain, and raise their wages in a safe and just working environment. Aspirational language will not help build new markets for U.S. products.

- **Analysis of the country specific plans to follow in the coming days, but we note with great disappointment the lack of any plan for Mexico,** which is and has long been woefully out of compliance with international labor standards. To be clear, we maintain that no country should get TPP benefits until it complies with all the obligations of the TPP, including its labor standards.

MARKET ACCESS: Where is the Upside for U.S. Workers and Producers Because Downside is Clear

- The TPP lowers U.S. tariffs to zero, giving our competitors unfettered access to the U.S. market while some other countries are allowed dramatically longer periods of time to open their markets.

- The ability of other countries, like Vietnam, to maintain their tariffs for significant periods of time will provide further incentives for U.S. companies to outsource production and offshore jobs and use Vietnam as an export platform to send their products back to the U.S. A good example of this is our experience with China where more than 45% of the products produced by foreign-invested enterprises are exported to the U.S. rather than sold to Chinese consumers.

- According to an initial analysis published in the Wall Street Journal, the U.S. market access concessions alone will increase the U.S. trade deficit in manufactured goods and autos and auto parts by more than $55 billion dollars resulting in the loss of more than 330,000 jobs.

- Tariffs are not the only impediment to U.S. exports to TPP countries. The TPP countries with whom the U.S. does not have existing free trade agreements with have utilized various market access impediments as well as maintain state-owned enterprises and non-market economic policies (Vietnam) to ensure the success of their companies. The TPP will do little to ensure that access for U.S. exports will increase to offset the flood of imports that are anticipated.

- Currency manipulation can ensure that any "market access" achieved in this chapter is undermined.

PROCUREMENT CHAPTER: Rules on Buy America, Buy Local - America's Domestic Producers & Their Employees, Responsible Purchasing Policies Net Losers

- Trade commitments that require the federal government to treat foreign bidders as if they were U.S. bidders undermine one of most important job creation tools: fiscal policy. Governments should be able to use stimulus funds to create jobs within their borders, and not be required to spend those funds to create jobs elsewhere—nor should developing countries be prevented from using their limited funds on domestic stimulus. That is why the AFL-CIO recommended omitting a Government Procurement chapter from TPP.

- **Tthe TPP gives bidders from Vietnam, Malaysia, Brunei, and other TPP countries expansive access to U.S. goods, services, and construction contracts.**
- **It is not clear that responsible bidding criteria (such as a requirement that a bidder not have outstanding environmental clean-up obligations or the use of bonus points for bidders with better safety records) will be free from "barriers to trade" type challenges.**

- **Though the agreement does not cover state procurement at this time, the TPP requires that the Parties "commence negotiations with a view to achieving expanded coverage, including sub-central coverage" within three years.** Such provisions could undermine popular local and state preference programs.

- Given that USTR has not produced any studies showing that Government Procurement provisions in prior agreements are net job and wage winners for U.S.-based workers—despite repeated requests—we can only conclude that such evidence does not exist and that this entire chapter is a gain for global corporations, but not for U.S. workers.

- Partial List U.S. Procuring entities now open to TPP bidders (there are at list 93 specific procuring entities listed): Department of Transportation (in part), Department of Defense (in part), Department of Veterans Affairs, Department of State, Department of Agriculture (in part), Department of Homeland Security (in part), General Services Administration, The Smithsonian Institution, Federal Prison Industries, Inc., Federal Reserve System, Federal Communications Commission, Tennessee Valley Authority (except Malaysia)

RULES OF ORIGIN CHAPTER: ROOs, Particularly for Autos, Won't Promote Jobs in U.S., Or Wider TPP Area

- The single most critical area where the rules of origin concern domestic production and the workforce is in the auto and auto parts sector. **The TPP dramatically lowers the existing North American Free Trade Agreement requirement of 62.5% content (which itself did not work well and promoted a major production shift to Mexico) to a new 45%, TPP-wide regional value content standard based on the net cost method. This is a substantial drop in the requirement for**

content that will increase the percentage of parts from China and other non-TPP countries that could be in a vehicle and still qualify for the vast preferences of the Agreement.

- **Essentially, an auto with 55% Chinese content could be considered to be Made in America or Made in the TPP under the provisions of the Agreement, qualifying** for its tariff benefit while undermining the premise that somehow China would have to raise its standards in order to benefit from the TPP.

- **In the final days of the negotiations, the TPP text was modified to include a new provision that would grant preferences for additional parts that would be considered to be made by a TPP country whether or not they, in fact, were actually produced in those countries.** This new approach opens up a huge loophole that might, in fact, result in the stated 45% requirement actually being closer to 30-35% making it the lowest rule of origin requirement of any FTA involving the U.S.

  - **This new provision establishes a standard that appears to be similar to a "deemed originating" standard—meaning many important auto parts will count as TPP-originating whether or not they actually came from a TPP country.** Parts subject to this weaker rule include certain body parts, glass and other items.

- **In addition, the rules of origin would potentially allow for further reductions in the value of the content that might have to come from a TPP country to qualify for the Agreement's benefits: parts that met the low thresholds in the Agreement would then be considered to originate in the TPP essentially then being considered to be 100% sourced in the TPP, driving the nominal 45% regional value content down even further.**

- **The *Wall Street Journal* published an initial estimate that the U.S. trade deficit in autos and auto parts would increase by $23 billion making it the single greatest loser of any sector.**

- **Finally, it is important to note that additional countries could "dock on" to this agreement in the future. Therefore, the ROO standard could prove to be weakened over time as more production is shifted to non-TPP countries, threatening U.S.-based auto supply chain jobs.**

SANITARY AND PHYOSANITARY CHAPTER: Constraints on Food Safety Provisions

- **New language on border inspection allows exporters to challenge border inspection procedures:** The TPP contains specific language on border inspections that allow challenges to the U.S. border inspection system. Border inspections must "limited to what is reasonable and necessary" and "rationally related to available science," which allows challenges to the manner inspections and laboratory tests are conducted. (Art. 7.11 at para. 5.)

- **New language allows exporters to challenge specific detentions at the border for food safety problems:** New language that replicates the industry demand for a so-called Rapid Response Mechanism that requires border inspectors to notify exporters for every food safety check that finds a problem and give the exporter the right to bring a challenge to that port inspection determination. (Art. 7.11 at paras. 6 to 8.) This is a new right to bring a trade challenge to individual border inspection

decisions (including potentially laboratory or other testing) that second-guesses U.S. inspectors and creates a chilling effect that would deter rigorous oversight of imported foods.

- **Stronger language on risk assessment makes it easier to challenge U.S. food safety laws and allows foreign review of U.S. regulatory process:** The TPP SPS risk assessment language is considerably stronger than the WTO SPS rules and includes deregulatory catch-phrases that are designed to make it easier to lodge trade disputes against food safety measures. (Art. 7.9 at para. 5.) Food safety oversight would be assessed based not on the extent to which it protected consumers but primarily on the extent it impacted trade, and the language favors risk management strategies that put trade before food safety. (Art. 7.9 at para. 6(b).) The U.S. regulatory process already has considerable risk assessment and cost benefit requirements, this language allows foreign countries to challenge the underlying determination, science and analysis in the rulemaking process.

- **Encourages the use of private certifications for food safety instead of government inspection:** The TPP includes new language that encourages the use of private certifications of food safety assurances — either third party certifications or potentially even self-certification — that would meet the same food safety objectives. (Art. 7.12.) Third party or self-certified food safety claims are considerably worse than independent, government oversight because there is a financial incentive to certify the food as safe. Several U.S. food safety outbreaks have occurred at facilities that received private certifications that attested to their food safety (the companies behind the 2009 peanut butter salmonella outbreak, 2010 egg salmonella outbreak and the 2011 cantaloupe listeria outbreak all received outstanding ratings from their third-party certifier).

- **Thematically prioritizes the international trade in food ahead of food safety:** The TPP SPS preamble says governments can protect human, animal and plant health and life *"while facilitating and expanding trade"* — which means that food safety oversight can exist only in conjunction with trade expansion. The WTO SPS preamble allows food safety oversight but warns of food safety programs that are discriminatory or act as barriers to trade. (Art. 7.2(a).)

STATE OWNED ENTERPRISES TERMS: Rules Won't Reverse Rise of SOEs and their Undermining of U.S. Domestic Production and Employment

- The negative impact of state-owned enterprises and state controlled and supported entities on domestic production and employment in the U.S. has increased dramatically over the years. While China's SOEs have had an enormous negative effect on the U.S., other countries – including TPP participants Vietnam, Malaysia and Singapore maintain and support vast SOEs which control significant portions of their economies. Indeed, Vietnam continues to be considered as a non-market economy under the terms of their WTO accession.

- Other countries have taken a cue from China and these other countries to actually increase the power and reach of their SOEs not only in their own markets, but in global commerce. The effect has been devastating in industries ranging from steel and other metals, to telecommunications, chemicals and many others. The TPP has been touted as the first agreement with a chapter addressing the activities of SOEs and proponents have argued that we need to write the rules so China doesn't have the

opportunity to set the standards. Unfortunately, the standards created in the TPP text will do little to nothing to reverse the rise of SOEs and their role in undermining U.S. domestic production and employment.

- The definitions of what a state-owned entity are not broad enough and fail to include all commercial entities that are, or potentially could, operate on behalf of the state. The text provides a definitional structure that leaves substantial flexibility for the state to exert control or influence over its entities while evading coverage of the TPP and harming U.S. companies and their workers.

- The TPP precludes action against any existing support or preferential arrangement benefitting an SOE that was provided prior to the entry into force of the Agreement. This provides a safe harbor for all the existing benefits that SOEs have received as well as those that might be provided over the potentially lengthy period of time before the agreement enters into force, for example, a 40-year no interest loan.

- The TPP fails to cover sub-federal, state-owned enterprises and only calls for a possible review of this issue after a several year period. But if China is to join, the omission of sub-central entities is critical. As The Economist magazine noted last year, while the number of SOEs in China at the federal level has been reduced over the years, there are still 155,000 enterprises owned by central and local governments. The failure to cover sub-federal SOEs in the current TPP countries, as well as a TPP acting as template for future countries, including China, via the docking clause, is a massive loophole that will have potentially devastating consequences for domestic production and employment in the U.S. The lack of coverage of foreign sub-federal entities is a critical flaw with no expectation of future coverage.

- The TPP fails to recognize the pervasive and perverse impact of SOEs in foreign countries. The text requires proof of a "direct effect" which, in many cases, is difficult to prove because of the lack of transparency (which is not sufficiently addressed in the so-called transparency clause) and the reluctance of firms to question activities of SOEs or those entities operating with state support because of concern about threats of market consequences and retaliation.

- The adverse effects provision in the TPP requires, in part, a showing of "significant" harm which fails to recognize the often corrosive, persistent effect of the operations of SOEs.
- The adverse effects provision requires a showing of harm, under normal circumstances, of at least one year. This ignores the fact that harm is often the result of individual, but repeated sales in a market such as for steel and other commodities.

- In particular, the provisions seem ill suited to adequately protect small manufacturers and ensure they can remain in business during the time to takes to gather evidence sufficient to demonstrate a harm, pursue a case, and secure relief.

- Finally, we are not confident that the SOE definition and chapter is carefully crafted to ensure the integrity of important public services including entities such as the U.S. Postal Service, Amtrak, and the Tennessee Valley Authority. Public services are not commercial enterprises and should not be treated as such.

FINAL PROVISIONS – ENTRY INTO FORCE: TPP Only Enters into Force if U.S. & Japan Approve

- There are three scenarios for how the TPP could enter into force. (Article 30.5) All would require the United States and Japan plus some additional countries to approve the deal. Thus, if Congress does not approve the TPP, it will not enter into force for the other countries.
  - The TPP could go into effect 60 days after all of the original countries have provided notice in writing that they completed their domestic approval processes if this occurs within two years of the deal being signed.
  - If two years pass and all of the original signatory countries have not provided the notification, then the deal could go into effect 60 days after the two year period ends if notification has been given by at least six of the original signatories that together account for at least 85 percent of the combined gross domestic product of the original signatories in 2013. (Based on data of the International Monetary Fund using current prices in U.S. dollars.) The 85 percent requirement means both the United States and Japan must be among the six nations.
  - If neither of those two scenarios occur, then the TPP could enter into force 60 days after the date on which at least six of the original signatories, which together account for at least 85 per cent of the combined gross domestic product of the original signatories in 2013, have provided the required notification that they approved the deal.
  - To create pressure on countries other than the United States and Japan to ratify the deal and provide notice, the pact empowers the TPP Commission (the governing body) to determine whether the agreement will enter into force for a country providing notice it has completed its approval processes at a date after the deal went into effect for the initial group of countries.

BIOTECHNOLOGY AND GMO TALKING POINTS - VARIOUS CHAPTERS: First Trade Pact to Subject GMOs to new Trade Rules

- **The TPP is the first trade agreement to specifically identify agricultural biotechnology/GMO products and policies as subject to new trade rules:** The biotechnology, seed and agribusiness industries lobbied for and secured new trade protections for GMOs in the TPP. The National Treatment chapter includes an all-encompassing definition (all agricultural products including fish developed with a host of biotechnology techniques, including the combination of traits from unrelated plants or animals). (Art. 2.21.)

- **USDA and USTR have long-identified foreign governments' biotechnology oversight as a trade barrier, language in the TPP makes it easier to challenge these rules:** USTR has identified all agricultural biotechnology oversight (including a country's GMO approval process, GMO import monitoring and GMO labeling requirements) as potential trade barriers. Language in the TPP provides more specific avenues of attack for countries and companies to challenge foreign government oversight of agricultural biotechnology. (Art. 2.29 at paras. 4, 9 and 10.)

- **Special language designed to attack rules regulating approval of GMO crops and products:** The TPP requires countries to submit to other countries their regulatory approval process, their scientific documentation used to establish their regulatory approval process and the list of approved agricultural

biotech crops or products. The TPP specifically encourages countries to expeditiously approve GMO crops and products. (Art. 2.29 at paras. 4, 8.) These affirmative obligations facilitate foreign governments and agribusiness, biotech and food manufacturing companies to challenge biotechnology regulations under the SPS (food safety) or investor-to-state provisions.

- **Special language on testing for GMO contamination:** Countries that prohibit the import of unapproved GMO crops (or categories of GMO crops) often test imports for unapproved GMO traits (what USDA and the TPP refer to as low-level presence). U.S. companies have exported both GMO corn and rice that were unapproved (even in the U.S.) and recently a GMO corn variety that was unapproved overseas contaminated U.S. corn exports. The TPP requires countries to submit their requirements for regulating and testing for GMO contamination of imports and the scientific basis for these policies — again providing a venue for countries to challenge rules governing unapproved GMO contamination in imports and challenge at TPP tribunals whether any actions taken to stop unapproved GMO contamination are "appropriate." (Art. 2.29 at paras. 6 to 8.)

- **Specifically allow GMO regulations and safeguards to be challenged at TPP tribunals under pro-industry rules:** The TPP language on food and crop safety establishes limits on permissible regulation of GMOs unless the regulations meet very high thresholds of scientific certainty required by the TPP language on risk assessment. (Art. 7.9 at para. 5.) Regulations will be held to a standard established at a UN body known as the Codex Alimentarius (which means food law in Latin). Agribusinesses, biotechnology companies and pro-GMO governments have effectively used the Codex forum to lower the bar on what GMO regulations are acceptable for international trade. Other TPP provisions adopted from the WTO text make it easier for pro-GMO countries to challenge GMO rules for "discriminating" against "like products" (a corn-is-corn standard) or for being more trade-restrictive than necessary. (Art. 2.3 at paras. 1 and 2.)

- **Leaves state and local GMO measures vulnerable to challenge:** Consumers increasingly want to know what is in their food — including GMO ingredients. Several states (Vermont, Maine and Connecticut) have already passed GMO labeling requirements, dozens of other states are considering GMO labeling laws and some local governments have enacted rules governing the cultivation of GMO crops or the use of GMO-associated herbicides. Foreign countries or companies could use the TPP provisions on labeling and National Treatment to challenge these local and state efforts to increase food chain transparency. (Art. 2.3 at para 2, Art. 8.2 and Art. 8.3 at paras. 1 and 1*bis*.)

TOBACCO - VARIOUS TPP CHAPTERS: How Tobacco Is Treated

- **ISDS Carve Out - Right to elect for exemption**: Exceptions chapter Article 29.5 gives Parties the right to deny the benefits of the investor-state dispute settlement mechanism with respect to claims against tobacco control measures. The definition of "tobacco control measures" is robust, and includes alternative nicotine delivery devices (ANDs, often referred to as e-cigarettes). The language explicitly exempts trade in tobacco leaf from the exemption. This falls well short of the full exemption for tobacco measures from the entire agreement proposed by Malaysia. However, it is a huge step forward for tobacco control from previous TIAs, and is strong enough to invoke strong opposition from pro-tobacco industry politicians here in the U.S. It is the result of a nearly 5-year effort by public health groups in nearly all TPP countries.

- **Caveat to Carve Out:** Aside from its application only to ISDS, the biggest weakness of the exemption is its status as an election for individual Parties. This leaves the door open to back-door pressure by host governments, the tobacco industry and chambers of commerce to allow ISDS cases to proceed. Note that state-to-state disputes are not limited by this exemption.

- **Tobacco Tariffs Treated Like Any Other Product**: Tobacco is treated like any other product in terms of tariff reduction. For the most part, this means that tobacco tariffs are reduced to zero, which produces a windfall of tobacco profits—unless there is a later compensating increase in domestic excise taxes. This explicit promotion of tobacco exports appears to violate the Doggett Amendment, a congressional limit on authority of U.S. agencies to promote tobacco sales.

- **Tobacco Still Treated Like Other Products in Rest of TPP.** This signals that governments are still not recognizing that tobacco is unique in international trade (we want less, not more, and these same governments have agreed to this in the FCTC and other international instruments, such as the SDGs and the NCD summit). The failure to approve the full exemption will have consequences for tobacco control. For example, the chapter on regulatory coherence requires Parties to set up mechanisms for "interested persons" to provide input into regulatory oversight. This creates a direct conflict of law with FCTC Article 5.3, which requires Parties (11 of whom are also TPP Parties) to limit government interaction with the tobacco industry.

<u>This initial analysis compiles contributions by labor and public interest experts.</u>

For more info on labor, jobs, wages, Rules of Origin, State Owned Enterprises and more, contact: Celeste Drake, AFL-CIO and Owen Herrnstadt, Machinists Union; on climate, environment, and ISDS challenges to such policies contact Ben Beachy and Ilana Solomon, Sierra Club; on food safety and ag issues, contact Patrick Woodall and Tony Corbo, Food and Water Watch; on copyright issues, contact Maira Sutton and Jeremy Malcolm, EFF and Burcu Kilic, Public Citizen; on Investment/ISDS, Financial Services, Accession, National Security and Other Exception Texts contact Lori Wallach and Robijn van Giesen, Public Citizen's Global Trade Watch; on access to medicines, patent and medicine pricing rules, contact Peter Maybarduk and Burcu Kilic, Public Citizen's Access to Medicines program.

https://www.eff.org/deeplinks/2015/12/how-tpp-will-affect-you-and-your-digital-rights

December 8, 2015 | By Maira Sutton

How the TPP Will Affect You and Your Digital Rights

The Internet is a diverse ecosystem of private and public stakeholders. By excluding a large sector of communities—like security researchers, artists, libraries, and user rights groups—trade negotiators skewed the priorities of the Trans-Pacific Partnership (TPP) towards major tech companies and copyright industries that have a strong interest in maintaining and expanding their monopolies of digital services and content. Negotiated in secret for several years with overwhelming influence from powerful multinational corporate interests, it's no wonder that its provisions do little to nothing to protect our rights online or our autonomy over our own devices. For example, everything in the TPP that increases corporate rights and interests is binding, whereas every provision that is meant to protect the public interest is non-binding and is susceptible to get bulldozed by efforts to protect corporations.

Below is a list of communities who were excluded from the TPP deliberation process, and some of the main ways that the TPP's copyright and digital policy provisions will negatively impact them. Almost all of these threats already exist in the United States and in many cases have already impacted users there, because the TPP reflects the worst aspects of the U.S. Digital Millennium Copyright Act (DMCA). The TPP threatens to lock down those policies so these harmful consequences will be more difficult to remedy in future copyright reform efforts in the U.S. and the other eleven TPP countries. The impacts could also be more severe in those other countries because most of them lack the protections of U.S. law such as the First Amendment and the doctrine of fair use.

General Audience

- Excessive copyright terms deprive the public domain of decades of creative works. They also worsen the orphan works problem, which arises when obtaining permission to use works is impossible because the rightsholder is unknown, deceased, or is nowhere to be found, and using them without permission is legally risky.
- Lose autonomy and control over legally purchased devices and content because it is a crime to remove its digital locks or Digital Rights Management (DRM). This means modifying, repairing, recycling, or otherwise tinkering with a digital device or its contents could be banned or is at least legally risky.
- If you post a personal video that contains someone's copyrighted song, video, or image online without permission, it may get taken down or the user may be forced to pay a penalty no matter how insignificant that copyrighted content is to the whole of the video. Their account may also be suspended or restricted permanently or for a prolonged amount of time. If it happens to go viral they may be held criminally liable because it's arguably available at a "commercial scale."

- Those who put on a themed party or cosplay based on a character from a favorite show or movie could be forced to pay a penalty or have images from it removed from the Internet. Again, the risks and penalties are much higher if it happens on a "commercial scale."
- If you stream some copyrighted gameplay with commentary to friends and other fans, the video may get taken down or the user may be forced to pay a fee.
- It will hamper introduction of new user protections in the law, such as new fair use rules or new permanent permissions to circumvention DRM on devices, because several thousands of companies would be empowered to challenge new public interest rules as undermining their "investments" or expected future profits.
- New rules applicable to national-level domains will block reforms that EFF and others are working on to protect website owners from having to reveal their real name, address, and other personally identifying information through the domain name system (DNS), making them vulnerable to copyright and trademark trolls, identity thieves, scammers, and harassers.
- Safety of devices and networks could be compromised because the TPP bans countries from requiring source-code disclosure and code auditing for most software and devices.

[Link to this section]

Innovators and Business Owners

- DRM is often used for anti-competitive purposes. It can block innovators from building interoperable services or products to be used with existing platforms, and prevents third-party repair services. More fundamentally, it blocks tinkering and experimentation which is critical to open innovation.
- Small web-based businesses and platforms may not have the legal resources or expertise to deal with excessive or faulty copyright takedowns.
- Services that may want to use or build upon existing content for new purposes will have less protections in other countries because fair use is not enshrined in the TPP. No incentive is created for TPP countries to pass flexible exceptions and limitations to copyright's restrictions.
- New legal protections for independent innovators and small businesses may be undermined if a multinational company alleges it undermines their investment or expected future profits and challenges the rule in an investor-state proceeding.

[Link to this section]

Libraries, Archives, and Museums

- Excessive copyright terms harm the availability of books, photographs, and all creative works in the public domain. It also worsens the orphan works problem, when obtaining permission to use works is impossible because the rightsholder is unknown, deceased, or is nowhere to be found, and so preserving or archiving copies of them could be legally risky.

- Heavy penalties for infringement, in the form of pre-established statutory damages that are not connected to the actual harm from infringement, chills preservation and archival efforts, where copying or changing the format of existing works is already legally risky.
- Research and quotation can be hampered by bans on circumventing DRM on books or other kinds of digital content, and also limit the availability of digital works
- Despite explicit exception for libraries and museums, a ban on tools for circumvention limits their ability to take advantage of it because they often lack the knowledge or tools to do so.
- Weak exceptions and limitations language gives no incentive for countries to give legal certainty to activities of libraries, archives, and museums that involve technical acts of copying or DRM circumvention—such as enabling the use of copyrighted works for research and quotation, preservation, and copying material for educational purposes.

[Link to this section]

Students

- Use of textbooks, documents, movies, photographs, or other copyrighted works for school assignments and projects could be restricted even further because such rights are not enshrined in the TPP.
- Removing DRM or rights management information from textbooks, articles, or any kind of creative work could lead to criminal liabilities if they share the unlocked work with friends or fellow students.
- Excessive copyright terms harm the availability of books, photographs, and all creative works in the public domain. It also worsens the orphan works problem, when obtaining permission to use works is impossible because the rightsholder is unknown, deceased, or is nowhere to be found, and so using them for research or school projects could be legally risky. Too-long-copyrights also make books more expensive.
- Heavy-handed criminal and civil penalties for copyright infringement can be chilling on students who seek to share or use copyrighted works for educational purposes, or at worst, it could lead to imprisonment or leave them with huge fines.

[Link to this section]

Impacts on Online Privacy and Digital Security

- New rules will block reforms that EFF and others are working on to protect website owners from having to reveal their real name, address, and other personally identifying information through the DNS, making them vulnerable to copyright and trademark trolls, identity thieves, scammers and harassers.
- ISPs may block Virtual Private Networks (VPNs) as part of their duty to cooperate with copyright owners to deter the unauthorized transmission of copyright material. As an intermediary, VPNs could also be made liable for the transmission of infringing works if they fail to follow safe harbor rules such as disconnecting repeat infringers.

- If a user sends a counter-notice to restore wrongfully removed content, the online service provider can be required to pass on personal information of the user to the rightsholder to allow them to serve the user with a lawsuit in case they insist that the work infringed on their copyright.
- There is no explicit exception for security researchers to circumvent DRM in order to conduct encryption research on digital devices or content, unlike under U.S. law. This is deeply problematic when third party researchers have been credited with finding security holes in many modern devices. This criminalization of DRM circumvention discourages people from identifying security flaws when doing so requires breaking the law.

[Link to this section]

Website Owners

- Copyright enforcement rules incentivize website owners to take down content or block users from their site from a mere copyright infringement allegation. They will do so in order to protect themselves from liability, even if the work in question is fair use or otherwise legal.
- New rules will block reforms that EFF and others are working on to protect website owners from having to reveal their real name, address, and other personally identifying information through the DNS, making them vulnerable to copyright and trademark trolls, identity thieves, scammers, and harassers.
- If the website's domain is alleged to infringe on someone's trademark, the dispute resolution process that national domain registries are required to adopt is one based on a flawed global model that favors established trademark holders.
- If the webpage receives several copyright infringement notices, it may be downranked or completely removed from search results.

[Link to this section]

Gamers

- Modifying games or sharing the information on how to do so is illegal under rules that ban the unlocking of DRM, even if it has nothing to do with piracy. Circumventing DRM is a separate criminal offense from copyright infringement.
- Streaming or uploading recorded gameplay, even with commentary, can be taken down. Otherwise they may be forced to pay a fine or be unable to object to advertisements being added to the video. Their account may also be suspended or restricted permanently or for a prolonged period of time.

[Link to this section]

Artists

- Ongoing legal uncertainty, or even heightened illegality, of remixing or appropriating creative works for their own projects.
- Bans on circumventing digital locks or DRM on devices and content can make it difficult or impossible to re-use locked content for new works.
- Excessive copyright terms deprive the public domain of decades of creative works. They also worsen the orphan works problem, when obtaining permission to use works is impossible because the rightsholder is unknown, deceased, or is nowhere to be found, and so using them is legally risky.
- Artists could face liability for stripping off watermarks (AKA rights management information) from works, even if you're reusing them for fair use or other legal purposes.

[Link to this section]

Journalists and Whistleblowers

- Criminal or civil penalties for publishing information that reveals a corporate "trade secret" and is accessed, disclosed, or made available through any kind of computer system, even if it is for the purpose of revealing corporate wrongdoing. They could face criminal liabilities for publishing information from sources whom they know obtained the information improperly.
- There is continued legal uncertainty about the scope of rights to quote from sources, due to the lack of a fair use or journalistic usage right.
- It could undermine anonymity of journalists or whistleblowers online by obligating countries to require the availability of a real name and address for registered domains on websites.

[Link to this section]

People with Sensory Disabilities

- There are no compulsory copyright limitations or exceptions for persons with disabilities. That means countries would be required to enact stronger copyright enforcement mechanisms without having to enact legal safeguards for persons with disabilities, even if new rules lead to greater restrictions on the availability of content in accessible formats.
- Excessive copyright terms of life of the creator plus 70 years keep digital creative works, including software, locked behind onerous restrictions for longer and have been shown to further worsen the availability of books.
- Bans on getting around digital locks or circumventing DRM undermine people's ability to modify their own content and devices. Removing DRM on books, movies, video games or software to turn them into accessible formats becomes a criminal act, or is at least legally risky.
- Works that are remixed or modified for accessibility purposes, such as subtitling, could be removed from the Internet even if it's fair use. If it happens to go viral they may be held criminally liable because it's arguably available at a "commercial scale."

[Link to this section]

Tinkerers and Repairers

- Bans on getting around digital locks or circumventing DRM undermines people's ability to experiment and modify their own content and devices or to take it to a third-party repair service. Although countries may create exceptions to DRM rules, there is no incentive for them to do so because there are no obligatory exceptions.
- DRM is used for anti-competitive purposes and blocks people from building services or products for use with existing platforms.
- It is a separate criminal offense to share the knowledge or tools to unlock DRM restrictions.
- Repairing a part in a car with embedded software may be a crime if it requires circumvention of the car's DRM.
- Countries will be prohibited from requiring independent repair shops to be given access to the source code of the products they repair.
- Modifying a home entertainment system, video game console, TV, ebook, or other type of digital platform to show content that is not available through official content providers could be illegal.

[Link to this section]

Free Software

- Bans on DRM circumvention undermine people's ability to examine and pick apart software used in or with devices and content, and experiment to create interoperable content and devices. DRM is often used for anti-competitive purposes and can be used to block free software services or products to be used with existing proprietary platforms.
- Excessive copyright terms of life of the creator plus 70 years keep digital creative works, including software, locked behind onerous restrictions for longer.
- The TPP would prohibit countries from requiring products be supplied with open source licenses, even where this would be helpful to curb rampant information security problems.

[Link to this section]

Cosplayers and Fans of Anime, Cartoons, or Movies

- Excessive copyright terms of life of the creator plus 70 years keep digital creative works, including anime, comic books, and movies, locked behind onerous restrictions for longer.
- Fans putting on a themed party or cosplay based on a character from a favorite show or movie could be forced to pay a penalty or have images from it removed from the Internet. If it happens to go viral they may be held criminally liable because it's arguably available at a "commercial scale."

- Fans could face a lawsuit or a criminal prosecution even if the author of the work they used or modified does not care about the activity in question. That means law enforcement can go after fans for derivative works on a "commercial scale" without the author of the original work filing charges.

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.

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://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.

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."

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 go, President Obama announced his intention to pursue this landmark agreement and join the P4 (Brunei arussalam, Chile, New Zealand and Singapore) in the negotiations. Today, the TPP has grown to include early 40 percent of the world's GDP under a single high standards trade agreement. It will open portunities 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."

ASEAN (Association of Southeast Asian Nations) countries represent over 30 percent of countries egotiating the TPP, including Brunei, Malaysia, Singapore and Vietnam," Feldman continued. "40 ercent 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 mmercial 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.**

Learn more about the deal and share it:

THE TRADE PAGE RETWEET @WHITEHOUSE ON TWITTER

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.

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.

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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.

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

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."

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

Sunday 11 October 2015 09.23 EDT

Last modified on Wednesday 14 October 2015 03.34 EDT

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.

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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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.

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.

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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.
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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

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

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.rtE1rjJ0.dpuf

POLITICO

The TPP issues in-depth

By Doug Palmer

7/24/15 1:49 PM EDT

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

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

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

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

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

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

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

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

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

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

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

Pork — When Japan sought to exclude a long list of "sacrosanct" agricultural commodities from complete tariff elimination under the pact, no one screamed their opposition louder than the National Pork Producers Council. A year later, the group's efforts seem to have 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.”

Prosperity Undermined

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

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Introduction

Polling and congressional trade agreement voting records over the past two decades show a steady erosion of what had been bipartisan support for trade agreements.[1] Polls show the U.S. public supports the concept of trade expansion,[2] but opposes the status quo trade model.[3] The actual results of trade pacts since the controversial North American Free Trade Agreement (NAFTA) have fueled this trend.

Over 21 years, a series of trade agreements not only have failed to meet their corporate and political backers' glowing promises of job creation,[4] but instead have contributed to unprecedented and unsustainable trade deficits,[5] the net loss of nearly 5 million U.S. manufacturing jobs[6] and more than 55,000 factories,[7] the offshoring of higher-wage service sector jobs,[8] flat median wages despite significant productivity gains[9] and the worst U.S. income inequality in the last century.[10] Even for U.S. agriculture, a sector that consistently has been promised gains from trade pacts, U.S. food exports have stagnated while U.S. food imports have surged under NAFTA-style deals.[11] Given that the Trans-Pacific Partnership (TPP) pact now under negotiation replicates and expands on the same model, opposition in Congress and among the public is deep and broad.[12]

"The United States has a $178 billion goods trade deficit with its 20 free trade agreement (FTA) partners. The job-displacing U.S. trade deficit with FTA partners has surged 427 percent since the pacts took effect…"

"Three of every five displaced manufacturing workers who were rehired in 2014 took home smaller paychecks, and one in three lost more than 20 percent, according to U.S. Department of Labor data."

The United States has a $178 billion goods trade deficit with its 20 free trade agreement (FTA) partners.[13] The job-displacing U.S. trade deficit with FTA partners has surged 427 percent since the pacts took effect, as imports have ballooned and exports to FTA partners actually have lagged behind exports to the rest of the world.[14] Even eliminating trade in fossil fuels, the United States has a more than $92 billion trade deficit with its NAFTA partners alone.[15] In contrast, the United States had a small surplus with Mexico and a $30 billion deficit with Canada before NAFTA.[16] A 2011 study found that the ballooning trade deficit with Mexico alone under NAFTA resulted in the *net* loss of about 700,000 U.S. jobs,[17] and more than 850,000 specific U.S. jobs have been certified as NAFTA casualties under just one narrow U.S. Department of Labor program called Trade Adjustment Assistance (TAA).[18] The U.S. trade deficit with China has grown from $112 billion in 2001, when China joined the World Trade Organization (WTO) with U.S. congressional approval, to $350 billion today,[19] spurring an estimated 3.2 million U.S. job losses.[20] U.S. manufacturing workers who lose jobs to trade and find reemployment are typically forced to take pay cuts. Three of every five displaced manufacturing workers who were rehired in 2014 took home smaller paychecks, and one in three lost more than 20 percent, according to U.S. Department of Labor data.[21]

Economists across the political spectrum agree that trade flows during the era of FTAs have contributed to rising U.S. income inequality, from Nobel laureate Paul Krugman[22] to International Monetary Fund economists.[23] The only debate is the extent of the blame to be placed on trade. Even the pro-NAFTA Peterson Institute for International Economics has estimated that 39 percent of observed growth in U.S. wage inequality is attributable to trade trends.[24]

"Economists across the political spectrum agree that trade flows during the era of FTAs have contributed to rising U.S. income inequality…"

Under the most recent major FTA – a 2012 deal with Korea that literally served as the U.S. opening offer for the TPP negotiations – the U.S. trade deficit with Korea ballooned 90 percent in just the first three years.[25] That equates to the loss of another 90,000-plus U.S. jobs, counting both exports and imports, according to the ratio the Obama administration used to claim the pact would create jobs.[26] The trade deficit surge in the FTA's first three years was driven by a 7 percent ($3 billion) *decline* in U.S. goods exports to Korea and an 18 percent ($10.6 billion) increase in goods imports from Korea.[27] Despite promises that small businesses would be major winners under such deals, small U.S. firms have endured an even steeper drop in exports to Korea than large firms under the Korea FTA.[28] The Obama administration has incited even more congressional opposition[29] by trying to dissemble these disastrous outcomes with cooked data.[30]

In the face of the relentless evidence that our status quo trade agreement model is not working, the Obama administration has doubled down on the old model with the TPP.[31] But the push for more of the same trade policy has hit a wall of opposition from the largest, most diverse coalition to ever oppose a U.S. trade deal, fueled by the two-decade legacy of the TPP's predecessor pacts.[32]

Executive Summary

Trade Deficits Surge, Good U.S. Jobs Destroyed

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

- **U.S. agricultural exports are lagging under U.S. trade deals while agricultural imports are surging, belying empty promises used to sell the deals to farmers and ranchers.** NAFTA and WTO supporters told U.S. farmers that the pacts would increase exports and thus provide a new path for struggling farmers to succeed economically.[39] But data from the U.S. Department of Agriculture show that the volume of U.S. food exports to all FTA partners has risen just 1 percent since 2008 while rising 24 percent to the rest of the world.[40] In the first three years of the 2012 Korea FTA, total U.S. agricultural exports to Korea *have fallen* 5 percent, while rising 4 percent to the rest of the world.[41] Meanwhile, agricultural imports from FTA countries have surged. In 2014,

the 20 U.S. FTA partners were the source of 71 percent of all U.S. food imports, but were the destination of just 35 percent of all U.S. food exports (by volume).[42] Due to stagnant U.S. food exports to FTA countries and a surge in food imports from those countries, the U.S. food trade balance with FTA countries has fallen 13 percent since 2011, the year before the most recent FTAs took effect. In contrast, the U.S. food trade surplus with the rest of the world has *risen* 23 percent since 2011.[43] The disparity owes in part to the fact that the U.S. agricultural trade balance with NAFTA partners has fallen from a $2.5 billion trade *surplus* in the year before NAFTA to a $1.1 billion trade *deficit* in 2014 – the largest NAFTA agricultural trade deficit to date.[44] Smaller-scale U.S. family farms have been hardest hit by such unbalanced agricultural trade under deals like NAFTA and the WTO. Nearly 180,000 small U.S. family farms – one out of 10 – have gone under since NAFTA and the WTO took effect.[45] Status quo U.S. trade policy also poses serious risks to food safety, as our current trade agreements both increase imports *and* set limits on the safety standards and inspection rates for imported foods.[46] WTO and NAFTA required the United States to replace its long-standing requirement that only meat and poultry meeting U.S. safety standards could be imported. Under this standard, only meat from plants specifically approved by U.S. Department of Agriculture inspectors could be imported. But WTO and NAFTA – and the FTAs that followed – required the United States to accept meat and poultry from all facilities in a trade partner country if that country's system was found to be "equivalent," even if core aspects of U.S. food safety requirements, such as continuous inspection or the use of government (not company-paid) inspectors, were not met.[47]

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

- **Offshoring of U.S. jobs is moving rapidly up the income and skills ladder.** Alan S. Blinder, a former Federal Reserve vice chairman, Princeton economics professor, and NAFTA-WTO supporter, says that one out of every four U.S. jobs could be offshored in the foreseeable future.[58] In a study Blinder conducted with Alan Krueger, fellow Princeton economist and former Chairman

of President Obama's Council of Economic Advisers, the economists found the most offshorable industry to be finance, not manufacturing (with information and professional services also showing high offshoring propensity).[59] Indeed, according to their data, U.S. workers with a four-year college degree and with annual salaries above $75,000 are those most vulnerable to having their jobs offshored, meaning the United States could see its best remaining jobs moving abroad.[60]

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

- **The WTO, NAFTA and NAFTA expansion agreements ban Buy American preferences and forbid federal and many state governments from requiring that U.S. workers perform the jobs created by the outsourcing of government work.** "Anti-offshoring" and Buy American requirements, which reinvest our tax dollars in our local communities to create jobs here, are prohibited under NAFTA-style trade agreements' procurement rules.[66] These rules require that all firms operating in trade-pact partner countries be treated as if they were domestic firms when bidding on U.S. government contracts to supply goods or services.[67] Complying with this requirement means gutting existing Buy American or Buy Local procurement preferences that require U.S. taxpayer-funded government purchases to prioritize U.S.-made goods, or rules that require outsourced government work to be performed by U.S workers. By expanding past trade deals' procurement restrictions, the TPP would promote further offshoring of our tax dollars.[68] Trade pacts' limits on domestic procurement policies could also subject prevailing wage laws – ensuring fair wages for non-offshorable construction work – to challenge in foreign tribunals.[69]

U.S. Wages Stagnate, Despite Doubled Worker Productivity

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

- **Trade agreement foreign investor privileges promote offshoring of production from the United States to low-wage nations.** Trade competition has traditionally come from imports of products made by foreign companies operating in their home countries. But today's "trade" agreements also contain extraordinary foreign investor privileges that reduce many of the risks and

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

- **Manufacturing workers displaced by trade have taken significant pay cuts.** Trade affects the *composition* of jobs available in an economy. As mentioned, trade deficits also inhibit the overall *number* of jobs available when the economy is not at full employment. But even when unemployment is low and the overall *quantity* of jobs is largely stable, trade policy impacts the *quality* of jobs available. In the two decades of NAFTA-style deals, the United States has lost higher-paying manufacturing jobs even in years when unemployment has remained low, as new lower-paying service sector jobs have been created.[76] The result has been downward pressure on U.S. middle-class wages. A recent National Bureau of Economic Research study concludes, "offshoring to low wage countries and imports [are] both associated with wage declines for US workers. We present evidence that globalization has led to the reallocation of workers away from high wage manufacturing jobs into other sectors and other occupations, with large declines in wages among workers who switch…"[77] Indeed, according to the U.S. Bureau of Labor Statistics, about three out of every five displaced manufacturing workers who were rehired in 2014 experienced a wage reduction. About one out of every three displaced manufacturing workers took a pay cut of greater than 20 percent.[78] For the median manufacturing worker earning more than $38,000 per year, this meant an annual loss of at least $7,600.[79]

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

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

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

- **The current trade model's downward pressure on wages outweighs the gains of access to cheaper imported goods, making most U.S. workers net losers.** Trade theory states that while workers may lose their jobs or endure downward wage pressure under trade "liberalization," they also gain from greater access to cheaper imported goods. When the non-partisan Center for Economic and Policy Research (CEPR) applied the actual data to the trade theory, they discovered that when you compare the lower prices of cheaper goods to the income lost from low-wage competition under status quo trade policies, the trade-related wage losses outweigh the gains in cheaper goods for the majority of U.S. workers.[85] The CEPR study found that U.S. workers without college degrees (61 percent of the workforce)[86] have lost an amount equal to about 10 percent of their wages, even after accounting for the benefits of cheaper goods.[87] That means a net loss of more than $3,500 per year for a worker earning the median annual wage of $35,540.[88]

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

U.S. Income Inequality Increases

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

- **Longstanding economic theory states that trade will likely increase income inequality in developed countries like the United States**. As competition with low-wage labor abroad puts downward pressure on middle-class wages while boosting the profits of multinational firms, the gap between the rich and everyone else widens. In the 1990s a spate of economic studies put the theory to the test, resulting in an academic consensus that trade flows had indeed contributed to rising U.S. income inequality.[92] The pro-"free trade" Peterson Institute for International Economics, for example, found that 39 percent of the increase in U.S. wage inequality was

attributable to U.S. trade flows.[93] In 2013, when EPI updated an oft-cited 1990s model estimate of trade's impact on U.S. income inequality, it found that using the model's own conservative assumptions, trade with low-wage countries played a much larger role in spurring U.S. income inequality in the last two decades. EPI found that trade flows, according to the well-known model, accounted for 93 percent of the increase in U.S. income inequality from 1995-2011 – an era marked by the establishment of NAFTA, the WTO and NAFTA expansion pacts.[94] Expressed in dollar terms, EPI estimated that trade's inequality-exacerbating impact spelled a $1,761 loss in wages in 2011 for the average full-time U.S. worker without a college degree.[95]

- **The TPP's expansion of status quo trade policy would result in pay cuts for all but the richest 10 percent of U.S. workers.** In 2013 economists at CEPR dug into the results of a study done by the pro-TPP Peterson Institute for International Economics that, despite using overoptimistic assumptions, projected the TPP would result in tiny economic gains in 2025. CEPR assessed whether those projected gains would counterbalance increased downward pressure on middle-class wages from the TPP, applying the empirical evidence on how recent trade flows have contributed to growing U.S. income inequality. Even with the most conservative estimate from the economic literature of trade's contribution to inequality (that trade is responsible for just 10 percent of the recent rise in income inequality), they found that the losses from projected TPP-produced inequality would wipe out the tiny projected gains for the median U.S. worker. With the still-conservative estimate that trade is responsible for just 15 percent of the recent rise in U.S. income inequality, the CEPR study found that the TPP would mean wage losses for all but the richest 10 percent of U.S. workers.[96] That is, for any workers making less than $90,060 per year (the current 90th percentile wage), the TPP would mean a pay cut.[97]

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

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

Small Businesses' Exports and Export Shares Decline

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

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

Job-Displacing Trade Deficits Surge under FTAs: U.S. Trade Deficits Grow 427% with FTA Countries

The aggregate U.S. goods trade deficit with FTA partners is more than five times as high as before the deals went into effect, while the aggregate trade deficit with non-FTA countries has actually fallen. The key differences are soaring imports into the United States from FTA partners and *lower* growth in U.S. exports to those nations than to non-FTA nations. **Growth of U.S. exports to FTA partners has been 20 percent *lower* than U.S. export growth to the rest of the world over the last decade** (annual average growth of 5.3 percent to non-FTA nations vs. 4.3 percent to FTA nations).[110]

The aggregate U.S. trade deficit with FTA partners has *increased* by about $144 billion, or 427 percent, since the FTAs were implemented. In contrast, the aggregate trade deficit with all non-FTA countries has *decreased* by about $95 billion, or 11 percent, since 2006 (the median entry date of

existing FTAs). Using the Obama administration's trade-jobs ratio[111] and counting both exports and imports, **the FTA trade deficit surge implies the loss of about 780,000 U.S. jobs.** NAFTA contributed the most to the widening FTA deficit – under NAFTA, the U.S. trade deficit with Canada has ballooned and a U.S. trade surplus with Mexico has turned into a nearly $100 billion deficit. More recent deals, such as the Korea FTA, have produced similar results.

FTA Partner	Entry Date	Pre-FTA Trade Balance	2014 Balance	Change in Balance Since FTA
Israel*	1985	($1.0)	($15.2)	($14.2)
Canada	1989	($23.9)	($82.4)	($58.5)
Mexico	1994	$2.6	($99.8)	($102.3)
Jordan	2001	$0.3	$0.6	$0.3
Chile	2004	($2.0)	$5.8	$7.8
Singapore	2004	$0.8	$10.2	$9.4
Australia	2005	$7.4	$13.6	$6.2
Bahrain	2006	($0.1)	$0.1	$0.2
El Salvador	2006	($0.2)	$0.7	$0.9
Guatemala	2006	($0.6)	$1.5	$2.1
Honduras	2006	($0.7)	$1.2	$1.9
Morocco	2006	$0.1	$1.0	$1.0
Nicaragua	2006	($0.7)	($2.2)	($1.5)
Dominican Republic	2007	$0.6	$2.8	$2.2
Costa Rica	2009	$1.2	($3.2)	($4.4)
Oman	2009	$0.6	$0.9	$0.4
Peru	2009	($0.2)	$2.9	$3.0
Korea	2012	($15.4)	($26.6)	($11.2)
Colombia	2012	($10.0)	$1.2	$11.2
Panama	2012	$7.8	$9.4	$1.6
FTA TOTAL:		($33.7)	($177.5)	**($143.9)**
Non-FTA TOTAL:	[2006]	($829.3)	($734.2)	**$95.1**
FTA Deficit INCREASE: 427%			**Non-FTA Deficit DECREASE: 11%**	

*Billions of 2014 USD. Source: U.S. International Trade Commission. (*Measured since 1989 due to data availability.)*

"Higher Standards" Have Failed to Alter FTA Legacy of Ballooning Trade Deficits

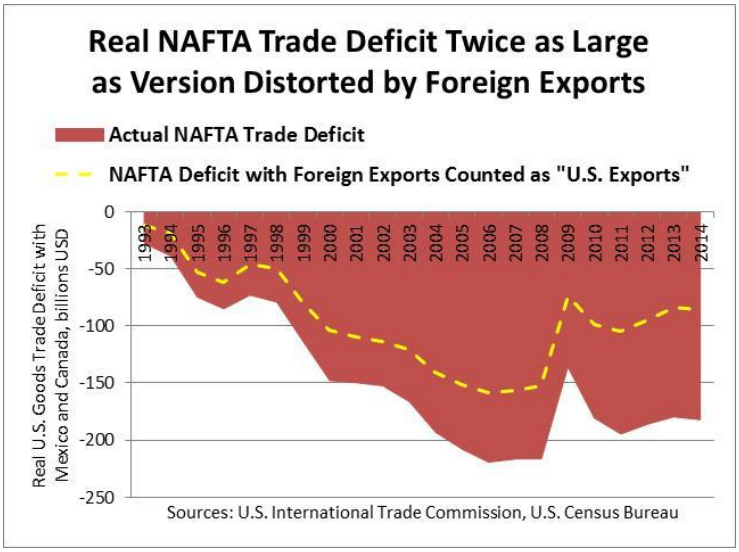
Some proponents of status quo trade have claimed that post-NAFTA FTAs have included higher standards and thus have yielded trade balance improvements.[112] But the Korea FTA included the higher labor and environmental standards of the May 10, 2007 deal between congressional leaders and the George W. Bush administration, and still the U.S. trade deficit with Korea has ballooned in the three years since the deal's passage. Meanwhile, most post-NAFTA FTAs that have resulted in (small) trade balance improvements *did not* contain the "May 10" standards. The evidence shows no correlation between an FTA's inclusion of "May 10" standards and its trade balance impact. Reducing the massive U.S. trade deficit will require a more fundamental rethink of the core status quo trade pact model extending from NAFTA through the Korea FTA, not more of the same.

Corporate FTA Boosters Use Errant Methods to Claim Higher Exports under FTAs

Members of Congress will invariably be shown data by defenders of our status quo trade policy that appear to indicate that FTAs have generated an export boom. Indeed, to promote congressional support for new NAFTA-style FTAs, industry associations like the U.S. Chamber of Commerce have funded an entire body of research designed to create the appearance that the existing pacts have both boosted exports and reversed trade deficits with FTA partner countries. This work relies on several methodological tricks that fail basic standards of accuracy:

- **Ignoring imports:** U.S. Chamber of Commerce studies regularly omit mention of soaring imports under FTAs, instead focusing only on exports.[113] But any study claiming to evaluate the net impact of trade deals must deal with both sides of the trade equation. In the same way that exports are associated with job opportunities, imports are associated with lost job opportunities when they outstrip exports, as dramatically seen under FTAs.

- **Counting "foreign exports":** The U.S. Chamber of Commerce errantly claims that the United States has a trade surplus with FTA nations by counting foreign-made goods as "U.S. exports."[114] Their data include "foreign exports" – goods made elsewhere that pass through the United States without alteration before being re-exported abroad. Foreign exports support zero U.S. production jobs and their inclusion artificially diminishes real FTA deficits.[115]



- **Omitting major FTAs:** The U.S. Chamber of Commerce has repeatedly claimed that U.S. export growth is higher to FTA nations that to non-FTA nations by simply omitting FTAs that do not support their claim. One U.S. Chamber of Commerce study omitted all FTAs implemented before 2003 to estimate export growth.[116] This excluded major FTAs like NAFTA that comprised more than 83 percent of all U.S. FTA exports. Given NAFTA's leading role in the 427 percent aggregate FTA deficit surge, its omission vastly skews the findings.

- **Failing to correct for inflation:** U.S. Chamber of Commerce studies that have claimed high FTA export growth have not adjusted the data for inflation, thus errantly counting price increases as export gains.[117]

- **Comparing apples and oranges:** The U.S. Chamber of Commerce has claimed higher U.S. exports under FTAs by using two completely different methods to calculate the growth of U.S. exports to FTA partners (an unweighted average) versus non-FTA partners (a weighted average).[118] This inconsistency creates the false impression of higher export growth to FTA partners by giving equal weight to FTA countries that are vastly different in importance to U.S. exports (e.g. Canada, where U.S. exports exceed $260 billion, and Bahrain, where they do not reach $1 billion), despite accounting for such critical differences for non-FTA countries.

Millions of U.S. Jobs Lost under Status Quo Trade Deals

Nearly 5 million U.S. manufacturing jobs – one out of every four – have been lost since the establishment of NAFTA, the WTO and NAFTA expansion deals.[119] Since NAFTA took effect, more than 55,000 U.S. manufacturing facilities have closed.[120] The U.S. manufacturing sector has long been a source of innovation, productivity, growth and good jobs.[121] But by 2014, manufacturing accounted for less than 9 percent of the U.S. workforce for the first time in modern history.[122]

Deals like NAFTA have contributed to the hemorrhaging of U.S. manufacturing and other jobs by incentivizing offshoring and fueling massive U.S. trade deficits. The U.S. Department of Labor lists more than 2.7 million workers as specifically losing their jobs to offshoring and import competition since the enactment of NAFTA, the WTO and NAFTA expansion FTAs – and that is under just one narrow program that excludes many whose job loss is trade-related.[123]

NAFTA-style deals have included foreign investor protections that offer special benefits to firms that offshore U.S. jobs. The TPP's investment chapter would expand such offshoring incentives, eliminating many of the usual risks that make firms think twice about moving to low-wage countries, such as TPP member Vietnam.

For detailed data on trade-related job loss, visit Public Citizen's Trade Data Center: www.citizen.org/trade-data-center

- Find regularly updated data on the total number of manufacturing jobs lost in your state.
- Track specific, factory-by-factory, trade-related job losses in your area, certified by the Department of Labor.
- See how much job-displacing trade deficits have increased under existing FTAs in the goods that are important to your state.
- Get estimates of job losses in your state from China trade and NAFTA.

Under NAFTA-style FTAs, imports have surged while exports have slowed, contributing to a fourfold increase in the U.S. goods trade deficit since 1993.[124] (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.) [125] The aggregate U.S. trade deficit with its 20 FTA partners has increased by about $144 billion, or 427 percent, since the FTAs were implemented.[126] Standard macroeconomics shows that a large U.S. trade deficit costs U.S. jobs when the U.S. economy is not at full employment, as it has not been since the 2007-2008 financial crisis.[127] The TPP would further fuel the job-displacing U.S. trade deficit by forcing U.S. workers to compete directly with workers in Vietnam, where minimum wages average less than 60 cents an hour,[128] independent unions are banned and child labor is rampant.[129]

Burgeoning Job Losses under NAFTA, the WTO and the Korea FTA

After 21 years of NAFTA, a small pre-NAFTA U.S. trade surplus with Mexico and $30 billion trade deficit with Canada turned into a combined NAFTA trade deficit of $182 billion by 2014 – a real increase in the "NAFTA deficit" of 565 percent.[130] EPI estimates that the ballooning trade deficit with Mexico alone destroyed about 700,000 *net* U.S. jobs between NAFTA's implementation and 2010.[131] And since NAFTA, the U.S. Department of Labor has certified more than 850,000 specific U.S. workers for TAA – a narrow program that is difficult to qualify for – as having lost their jobs due to imports from Canada and Mexico or the relocation of factories to those countries.[132]

The rapid growth of the U.S. trade deficit with China since that country entered the WTO in 2001 has also had a devastating effect on U.S. workers. Since China's WTO entry, the U.S. goods trade deficit with China has grown from $112 billion to $350 billion.[133] EPI estimates that between 2001 and 2013, 3.2 million U.S. jobs, including 2.4 million manufacturing jobs, were lost or displaced due to the burgeoning trade deficit with China.[134] Indeed, a recent National Bureau of Economic Research study finds a direct link between the congressional vote that paved the way for China's WTO entry and "the sharp drop in U.S. manufacturing employment after 2001."[135] Another recent National Bureau of Economic Research study concludes, "We find that the increase in U.S. imports from China, which accelerated after 2000, was a major force behind recent reductions in U.S. manufacturing employment and that…it appears to have significantly suppressed overall U.S. job growth."[136]

Like NAFTA and the WTO, the 2012 Korea FTA – the U.S. template for the TPP – was sold by the Obama administration with the promise that it would yield "more exports, more jobs."[137] In contrast, U.S. goods exports to Korea dropped 7 percent ($3 billion) in the first three years of the FTA, while imports increased 18 percent ($10.6 billion).[138] As a result, the U.S. goods trade deficit with Korea ballooned 90 percent ($13.6 billion). In contrast, the global U.S. goods trade deficit during the same period *decreased* 2 percent.[139] The U.S.-Korea trade deficit rise 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.[140]

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 under current U.S. trade policy one out of every four U.S. jobs could be offshored in the foreseeable future.[141] 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 and insurance, not manufacturing (with information and professional services also showing high offshoring propensity).[142] 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 move abroad.[143]

Buy American Banned: More U.S. Jobs Lost as Tax Dollars Are Offshored

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.[144] 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.[145] Complying with this requirement means waiving 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. The TPP would further gut Buy American policies, requiring the U.S. government to give any company operating in a TPP country, including Chinese firms in Malaysia or Vietnam, the same access as U.S. firms to U.S. taxpayer-funded government contracts.[146]

NAFTA in Depth: Two Decades of Losses for U.S. Workers

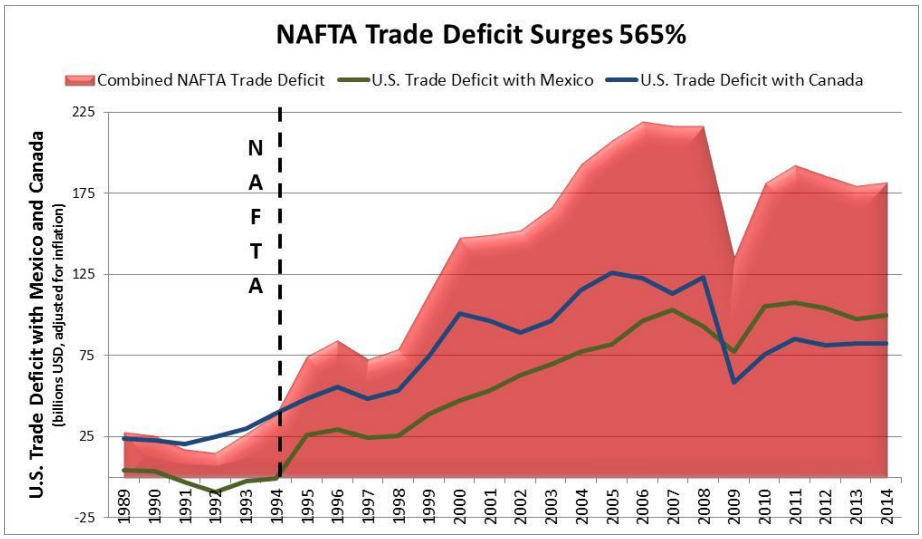
In 1993, Gary Hufbauer and Jeffrey Schott of the pro-NAFTA Peterson Institute for International Economics (PIIE) projected that NAFTA would lead to a rising U.S. trade surplus with Mexico, which would create 170,000 net new jobs in the United States within the pact's first two years.[147] Then-U.S. Trade Representative Mickey Kantor similarly predicted "export jobs related to Mexico" would reach 200,000 "by 1995 if NAFTA with the supplemental agreements is implemented."[148] President Bill Clinton went even further, stating, "I believe that NAFTA will create a million jobs in the first five years of its impact."[149]

Hufbauer and Schott based their projection on the observation that when export growth outpaces the growth of imports, more jobs are created by trade than are destroyed by trade.[150] Instead of an improved trade balance with Canada and Mexico, however, NAFTA resulted in a surge of imports from Mexico and Canada that led to huge U.S. trade deficits.

According to Hufbauer and Schott's own methodology, these deficits meant major job loss. Less than two years after NAFTA's implementation, even before the depth of the NAFTA deficit became evident, Hufbauer recognized that his jobs prediction was incongruent with the facts, telling *The Wall Street Journal*, "The best figure for the jobs effect of NAFTA is approximately zero…the lesson for me is to stay away from job forecasting."[151] The Obama administration apparently has not learned that lesson. Repeating the tactics of the Clinton administration, in 2015 Obama administration officials cited a PIIE study to claim that the TPP would create 650,000 new jobs, despite that the study itself did not project any new job creation from the deal. Even *The Washington Post*, with a pro-TPP editorial board, assigned the claim four Pinocchios and dismissed the jobs promise as "illusionary."[152]

NAFTA Results: Massive Job Loss, Ballooning Deficits, Slow Export Growth

The U.S. goods trade deficit with Canada of $30 billion and the $2.6 billion surplus with Mexico in 1993 (the year before NAFTA took effect) turned into a combined NAFTA trade deficit of $182.1 billion by 2014, as indicated in the graph below.[153] These are inflation-adjusted numbers, meaning the difference is not due to inflation, but an increase in the deficit in real terms. EPI calculates that the ballooning trade deficit with Mexico alone destroyed about 700,000 *net* U.S. jobs between NAFTA's implementation and 2010.[154] This toll has likely grown since 2010, as the non-fossil fuel U.S. goods trade deficit with Mexico has risen 11 percent further.[155] Much of the job erosion stems from the decisions of U.S. firms to embrace NAFTA's new foreign investor privileges and relocate production to Mexico to take advantage of its lower wages and weaker environmental standards. The U.S. trade deficit with NAFTA partners Mexico and Canada has worsened considerably more than the



U.S. trade deficit with countries with which we have not signed NAFTA-style deals. Since NAFTA, the annual growth of the U.S. trade deficit has been 45 percent higher with Mexico and Canada than with countries that are not party to a NAFTA-style U.S. trade pact.[156]

Defenders of NAFTA argue that the NAFTA deficit is really only due to fossil fuel imports. Although fossil fuels account for a substantial portion of the trade deficit with Canada and Mexico, the fossil fuel share of the trade deficit with Canada and Mexico actually declined from 82 percent in 1993 to 49 percent in 2014. Indeed, the non-fossil fuel deficit with Canada and Mexico has risen to an even greater degree than the overall deficit, multiplying over 19-fold since NAFTA's implementation.[157]

The NAFTA trade deficit increase owes in part to the fact that U.S. manufacturing and services exports have grown *more slowly* since NAFTA took effect. Since NAFTA's enactment, annual growth in U.S. manufacturing exports to Canada and Mexico has fallen 41 percent below the annual rate seen in the years before NAFTA.[158] Even growth in services exports, which were supposed to do especially well under the trade pact given a presumed U.S. comparative advantage in services, dropped precipitously after NAFTA's implementation. Annual growth of U.S. services exports to Mexico and Canada since NAFTA has dropped to less than half the pre-NAFTA rate.[159]

Trade Adjustment Assistance Data Tracks U.S. Job Loss from NAFTA

While EPI's estimates of the job losses resulting from NAFTA summarize the overall effect of the trade deficit, the government itself tracks some of the layoffs known to have specifically occurred due to imports or offshoring, through the U.S. Department of Labor's TAA program. TAA is quite narrow, only covering a subset of the jobs lost at manufacturing facilities, while excluding a portion of the jobs that have directly relocated to Mexico or Canada. The program is also difficult to qualify for, which has led some unions to direct workers to other assistance programs. Even a report by the pro-NAFTA PIIE estimated that fewer than 10 percent of workers who lose their jobs in industries facing heavy import competition receive assistance under TAA.[160] Thus, the NAFTA TAA numbers significantly undercount NAFTA job loss. Still, under TAA, more than 850,000 workers have been certified as having lost their jobs due to imports from Canada and Mexico or the relocation of factories to those countries.[161] To see the full set of TAA-certified job losses – searchable by company, product, congressional district and city – visit Public Citizen's TAA database at www.citizen.org/taadatabase.

The U.S. government also tried to identify specific jobs *created* by NAFTA rather than destroyed. The U.S. Department of Commerce established such a program, but after finding fewer than 1,500 specific jobs attributable to NAFTA, the program was shut down because its findings were so bleak.[162]

Corporate Promises of Job Creation Are Broken

In addition to NAFTA supporters' unfulfilled promises of overall job creation, specific companies also lobbied for NAFTA by claiming that the deal would boost their own hiring and reduce the need to move jobs to Mexico and Canada. In reality, the vast majority of their promises of job creation failed to materialize, and many of these companies have actually moved operations to Mexico and Canada since NAFTA's passage.[163] For example, Chrysler declared that if NAFTA passed, it would export 25,000 vehicles to Mexico and Canada by 1995, claiming that the sales would support 4,000 U.S. jobs. In reality, since NAFTA's passage Chrysler has eliminated 7,108 U.S. jobs explicitly certified under TAA as displaced by rising imports from Canada and Mexico or decisions to offshore production to those countries (thousands more trade-related job losses at Chrysler do not specify a country). Siemens made claims similar to Chrysler's, and yet it has eliminated more than 1,400 U.S. jobs by offshoring

production to Mexico.[164] Johnson & Johnson promised that it would hire hundreds of U.S. workers if NAFTA was approved, but ended up offshoring 950 U.S. jobs to Mexico and Canada.[165] The table below details a few examples of corporations' empty promises of NAFTA job growth.

Specific Corporate Promises of NAFTA Job Gains versus Actual Outcomes

Corporation	Promise	Reality
Chrysler	"With the passage of NAFTA, Chrysler is planning to export 25,000 vehicles to Mexico and Canada by 1995 and 80,000 by the year 2000. The sales will support 4,000 U.S. jobs by 1995, including Chrysler employees and U.S. suppliers." "NAFTA: We Need It: How U.S. Companies View Their Business Prospects Under NAFTA," *National Association of Manufacturers, November 1993.*	Chrysler has eliminated **17,757 U.S. jobs** due to imports or offshoring under NAFTA, including 7,108 job losses explicitly attributed to rising imports from Canada and Mexico or decisions to offshore production to those countries (the remainder of the job losses do not specify the country).
Fruit of the Loom	In a Senate floor speech on November 19, 1993, Sen. Mitch McConnell (R-Ky.) explained that he would be voting for NAFTA because "American firms will not move to Mexico just for lower wages… without NAFTA, United States firms are more likely to move production to Mexico." He specifically cited Fruit of the Loom, stating, "…consider Fruit of the Loom. This fine Kentucky firm, which is my State's largest private employer, expects to boost sales to Mexico under NAFTA and eventually create 1,000 new jobs." *Congressional Record, November 19, 1993.*	Fruit of the Loom has eliminated **12,155 U.S. jobs** due to imports or offshoring under NAFTA. That includes 2,936 job losses explicitly attributed to offshoring to Mexico or rising imports from Canada and Mexico (the remainder of the job losses do not specify the country). More than 3,600 of Fruit of the Loom's trade-related layoffs have occurred in Kentucky.
General Electric	"We are looking at another $7.5 billion in potential sales over the next 10 years. These sales could support 10,000 jobs for General Electric and its suppliers. We fervently believe that these jobs depend on the success of this agreement." *Michael Gadbaw, General Electric, before the House Foreign Affairs Committee, October 21, 1993.*	General Electric has eliminated **11,675 U.S. jobs** due to imports or offshoring under NAFTA, including 6,135 job losses explicitly attributed to rising imports from Canada and Mexico or decisions to offshore production to those countries (the remainder of the job losses do not specify the country).
Caterpillar	"The NAFTA would eliminate the incentive to move operations to Mexico...U.S. companies would be better able to serve the Mexican market by exporting, rather than by moving production...Caterpillar estimates NAFTA-mandated tariff reductions – coupled with increased economic growth – would increase demand in Mexico by 250-350 units annually." *"The Impact of NAFTA on Illinois," prepared for USA*NAFTA by the Trade Partnership, Washington D.C., June 1993.*	Caterpillar has eliminated **3,270 U.S. jobs** due to imports or offshoring under NAFTA, including 738 job losses explicitly attributed to rising imports from Canada and Mexico or decisions to offshore production to those countries (the remainder of the job losses do not specify the country).

Source for corporate promises: Public Citizen, "NAFTA's Broken Promises: Failure to Create U.S. Jobs," January 1997, Available at: www.citizen.org/trade/article_redirect.cfm?ID=1767. Source for TAA-certified job losses: Public Citizen, Trade Adjustment Assistance Database, 2014. Available at: www.citizen.org/taadatabase.

Special Investor Privileges Promote Offshoring of U.S. Jobs

NAFTA's special new rights and privileges for foreign investors eliminated many of the risks and costs that had been associated with relocating production to a low-wage venue. The incentives these rules offered for offshoring included a guaranteed minimum standard of treatment that Mexico had to provide to relocating U.S. firms, which went above and beyond the treatment provided to domestic firms. This included the right for foreign investors to challenge the Mexican government directly in United Nations and World Bank tribunals, demanding compensation for environmental, zoning, health and other government regulatory actions of general application that investors claimed as undermining their expectations.[166] The protections granted to corporations interested in offshoring contributed to the flow of foreign investment into Mexico, which quadrupled after the implementation of NAFTA.[167]

Studies Reveal Consensus: Trade Flows during "Free Trade" Era Have Exacerbated U.S. Income Inequality

Recent Studies: Trade's Contribution to Inequality Has Increased amid Status Quo Trade Deals and Is Likely to Increase Further

U.S. income inequality has jumped to levels not seen since the pre-depression 1920s, as middle-class wages have stagnated while the incomes of the rich have surged.[168] 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.[169] Meanwhile, 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 rose 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.[170]

Since 1941 standard economic theory has held that trade liberalization is likely to contribute to greater income inequality in developed countries like the United States.[171] As direct competition with low-wage labor abroad puts downward pressure on middle-class wages, the profits of multinational firms rise, and the income gap between the rich and everyone else widens. 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).[172]

In the early 1990s, as U.S. income inequality soared amid the enactment of U.S. "free trade" deals, a spate of economic studies put the theory to the test, aiming to determine the relative contribution of trade flows to the rise in U.S. income inequality. **The result was an academic consensus that trade flows had, in fact, contributed to rising U.S. income inequality. The only debate was *the extent* of trade's role**, with most studies estimating that between 10 and 40 percent of the rise in inequality during the 1980s and early 1990s stemmed from trade flows, as indicated in the table below.[173]

1990s Studies on Trade's Impact on U.S. Income Inequality		
Author(s)	**Year of Study**	**Portion of Inequality Increase Attributed to Trade**
Borjas, Freeman, Katz	1997	**5%**
Lawrence	1996	**9%**
Borjas and Ramey	1993	**10%**
Cooper	1994	**10%**
Krugman	1995	**10%**
Baldwin and Cain	1994	**9-14%**
Leamer	1994	**20%**
Cline	1997	**39%**
Karoly and Klerman	1994	**55-141%**
Wood	1994	**100%**

Status Quo Trade Deals Increase Inequality by Depressing Middle-Class Wages

U.S. FTAs have contributed to the historic rise in U.S. income inequality primarily by exerting downward pressure on middle-class wages. Status quo trade deals have forced U.S. workers to compete directly with low-wage workers in countries with lax or nonexistent labor protections, while offering special protections to U.S. firms that offshore their production to those countries.[174] The predictable result has been the loss of U.S. jobs, primarily in higher-paying manufacturing sectors.

Of course, most workers who lose their jobs to imports or offshoring eventually find new work. But as manufacturing jobs have become scarcer, many trade-displaced workers have been forced to take lower-paying jobs in non-offshoreable service sectors. 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**…"[175] 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 took a pay cut of greater than 20 percent.[176] For the median manufacturing worker earning more than $38,000 per year, this meant an annual loss of at least $7,600.[177]

But the wage losses are not limited to those workers who actually lose their jobs under trade deals. When manufacturing workers are displaced 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. **As increasing numbers of trade-displaced workers have joined the glut of workers competing for these non-offshorable jobs, real wages have actually been declining in these growing sectors.**[178] The downward pressure on wages thus spreads to much of the middle class.

Meanwhile, status quo trade deals have eroded U.S. workers' power to reverse the middle-class wage stagnation via collective bargaining. In the past, U.S. workers represented by unions were able to bargain for their fair share of economic gains generated by productivity increases.[179] 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.[180]

Some analysts argue that technology-related efficiency gains also spur U.S. manufacturing job loss and exert downward pressure on middle-class wages, in attempt to diminish the role of trade policy in exacerbating U.S. income inequality.[181] But recent studies indicate that the role of technology has been overstated. A 2013 National Bureau of Economic Research study on the U.S. job impacts of both technology and trade finds "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."[182] In another 2013 study, **Federal Reserve economists find "limited support" for the notion that technological change explains U.S. workers' declining share of national income, while identifying increasing import competition and offshoring as "a leading potential explanation."**[183] An earlier study by International Monetary Fund economists similarly concludes, "Among developed countries…the adverse impact of globalization [on income inequality] is somewhat larger than that of technological progress."[184] Regardless of how much importance should be ascribed to technological change, the importance of status quo trade in spurring income inequality is a consistent finding of the panoply of studies cited above and below. Since Congress actually has a say over trade policy, why would we not push for a new trade policy that fosters rather than erodes middle-class wages and diminishes rather than widens the yawning income gap?

Pro-FTA Think Tank: Trade Responsible for 39% of Inequality Growth

In one of the more frequently cited studies from the 1990s – a 1997 report published by the pro-"free trade" Institute for International Economics (now the Peterson Institute for International Economics)[185] – author William Cline estimated that trade was responsible for a 7 percent gross increase in U.S. wage inequality during a time period in which wage inequality rose by a total of 18 percent – meaning that **the trade impact on U.S. wage inequality amounted to 39 percent of observed inequality growth**.

Cline used an economic model to calculate that trade liberalization, trade costs, and offshoring were responsible for an estimated 7 percent gross increase in the wage inequality that had occurred from 1973 to 1993 (i.e. a 7 percent rise in the ratio of the wages earned by those with some college education compared to the wages earned by those with a high school education or lower).[186] Cline reported an 18 percent total wage inequality increase during this time period.[187] Dividing the 7 percent trade-prompted inequality increase by the 18 percent total inequality increase amounts to a 39 percent contribution of trade to the rise in inequality.

In his study, Cline noted that trade was just one of several factors contributing to the rise in inequality, and that trade's 7 percent gross contribution was less than 10 percent of the total estimated *gross* contributions of all inequality-exacerbating factors.[188] While Cline attempted to downplay the results of his own model (trade's estimated 39 percent contribution to the net increase in inequality) and instead emphasize trade's smaller share of the total estimated *gross* contributions to inequality, Cline himself admitted that this interpretation of the results was not "typical[]."[189] Indeed, in his review of other scholars' studies listed in the above table, Cline himself reported the primary result of each study by dividing the estimated trade-prompted gross inequality increase by the observed net inequality increase – the same method used to arrive at the 39 percent estimate using the data from Cline's study.[190] This standard approach makes sense, because if trade flows had not spurred a 7 percent

increase in U.S. wage inequality (to use Cline's study), the total observed rise in inequality indeed would have been about 39 percent lower.

Further, while Cline's study named several non-trade factors contributing to the rise in income inequality, the factor with the largest substantiated gross contribution to inequality was trade. Other inequality-exacerbating factors included increased immigration (an estimated 2 percent contribution), a reduced real minimum wage (an estimated 5 percent contribution) and deunionization (an estimated 3 percent contribution – one arguably influenced by trade deals that enable the offshoring threats used to counter union drives).[191] After accounting for all of these factors, Cline was left with a missing 67 percent gross contribution to wage inequality (required to arrive at the observed 18 percent *net* inequality increase after taking into account downward pressures on inequality).[192] Cline then "arbitrarily" assigned half of this mystery category to "skill biased technical change" and kept the other half as "unexplained."[193] While the resulting role allocated to technological change significantly exceeded that found for trade, the allocation was not substantiated by any economic model or calculation, leaving trade as the study's largest inequality-exacerbating factor backed up by data.

Recent Studies Reveal Rising Impact of Trade on U.S. Income Inequality

More recent studies have concluded that **trade's role in exacerbating U.S. income inequality has likely grown since the 1990s**, as U.S. imports from lower-wage countries, and U.S. job offshoring to those countries, have risen dramatically amid the implementation of NAFTA, the WTO and a series of NAFTA expansion pacts, impacting an increasing swath of middle-class jobs. Further, an array of studies now project future increases in the offshoring of U.S. jobs, suggesting that **even under current U.S. trade policy, trade flows will soon be responsible for an even greater share of rising U.S income inequality**. Were the TPP to take effect, expanding status quo U.S. trade policy and incentivizing further offshoring to low-wage countries like Vietnam, it would only exacerbate trade's contribution to historically high U.S. income inequality.

Why are American Workers getting Poorer? China, Trade and Offshoring*; Avraham Ebenstein, Ann Harrison and Margaret McMillan; National Bureau of Economic Research; March 2015*

In this study on trade's impact on U.S. workers' wages, the authors conclude, "We find significant effects of globalization, with offshoring to low wage countries and imports 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..."[194] Running econometric tests on wage and trade data from 1983-2008, the economists find that **a 10 percent increase in an occupation's exposure to import competition was associated with a more than 15 percent drop in wages for U.S. workers performing somewhat routine tasks** (and a nearly 3 percent wage decline for U.S. workers overall). As many middle-class occupations have faced surging imports from FTA countries, this finding indicates particularly large wage losses for U.S. workers under status quo trade deals. The authors also find statistically significant wage declines associated with the offshoring of U.S. jobs to low-wage countries, particularly in recent years (2000-2008), as offshoring has increased.[195] The study controlled for technological change so as to capture the impacts of imports and offshoring alone.[196]

IV Quantile Regression for Group-level Treatments, with an Application to the Distributional Effects of Trade; *Denis Chetverikov, Bradley Larsen, and Christopher Palmer; National Bureau of Economic Research; March 2015*

This study on the U.S. wage impacts of rising import competition from China from 1990 to 2007 finds that "Chinese import competition affected the wages of low-wage earners more than high-wage earners, **demonstrating how increases in trade can causally exacerbate local income inequality**." Indeed, the authors' econometric tests find that for the lower third of U.S. workers by income, the downward pressure on wages from the import competition was twice as strong as the average effect.[197]

The Decline of the U.S. Labor Share*; Michael W. L. Elsby, Bart Hobijn and Aysegul Sahin; The Brookings Institution; Fall 2013*

Economists at the Federal Reserve and University of Edinburgh used this study to identify why U.S. workers' share of national income has been steadily declining over the past couple decades. After a battery of econometric tests, the authors find "limited support" for the theory that technological change primarily explains middle-class workers' diminishing slice of the economic pie. Instead, they conclude, "our analysis identifies offshoring of the labor-intensive component of the U.S. supply chain as a leading potential explanation of the decline in the U.S. labor share over the past 25 years."[198] Indeed, their findings "suggest that increases in the import exposure of U.S. businesses can account for 3.3 percentage points of the 3.9 percentage point decline in the U.S. payroll share over the past quarter century."[199] That is, **increases in offshoring and import competition since about the dawn of the NAFTA era are associated with 85 percent of the observed decline in U.S. workers' share of national income** – a result that the economists find "striking," leading them to suggest that if the trade status quo continues, "the labor share will continue to decline."[200]

Using Standard Models to Benchmark the Costs of Globalization for American Workers without a College Degree*; Josh Bivens; Economic Policy Institute; March 22, 2013*

In this study Josh Bivens, an economist at EPI, updates an early-1990s model estimate of the impact of trade flows on U.S. income inequality and finds that, using the model's own conservative assumptions, one third of the increase in U.S. income inequality from 1973 to 2011 was due to trade with low-wage countries.[201] More importantly, Bivens finds that the trade-attributable share of the rise in income inequality has increased rapidly since the 1990s as manufacturing imports from low-wage countries have escalated. The data reveal that **while trade spurred 17 percent of the income inequality increase occurring from 1973 to 1995, trade flows were responsible for more than 93 percent of the rise in income inequality from 1995 to 2011 – a period marked by a series of U.S. "free trade" deals**.[202] Expressed in dollar terms, Bivens estimates 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.[203] Bivens concludes, "various policy decisions that have governed how the American economy is integrated into the global economy have increased the damage done to American workers…[including] pursuing expanded global integration through trade agreements that carve out protections for corporate investors but not for American workers…"[204]

Rising Income Inequality: Technology, or Trade and Financial Globalization?*; Florence Jaumotte, Subir Lall, and Chris Papageorgiou; International Monetary Fund; July 2008*

The International Monetary Fund authors find that the rise in income inequality from 1981-2003 in 20 developed countries, including the United States, is *primarily* attributable to trade and financial globalization trends. They conclude that globalization's contribution to inequality has outweighed the role of technological advancement: **"Among developed countries…the adverse impact of globalization is somewhat larger than that of technological progress."**[205]

Trade and Wages, Reconsidered*; Paul Krugman; The Brookings Institution; Spring 2008*

In a Brookings Institution study, Nobel-winning economist Paul Krugman finds that trade flows likely now account for an even greater degree of U.S. income inequality than that found in a series of studies from the early 1990s, which had already concluded that trade liberalization had a negative, but modest, impact on income inequality in developed countries like the United States. Like Bivens (see above), Krugman notes that U.S. manufacturing imports from low-wage developing countries have grown dramatically in the last two decades, suggesting that the role of trade flows in spurring U.S. income inequality growth is "considerably larger" than before.[206] Krugman concludes, **"…there has been a dramatic increase in manufactured imports from developing countries since the early 1990s. And it is probably true that this increase has been a force for greater inequality in the United States and other developed countries."**[207]

Globalization, American Wages, and Inequality: Past, Present, and Future*; Josh Bivens; Economic Policy Institute; September 6, 2007*

In this report Bivens cites an array of recent economic studies that project that the offshoring of U.S. jobs will increase under current trade policy, suggesting a substantial further rise in the impact of trade flows on U.S. income inequality.[208] For example, Princeton economist and former Council of Economic Advisors member Alan Blinder estimates that about one in every four U.S. jobs, including higher-paying service-sector jobs, could be offshored in the foreseeable future.[209] While such studies differ in the projected extent of future U.S. job offshoreability, all imply an increase in the impact of trade flows on U.S. income inequality. Bivens finds that **the range of projections for increased offshoring suggest a further 74 to 262 percent increase in U.S. income inequality attributable to trade with lower-wage countries, compared to the level seen in 2006**.[210] Bivens concludes, "The potential level of redistribution caused by offshoring is vast, and, so should be the policy response."[211]

TPP-Spurred Inequality Increase Would Mean a Pay Cut for 90% of Workers

The TPP would further exacerbate U.S. income inequality by forcing U.S. workers to compete directly with even lower-paid workers abroad while expanding past FTAs' incentives for firms to offshore middle-class U.S. jobs to low-wage countries. The pact's investment chapter would create extraordinary rights and privileges for foreign investors, eliminating many of the usual risks and costs that make firms think twice before relocating abroad.[212] In addition, the TPP would place U.S. workers in direct competition with workers in low-wage TPP member countries like Vietnam, where wages average less than 60 cents an hour,[213] independent unions are banned and child labor is rampant.[214] If the legacy of existing FTAs provides any indication, this uneven playing field would spur a surge in imported goods from TPP countries, resulting in more layoffs of middle-class U.S. workers.[215] Like manufacturing workers displaced under current trade pacts, many workers who would lose their jobs to TPP-spurred offshoring or imports would be forced to compete for lower-paying service sector jobs, putting further downward pressure on middle-class wages and fueling greater income inequality.

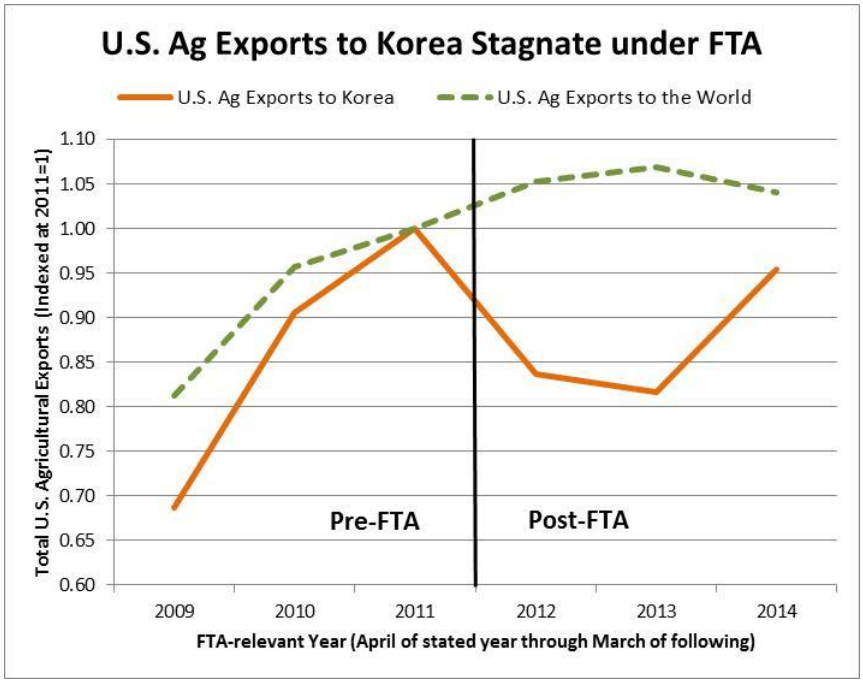
Defenders of the TPP sometimes acknowledge the pact likely would further constrain middle-class wages, but claim that the deal would produce economic gains, largely in the form of cheaper imported consumer goods, that would outweigh those costs for most U.S. workers. Economists at CEPR put that theory to the test, using the results of a study 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 of trade's contribution to inequality from the studies cited above (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.[216] That is, for any workers making less than $90,060 per year (the current 90th percentile wage), the TPP would mean a pay cut.[217]

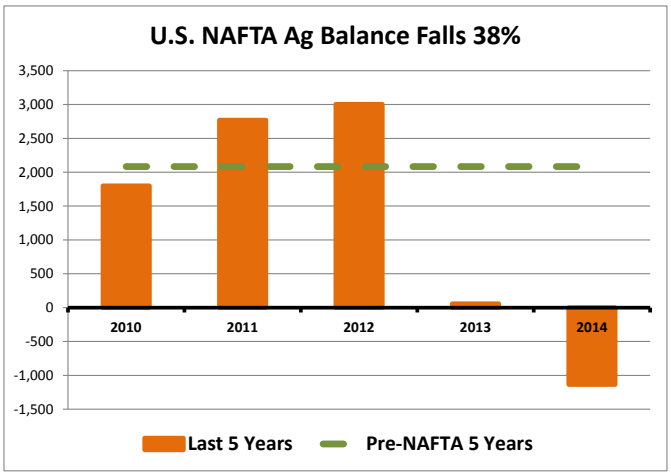
Agricultural Exports Lag under Trade Deals, Belying Empty Promises Recycled for the TPP

Time and again, U.S. farmers and ranchers have been promised that controversial FTAs would provide a path to economic success by boosting exports. Time and again, these promises have been broken. Data from the U.S. Department of Agriculture (USDA) reveal that U.S. agricultural exports have lagged, agricultural imports have surged and family farms have disappeared under existing FTAs. Undeterred by its own data, USDA recently repeated the standard FTA sales pitch with a factsheet claiming that the TPP, which would expand the status quo trade model, would "support expansion of U.S. agricultural exports, increase farm income, generate more rural economic activity, and promote job growth."[218] That promise contradicts the actual outcomes of the FTAs that serve as the TPP's blueprint.

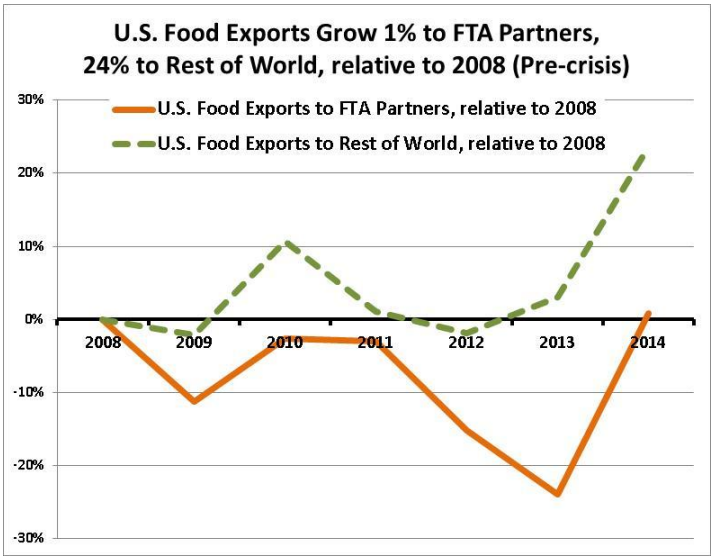
Agricultural exports stagnate under most recent FTA: Before the 2011 passage of the Korea FTA – which U.S. negotiators used as the template for the TPP – U.S. Secretary of Agriculture Tom Vilsack stated, "we believe a ratified U.S. Free Trade Agreement [with Korea] will expand agricultural exports by what we believe to be $1.8 billion."[219] In reality, exports of all U.S. agricultural products to Korea *fell* $323 million, or 5 percent, from the year before the FTA took effect to its recently-completed third year of implementation. During that same period, total U.S. agricultural exports to the world *rose* 4 percent. Even if comparing the average agricultural export level in the three years before the FTA took effect (including 2009, when global trade declined due to the worldwide recession) with the average level in the three post-FTA years, U.S. agricultural exports to Korea only have increased by $31 million, or 1 percent. U.S. agricultural exports to the world during that period have risen 14 percent.[220]



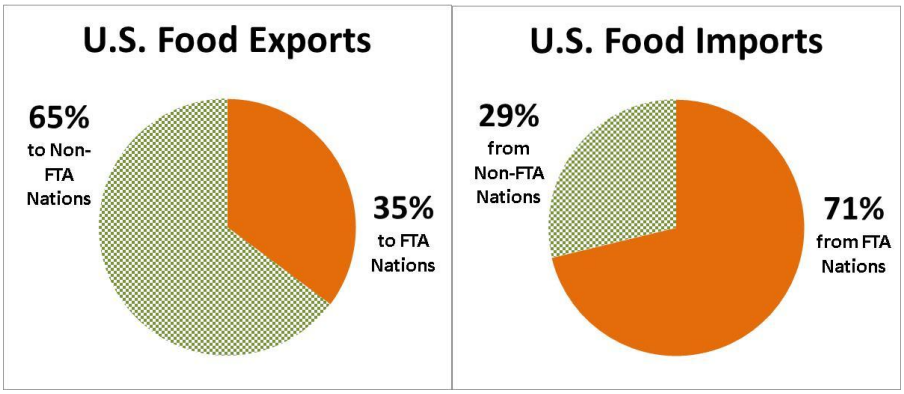
Agricultural trade surplus turns into a trade deficit under NAFTA: the U.S. agricultural trade balance with NAFTA partners has fallen from a $2.5 billion trade surplus in the year before NAFTA to a $1.1 billion trade deficit in 2014 – the largest NAFTA agricultural trade deficit to date. Even if one includes agricultural trade over the preceding several years, when agricultural export values were inflated by anomalously high international food prices, the average U.S. agricultural trade balance with NAFTA countries over the last five years still fell 38 percent below the average balance in the five years before NAFTA.



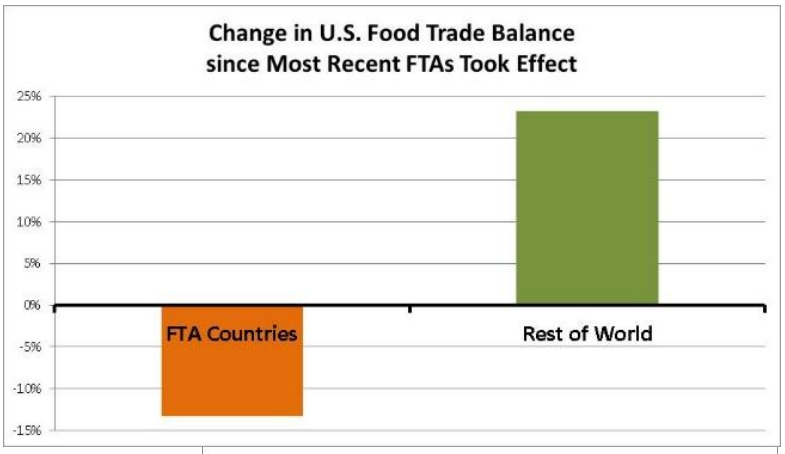
Agricultural exports to FTA partners lag behind: USDA data show that U.S. food exports to FTA partners have trailed behind food exports to the rest of the world in recent years, despite the claim in USDA's factsheet that "in countries where the United States has free trade agreements, our exports of food and agricultural products have grown significantly."[221] The volume of U.S. food exports to non-FTA countries rebounded quickly after the 2009 drop in global trade following the financial crisis. But U.S. food exports to FTA partners remained below the 2008 level until 2014. Even then, U.S. food exports to FTA partners were just 1 percent higher than in 2008, while U.S. food exports to the rest of the world stood 24 percent above the 2008 level.



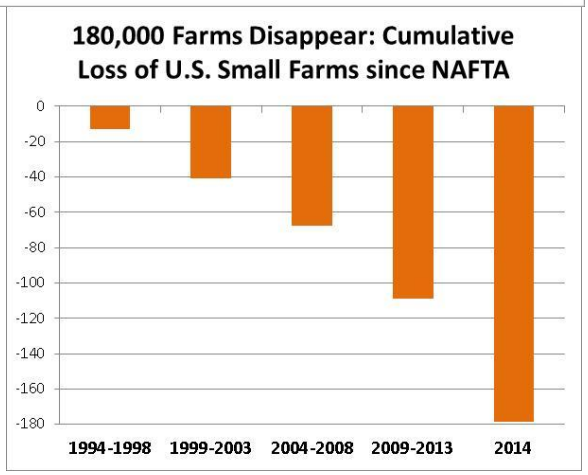
FTA partners account for most U.S. agricultural imports, relatively few agricultural exports: The USDA factsheet makes no mention of agricultural imports that undercut business for U.S. farmers. Most U.S. food imports come from FTA countries, while most U.S. food exports *are not* sold in FTA countries. This counterintuitive outcome is the opposite of what FTA proponents have promised U.S. farmers and ranchers. *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* (measuring by volume).



Agricultural trade balance suffers under FTAs: 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 (by volume) 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.



Small U.S. farms disappear during FTA era: Smaller-scale U.S. family farms have been hardest hit by rising agricultural imports and declining agricultural trade balances under FTAs. Since NAFTA and NAFTA expansion pacts have taken effect, one out of every 10 small U.S. farms has disappeared. By 2014, nearly 180,000 small U.S. farms had been lost.[222]



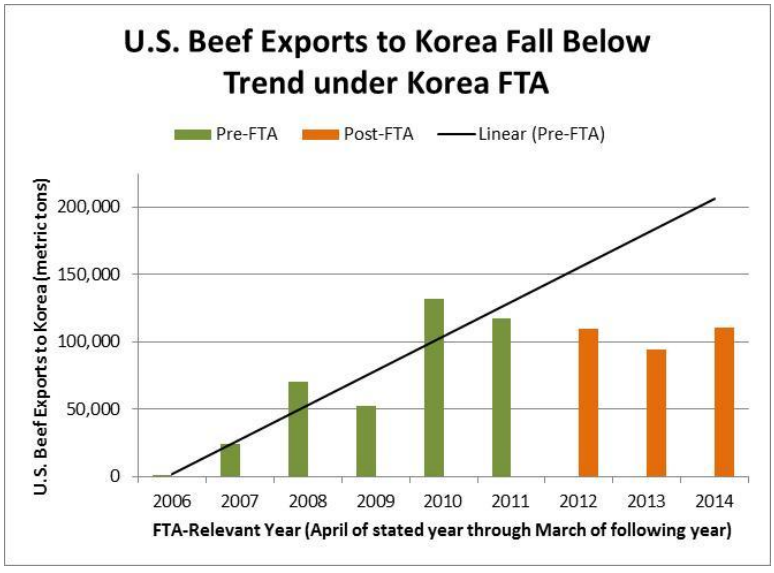
Falling Exports, Rising Trade Deficits in Key U.S. Crops under Status Quo Trade Deals

Most of the agricultural products that USDA highlights in its factsheets as prospective winners under the TPP have actually been losers under the FTA model that the TPP would expand:

- **Apples:** U.S. exports to Korea of apples have fallen 10 percent in the first three years of the Korea FTA.[223]

- **Barley:** U.S. exports of barley to U.S. FTA partners have grown just 12 percent (14,000 metric tons) while growing 144 percent (120,000 metric tons) to the rest of the world since 2011 (the year before the most recent FTAs took effect).

- **Beef:** U.S. beef exports to Korea have stagnated under the Korea FTA, falling below the historical growth trend and defying the administration's promises that beef exports to Korea would grow even more than in the past.[224] Even without an FTA, U.S. beef exports would be expected to grow as a product of Korea's population and economic growth. Instead, they have flatlined.



- **Beer:** U.S. exports to Korea of beer have increased just 2 percent in the first three years of the Korea FTA,

while total U.S. beer exports to the world have increased 42 percent during the same period.

- **Citrus Fruits and Juices:** U.S. exports to Korea of citrus fruits have fallen 4 percent under the first three years of the Korea FTA – a loss of more than 6,000 metric tons of citrus fruit exports each year. And under 21 years of NAFTA, U.S. net exports of orange juice and grapefruit juice to Canada and Mexico have fallen by more than 200,000 kiloliters.

- **Corn:** U.S. exports to Korea of corn have dropped 59 percent under the Korea FTA's first three years – a loss of more than 3.7 million metric tons of corn exports each year.

- **Dairy Products:** U.S. exports to Korea of milk, cream and whey have plummeted 91 percent in the first three years of the Korea FTA – a loss of more than 3.4 million liters of dairy exports each year.

- **Distilled Spirits:** U.S. exports of distilled spirits to U.S. FTA partners have grown just 3 percent (2.5 million liters) while growing 27 percent (32.2 million liters) to the rest of the world since 2011 (the year before the most recent FTAs took effect).

- **Feeds and Fodder:** U.S. exports of feeds and fodder to U.S. FTA partners have *fallen* 5 percent (more than 382,000 metric tons) while *growing* 80 percent (more than 8.8 million metric tons) to the rest of the world since 2011 (the year before the most recent FTAs took effect).

- **Hides and Skins:** U.S. exports to Korea of hides and skins have dropped 14 percent under the first three years of the Korea FTA.

- **Potatoes:** U.S. net exports of potatoes to Canada and Mexico have fallen 580,000 metric tons under 21 years of NAFTA.

- **Poultry:** U.S. exports to Korea of poultry have plummeted 31 percent under the first three years of the Korea FTA – a loss of more than 24,000 metric tons of poultry exports each year.

- **Rice:** U.S. exports to Korea of rice have fallen 13 percent under the Korea FTA's first three years – a loss of nearly 13,000 metric tons of rice exports each year.

- **Soybeans and Soybean Products:** U.S. exports of soybeans and soybean products to U.S. FTA partners have grown just 8 percent (759,000 metric tons) while growing 52 percent (17.3 million metric tons) to the rest of the world since 2011 (the year before the most recent FTAs took effect).

- **Vegetables:** U.S. exports of vegetables to U.S. FTA partners have *fallen* 21 percent (more than 13,000 kiloliters) while *growing* 721 percent (more than 14,000 kiloliters) to the rest of the world since 2011 (the year before the most recent FTAs took effect).

- **Wine:** U.S. net exports of wine to Canada and Mexico have fallen more than 24,000 kiloliters under 21 years of NAFTA. And while FTA proponents have claimed wine as a winner under the Korea FTA, average annual U.S. exports of wine to Korea have increased by just 166 kiloliters – less than 0.005 percent of the wine sold in the United States each year. More wine is sold in an average *half hour* in the United States than the gain in U.S. wine exports to Korea in an average *year* under the Korea FTA.[225]

Three Years of Korea FTA Show Failure of Obama's 'More Exports, More Jobs' Trade Pact Promises

Trade Deficit With Korea Balloons 90 Percent as Exports Fall and Imports Surge Under Korea Pact Used as Trans-Pacific Partnership Template

U.S. government trade data covering the full first three years of the U.S.-Korea FTA reveals that the U.S. goods trade deficit with Korea has nearly doubled.[226] The U.S. International Trade Commission data show Korea FTA outcomes that are the opposite of the Obama administration's "more exports, more jobs" promise for that pact,[227] which it is now repeating for the TPP as it tries to persuade Congress to approve the controversial deal:[228]

- **The U.S. goods trade deficit with Korea has swelled 90 percent, or $13.6 billion**, in the first three years of the Korea FTA (comparing the year before the FTA took effect with the third year of implementation).

- The trade deficit increase equates to **the loss of more than 90,000 U.S. jobs** in the first three years of the Korea FTA, counting both exports and imports, according to the trade-jobs ratio that the Obama administration used to project job *gains* from the deal.[229]

- **U.S. goods exports to Korea have dropped 7 percent, or $3 billion**, under the Korea FTA's first three years.

- **U.S. imports of goods from Korea have surged 18 percent, or $10.6 billion** in the first three years of the Korea FTA.

- Record-breaking U.S. trade deficits with Korea have become the new normal under the FTA – **in 35 of the 36 months since the Korea FTA took effect, the U.S. goods trade deficit with Korea has exceeded the average monthly trade deficit in the three years before the deal.** In January 2015, the monthly U.S. goods trade deficit with Korea topped $3 billion – the highest level on record.

- **The 90 percent surge in the U.S.-Korea goods trade deficit in the first three years of the FTA starkly contrasts with the 2 percent *decrease* in the global U.S. goods trade deficit during the same period.** And while the strengthening value of the dollar has inhibited overall U.S. exports recently, U.S. goods exports to the world have remained level (zero percent change) while U.S. exports to Korea have fallen during the FTA's first three years.

- **The U.S. manufacturing trade deficit with Korea has grown 47 percent**, or $10.6 billion, since implementation of the Korea FTA. The increase owes to a 1 percent, or $0.5 billion, decline in U.S. exports to Korea of manufactured goods and a 17 percent, or $10.1 billion, increase in imports of manufactured goods from Korea.[230]

- **U.S. exports to Korea of agricultural goods have** fallen **5 percent**, or $323 million, in the first three years of the Korea FTA. U.S. agricultural imports from Korea, meanwhile, have grown 29

percent, or $103 million, under the FTA. As a result, the U.S. agricultural trade balance with Korea has declined 6 percent, or $426 million, since the FTA's implementation.[231]

Data Omissions and Distortions Cannot Hide Bleak Korea FTA Outcomes

The Office of the U.S. Trade Representative (USTR) has tried to obscure the bleak Korea FTA results, as congressional ire about the pact is fueling opposition to the administration's push for Congress to approve the TPP, for which the Korea FTA served as the U.S. template. USTR's factsheet on the third anniversary of the Korea FTA's implementation included these data omissions and distortions:[232]

- USTR misleadingly emphasizes a relatively small increase in U.S. exports to Korea of passenger vehicles under the FTA, while omitting the much larger surge in job-displacing imports of passenger vehicles from Korea. U.S. imports of passenger vehicles from Korea have ballooned by 416,893 vehicles in the first three years of the Korea FTA, dwarfing a 24,217-vehicle increase in U.S. passenger vehicle exports to Korea. As a result, the U.S. trade deficit with Korea in passenger vehicles has grown 46 percent.[233] And while total U.S. automotive exports to Korea have increased $0.7 billion in the FTA's first three years, U.S. automotive imports from Korea have risen $6.4 billion. As a result, the U.S. automotive trade deficit with Korea has swelled 36 percent, or $5.7 billion, under the FTA.[234]

- USTR also claims that the decline in U.S. exports to Korea under the FTA is due to decreases in exports of fossil fuels and corn. But even after removing fossil fuels and corn products, U.S. exports to Korea still have declined by $1.5 billion, or 4 percent, in the first three years of the FTA.[235] Product-specific anomalies cannot explain away the broad-based drop in U.S. goods exports to Korea under the FTA.

- USTR also tries to dismiss the decline in U.S. exports to Korea under the FTA as due to a weak economy in Korea. But the Korean economy has grown each year since the FTA passed, even as U.S. exports to Korea have shrunk.[236] Korea's gross domestic product in 2014 was 12 percent higher than in the year before the FTA took effect, suggesting that U.S. exports to Korea should have expanded, with or without the FTA, as a simple product of Korea's economic growth.[237] Instead, U.S. exports to Korea have fallen 7 percent in the first three years of the FTA.

- USTR counts foreign-produced goods as "U.S. exports," falsely inflating actual U.S. export figures. USTR often reports export numbers that include "foreign exports," also known as "re-exports" – goods made abroad that pass through the United States before being re-exported to other countries. By U.S. Census Bureau definition, foreign exports undergo zero alteration in the United States, and thus support zero U.S. production jobs.[238] Each month, the U.S. International Trade Commission removes foreign exports from the raw data reported by the U.S. Census Bureau. But USTR regularly uses the uncorrected data, inflating the actual U.S. export figures and deflating U.S. trade deficits with FTA partners like Korea. *In the first three years of the Korea FTA, foreign exports to Korea have risen 13 percent, or $290 million, which USTR errantly counts as an increase in "U.S. exports."*[239]

U.S. Small Businesses Have Endured Slow and Declining Exports under "Free Trade" Deals

Large corporations pushing for the TPP and Trans-Atlantic Free Trade Agreement (TAFTA), two sweeping deals under negotiation that would expand the status quo trade model, have created a new sales pitch: these controversial pacts would be a gift not primarily to them, but to *small* businesses.[240] The Obama administration has made similar claims that these pacts would help U.S. small and medium enterprises boost exports,[241] often on the basis that SMEs comprise most U.S. exporters.[242]

But SMEs comprise most U.S. exporting firms simply because they constitute 99.7 percent of U.S. firms overall.[243] The more relevant questions are what share of SMEs actually depend on exports for their success, and for those that actually do export, how have they fared under FTAs serving as a model for the TPP and TAFTA?

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.[244] Even if FTAs actually succeeded in boosting exports, which government data show they do not,[245] exporting is primarily the domain of large corporations, not small businesses.

The relatively few small businesses that do actually export have seen even more disappointing export performance under FTAs than large firms have seen. Small firms have endured a particularly steep fall in exports under the Korea FTA (the U.S. template for the TPP), particularly slow export growth under NAFTA (the U.S. template for the Korea FTA), and declining export shares under both deals.

- **U.S. small businesses have seen their exports to Korea *decline* even more sharply than large firms under the Korea FTA**. U.S. Census Bureau data reveal that both small and large U.S. firms saw their exports to Korea fall in the FTA's first two years (the latest available data separated by firm size), compared to the year before implementation. But small firms fared the worst. 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. As a result, under the Korea FTA, small firms are capturing an even smaller share of the value of U.S. exports to Korea (14 percent), while big businesses' share has increased to 67 percent.[246]

- **Small businesses' exports have lagged under NAFTA.** Corporate and government officials promised that small businesses would be major winners from NAFTA. Instead, 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). Small firms' exports to NAFTA partners increased by 39 percent, while their exports to the rest of the world grew by 77 percent, according to U.S. Census Bureau data.[247]

- **Small firms' exports to Mexico and Canada under NAFTA have grown less than half as much as large firms' exports to NAFTA partners** (39 percent vs. 93 percent in the 1996-2013 window of data availability). As a result, U.S. small businesses' share of total U.S. exports to Mexico and Canada has fallen under NAFTA. U.S. firms with fewer than 100 employees saw their share of U.S. exports to NAFTA partners decline from 14 to 10 percent from 1996 to 2013. 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.[248]

- **NAFTA has done nothing to change the fact that a miniscule portion of U.S. small businesses export.** After 20 years of NAFTA, just 0.6 percent and 1.1 percent of U.S. small businesses exported to Mexico and Canada, respectively, compared to 19 percent and 26 percent of large firms (in 2013, the latest year of available data on total firms by size).[249] Selling another FTA as a boon for small business exports contradicts the empirical evidence.

Unpacking Data Tricks Used to Hide Job-Displacing Trade Deficits under U.S. FTAs

The Office of the U.S. Trade Representative claims that the United States has a trade surplus with its 20 FTA partner countries.[250] This assertion is at the center of the administration's efforts to convince Congress to approve the TPP, which is modeled on the past FTAs. **Yet, if one reviews the U.S. government trade data available to all on the U.S. International Trade Commission (USITC) website, in fact in 2014 we had a $177.5 billion goods trade deficit with the FTA nations.[251] Typically our services surplus with FTA partners is in the $75-80 billion range.[252] That means we have a large overall trade deficit with our FTA partners.** So, how can USTR claim we have a surplus? To make the data support their political message, USTR either cobbles together broad sectors in which we have trade deficits (e.g. what they call "energy") and simply excludes them, and/or artificially inflates export levels by counting foreign-made goods as U.S. exports. After USTR's methodology was challenged yet again, in a March 19, 2015 letter signed by members of Congress,[253] USTR issued a "fact sheet."[254] Below are USTR's claims versus the facts.

USTR Claim: "The reality is that the United States runs a trade surplus in goods and services with our collective free trade agreement partners. Look at the official U.S. government data collected by the Census Bureau consistent with UN Statistical Guidelines. Add up all the exports to our FTA partners and subtract all the imports and you get a surplus."

FACT: **The reality is that the combined U.S. goods and services trade balance with our 20 FTA partners in 2013 was a $105 billion deficit (a $180 billion goods trade deficit and a $75 billion services trade surplus). The United States ran a** $177.5 billion goods trade deficit**, collectively, with its 20 FTA partners in 2014.** As USTR notes, one can look at the official U.S. government data collected by the U.S. Census Bureau with respect to trade in goods and do the math yourself. But, what you get when you add up all of the exports and subtract all of the imports from our FTA partners is a large goods trade deficit. The data are made available to the public by the USITC at http://dataweb.usitc.gov/. The USITC presentation of the data are consistent with UN Statistical Guidelines, which recommend that re-exports "be separately identified (coded) for analytical purposes."[255] As for services – contrary to USTR's claim, the Census Bureau doesn't collect services trade data. That comes from the Bureau of Economic Analysis on a quarterly basis and can be accessed here. (Services trade data for 2014 have only been posted for some U.S. FTA partners.)

USTR Claim: "If you buy something from Canada for 100 dollars and sell it to Mexico for 200 dollars, you aren't losing a 100 dollars"[sic]

FACT: USTR tries to explain why it **counts foreign-made products as "U.S exports," which is how USTR artificially inflates U.S. export figures and deflates U.S. trade deficits with FTA partners.**[256] "Foreign exports" (also known as "re-exports") are goods made abroad, imported into the United States, and then re-exported again *without undergoing any alteration in the United States.* (That is the U.S. Census Bureau definition.[257]) USTR's numbers count as "U.S. exports," for example, goods manufactured entirely in China that enter the San Diego port and do nothing but sit in a warehouse before being trucked 18 miles south and re-exported to Mexico. In order to get the numbers necessary to support its claim that we have a trade surplus with our FTA partners, USTR must count these as U.S. exports even though the goods were not produced here, nor did they support a single U.S. production job. While USTR is correct that a firm – say, Walmart – does not lose money by landing cases of Canadian grown and processed canola oil at a southern California port, and then shipping it by truck for sale in Mexico at a marked up price, this is unrelated to the fact that these Canadian goods should not be counted as U.S. exports.

USTR Claim: "*For an apples-to-apples comparison, you have to look at measures that look comprehensively at both imports and exports. That is what the Department of Commerce, the official source of U.S. trade data, does when it releases trade balance data every month. That's what UN statistical guidelines suggest. We think that's a better approach than systematically overstating imports relative to exports."*

FACT: No one contests that the U.S. Census Bureau gathers the official government data on U.S. goods exports, including whether goods that were shipped out of U.S. ports were produced here (i.e. U.S. "domestic exports") or were just re-exports of foreign-produced goods (i.e. "foreign exports"). But the U.S. Census Bureau's monthly trade data reports on U.S. exports to each U.S. trade partner lump foreign exports in with U.S. domestic exports. However, the USITC reports these government trade data with foreign exports removed, providing the official data on U.S.-made exports. USTR chooses to use the raw data with foreign exports still included. **We think that counting only U.S.-made exports as "U.S. exports" is a better approach than using foreign-produced goods to systematically overstate U.S. exports to FTA partners.** And only counting U.S.-made exports is the standard practice of the USITC when it prepares the statutorily-required reports on the probable economic effects of pending FTAs for Congress and the administration (*see* 19 USC 3804(f)).[258] That is, **the official, statutorily-required government analysis of pending FTAs on which the administration and Congress rely does not count "foreign exports" as "U.S. exports," as USTR does**. In addition, these reports typically become the basis for promises from the administration that a given FTA will boost U.S. exports and jobs. The Obama administration promise that the Korea FTA would create 70,000 U.S. jobs was based on the USITC's projection of an increase in U.S. goods exports under the deal. A White House factsheet stated, "The U.S. International Trade Commission has estimated that the tariff cuts alone in the U.S.-Korea trade agreement will increase exports of American goods by $10 billion to $11 billion. The Obama Administration is moving this agreement forward to seize the 70,000 American jobs expected to be supported by those increased goods exports alone..."[259] For an apples-to-apples comparison of how well promises made for a given FTA have panned out, we need to use the same definition of "U.S. exports" relied upon to create those promises. That definition, as used by the USITC, does not include "foreign exports." Doing an apples-to-apples comparison, U.S. goods exports to Korea have fallen $3 billion in the Korea FTA's first three years, while the U.S. goods trade deficit with Korea has increased $13.6 billion over the same period. Using the ratio that the administration employed to promise 70,000 jobs based on projected goods export increases, and counting both exports and imports, the $13.6 billion *decline* in net U.S. goods exports to Korea equates to more than 90,000 *lost* U.S. jobs in the FTA's first three years.

USTR Claim: The ITC does not produce any original trade data or make any corrections or adjustment to so-called "raw" Census data. It presents Census data with no adjustment. You don't have to take our word for it. Here's what the ITC website says: "Census is the official source of U.S. import and export statistics for goods" and "all material on [the ITC website] was compiled from official statistics of the U.S. Department of Commerce, Census Bureau."

Yes, the U.S. Census Bureau gathers the official government data on U.S. exports – both those that are actually produced in the United States and those produced in a foreign country. Indeed, it is the U.S. Census Bureau that marks when goods exported from the United States were produced in the United States (i.e. U.S. "domestic exports") and when they are just re-exports of foreign-produced goods (i.e. "foreign exports"). *But the U.S. Census Bureau does not display these data for individual FTA countries in its monthly trade reports.*[260] Instead, the U.S. Census Bureau's monthly reports on U.S. exports to each trade partner lump foreign exports in with U.S. domestic exports. Each month, the USITC makes available to the public the U.S. Census Bureau data on U.S. domestic exports to individual trade partners, with foreign exports removed, via its web portal (http://dataweb.usitc.gov/), typically within one to two days of the U.S. Census Bureau data release. **Given the availability, via the USITC, of the government trade data that separate out the foreign exports that falsely inflate U.S. export levels, why does USTR continue to use the data that conflate domestic and foreign exports?**

USTR Claim: USTR uses the official measure of trade balance, provided by the Census Bureau and available through the ITC's website, which provides an apples-to-apples comparison of "total exports" and "general imports." Again, you don't have to take our word for it. Here's what the ITC website says about the measure cited by USTR: "By subtracting general imports from total exports, the value of re-exports would appear to be 'cancelled out,' and hence the measure can be a good estimate of the net gain or loss of national revenue resulting from international trade." The ITC also notes that this is the measure used by Census, the UN, and the WTO. By contrast, the approach suggested by the authors at the press conference results in creating the appearance of larger trade deficits and smaller trade surpluses because it mixes and matches items for comparison.

FACT: **Actually, USTR's quote of the USITC website text, noting that "[b]y subtracting general imports from total exports, the value of re-exports would appear to be 'cancelled out,'" applies to the U.S. trade balance with the entire world, not with individual countries.** And the quote makes that clear, with the USITC explaining that this method "can be a good estimate of the net gain or loss of national revenue resulting from international trade."[261] That is, this calculation works for determining total U.S. net exports to the world, which is included in the formula to determine U.S. gross domestic product. But using this formula to calculate bilateral trade balances, as USTR does, distorts the results. Consider a good produced in China that enters the United States and then is re-exported to Mexico. USTR's method of calculating the U.S. trade balance with Mexico would count that good as a U.S. export to Mexico. This would inflate our exports to Mexico, and thus artificially reduce our trade deficit with Mexico. Yes, the net effect on the global U.S. trade deficit would be approximately zero (the import from China would be washed out by the export to Mexico in the total U.S. trade balance with the world). But as members of Congress assess the merits of entering into controversial pending FTAs that are based on the same model as past FTAs, they want to know the *actual* U.S. trade deficit with *individual* FTA partners – a deficit that is artificially reduced by USTR's inclusion of foreign exports.

USTR Claim (from The Hill): The office of the USTR points to data from the Department of Commerce that shows the U.S. has a trade surplus with its 20 free-trade partners when goods and services, non-energy goods, manufacturing, agriculture and services are included. That calculation yields for a $10.2 billion surplus in calendar year 2014.[262]

FACT: USTR is cherry-picking data to get the result it seeks – choosing to exclude all goods deemed as relating to "energy," in sectors in which we have trade deficits. It is not clear what exactly USTR means by "non-energy goods." But even if excluding all fossil fuels, the U.S. "non-energy" goods balance with its FTA partners in 2014 was a *deficit* of about $112 billion. (This is using the designation for "fossil fuels" typically used by USTR – HTS 27.) Assuming a services trade surplus with FTA partners of $75-80 billion, the combined U.S. services and "non-energy" goods balance with its FTA partners in 2014 was still a $32-37 billion trade deficit. The only way that USTR can claim a "non-energy" goods and services surplus with FTA partners is by also counting a large array of manufactured products as "energy" related goods and thus excluding them from the deficit calculation, and/or by counting foreign-produced goods as "U.S. exports," which USTR regularly does. If USTR is also excluding billions of dollars' worth of manufactured products as "energy" goods, its assertion of an FTA trade surplus is even more dishonest, as many U.S. jobs depend on manufacturing, for example, wind turbines, electrical grid components, batteries and other energy-related products. It would be extremely misleading to claim that trade flows affecting these jobs do not matter.

Conclusion

It is little wonder that majorities of Republicans, Democrats and independents alike oppose the status quo trade pact model.[263] More than two decades of NAFTA, the WTO and NAFTA expansion pacts have contributed to surging U.S. trade deficits, widespread U.S. job loss, a flood of agricultural imports, downward pressure on middle-class wages and unprecedented levels of income inequality. Behind the aggregate data lie shuttered factories, lost livelihoods and struggling communities. These outcomes directly contradict the rosy promises made by corporate interests to sell these controversial deals to a skeptical U.S. Congress and public. They also contradict President Obama's stated economic agenda to revive U.S. manufacturing, boost middle-class wages and tackle inequality[264] – an agenda that the TPP would undermine. The Obama administration's push for yet another NAFTA expansion deal casts a blind eye to the damaging legacy of the current trade model. With opinion polls showing that the U.S. public is painfully aware of this legacy, the administration's TPP push faces stiff opposition in the halls of Congress and the court of public opinion. Turning a blind eye to the lived realities of the NAFTA trade model is unlikely to prove a winning strategy.

Annex: Fact-Checking Corporate and Obama Administration Trade Data Distortions

Years of unfair trade deals modeled after NAFTA have contributed to ballooning U.S. trade deficits, mass offshoring of good U.S. jobs and a historic increase in U.S. income inequality. But rather than change our failed trade policies, the Obama administration appears bent on trying to hide the facts – by changing the data. As USTR pushes for the largest expansions of the NAFTA model to date – the proposed TPP and TAFTA – it has resorted to data distortions to obscure the dismal outcomes of past trade deals.

Below is a sampling of the administration's recent misleading claims, based on data distortions and omissions, alongside the sobering realities of status quo trade policies, based on official U.S. government data.

Administration Trade Myths	Reality
"Almost 95% of the world's consumers are outside America's borders."[265]	**Less than 2 percent of the world's consumers** live in TPP countries with consequential tariffs. Most of those consumers live in Vietnam,[266] where minimum wages average less than **60 cents an hour**, meaning they earn too little to afford U.S. exports.[267]
"Through this agreement [the TPP], the Obama Administration seeks to boost U.S. economic growth"[268]	The only U.S. government study on the TPP's likely impact on economic growth found that even if the deal eliminated *all* tariffs in *all* sectors in *all* countries, it would produce precisely **0.00 percent U.S. economic growth**.[269]
"…exporters tend to pay their workers higher wages."[270]	**Jobs lost to imports tend to pay even higher wages than jobs supported by exports.** For example, EPI estimates that the average U.S. worker in an industry competing with imports from China earns $1,022 per week, while the average worker in an industry that exports to China earns just $873 per week.[271]
See the data tricks behind USTR's TPP myths: http://www.citizen.org/trade-myths.	
"The largest factor affecting the trade balance with NAFTA countries is the importation of fossil fuels and their byproducts. If those products are excluded, there is no deficit.[272]	The fossil fuels share of our trade deficit with Mexico and Canada has declined under NAFTA, while **the total NAFTA deficit has surged 565 percent, topping $182 billion**.[273]
"Since its entry into force, U.S. manufacturing exports to NAFTA have increased 258%"[274]	Since NAFTA's enactment, **annual growth in U.S. manufacturing exports to Canada and Mexico has fallen 41 percent below the pre-NAFTA rate**.[275]
"…under NAFTA, U.S. trade with Canada and Mexico have supported over 140,000 small and medium-sized businesses."[276]	**U.S. small firms' exports to NAFTA partners have grown only half as fast as their exports to the rest of the world**, and less than half as fast as large firms' exports to Canada and Mexico.[277]
See the data tricks behind USTR's NAFTA myths: http://www.citizen.org/documents/NAFTA-USTR-data-debunk.pdf.	
"Largely due to these two external factors [declines in corn and fossil fuel exports], total U.S. goods exports to Korea were down 4.0% in 2013 compared to 2011 (pre-FTA)."[278]	Our **trade deficit with Korea has ballooned 90 percent** under the FTA, and exports to Korea have fallen. Without corn and fossil fuels, the deficit rise and export fall remain.[279]

"U.S. exports of key agricultural products benefiting from tariff cuts and the lifting of other restrictions under KORUS continued to post significant gains."[280]	***Total* U.S. agricultural exports to Korea have *fallen* 5 percent** under the FTA.[281]
"U.S. vehicle exports have more than doubled, increasing from 16,659 vehicles in 2011 to 37,914 vehicles in 2014."[282]	**U.S. imports of passenger vehicles from Korea have ballooned by 416,893 vehicles** in the first three years of the Korea FTA, dwarfing the 24,217-vehicle increase in U.S. passenger vehicle exports to Korea.[283]
See the data tricks behind USTR's Korea FTA myths: http://citizen.org/documents/korea-fta-3-years.pdf.	

Corporate proponents of expanding the unpopular NAFTA model through the TPP and TAFTA have been hard at work to churn out "fact" sheets and studies praising the deals. But among the many sheets are few facts. Below we wade through the spin from corporate coalitions and industry-driven think tanks to debunk the counterfactual claims.

Corporate Trade Myths	Reality
Peterson Institute for International Economics: The TPP "promise[s] substantial benefits and could lead to...a more peaceful and prosperous world economy."[284] (It was the Peterson Institute that projected in 1993 that NAFTA would create 170,000 net new U.S. jobs in the pact's first two years.[285] Instead, hundreds of thousands of U.S. jobs have been lost under NAFTA.[286])	Using optimistic assumptions, this pro-TPP study projected the deal could result in a meager 0.2 percent increase to U.S. gross domestic product (GDP)[287] – a fraction of the GDP increase from the fifth version of the iPhone.[288] CEPR finds that **for 9 out of 10 U.S. workers, these tiny gains likely would be outweighed by a TPP-spurred increase in income inequality**.[289] The net result? A pay cut for all but the richest 10 percent.
Corporate alliances of the **"Trade Benefits America" coalition**: The TPP will "open new markets in countries that are not current FTA partners."[290]	Under the Korea FTA – the U.S. template for the TPP – U.S. exports to Korea have actually fallen. Overall, **U.S. export growth to FTA partners has actually been 20 percent lower than to non-FTA partner countries**.[291] How can we do more of the same and expect different results?
The **Third Way think tank**: the TPP would help the United States "increase U.S. exports by almost $600 billion" to "Asia-Pacific markets."[292]	This study's $600 billion projection was based on a hypothetical rise in exports to 12 countries. Seven are not even in the TPP. Two more are in the TPP but already have U.S. FTAs. **That leaves three of the 12 countries for which the TPP could even plausibly boost exports**...if we ignore the fact that past FTAs have not brought higher export growth.[293]

U.S. Chamber of Commerce: The TPP could create "700,000 new U.S. jobs."[294]	The Chamber did not say how they decided this would be the TPP's impact on jobs. They simply said it was based on the above Peterson Institute study, which included a miniscule GDP projection, but no jobs projection. **It is unclear how the Chamber pulled a jobs number from a study that did not produce one**.[295]
Emergency Committee for American Trade: "recent data suggest that trade agreements, on the whole, actually help to improve U.S. trade balances with FTA partner countries."[296]	**The aggregate U.S. goods trade deficit with FTA partners has increased by more than $143 billion, or 427 percent**, since the FTAs were implemented. In contrast, the aggregate U.S. goods trade deficit with all non-FTA countries has decreased by more than $95 billion, or 11 percent, since 2006 (the median entry date of existing FTAs).[297]
European Centre for International Political Economy: Elimination of tariffs under TAFTA could result in a 0.1 to 1 percent increase in U.S. GDP.[298]	Tariffs between the European Union and the United States are already quite low. That is why this study on the potential impact of TAFTA tariff elimination produced paltry results. **Even if we accept the study's unrealistic assumption that TAFTA would eliminate 100 percent of tariffs, the projected gain would amount to an extra three cents per person per day**.[299]
Centre for Economic Policy Research: Assuming that TAFTA will not only eliminate tariffs, but "non-tariff barriers," the deal could produce a 0.2 – 0.4 percent increase in U.S. GDP.[300]	This study assumed that TAFTA would reduce or eliminate up to one out of every four "non-tariff barriers" – which, according to the study, could include Wall Street regulations, food safety standards and carbon controls. **The study used a hypothetical model to project tiny gains from this widespread degradation of public interest protections, while making no effort to measure the economic, social or environmental costs that would result**.[301]
The **Atlantic Council**, the **Bertelsmann Foundation**, and the **British Embassy**: Under TAFTA, "all states could gain jobs and increase their exports to the EU."[302]	This study was a recycled version of the one above from the Centre for Economic Policy Research. **It used the same assumption: that TAFTA would produce small economic gains from the weakening of financial regulations, milk safety standards, data privacy protections and other "trade irritants" – at no cost to consumers**.[303]

ENDNOTES

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ARL Policy Notes

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

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

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

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

Copyright

Copyright Term

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

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

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

Formalities

In last year's leaked text, Article QQ.G.X appeared for the first time and was unbracketed, signaling agreement by the TPP negotiating parties. This provision read, "No Party may subject the enjoyment and exercise of the rights of authors, performers and producers of phonograms provided for in this Chapter to any formality." As noted in last year's analysis by 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.

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

TPP
The programmed disappearance of the family farm
August 24, 2015 | Marc Laviolette and Pierre Dubuc - respectively president and secretary of the Free SPQ | Canada

In Quebec, the production of 6920 family farms is under supply management and represents 43.2% of total farm receipts.
In Quebec, the production of 6920 family farms is under supply management and represents 43.2% of total farm receipts.
"Long years of suffering and economic and financial difficulties and decrease in living standards," predicted the Prime Minister Couillard about the independence project, in a vain attempt to forget her skeletal "shopping list" sent to federal party leaders. This list which is conspicuously absent maintaining supply management in agriculture, yet a very topical issue.

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

To join the free trade agreement, Japan would require a car produced in the signatory countries of the Agreement can be sold exempt from tariffs with content threshold of its components from these countries well below the norm of 62 5% currently required under NAFTA. Japanese manufacturers have used auto parts produced in low-cost countries, like Thailand, that are outside of the future free trade area.

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

A global oversupply

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

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

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

Catastrophic

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

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

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

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

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

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

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

Winners?

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

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

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

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

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

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

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

INSIDE US TRADE:

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

Posted: September 09, 2015

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

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

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

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

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

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

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

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

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

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

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

EU seeks to remove obstacle to trade deal

By Christian Oliver in Brussels and Shawn Donnan in Washington

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

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

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

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

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

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

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

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

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

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

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

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.
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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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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/

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/enditorial-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-14713-2014-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/2014/11/miscommunicating-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/59898/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 Art16, 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.

If Regulatory Cooperation is adopted, strong and enforceable safeguards shall be put in place so that the right to regulate is not undermined.

22 Art 7 of the textual proposal on Regulatory Cooperation

23 Art 3, par 1, of the textual proposal on Regulatory Cooperation

24 Art 3, para 2, of the textual proposal on Regulatory Cooperation

25 EDRi's red lines on TTIP: https://edri.org/ttip_redlines/

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]

No provisions on data protection should be included in this deal and any lock-in of existing data transfer agreements should be prevented.

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.awp.is/filtrala/2014/12/17/19.html

28 See European Commission page on adequacy mechanism: 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/

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%2b02%2bDOC%2bPDF%2bV0%2f%2fEN

34 http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21583&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/2013/09/19-cybersecurity-and-trade-global-local-friedman/brookingscybersecuritynew.pdf

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/sony/press/

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_153020.7%20IPR,%20GIs%202.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.

Net neutrality principles and rules on access to the internet should not be discussed within the context of the TTIP negotiations or any other trade or investment agreements.

46 US proposal in TiSA on e-commerce: https://data.awp.is/filtrala/2014/12/17/19.html

47 Access' policy brief on zero rating: https://accessnow.org/page/-/Access-Position-Zero-Rating.pdf

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 https://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.

All trade-related agreements need a binding, available, enforceable and suspensive Human Rights clause.

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=2405852

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

TTIP would set a precedent in the digital rights sphere

✗ 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

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.

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Transatlantic Investment Treaty Protection – A Response to *Poulsen, Bonnitcha and Yackee*

Freya Baetens*

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This paper is intended as a response to the thought-provoking paper of Lauge Paulson, 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

[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

[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

[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

[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, Künnecke (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

[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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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.

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[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
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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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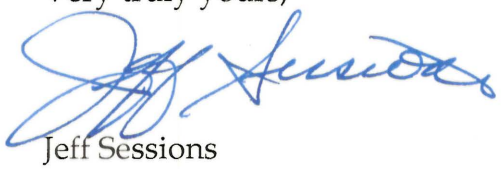
The implications of this new Pacific Union are extraordinary and ought to be discussed in full, in public, before Congress even contemplates fast-tracking its creation and pre-surrendering its power to apply the constitutional two-thirds treaty vote. In effect, to adopt fast-track is to agree to remove 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:
ARMED SERVICES
JUDICIARY
ENVIRONMENT AND PUBLIC WORKS
BUDGET

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.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 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

[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
On behalf of UACT

Contact information:
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Email: manon.ress@cancerunion.org

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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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*

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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/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.

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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.

"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

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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.

Sharon Anglin Treat, National Caucus of Environmental Legislators
Stakeholder Presentation, Round 8 TTIP negotiations, Brussels, Belgium
February 4, 2015

"Regulatory cooperation" and the U.S. states: A threat to federalism and democracy, and to public health and the environment

Good afternoon. My name is Sharon Treat and I am here on behalf of the more than 900 U.S. state legislators who are members of the National Caucus of Environmental Legislators (NCEL). While no longer an elected official myself, though NCEL I am working with state elected officials on environmental and trade matters.

Last week, Republican and Democratic legislators in Maine, Vermont and Wisconsin all introduced legislation to ban plastic microbeads in personal care products; Illinois already bans this ingredient, which is contaminating waterways and is ingested by fish.

This legislative activity is just the latest by U.S. states that have acted to protect public health and the environment from the effects of chemicals and other toxic materials.

In 2014, 30 states considered toxic chemical policy legislation. Today, 169 laws in 35 states have been enacted which ban or regulate toxic chemicals from a variety of consumer products, including:

- Bisphenol-A
- Heavy metals
- Flame retardants
- Phthalates
- Mercury
- Coal tar byproducts
- Certain pesticides including neonicotinoids

Of particular significance, several states including my own state of Maine, have established a rigorous process to define hazardous chemicals of greatest concern to vulnerable populations, and then to require reporting and notice, and potentially regulations including product bans. Maine is reviewing up to 70 chemicals in this process, including a strong focus on endocrine disruptors.

The system of federalism set forth in the U.S. Constitution provides wide latitude to state governments to regulate to protect the public health, safety and welfare. Federal environmental laws – on toxic chemicals, pesticides, air and water pollution – all make clear that federal standards are the minimum "floor", not a "ceiling", and that state governments may set more protective standards.

This is a very good thing, because the U.S. federal government has failed to act. Of the 84,000 chemicals on the inventory with the Toxic Substance Control Act, only 200 have undergone health and safety testing before entering the market. The EU has banned the use

of 1,328 chemicals and additionally regulated more than 250 ingredients, while in the U.S., approximately 11 substances have been banned at federal level. 82 pesticides that are banned in the EU are allowed in the U.S.

We are concerned that TTIP's regulatory coherence provisions will threaten the democratic process, the U.S. system of federalism, and ultimately, the health of our citizens and of the environment.

Of course, much of what we know is based on leaks, and the regulatory coherence proposals in particular – now re-branded as less coercive-sounding "regulatory cooperation" – seem to change on almost a daily basis. Nonetheless, some themes are apparent, and they are disturbing.

- **Sub-central level governments, including U.S. states and EU national governments would be covered. The latest EU draft doesn't spell out how, but makes very clear its intent to do so.**
- The "regulations" covered would include laws enacted by elected parliamentarians at all levels of government.
- An ongoing, unelected regulatory oversight entity would be created, which in multiple ways would oversee the actions of the elected representatives.
- As proposed by the EU, this body would likely impose onerous burdens on U.S. state lawmakers and regulators, such as requiring:
    - early notice proposed laws;
    - numerous rounds of notice and comment;
    - complaint mechanisms; and
    - trade impact analyses

U.S. states' legislative and regulatory activities in reviewing, labeling, restricting and banning chemicals and products -- actions which diverge so greatly from the lax approach to regulating at the U.S. federal level -- will surely be targeted.

Indeed, industry stakeholders have made clear that this is their TTIP goal: to prevent U.S. state regulation that exceeds U.S. federal standards. Targeted are GMO labeling laws in Vermont, pesticide provisions in Minnesota and Oregon, and chemical laws in California, Maine, and Washington state.

It is one thing to file a legal challenge to a law or regulation after it is enacted. It is quite another to seek to change or suppress those laws before they are enacted, not through the democratic process of a legislature with public hearings and opportunities to provide testimony, but through an unelected and unaccountable – and at this time, ill-defined - regulatory oversight body. A body, moreover, that may insert significant conflicts of interest into the process, with industry stakeholders perhaps participating through working groups associated with this body.

U.S. state lawmakers have previously been contacted by foreign governments, pressuring them to withdraw legislation because of claims of trade violations. ***These claims had little***

basis and the contact was inappropriate. Now, under TTIP, EU negotiators want to institutionalize this interference, and provide remedies not only to governments but potentially to investors as well.

In the U.S., we know from experience that requiring cost benefit and regulatory impact statements is burdensome and expensive, resulting in delays to critical health and safety measures, and providing grounds for legal challenges. **TTIP proposes to add another layer, a trade impact analysis, elevating trade and financial concerns above all other considerations.**

State laws are already subject to industry lobbying and litigation. TBT and other trade rules, combined with the enforcement mechanism of ISDS, provide multinational corporations even more powerful mechanisms to suppress laws that reduce their profits, regardless of the human cost.

Whatever you call it – harmonization, convergence, coherence, or cooperation – the purpose and impact remain unchanged. If these proposals are allowed to proceed, we fear the likely outcome will be to undermine not only public health and environmental protections, but our democratic institutions themselves, and in particular, elected government.

http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230

February 10, 2015

Now online - EU negotiating texts in TTIP

The European Commission is **negotiating** TTIP as **openly** as possible.

A final agreement would have **24 chapters**, grouped together in 3 parts:

1. Market access
2. Regulatory cooperation
3. Rules

And as part of our latest **transparency initiative**, we're publishing:

- new **2-page factsheets**, in plain language
- **negotiating texts** we've given US negotiators:
  - EU textual **proposals** on parts 2 and 3 of the TTIP – these set out how we'd want a final deal to read, line by line
  - EU **position** papers – what we want to achieve in a chapter.

We will publish further texts as they become available.

We will make the whole text of the agreement public once negotiations have been concluded – well in advance of its signature and ratification.

For the text of a recently completed EU trade agreement, see the text of the EU-Canada Free Trade Agreement (CETA). The text is still subject to legal revision.

POSITION PAPERS set out and describe the European Union's general approach on topic in the TTIP negotiations. They are tabled for discussion with the US in negotiating rounds.

TEXTUAL PROPOSALS are the European Union's initial proposals for legal text on topics in TTIP. They are tabled for discussion with the US in negotiating rounds. The actual text in the final agreement will be a result of negotiations between the EU and US.

Reader's guide
Glossary

EU negotiating texts, chapter by chapter

Part 1: Market Access

Better access to the US market

Trade in Goods and Customs Duties

- Factsheets
  - Factsheet on Trade in Goods and Customs Duties

Services

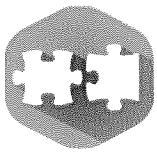
- Factsheets
  - Factsheet on Services
  - TTIP and public services
  - TTIP and culture
- EU position papers
  - Financial Services in TTIP

Public Procurement

- Factsheets
  - Factsheet on Public Procurement

Rules of Origin

- Factsheets
  - Factsheet on Rules of Origin



Part 2: Regulatory Co-operation

Cutting red tape and costs - without cutting corners

Regulatory Coherence

- Factsheets
  - Factsheet on Regulatory Coherence
  - TTIP and regulation: an overview - (other language versions)
- EU textual proposal
  - Introduction to the EU legal text on Regulatory Cooperation in TTIP
  - Textual proposal on regulatory cooperation in TTIP

Technical Barriers to Trade (TBTs)

- Factsheets
  - Factsheet on Technical Barriers to Trade (TBTs)
- EU textual proposal
  - Technical Barriers to Trade (TBTs) in TTIP

Food Safety and Animal and Plant Health (SPS)

- Factsheets
  - Factsheet on Food Safety and Animal and Plant Health (SPS)
- EU textual proposal
  - SPS in TTIP

Specific industries

Chemicals

- Factsheets
  - Factsheet on Chemicals
- EU position papers
  - Chemicals in TTIP
  - Chemicals in TTIP - outline
  - Chemicals in TTIP - examples

Cosmetics

- Factsheets
  - Factsheet on Cosmetics
- EU position papers
  - Cosmetics in TTIP

Engineering

- Factsheets
  - Factsheet on Engineering
- EU position papers
  - Engineering in TTIP

Medical Devices

- Factsheets
  - Factsheet on Medical Devices

Pesticides

- Factsheets
  - Factsheet on Pesticides NEW

Information and Communication Technology (ICT)

- Factsheets
  - Factsheet on Information and Communication Technology (ICT)

Pharmaceuticals

- Factsheets
  - Factsheet on Pharmaceuticals
- EU position papers
  - Pharmaceuticals in TTIP

Textiles

- Factsheets
  - Factsheet on Textiles
- EU position papers
  - Textiles in TTIP

Vehicles

- Factsheets
  - Factsheet on Vehicles
- EU position papers
  - Vehicles in TTIP - example 1 - seatbelts
  - Vehiculs in TTIP - example 2 - lighting and vision standards NEW
  - Vehicles in TTIP

Part 3: Rules

New rules to make it easier and fairer to export, import and invest

Sustainable Development

- Factsheets
  - Factsheet on Sustainable development
  - Labour rights and civil society participation in TTIP
- EU position papers
  - Sustainable Development in TTIP – issues, provisions
  - Sustainable Development in TTIP

Energy and Raw Materials (ERMs)

- Factsheets
  - Factsheet on Energy and Raw Materials (ERMs)
- EU position papers
  - Energy and Raw Materials in TTIP

Customs and Trade Facilitation (CTF)

- Factsheets
  - Factsheet on Customs and Trade Facilitation (CTF)
- EU textual proposals
  - Customs and Trade Facilitation in TTIP

Small and Medium-Sized Enterprises (SMEs)

- Factsheets
  - Factsheet on Small and Medium-Sized Enterprises (SMEs)
- EU textual proposals
  - SMEs in TTIP

Investment Protection and Investor-State Dispute Settlement (ISDS)

- Factsheets
  - Factsheet on Investment Protection and Investor-State Dispute Settlement (ISDS)
  - Investment protection and ISDS in 2 pages
  - Investment protection and ISDS in 8 pages

Competition

- Factsheets
  - Factsheet on Competition
- EU textual proposals
  - Competition in TTIP – Anti-trust and Mergers
  - Competition – State-Owned Enterprises (SOEs)
  - Competition – Subsidies

Intellectual Property (IP) and Geographical Indications (GIs)

- Factsheets
  - Factsheet on Intellectual Property (IP) and Geographical Indications (GIs)
- EU position papers
  - Intellectual Property in TTIP NEW

Government-Government Dispute Settlement (GGDS)

- Factsheets
  - Factsheet on Government-Government Dispute Settlement (GGDS)
- EU textual proposals
  - Government-Government Dispute Settlement (GGDS)

For further information

More on TTIP

Trade in goods and customs duties in TTIP

Cutting the cost of exporting and importing goods between the EU and the US

In this chapter we want to:

- remove customs duties and other barriers to trade
- stimulate the economy and create jobs
- help EU companies grow and compete worldwide.

Reasons for negotiating trade in goods and customs duties

Customs duties (tariffs in the jargon) make trade in goods more expensive.

This makes it hard for EU firms to sell their goods in the US because it makes them more expensive than American-made goods.

At just under 2%, average customs duties between the EU and the US are generally low. But the average hides a different situation for individual products:

- Over half of EU-US trade is not subject to customs duties.
- Most of the rest faces widely differing duties, ranging from 1-3% for basic goods, such as raw materials, and 30% for goods like clothes and shoes.
- Some customs duties are so prohibitively high they effectively cut off any trade; for instance, the US duty on raw tobacco is 350% and over 130% for peanuts.
- In some cases, US and EU duties are different even on the same product. For example:
    - for cars:
        - EU duty on imports from the US is 10%
        - US duty on imports from the EU is only 2.5%
    - for train carriages:
        - the US imposes a 14% duty on imports
        - the EU charges only 1.7% on imports from the US.

The EU wants to remove these duties and other barriers to trade, such as lengthy administrative checks, that increase the cost of trade in goods.

EU goals

This chapter would remove nearly all customs duties on EU-US trade

This would:

- result in immediate savings for EU companies
- create 'spill-over' effects – benefits not directly related to trade; for example:
    - scrapping tariffs would lower the cost of the goods we export...
    - ...which would increase sales...
    - ...which would mean more jobs to enable firms to produce more...
    - ...which would boost demand from people filling

those new jobs for other goods we produce.

- encourage trade in goods between the EU and the US.

Sensitive or controversial issues

Most tariffs will be gone on day one of the agreement because doing so will have few negative effects.

Where removing EU customs duties immediately could pose difficulties for EU firms, we want to agree a longer phase-out period to allow firms to adapt.

Where they would still face problems, even with longer phase-out periods, we would only partially open our market.

Tall Tales of the TPP (and TTIP)

http://www.foe.org/news/blog/2015-02-tall-tales-of-the-tpp#sthash.Sw3GmqAs.dpuf

Friends of the Earth, U.S.

Posted Feb. 27, 2015 / Posted by: Bill Waren

Dean Baker, the co-director of the Center for Economic and Policy Research, recently wrote about official misinformation in the effort to pass Fast Track trade promotion authority legislation to grease the skids for approval of the Trans Pacific Partnership and similar trade agreements:

"Washington politics always involves a high level of silliness (does President Obama really love America?), but when it comes to trade policy it shifts to full-fledged craziness. Anything is fair game when the political establishment wants to pass major trade agreements like NAFTA or the Trans-Pacific Partnership. At such times we see respectable Washington types making pronouncements bearing so little relationship to reality that they would cause Sarah Palin to cringe."[1]

The White House says TPP and TTIP investment chapters are similar to U.S. law.

Corporate lobbyists and even "respectable" staff of the Office of the U.S. Trade Representative, including Ambassador Michael Froman himself, have been making pronouncements to members of Congress and even environmental groups that bear little relationship to reality. They have been saying that the Trans Pacific Partnership and Transatlantic Trade and Investment Partnership provisions for investor-state dispute resolution are similar to U.S. constitutional standards (as when the state highway department takes a family's backyard for a road expansion and must pay them just compensation).

In an Op Ed in the Washington Post, Senator Elizabeth Warren attacked the TPP investment chapter and posed the very reasonable question:"_Why create these rigged, pseudo-courts at all? What's so wrong with the U.S. judicial system?" In a reply posted on the White House website, Jeff Zients, the director of the National Economic Council, said: "The purpose of investment provisions in our trade agreements is to provide American individuals and businesses who do business abroad with the same protections we provide to domestic and foreign investors alike in the United States."[2]

The only polite adjective that can be applied to Zients' statement is that it is "astonishing," given the firm conviction of the U.S. Trade Representative's office not to depart significantly from the U.S. Model Bilateral Investment Treaty language. A leak of the TPP investment chapter text a few months after the 2012 Model BIT was published corroborated this.[3] Investor-state claims for compensation under the U.S. model for bilateral investment treaties and free trade agreement investment chapters depart significantly from U.S. constitutional standards.

The stock talking point of the U.S. Trade Representative's office is that investment protections are **intended** to prevent discrimination, repudiation of contracts, and expropriation of property without due process of law and appropriate compensation and that these are the same kinds of protections that are included in U.S. law.[4] The lawyerly weasel word here is "intended." In fact, many investment tribunals have read the language in U.S. investment agreements and the "fair and equitable treatment" language in the "minimum standard of treatment" article in particular to embody foreign investor rights that are far more sweeping than rights provided in U.S. constitutional law, such as for example a right to a "stable legal and business framework." This can result in massive tribunal awards of money damages in compensation for lost future profits resulting from changes in government regulatory policy. [5]

The U.S. model for TPP and TTIP investment chapters provides greater rights for foreign investors than U.S. investors enjoy under the Constitution.

It is unnecessary to provide for investor-state arbitration in the TPP, and particularly in the TTIP. The U.S. and EU already have well-developed and generally fair court systems to resolve allegations of property rights and due process violations resulting from enforcement of environmental and public health safeguards. Most TPP countries also have well-developed and fair court systems. And, with respect to TPP countries that do not have fair court systems, it has to be asked: why is the U.S. negotiating the TPP with the communist dictatorship of Vietnam and the Sultanate of Brunei, which is ruled under a harsh form of Sharia law?

In fairness, the expropriation articles in the new U.S. Model BIT and in the leaked TPP investment chapter text are an improvement at the margins over similar language in NAFTA's chapter 11 on investment, but are still problematic. The most serious problems are with the wide-open article on "Minimum Standard of Treatment" (especially its "Fair and Equitable Treatment" provision)[6], the definitions of "investment" and "investor,"[7] the ineffective or non-existent environmental exceptions[8], and the procedural structure for adjudication of investor claims by biased tribunals of trade lawyers.

Investors' substantive rights in the model BIT and the leaked TPP investment chapter text are sweeping when compared to U.S. constitutional law or the general legal practice of nations around the world. Greater substantive rights follow first from an overbroad definition of investment that includes the expectation of gain or profit, and second, from vague standards of investor rights under the expropriation and minimum standard of treatment articles that are subject to multiple and conflicting interpretations by tribunals. Many tribunals have offered expansive interpretations of investor rights. Greater procedural rights flow from the business-friendly investor–state dispute resolution process and the ad hoc appointment of biased arbitrators.

Investment tribunals protect corporate privilege, not the public interest.

The wealthy enjoy greater procedural rights. The U.S. Model BIT and the leaked TPP investment chapter provide greater procedural rights for foreign investors than U.S. investors enjoy. For example, they get to pick one of the arbitrators. In addition, the usual practice in international law is for claims to be arbitrated on a government-to-government basis, but the new model BIT would put transnational corporations and investors on the same level as nation-states. Only foreign investors have access to these investment tribunals convened under the authority of

the World Bank and United Nations. No similar procedural rights are provided to ordinary citizens, other than the occasional opportunity to file briefs as a friend-of–the-court.

A separate "court" for foreign capital is established. Foreign investors would be able to bypass domestic courts and bring suit before special international tribunals designed to encourage international investment. The authority of domestic judicial institutions is undermined. For example, an international investment tribunal, in the Chevron v. Ecuador case, issued the equivalent of an injunction to forbid the enforcement of an Ecuadorian court judgment requiring the oil company to pay for the clean up and health care costs resulting from a massive oil spill in the Amazon rainforest. Foreign corporations and investors can even sue for damages running in the millions or billions of dollars, in compensation for a legitimate court judgment. What happens the first time a foreign investor claims such an award in compensation for a U.S. Supreme Court judgment?

Tribunal arbitrators typically have a pro-corporate bias. Arbitrators in these cases are typically international commercial lawyers who may alternately serve as arbitrators one day and return as corporate counsel the next, thus raising questions of conscious or unconscious bias.[9] Scholarly studies often based on empirical research make a convincing case that arbitrator bias is real

Crippling awards of money damages chill regulatory initiatives and put pressure on governments to settle. U.S.-style investment agreements provide a highly effective enforcement tool: the assessment of money damages. Such damage awards can be large enough to severely stress the public budgets of both small and large countries. The fear of such ruinous judgments can force a country to settle unjust investor claims and to back away from protecting the environment and the public interest.

TPP and TTIP investment chapters upset the balance between investor protection and public regulation.

Far from being a benign replication of U.S. constitutional jurisprudence, the TPP and TTIP investment chapters are based on U.S and international models for bilateral investment treaties and free trade agreement investment chapters. These models bear little resemblance to property rights and substantive due process protections in the U.S. Constitution or the legal traditions of other countries with well developed legal systems that protect private property from arbitrary expropriation and regulation. Seventy six law professors and other distinguished scholars from around the world issued a "Public Statement on the International Investment Regime" on August 31, 2010, in which they state that:

"Awards issued by international arbitrators against states have in numerous cases incorporated overly expansive interpretations of language in investment treaties. These interpretations have prioritized the protection of the property and economic interests of transnational corporations over the right to regulate of states and the right to self-determination of peoples. This is especially evident in the approach adopted by many arbitration tribunals to investment treaty concepts of corporate nationality, expropriation, most-favoured-nation treatment, non-discrimination, and fair and equitable treatment, all of which have been given unduly pro-investor interpretations at the expense of states, their governments, and those on whose behalf

they act. This has constituted a major reorientation of the balance between investor protection and public regulation in international law...."

"Investment treaty arbitration as currently constituted is not a fair, independent, and balanced method for the resolution of investment disputes and therefore should not be relied on for this purpose. There is a strong moral as well as policy case for governments to withdraw from investment treaties and to oppose investor-state arbitration..."[10]

Selected Endnotes

[1] Dean Baker, Trade Crazy: The Push for Fast Track Trade Authority, Huffington Post, February 23, 2015 According to Baker "The *Washington Post* gave us one such gem last week when it took issue with those saying that currency rules should be part of any new trade pact. Its lead editorial last Thursday argued against including any provisions on currency. Its main point is best summarized by a paraphrase of an old Barbie line: 'Currency values are hard.'", *available at*, http://www.huffingtonpost.com/dean-baker/trade-crazy-the-push-for_b_6740130.html

[2] Senator Elizabeth Warren, The Trans-Pacific Partnership clause everyone should oppose, Washington Post, Opinion, February 25, 2015, *available at, http://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html*; Jeffrey Zients, Investor-State Dispute Settlement (ISDS) Questions and Answers, The White House Blog, February 26, 2015, available at http://www.whitehouse.gov/blog/2015/02/26/investor-state-dispute-settlement-isds-questions-and-answers

[3] As Professor Jane Kelsey, University of Auckland (NZ) law faculty, and Lori Wallach, Director of Global Trade Watch explain, "The United States has made it clear that it expects the TPP to include an Investor-State dispute mechanism based on the US Model BIT used in recent US FTAs, which is in turn based on the Investment Chapter 11of the North American Free Trade Agreement (NAFTA)." Investor-State" Disputes in Trade Pacts Threaten Fundamental Principles of National Judicial Systems April 2012, *available at, https://tpplegal.files.wordpress.com/2012/05/isds-domestic-legal-process-background-brief.pdf*

[4] Ben Beachy and Lori Wallach, Myths and Omissions: Unpacking Obama Administration Defenses of Investor-State Corporate Privileges, Public Citizen, October 2014, p.8 *available at, http://www.citizen.org/documents/ISDS-and-TAFTA.pdf* .

[5] *See,* Occidental Exploration and Production Company v. The Republic of Ecuador, Final Award, Ad hoc – UNCITRAL Arbitration Rules (2004), at para. 183. Italics added. *Available at*: http://italaw.com/sites/default/files/casedocuments/ita0571.pdf; Railroad Development Corporation v. Republic of Guatemala, ICSID Case No. ARB/07/23, *Available at*: http://italaw.com/sites/default/files/casedocuments/ita0709_0.pdf

[6] **Foreign investors enjoy greater substantive rights under "expropriation" and "minimum standard of treatment" articles.**

Expropriation. The vague expropriation obligations in the U.S. Model BIT and the leaked TPP investment chapter are easily given a broad or narrow reading by investment tribunals depending on the bias of the arbitrators. Tribunal decisions interpreting similar language in existing agreements are all over the map. Annex 12-D in the leaked TPP investment chapter is somewhat better than the comparable NAFTA language, but still a problem. It says that an indirect expropriation is a violation when a "deprivation" of the investor's property is severe, disproportionate, or continues over time. A finding of discrimination or breach of contract can trigger a finding of "indirect expropriation" (aka a "regulatory taking" of property).

Minimum standard of treatment. The "minimum standard of treatment" article is the big problem in large part because in contains an open ended and largely undefined right to "fair and equitable treatment," that invites a subjective interpretations by arbitrators that inevitably reflect their personal values and political philosophy about when government action is substantively unfair. These loose concepts make it very difficult to predict when a tribunal will find that justice has been denied particularly when the question is not about procedural fairness but substantive "due process."Arbitrators are essentially asked to make a "gut call" on whether government action offends their personal sense of fundamental fairness. Successful investor claims against governments in investment tribunal proceedings have disproportionately relied on this kind of "gut check" interpretation of "fair and equitable" treatment.

[7] **Sweeping definitions of investment and Investor grant foreign investors greater rights.**

Definition of investment The overbroad definition of investment protects the mere expectation of gain or profit. The U.S. Model BIT defines investment to means every asset that an investor owns or controls, directly or indirectly, that has such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. As a practical matter, this definition in combination with other language in the model BIT would result in an inflated award of damages based in part on a valuation of the investment based on speculative projections of lost future profits. "Investment" is broadly defined in the leaked TPP text to cover permits, intellectual property rights, derivatives and other financial instruments, and contracts, among many others.

Definition of Investor. This covers investors that have made or are *"attempting to make"* an investment. The broad "attempting to make" language can be satisfied by spending a relatively small amount of money to start up an enterprise or even simply seeking a permit or license. In other words it protects a speculative business plan in these circumstances. Moreover, the definition covers investors from non-TPP countries that have incorporated in a TPP country. The so-called "denial of benefits" language requires "substantial business activities" in a country that is a party to the TPP. But, this has proved to be a low threshold in some cases as tribunals have accepted jurisdiction over claims from investors that had merely set up a small office in a country that is party to the agreement.

[8] There is no effective across the board exception for environmental measures in either the U.S. Model Bilateral investment Treaty or the leaked TPP investment chapter. U.S. international investment agreements are extremely broad in coverage and provide very few general exceptions. They provide effective exceptions only for essential security interests and for disclosure of confidential information.

[9] *See generally on arbitrator behavior,* Gus Van Harten, Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration, 50 OSGOODE HALL L.J. 211, 226 (2012).Gus Van Harten, Fairness and Independence in Investment Arbitration: A Critique of Susan Franck's "Development and Outcomes of Investment Treaty Arbitration, SOCIAL SCIENCE RESEARCH NETWORK 1-2 (Dec. 1, 2011), http://ssrn.com/abstract=1740031

[10] Public Statement on the International Investment Regime – 31 August 2010, *available at http://www.osgoode.yorku.ca/public-statement-international-investment-regime-31-august-2010/*