Canada and E.U. Sign Trade Deal, Bucking Resistance to Globalization

http://www.nytimes.com/2016/10/31/business/international/canada-european-union-trade-agreement.html

By JAMES KANTEROCT. 30, 2016

Prime Minister Justin Trudeau of Canada, Donald Tusk, the president of the European Council, and Jean-Claude Juncker, the president of the European Commission, spoke glowingly of a trade agreement signed on Sunday.

By REUTERS on Publish Date October 30, 2016. Photo by Adrian Wyld/The Canadian Press, via Associated Press

BRUSSELS — The European Union and Canada signed a far-reaching trade agreement on Sunday that commits them to opening their markets to greater competition, after overcoming a last-minute political obstacle that reflected the growing skepticism toward globalization in much of the developed world.

Canada's prime minister, Justin Trudeau, had been forced to call off an earlier trip to sign the deal after Wallonia, the French-speaking region of Belgium, used its veto to withhold Belgium's approval of the deal. The pact required the support of all 28 European Union countries.

On Friday, Wallonia, which has been hit hard by deindustrialization and feared greater agricultural competition, withdrew its veto after concessions were made by the Belgian government, including promises to protect farmers. Hours later, the European Union announced that the deal was back on track.

Mr. Trudeau signed the pact on Sunday, joined by Donald Tusk, the president of the European Council, which represents the leaders of the member states; Prime Minister Robert Fico of Slovakia, which holds the rotating presidency of the body that runs the bloc's ministerial meetings; and Jean-Claude Juncker, the president of the European Commission, the bloc's executive arm.

The deal will help to demonstrate that "trade is good for the middle class and those working hard to join it," Mr. Trudeau said at a news conference in Brussels. Mr. Trudeau said he wanted to "make sure that everyone gets that this is a good thing for our economies but it's also a good example to the world."

But the Walloon intransigence has underlined the extent to which trade has become politically radioactive as citizens increasingly blame globalization for growing disparities in wealth and living standards. Across Europe and the United States, opposition to trade has become a rallying

point for populist movements on the left and the right, threatening to upend the established political order.

A compromise among the regions of Belgium, which persuaded Wallonia to drop its veto, called for language to clarify the handling of trade complaints brought by Canadian or European companies.

Belgium pledged to refer the arbitration system to the Court of Justice of the European Union, where judges can assess its legality.

Nonetheless, several dozen anti-trade activists held a rowdy protest on Sunday outside the building where Mr. Trudeau signed the pact, the Comprehensive Economic and Trade Agreement. The protesters splashed red paint on the forecourt of the building and condemned a planned Transatlantic Trade and Investment Partnership between Europe and the United States.

That much larger deal, known as T.T.I.P., has already stalled amid opposition from large numbers of Europeans, including many Germans and Austrians. The protesters see the Canadian deal as a warm-up for a much larger battle.

The spectacle of tiny Wallonia, with just 3.6 million people, holding up a deal that affects more than 500 million Europeans and 35 million Canadians and prompting European Union leaders to delay a summit meeting has rattled Western leaders.

“In the end, people who favor free trade survived to fight another day,” said Jacob Funk Kirkegaard, a senior fellow at the Peterson Institute for International Economics in Washington.

“Now that we see the Canadian deal has made it over the finish line, the Atlantic trade deal still has a fighting chance,” he said. “But it won’t be easy. T.T.I.P. could similarly threaten traditional farming interests and arouse knee-jerk European suspicions about common trans-Atlantic health and environmental standards.”

As a legal matter, the member states’ legislatures still need to ratify the Canadian agreement. That could mean more hiccups before it goes into effect.

Mr. Tusk, of the European Council, said he was cautiously optimistic that the deal would survive the ratification process and could send a positive message about globalization.

“Today’s decisions demonstrate that the disintegration of the Western community does not need to become a lasting trend,” Mr. Tusk said. “Free trade and globalization have protected hundreds of millions of people from poverty and hunger. The problem is that few people believe this.”

“The European Union is not yet in the group of hard protectionist and state-controlled economies like China or Russia,” said Hosuk Lee-Makiyama, the director of the European Center for International Political Economy, a research organization in Brussels. “Instead, the E.U. is carving out a new middle ground between those two countries and the United States.”

Europe, Mr. Lee-Makiyama said, is pivoting to a position as “neither an ally of East nor West.”

Once ratified, the Canadian deal would cut many tariffs on industrial goods and on farm and food items, according to the European Commission. The deal also would open up the services sector in areas like cargo shipping, maritime services and finance to European firms, the commission said.

The Canadian deal is also regarded by trade advocates as a template for advanced, industrial economies by making it easier for their regulators to recognize one another’s rules, and by updating the rules on how companies can make sure governments protect their investments.

If the Obama administration has its way, the next major regional trade accord to make it over the finish line will be the Trans-Pacific Partnership, which includes the United States, Canada, Japan and Vietnam.

The Pacific deal — largely because it involves a number of emerging economies — is a more traditional trade accord aimed mainly at cutting tariffs and knocking down impediments to trade.

But like the Europeans, many Americans do not want to make concessions that would lower wages or threaten jobs at home. The Asia-Pacific deal has become a hot issue in the United States presidential election; both major-party nominees, Hillary Clinton and Donald J. Trump, oppose it.

Mr. Funk Kirkegaard, the senior fellow at the Peterson Institute, said he gave the Pacific deal about a 30 percent chance of being concluded while President Obama is still in office. “Beyond January,” he said, “it’s all dependent on the results of the election and who’s the next president.”

TPP is too flawed for a simple ‘yes’ vote

https://www.bostonglobe.com/opinion/2015/11/08/jeffrey-sachs-tpp-too-flawed-for-simple-yes-vote/sZd0nlnCr18RurX1n549GI/story.html

By Jeffrey D. Sachs NOVEMBER 08, 2015

GLOBALIZATION is a positive and powerful force for good, if it is embedded in the right kind of ethical and legal framework. Yet the current draft of the Trans-Pacific Partnership is not worthy of a simple thumbs-up by the Congress. Without jettisoning the purported goals of TPP, the 12 signatories should slow down, take the pieces of this complex trade agreement in turn, and work harder for a set of international standards that will truly support global sustainable development.

The TPP should be judged on whether it guarantees global economic well-being, not whether it gives advantages to the United States to the detriment of other countries. The ultimate goal of economic policy should be to raise the well-being of all parts of society, including the poor and middle class. Agreements that help the rich at the expense of the poor, capital at the expense of labor, or particular sectors at the expense of consumers, should be viewed with skepticism.

The Obama administration surely negotiated the TPP in good faith, and the accord would likely add to global and US economic growth. This is not a pernicious accord, the fruits of a secret cabal, as some have feared. Nor is globalization an evil to be fought tooth and nail. The sad truth, however, is that while the administration promised a 21st-century agreement, we have yet another late 20th-century agreement. And we already know the likely results: economic growth at the expense of widening income inequality; excessive

power of big pharma, big finance, and other sectors with strong lobbying power; and the growing threats of negative-sum trade conflict with China.

The agreement, with its 30 chapters, is really four complex deals in one. The first is a free-trade deal among the signatories. That part could be signed today. Tariff rates would come down to zero; quotas would drop; trade would expand; and protectionism would be held at bay.

The second is a set of regulatory standards for trade. Most of these are useful, requiring that regulations that limit trade should be based on evidence, not on political whims or hidden protectionism.

The third is a set of regulations governing investor rights, intellectual property, and regulations in key service sectors, including financial services, telecommunications, e-commerce, and pharmaceuticals. These chapters are a mix of the good, the bad, and the ugly. Their common denominator is that they enshrine the power of corporate capital above all other parts of society, including labor and even governments.

The fourth is a set of standards on labor and the environment that purport to advance the cause of social fairness and environmental sustainability. But the agreements are thin, unenforceable, and generally unimaginative. For example, climate change is not even mentioned, much less addressed boldly and creatively.

The TPP will now be considered under the fast-track authority granted to the administration in June, meaning that Congress must vote up or down on the whole package rather than pick and choose. Ostensibly fast-track is used because multilateral trade agreements are too complex, with too many trade-

offs, to be taken up section by section. Yet the result is that we are being asked to swallow the bad with the good on issues of crucial significance for the future of the world economy.

We are also being told that we must adopt the TPP so that the United States, rather than China, sets the future rules. This is naive and disingenuous. Whether the TPP is signed now or not, China will have a large and inevitable role in setting the rules of 21st-century trade; and why not? It is already the main trading partner of several of the signatories, and indeed it will negotiate its own free-trade agreements with these and other countries. Better to work with the Chinese on the new trade structure rather than to hold the illusion that the United States will really set the terms of Asian trade and thereby court a rising contest with China that could ultimately turn into competing trade blocs or worse.

The up-or-down vote therefore raises two questions. First, are the bad parts indeed bad enough to vote down the package, thereby jeopardizing the undoubted good of other chapters? Second, do we truly face an all-or-nothing proposition, or rather could we agree with our negotiating counterparts on certain chapters while reconsidering others?

Sadly, the bad parts are indeed bad enough to risk the whole; yet the partners could also agree to a more measured, step-by-step approach, since that would be in the common interest, though not necessarily to the benefit of certain powerful interest groups.

The most egregious parts of the agreement are the exorbitant investor powers implicit in the Investor-State Dispute Settlement system as well as the unjustified expansion of copyright and patent coverage. We've seen this show before. Corporations are already using ISDS provisions in existing trade and investment agreements to harass governments in order to frustrate regulations and judicial decisions that negatively impact the companies'

interests. The system proposed in the TPP is a dangerous and unnecessary grant of power to investors and a blow to the judicial systems of all the signatory countries. And, as in earlier trade agreements, the United States has pushed through overly strong intellectual property rights that strengthen the aggressive pricing practices of big pharma and unnecessarily extend the copyright protections far beyond their social usefulness.

Perhaps most disappointing is the lack of creativity in the development, labor, and environmental chapters. Yes, they rhetorically defend global economic development, labor standards, and environmental sustainability, but they do so without specific enforcement powers. Why is it that companies can force arbitration tribunals to defend their investor rights, but workers have no such power? Why is climate change not even considered in the draft, despite the fact that it represents the most important environmental threat of the 21st century, and may have strong implications for future trade rules?

Congress should vote "no" on the current TPP, while simultaneously endorsing its trade provisions as well as continuing the work with our counterparts on the other chapters. The current drafts on investor rights, the environment, labor, and intellectual property make extravagant concessions to powerful corporate interests while leaving important social and environmental commitments vague and generally unenforceable. Globalization is indeed so important for our common good that it's of overriding significance to get it right.

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What Is Lost by Burying the Trans-Pacific Partnership?

New York Times

By JACKIE CALMES

NOV. 11, 2016

WASHINGTON — Congressional leaders confirmed this week what seemed inevitable with the triumph of Donald J. Trump: The far-reaching trade agreement with 11 other Pacific Rim nations that President Obama hoped to leave as a major legacy, but which Mr. Trump called "a terrible deal," is dead.

Senator Chuck Schumer of New York, the incoming Democratic leader, told labor leaders on Thursday that the pending Trans-Pacific Partnership, the largest regional trade agreement in history, would not be approved by Congress. Senator Mitch McConnell, Republican of Kentucky and the majority leader, said flat-out "no" when reporters on Wednesday asked whether the agreement would be considered in the lame-duck Congress that convenes next week — its last legislative chance, given the opposition from the president-elect.

Mr. Trump, whose invectives against trade agreements were central to his appeal to disaffected working-class voters, will have the authority as president "to negotiate better deals, as I think he would put it," Mr. McConnell said.

Yet there is little likelihood of Mr. Trump seeking a new agreement. That reflects not only his campaign statements, but also his yearslong hostility to past trade accords as well as the sheer difficulty of renegotiating a Pacific pact that was seven years in the making, entailing compromises among a dozen countries including Australia, Canada, Chile and Japan, but excluding China.

"Popular understanding of the T.P.P. is very low," Kevin G. Nealer, a scholar at the Center for Strategic and International Studies, wrote in a postelection analysis on Thursday. With its abandonment, he added, "The risk to America's role as trade policy leader — and therefore to the global economy — is real and immediate."

Mr. Obama and his team likewise emphasized the potential geopolitical blow, even as they promoted the economic benefits the trade agreement would offer American exporters by eliminating thousands of tariffs and other trade restrictions in the other countries.

Forsaking the agreement, the president insisted, would undercut the United States' standing in the fast-growing Asia-Pacific region as a reliable counterweight to an expansionary China, economically and militarily, for America's allies there. The other countries have approved the

pact or are in the process of doing so, but without the approval of the United States, it does not take effect.

That tension could well be evident later this month, when Mr. Obama and his trade representative, Michael B. Froman, attend the annual Asia-Pacific Economic Cooperation summit.

The Americans will have to explain their failure on the trade agreement to foreign leaders gathered in Lima, Peru, while China's leader, Xi Jinping, is there seeking progress toward an emerging alternative to the Trans-Pacific Partnership — the Regional Comprehensive Economic Partnership, known as R.C.E.P., which includes China, Japan and 14 other Asian countries but excludes the United States.

"In the absence of T.P.P., countries have already made it clear that they will move forward in negotiating their own trade agreements that exclude the United States," Mr. Obama's Council of Economic Advisers wrote days before the election. "These agreements would improve market access and trading opportunities for member countries while U.S. businesses would continue to face existing trade barriers."

One example is a bilateral agreement between Australia and Japan, which gives Australian beef exporters a price advantage over American producers whose exports are subject to higher Japanese tariffs; those tariffs would ultimately have been removed under the Pacific agreement.

"We are experiencing lost sales without T.P.P." of about $400,000 a day as a result, said Kevin Kester, a California cattle rancher and vice president of the National Cattlemen's Beef Association.

"Multiply that over several hundred more products and several dozen more free-trade relationships," Mr. Froman said in an interview.

The T.P.P. would have phased out some 18,000 tariffs that the other 11 countries have on imports from the United States, thus reducing their cost to foreign buyers. Beyond such typical trade actions, it also would have established a number of precedents for international trade rules dealing with digital commerce, intellectual property rights, human rights and environmental protection.

A number of countries had agreed to copyright protections, benefiting sectors like the film industry. The agreement would have assured an open internet among the 12 nations, including in Communist-run Vietnam, encouraging digital trade and serving as a contrast to China's walls to internet traffic.

It included commitments against wildlife trafficking — Vietnam, for example, is a major market for rhino horns and ivory — and against subsidies in that country and others on both sides of the Pacific that encourage overfishing.

For the first time in a trade agreement, state-owned businesses like those in Vietnam and Malaysia would have had to comply with commercial trade rules and labor and environmental standards. The agreement would have committed all parties to the International Labor Organization's principles prohibiting child labor, forced labor and excessive hours, and requiring collective bargaining, a minimum wage and safe workplaces.

While unions and human rights groups remained skeptical about enforcement, the United States reached separate agreements with Brunei, Malaysia and Vietnam in which the three countries committed to specific labor changes, under penalty of the United States' restoring tariffs for noncompliance. Those side agreements will fall along with the overall trade pact.

Election-year antitrade politics aside, the biggest hurdle to Republicans' consideration of the Pacific pact was objections from some — led by Senator Orrin G. Hatch of Utah, chairman of the committee responsible for trade — to intellectual-property provisions that would have limited monopoly protections for brand-name pharmaceutical companies' so-called biologics. Those are advanced drugs used, for instance, in cancer treatments.

The Obama administration — pressed by nearly every other nation, the generic drug industry and nonprofit health groups like Doctors Without Borders, all of which wanted quicker access to affordable lifesaving drugs — had agreed that drugmakers could keep production data secret for five to eight years, fewer than the 12 years in federal law. Mr. Hatch had demanded 12 years. But administration officials were hindered in how far they could go to appease Republicans given strong opposition in other countries to any change.

Without the trade agreement, however, drug companies have no monopoly protections for biologics data in some countries.

Democrats, organized labor and the Ford Motor Company were especially opposed to the trade agreement because it did not include what they considered enforceable protections against other countries' manipulation of their currency's value to gain price advantages for their products. The pact did have a side agreement that, in another first for trade accords, included the parties' "joint declaration" against currency manipulation, required them to report interventions in exchange markets and set annual meetings to discuss any disputes.

Another innovation in the T.P.P. was provisions to help small businesses, which lack the resources of big corporations, to navigate export rules, trade barriers and red tape.

Opponents on the left were especially critical of the agreement for opening the door to more foreign subsidiaries being able to go to special trade tribunals to sue to block local, state or federal policies — environmental or consumer safety rules, say — on grounds that the rules conflict with corporations' rights under the trade pact.

The administration, however, countered that the trade agreement actually reformed the so-called Investor-State Dispute Settlement tribunals, which are a longstanding feature of trade policy. It called for changes responding to criticisms that the tribunals favor corporations and interfere with nations' efforts to protect public health and safety.

James Kanter contributed reporting from Brussels.

INSIDE U.S. TRADE
DAILY NEWS

TISA ministerial canceled because a deal in 2016 has been ruled out

November 18, 2016

Parties to the Trade in Services Agreement decided at a Nov. 18 ambassadors meeting not to hold a ministerial in early December because they will not be able to conclude a deal by that time, according to Geneva sources.

Talks will continue in Geneva, as TISA parties believe that concluding a deal is within sight. Negotiators are now switching their focus from trying to conclude the deal this year to taking stock of where the talks stand to best position themselves to resume negotiations next year, sources said.

Deputy U.S. Trade Representative Michael Punke said in September that he had hoped that the deal could get done by the scheduled Dec. 5-6 ministerial, but it now appears the fate of TISA will fall to the incoming Trump administration unless negotiators are able to conclude the agreement in January before Trump takes office. That possibility has not been ruled out, according to one source.

Whether the U.S. has the political leverage to finish a deal by then is unclear because Trump's stance on the agreement is not yet known, and his administration could decide to withdraw from the talks.

Christine Bliss, the president of the Coalition of Services Industries, said TISA should be a priority for Trump's administration. Bliss hopes that the talks can be picked up early next year.

"We are disappointed that progress in the TISA negotiations is stalled but we believe that achieving a high standard TISA agreement should be a priority on the next Administration's trade agenda," she said in a Nov. 18 statement. "We hope that TISA negotiators can reengage early next year."

The Global Services Coalition -- whose members include CSI as well as 10 other services trade associations in TISA countries -- also said that it hoped TISA could be completed in the near future.

"The members of the Global Services Coalition are disappointed that no progress appears to have emerged from meetings today," they said in a Nov. 18 statement. "We are optimistic that a resolution can be achieved soon to bring this important TISA agreement to the finish line."

The Trump administration has yet to make any statements on TISA, but some observers have suggested that Trump's general anti-trade rhetoric may not bode well for a deal. However, some sources also note that TISA is generally seen as a

less controversial trade deal than the Trans-Pacific Partnership and the North American Free Trade Agreement. Accordingly, they believe, Trump could decide that TISA is the type of deal that the U.S. should approve.

David Malpass, an economic adviser to Trump who is leading the incoming administration's Treasury Department transition team, said last month that Trump's trade policy should focus more on manufacturing and less on services and investment.

A Retreat From TPP Would Empower China

http://www.nytimes.com/2016/11/21/opinion/a-retreat-from-tpp-would-empower-china.html

By THE EDITORIAL BOARD

NOV. 21, 2016

The limits of President Obama's ability to reassure the world about America's future role in the international sphere was apparent at the summit meeting of Asia-Pacific leaders in Lima, Peru, on Sunday. There is no way to ease the concerns of those leaders about America's retreat from the 12-nation Trans-Pacific Partnership trade pact, a casualty of anti-globalization fervor, American politics and, in particular, the objections of President-elect Donald Trump, who has called it a "disaster."

The presidential campaign focused on whether the deal, which would lower import duties and quotas, would benefit American workers. Mr. Trump said it would not and argued instead for a protectionist approach, including big tariffs that could end up inciting a trade war.

On Sunday, Mr. Obama again made the case that the trade agreement would be "a plus for America's economy, for American jobs," and failure to sign on to it "undermines our position across the region." The Pacific Rim leaders urged the signatories to move ahead with the deal.

If done right, the pact could stimulate exports while helping to reduce environmental destruction and improve the lives of workers in countries like Brunei, Peru, Chile and Vietnam, which were part of the negotiation. For example, countries that signed the deal would have to adopt minimum wages, protect endangered species and agree not to discriminate against foreign businesses in the interest of domestic and state-owned firms.

The agreement, known as TPP, was intended to play a strategic role in American diplomacy. It was the economic linchpin of Mr. Obama's effort to reaffirm the nation's role as a Pacific power and counter the rising influence of China, which was not part of the negotiations. Washington's abandonment of the pact is widely seen in the region as a blow to American prestige and an opening for China to negotiate trade rules, win friends among Asian nations and assert regional leadership.

Some governments took serious political risks to forge the compromises needed for the TPP. For example, the pact would require Vietnam to recognize labor unions that are not affiliated with the ruling Communist Party.

Nevertheless, Democrats, including Hillary Clinton and Bernie Sanders, joined Mr. Trump in pillorying the deal as written. Mrs. Clinton proposed changes that would have strengthened it. But with Republicans set to control the White House and Congress, Mr. Obama abandoned plans to seek ratification from the lame-duck Congress.

Without TPP, Mr. Obama's rebalance toward Asia is significantly diminished, and, if it continues at all, will be more dependent on expanded military cooperation. The shift has left friends in the region wondering about America's future role. Mr. Trump has shown little interest in Asia except to bash China on trade and currency issues and to raise doubts about the need to defend half-century alliances with Japan and South Korea. Some American experts expect him to take a more detached approach to the region, essentially ceding the space to Beijing.

That would be a serious mistake. Secretary of State John Kerry said in a speech in September that if TPP is rejected, "we take a step away from the protection of our interests and the promotion of universal values, we take a step away from our ability to shape the course of events in a region that includes more than a quarter of the world's population — and where much of the history of the 21st century is going to be written."

Administration officials say many nations may still choose to ratify TPP. One of them is Japan, whose prime minister, Shinzo Abe, worked most closely with Mr. Obama on the deal and says he has not given up on selling it to Mr. Trump. He met with Mr. Trump last week, but there was no sign of progress on the issue. He did say he was confident the two men could build a trusting relationship.

There are signs that China will take full advantage of the American shift to press its own trade vision. The Beijing-backed Regional Comprehensive Economic Partnership, a rival pact that excludes Washington, is already getting new attention, including from leaders in Peru and Malaysia who signed TPP and now plan to focus on trade negotiations with China.

The TPP is over. What happens now?

By Mathew Davies
Updated 8:47 PM ET, Tue November 22, 2016

http://www.cnn.com/2016/11/22/opinions/tpp-over-what-next-asia/

- The reliability of the US as a strategic partner has plummeted in key regional capitals
- Indonesia, China have put forward alternative economic proposals

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(CNN) Throughout the primaries and general election campaigns Donald Trump repeatedly criticized the Trans-Pacific Partnership (TPP) as being a terrible deal for America. Now, as President-Elect, Trump has committed to withdrawing from the TPP immediately upon assuming office.

Key US allies are dismayed at Trump's decision to reverse course. First amongst them, Japan's Prime Minister Shinzo Abe, a keen supporter of the TPP, who had worked hard to overcome domestic opposition to the agreement.
Australian Prime Minister, Malcolm Turnbull, had called the TPP an "important strategic commitment" and said that it was in Australia's national interest to see the TPP in force.

Beyond the immediate disquiet Trump's decision has caused amongst US allies, however, emerges another question: what does the US now want in the Pacific?
The TPP, alongside other aspects of Obama's pivot, was intended to provide certainty -- that the US was there for its friends and allies, committed to the key principles of free-trade and open economies as a mutually beneficial relationship.
What happens now is a question that many will be asking.

Not just an economic agreement

The TPP was always widely criticized, not only by Trump but also by Democratic primary contender Bernie Sanders and, even, by Hillary Clinton who once was a strong supporter of it.
It was intended to be a wide-ranging agreement between 12 states across the Pacific. It included an agreement to cut trade tariffs on manufactured and agricultural goods, harmonize approaches to intellectual property and to establish an agreed arbitration process by which investors can sue member governments if they violate the terms of the agreement.

It is a mistake, however, to view the TPP only as an economic agreement.

It is best understood as an economic dimension to President Barack Obama's decision during his first term to rebalance America's strategic resources to the Pacific to face a rising China.
This rebalance included the redeployment of military assets, the investment of increased diplomatic resources and -- through the TPP -- a renewed US economic interest in the region.
To achieve this end, the TPP included traditional US allies such as Australia and Japan as well as more recent friends such as Vietnam, and excluded China.
President-Elect Trump's decision to reverse US policy and abandon the TPP therefore not only has economic consequences but also political and strategic ones. The reliability of the US as an economic and strategic partner has just plummeted in key regional capitals.
Trump has indicated an interest in placing tariffs on Chinese exports to the US and little concern with the consequences of a trade conflict for supposed US allies.

Alternative proposals

With the abandonment of the TPP by Trump, we are now entering a period of intense competition around what, if any, economic agreement will be put in place across the Pacific and who will oversee that process.
Just as with the TPP, these seemingly economic arguments have clear political consequences.
China has already proposed its own economic agreement, a free-trade zone across South and East Asia that excludes the United States, the Regional Comprehensive Economic Partnership. This proposal, already under negotiation, will now receive renewed interest from states who were previously part of the TPP arrangement.
Before Trump's announcement, Prime Minister Abe said that there would be a shift in thinking towards participating in China's proposal were the TPP to fail.

Indonesia, which had not taken part in the TPP, has forwarded a different suggestion.
At the recently concluded APEC summit held in Lima, Peru, Indonesian Vice-President M Jusuf Kalla proposed an economic group comprising the ten member states of the Association of Southeast Asian Nations (ASEAN) together with The Pacific Alliance, a collection of four Central/Latin American states.
Such a grouping would offer ASEAN members, a collection of small and middle powers, a way to take the lead in the face of US withdrawal and the continued concern about Chinese domination.
Indonesia, when making the proposal, explicitly positioned it as a balance against both China and the United States, demonstrating the extent to which both states are now viewed with concern in Southeast Asia.
Whilst Indonesia's proposal is new, and seemingly made without extensive consultation with other ASEAN members, it would likely receive the backing of ASEAN member states including the Philippines, which under Rodrigo Duterte has followed a high-profile policy detaching itself from the US.

Any agreement better than none

Even ASEAN members with a strong relationship with the US, such as Singapore, will now look on these proposals with renewed interest in the belief that any agreement is better than no agreement.

Trump's decision to leave the TPP reinforces the biggest fear that his election has provoked -- that we do not know what the US is going to do next.

The TPP, despite being criticized widely within and beyond the US, was a traditional product of US diplomacy with traditional aims. The decision to leave the TPP is a sign that Trump places little value in the US keeping its promises when he sees no value in doing so -- and that uncertainty now colors dealings with the US.

Once Trump assumes the presidency, states across the Asia-Pacific -- whether allies, friends or supposed rivals -- are going to have to come to terms with a not only insular superpower, but likely an erratic one.

Trump just announced he'd abandon the TPP on day one. This is what happens next.

https://www.washingtonpost.com/news/wonk/wp/2016/11/22/trump-just-announced-hed-abandon-the-tpp-on-day-one-this-is-what-happens-next/?utm_term=.9ce664133276

By Ana Swanson November 22

President Obama shakes hands with Vietnam President Tran Dai Quang at the APEC Economic Leaders' Meeting in Lima, Peru, this past weekend. (Kevin Lamarque/Reuters)

On Monday, President-elect Donald Trump said that he would pull out of the Trans-Pacific Partnership, President Obama's signature trade deal linking countries around the Pacific Rim, on his first day in office. Immediately before, a gathering of international leaders in Peru gave early hints of what might happen next.

The picture is one of China rushing forward to lead the world's next trade agreement, with U.S. allies such as Australia and Japan in tow.

Without the United States, the TPP is effectively done. But international trade negotiations will not stay quiet for long. America's largest trading partners are already looking toward the next agreement. That appears likely to put China, Russia and other countries — which the United States had pointedly excluded from the TPP, in hopes of encouraging them to improve their trade practices and join at a later date — in a more favorable position to negotiate a trade pact that works for their economies.

At the summit in Peru this weekend, world leaders turned toward two agreements China has been negotiating in the TPP's shadow. As the United States pushed ahead with the TPP in the past several years, China had been pushing for the Regional Comprehensive Economic Partnership, a deal negotiated among 16 Asian countries that is now close to completion, as well as the Free Trade Area of the Asia-Pacific (FTAAP), which is open to 21 economies along the Pacific Rim, including China, Russia, Indonesia, Canada, Mexico, Peru, Chile and the United States.

In the past few years, the United States had persuaded its Pacific trading partners to set aside that second deal, the FTAAP, in favor of the TPP. But now that the TPP appears to be dead, China and other countries are pushing ahead with FTAAP.

Japan, Australia weigh in on Donald Trump's plan to abandon the TPP

Japanese Prime Minister Shinzo Abe says the Trans-Pacific Partnership would be 'meaningless' without the U.S. after President-elect Donald Trump said he would withdraw the U.S. from the trade deal on his first day in office. (Reuters)

Fred Bergsten, senior fellow and director emeritus of the Peterson Institute for International Economics and the author of a blueprint that led to the TPP, said the feeling from the Lima, Peru, meeting was that the world would continue down a path of trade liberalization, perhaps without the United States.

“It’s pretty clear the sentiment there was a backlash against a backlash,” he said.

In interviews and an op-ed published before the event, Australia's trade minister, Steve Ciobo, signaled that his country was moving on to the new free-trade agreement.

“With the future of the TPP looking grim, my ministerial counterparts and I will work to conclude a study on the Free Trade Area of the Asia-Pacific, which sets out agreed actions toward a future free trade zone,” Ciobo said, according to the Guardian.

After a meeting between Chinese President Xi Jinping and Russian President Vladimir Putin on the sidelines of the meeting, China’s Foreign Ministry announced that China and Russia would work together to promote the free-trade area.

Leaders from Singapore, Vietnam and Malaysia also confirmed they were shifting their focus to a China-backed deal, while Japan still appeared to be holding out hope that the United States would reverse its position on the TPP.

Trump and his trade advisers say that the TPP is a bad deal for the United States, citing the large numbers of losses in the manufacturing industry and other sectors that have come since the United States deepened trade in the 1990s. But Bergsten, a proponent of free trade, argues that being left out of the next global free-trade deal will hurt U.S. workers.

Although other countries will always hold the door open for an economy as large as the United States to join them, they also appear likely to forge a deal without the United States. If the United States does not join, the result would be what economists call “trade diversion” — where lower barriers to trade mean that countries in the pact may choose to buy goods from each other, even if an American-made good is cheaper. That could weigh on American exports and worsen the U.S. trade deficit.

The other risk is that China, Russia and other countries will probably create a trade agreement that is more favorable to them on certain issues, and less favorable to the United States, Bergsten says.

Although the TPP attempted to limit unfair competition by state-owned enterprises, China could push for more lenient treatment for its powerful state-owned companies in a new deal. The TPP also carved out tougher standards for the implementation of intellectual-property rights, which generate much of U.S. companies’ profits. A free-trade agreement negotiated by China could be more lax on that front as well.

"This is really a contest for the economic architecture of the most dynamic part of the world economy," Bergsten said. "If we now cop out, I'm suggesting that the debate will continue and the process of integration will continue, but yes, more likely on somebody else's model."

What's the difference between TTIP and TPP and why does Donald Trump want them scrapped?

http://www.telegraph.co.uk/business/2016/11/22/difference-ttip-tpp-does-donald-drump-want-scrapped/

22 November 2016 • 11:34am

On day one of his White House administration, president-elect Donald Trump has vowed to withdraw the US from the Trans Pacific Partnership, a free-trade agreement covering 12 countries.

"Instead, we will negotiate fair, bilateral trade deals that bring jobs and industry back onto American shores," Trump said.

The president-elect has made no secret of his opposition to TPP, a flagship policy of the Obama administration, which was agreed in 2015 but has not yet been ratified. Last year Trump tweeted that the deal "must be stopped" to "protect the American worker".

But what does the US' withdrawal from TPP mean for the world economy, and what are the implications for the other trade deal, the Transatlantic Trade and Investment Partnership?

What is the Trans-Pacific Partnership (TPP)?

The Trans-Pacific Partnership will create a free-trade zone with common labour and environmental standards, and measures to protect data and intellectual property of large companies.

It was agreed after nearly a decade of international talks between Washington and its international partners and is the most significant free trade deal since the US signed the North America Free Trade Agreement in 1994.

But it will still need ratification in all the parliaments of its major participants.

There are 12 countries involved across the Pacific Rim: Japan, the US, Australia, Brunei, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

The Pact was a cornerstone of President Barack Obama's strategic "pivot" towards Asia and his bid to reassert to US economic hegemony over China.

The idea is that it will benefit the US and its Asian trading partners by leveling the playing field and eliminating unnecessary taxes. It could also lead to strong commitments on labour practices and the environment.

The US' withdrawal from TPP could be the advantage of China, which may now be free to pursue its own deals in the region.

What is the Transatlantic Trade and Investment Partnership (TTIP)?

This is a deal being negotiated between the European Union and the United States.

Deliberations over the deal have been going on for years, but the first official round of talks took place in 2013.

It is hoped that whatever the agreement eventually looks like, it will result in increased trade and prosperity for those on both sides of the Atlantic.

The TPP creates a new international commission that makes decisions the American people can't vetoDonald Trump

Lower barriers to trade should mean that more of it takes place, and the ensuing competition should result in better and cheaper goods and services, making all sides better off.

But it's not just tariffs that the TTIP is meant to tackle. Politicians also want to get rid of non-tariff barriers, known as NTBs, which are rules that countries or regions, such as the EU, impose on goods, such as standards and sizes.

TTIP is intended to bring about lower trade tariffs, and to reduce regulatory barriers that make trade between the US and the EU more costly than it need be. If approved by US and EU politicians, TTIP would be the biggest agreement of its kind.

But the UK's decision to vote for Brexit, and the election of Trump, make TTIP's future decidedly uncertain, with many commentators now assuming that the agreement is dead in the water.

Why doesn't Trump like these deals?

Although Trump’s policy statements have been, at best, contradictory, he has been consistent in his opposition to TPP. "There is no way to fix the TTP," the president-elect said in June.

By extension, he is also deeply critical of TTIP and is widely expected to either ditch the deal or renegotiate the trade deal.

Trup does not like the deals because he thinks they will hurt American workers and undercut US companies. His stance on trade is protectionist: he has vowed to shield Americans from the effects of globalised trade by slapping hefty tariffs on cheap Chinese imports of up to 45pc.

He has even talked of getting ride of Nafta, the North American Free Trade Area, and questioned the US' relationship with the World Trade Organisation.

He fears previously protected sectors in the US could be subject to liberalised rules that will disadvantage them. Many American states have “buy American” policies, and would put up a fight at the idea of TTIP overruling these.

Trump also wants to appoint "tough and smart trade negotiators to fight on behalf of American workers".

On TTP, specifically, he says:

"The Trans-Pacific Partnership will undermine our economy, and it will undermine our independence. The TPP creates a new international commission that makes decisions the American people can't veto, making it easier for our trading competitors to ship cheap subsidised goods into US markets - while allowing foreign countries to continue putting barriers in front of our exports.

"The TPP lowers tariffs on foreign cars, while leaving in place the foreign practices that keep American cars from being sold overseas. The TPP even creates a backdoor for China to supply car parts for automobiles made in Mexico."

That said, in an interview with CNBC in August, Trump qualified his stance on global trade, saying: “The fact that I’m negotiating trade will mean that we’re going to make good trade deals.

“But we are absolutely going to keep trading. I am not an isolationist. And they probably think I am. I’m not at all. I’m a free trader. I want free trade, but it’s got to be fair trade. It’s got to be good deals for the United States."

A Progressive Agenda for Renegotiating NAFTA

Timothy A. Wise
BillMoyers.com
November 22, 2016

During the campaign, President-elect Donald Trump pledged to renegotiate the North American Free Trade Agreement (NAFTA) with Mexico and Canada, or withdraw the United States from the pact.

Although no one at Trump Tower so far has asked me for advice (and I'm not waiting by my phone for a call), I know a little bit about this subject: Eight years ago I helped convene a panel of experts to make recommendations to another president who promised to rewrite NAFTA.

That would have been Barack Obama, who, as a candidate in 2008, was clear on the issue: "NAFTA's shortcomings were evident when signed and we must now amend the agreement to fix them."

Alas, as president, he did no such thing, which is of course one of the reasons we find ourselves with a right-wing president who rode popular dissatisfaction with globalization into the White House.

A progressive agenda for renegotiating NAFTA

The president-elect seems serious about renegotiating the agreement, so it is worth revisiting some of the concrete reforms our Task Force on North American Trade Policy recommended in our policy report, "The Future of North American Trade Policy: Lessons from NAFTA." Many accuse progressives of having lots of criticisms but no concrete proposals. Here is a set of concrete proposals to reform NAFTA.

President-elect Trump's agenda for renegotiating NAFTA looks nothing like our panel's. And if he gets his way, the results will be a disaster for the working class Americans who gave him their votes.

Our starting point was entirely different from his as well. Rather than treating Mexico as the enemy in a deal that simply sent US jobs south, we followed the more accurate critique Obama made as a candidate for the White House: "While NAFTA gave broad rights to investors, it paid only lip service to the rights of labor and the importance of environmental protection."

Our experts, from the United States, Canada and Mexico, identified ways in which different parts of the agreement favored multinational firms at the expense of labor and the environment. The panel recommended a wholesale revision of the investment chapter of the deal, which was the first to allow corporations to sue governments over measures that impeded their profits. In other words, long before Sen. Elizabeth Warren (D-MA) campaigned against the so-called Investor State Dispute Settlement system as a rigged deal that favored big money over workers, we recommended the special courts be scrapped.

That objectionable provision is now part of the template for US trade agreements, including the seemingly defunct Trans-Pacific Partnership. It is very unlikely President-elect Trump is prepared to remove that provision from NAFTA, though Sen. Sherrod Brown (D-OH) has called on him to do just that.

Nor is he proposing the kind of coordinated set of industrial policies on the part of the NAFTA countries to reverse the collective loss — by the US, Canada and Mexico combined — of 25 percent of their manufacturing base to China and other Asian countries. That is what our task force called for. Such policies could include currency measures to ensure fair pricing, identification of potential high-wage industries in which to invest, strategic government incentives and investment in the early stages of those industries, and some limited protection from import competition.

You don't hear Trump talking about any such thing — just punitive tariffs, walls and declarations of China as a currency manipulator, which does nothing for jobs going to Mexico and fails to acknowledge our own overvaluation of our currency.

Trump no defender of labor

The yawning gap between rhetoric and reality in Trump's trade proposals may be largest on labor provisions. Any sane review of NAFTA has to recognize that industries fled to Mexico in part because of that country's low wages and its hostile atmosphere to union organizing. As long as Mexicans' wages are one-tenth of US manufacturing wages, multinational firms will continue moving south of the border, and the race to the bottom will continue.

That makes the starting point of any NAFTA rewrite worker protections, on all sides of all borders. Those would include protections for the right to organize unions as well as a guarantee of a living wage, decent benefits and safe working conditions. It would involve enforceable sanctions against firms — US *and* Mexican — that do not comply.

This would stop the race to the bottom, ensuring the agreement instead results in "harmonization upward," to decrease wage competition by raising all trading partners toward the wage levels and benefits US workers fought for most of the 20thcentury to win. These were battles waged by unions.

Have you heard anything pro-union from candidate Trump? Of course not. He was infamous for his exploitation of workers at his own projects, especially immigrants.

Reform US immigration policy, don't deport immigrants

Our expert panel also took on the third-rail issue of migration, recognizing that US immigration policies have abetted one of the most wage-depressing aspects of US-style globalization: An underclass of workers vulnerable to massive discrimination.

Undocumented workers have few rights in the workplace. Rather than deport them, as Trump is proposing to do, give them legal status so they are free to join unions and demand their rights. The AFL-CIO has advocated just such policies for years, precisely to prevent multinational firms from callously exploiting workers on both sides of the US-Mexico border.

Our expert panel got one thing very wrong. We thought the Democrats were serious about renegotiating NAFTA. If Obama, when he had a strong majority in Congress, had made good on his promise we might not be where we are today.

As Jared Bernstein, a former chief economist to Vice President Biden, and others have pointed out, Trump's nationalist agenda fails to address the causes of working-class distress, or even its most far-reaching symptoms. Higher tariffs on manufactured goods from Mexico will only come with some concession at the bargaining table. The US trade deficit will come down only with strategic investments in key manufacturing industries and reductions in our overvalued currency.

President-elect Trump must not be allowed to renegotiate NAFTA by scapegoating Mexico and imposing a nationalist version of an anti-worker, pro-corporation trade deal.

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Donald Trump Carrier Deal Previews New War On US Trade Pacts

http://www.ibtimes.com/political-capital/donald-trump-carrier-deal-previews-new-war-us-trade-pacts-2453554

By David Sirota @davidsirota On 12/01/16 AT 5:33 PM

Donald Trump is still weeks away from taking the presidential oath of office, but a deal he championed with an Indiana manufacturer is already threatening to challenge longstanding trade rules designed to prevent public contracts from being targeted to domestic firms.

On Thursday, Trump and Vice President-elect Mike Pence attended an Indianapolis event to celebrate Carrier's decision to quash its plan to shift up to 1,000 manufacturing jobs from Indiana to Monterrey, Mexico. Carrier officials said that new state tax incentives were an "important consideration" in their decision to keep some of the jobs in the United States.

However, a top Indiana economic development official said the decision was based more on the firm's fear that if it shifted the jobs out of the United States, Trump's administration would punish Carrier's parent company, United Technologies, by restricting its access to billions of dollars of federal government contracts. United Technologies annually gets roughly $5.6 billion in federal contracting largesse, according to the Indianapolis Star.

"Companies are not going to leave the United States anymore without consequences," Trump said during a speech at the company. "It's not going to happen."

Trump's new administration could follow the Carrier deal by seeking to systematically leverage its power over federal contractors to get companies to preserve domestic jobs. But that would run up against key provisions in longstanding U.S. trade deals that — if broken — could subject the United States to international sanctions.

Under those pacts — which Trump and many progressive public officials have campaigned against — federal, state and local governments face restrictions on efforts to award or rescind government contracts on the basis of where a company is located, or where its workforce is domiciled. In practice, those rules effectively prevent government officials from preferencing U.S.-based companies in their decisions to award government contracts. In 2015, roughly $13 billion of federal contracts went to foreign firms or foreign-based subsidiaries, according to data from Bloomberg Government.

"The policy tool Trump just used, conditioning procurement contracts on U.S. employment, is one of the policies forbidden in our current trade agreements," said Lori Wallach of Public Citizen, a left-leaning group that has pressed public officials to alter America's current trade

policies. “As part of Trump changing those trade agreements, he could announce to our trade partners that getting rid of those procurement rules are one of the things he is going to negotiate.”

The idea of leveraging contracting power is hardly new. Many states’ procurement codes include language designed to preference local vendors in government contracting decisions. Congress in 1983 passed the Buy America Act to try to make sure infrastructure projects use domestically produced materials.

To comply with trade agreements that bar contracting preferences, though, the United States has periodically waived those contract preference laws for companies based in trading-partner nations. Wallach told International Business Times that even before fully renegotiating trade deals, Trump could use his executive power to rescind those waivers, thereby opening up the possibility of new contract preference laws at the state and federal level.

“As a practical matter, if he was serious about this, he would announce a change in that regulation, and there’s a whole process to do that — but he can do that unilaterally,” Wallach said. “He would then give notice to the signatories of the World Trade Organization procurement agreements that this is an issue I intend to use the fast track authority that Congress gave me to negotiate a change of these rules.”

According to Obama administration officials, U.S. companies have a stake in preserving the existing system. The current procurement rules that bar contract preferences were created “with the aim of ensuring that U.S. goods, services and suppliers will be given fair and non-discriminatory opportunities to compete” for foreign government contracts, according to the Office of the United States Trade Representative.

“One of the key U.S. objectives in negotiating access to foreign procurement markets is to obtain a commitment from a foreign country to not apply domestic preferences that would prevent or undermine participation by U.S. suppliers in that country's procurement,” says the National Association of Procurement Officials in a review of the rules.

A recent case shows how those rules can operate in practice: Last week, the WTO ruled that a Washington State tax incentive for Boeing violates international trade agreements. The tax incentive package said it would be terminated if “any final assembly or wing assembly … has been sited outside the state of Washington.” Arbiters ruled that the clause effectively made the tax benefits contingent on the company producing planes in the state — which they said violated trade rules against domestic preferences. The ruling could force lawmakers to rescind or amend the tax package.

If Trump moves to scrap such rules and target federal contracts to firms that keep jobs in the United States, it could prompt other countries to do the same for their own companies.

“If he tries to institutionalize this and it’s not just 1,000 Carrier jobs but every company with federal contracts, he could newly introduce that federal contractors not offshore jobs, that would definitely go against what we’ve committed to do at the WTO,” said Todd Tucker, a trade expert at the Roosevelt Institute. “It would be enormously politically popular, but the risk from a policy

perspective is what if that starts going willy nilly across the board, so that we are doing it and other countries are doing it, that ends up helping inefficient industries. There's a danger of it going too far."

Tucker added, though, that "we don't want what we have now, which is under under no circumstances can countries say for this industry there is a strategic reason we want it local."

Japan Inc Warns of Global Trade Contraction Under Trump Presidency-Reuters Poll

http://www.nytimes.com/reuters/2016/12/07/business/07reuters-japan-companies-trump.html

By REUTERSDEC. 7, 2016, 6:21 P.M. E.S.T.

TOKYO — Corporate Japan is bracing for a rocky ride under incoming U.S. President Donald Trump, a Reuters poll showed, with well over a third of firms seeing a contraction in global trade as concerns about a rise in U.S. protectionism threaten to shatter a fragile economic recovery.

Fully three-quarters of Japanese companies expect no expansion in world trade, highlighting festering anxiety that Trump's fiery protectionist rhetoric during campaigning might turn into growth-sapping policies through his four-year term that begins in January.

Throughout the campaign that led to his upset election win, the Republican president-elect pledged to redraw trade deals to win back American jobs. He has threatened Mexico and China with punitive tariffs that some economists have warned could spark a trade war that could potentially roll back decades of liberalisation.

The Reuters Corporate Survey, conducted Nov. 22-Dec. 2, underscored such concerns.

The monthly poll of 531 big and mid-size firms found 40 percent expected global trade to shrink in the medium-term, 4 percent saw full-fledged trade friction, while 32 percent saw no change. Only one quarter predicted global trade will expand under Trump.

That would mark a deterioration in global trade, which has expanded at a modest rate below 3 percent in recent years after bouncing from a plunge in 2009 in the wake of the global financial crisis.

Trump has threatened to ditch the North American Free Trade Agreement, or NAFTA, between the United States, Canada and Mexico, arguing the agreement has sent U.S. manufacturing jobs to Mexico. He has also said he would withdraw from the Trans-Pacific Partnership, or TPP, an ambitious Asia-Pacific trade pact linking 12 countries including the United States and Japan.

In written responses, companies voiced concerns about the fate of TPP, NAFTA and Mexico, where Japanese automakers have plants, and how a waning American presence could pave the way for China to wield more influence worldwide.

"Reversal of free trade is a concern for our business, but what's more worrying is a weaker U.S. military presence in East Asia, which could embolden China to take control of the power vacuum in the region," wrote a manager at an electrical machinery company.

Trump "has declared exiting TPP and pushing bilateral trade pacts, and I'm worried about a shift in (global) trade regime towards one led by China," wrote a manager at a chemicals firm.

Managers answered on condition of anonymity in the survey, which was conducted for Reuters by Nikkei Research. Around 250 answered questions on the impact of a Trump presidency.

The uncertainty around Trump's trade policies adds to the risks for Japan's economy, which is struggling to mount a sustainable recovery amid slow global demand and sluggish domestic consumption.

UNPREDICTABLE

The survey found that three-quarters of Japanese companies saw no change in their investment stance towards U.S., while 14 percent said it would wane and the remaining 11 percent saw it growing.

Previous Reuters surveys taken during the election campaign had shown a majority of firms believed Trump would be bad for business in the United States, and that Japanese corporate appetite for investing in the U.S. would wane.

"Expectation is rising that Trump will adopt business-friendly steps such as infrastructure investment, tax cuts and deregulation," said Hidenobu Tokuda, senior economist at Mizuho Research Institute, who reviewed the survey results. "That said, companies remain cautious about what he says and does, which is all uncertain and utterly unpredictable."

The survey also found that companies worried both about a strong yen and a weak yen under a Trump presidency, suggesting there's no consensus on what sort of currency changes are in store.

The yen has nearly reversed all of this year's gains since the U.S. election - easing concerns about Japan's export-reliant economy - on expectations that Trump's proposed reflationary economic policies would push up U.S. interest rates.

Sixty-two percent said the dollar would move in a 100-110 yen range next year - slightly stronger than around a 111-114 yen range seen during the survey period. Just 27 percent saw it in the 110-120 yen and 2 percent said it would weaken beyond 120 yen. Eight percent saw it strengthening to the 90-100 yen range.

(Reporting by Tetsushi Kajimoto; Additional reporting by Izumi Nakagawa.; Editing by Malcolm Foster & Shri Navaratnam)

EU official hopeful for trade deal under Trump presidency

https://www.washingtonpost.com/world/national-security/eu-official-hopeful-for-trade-deal-under-trump-presidency/2016/12/07/c6b70ac6-bcc5-11e6-ae79-bec72d34f8c9_story.html?utm_term=.c579fa1e159d

By Maria Danilova | AP December 7

WASHINGTON — A senior European Union official on Wednesday expressed hope that the incoming Trump administration will continue talks on a comprehensive free trade agreement with Europe.

EU Ambassador to the U.S. David O'Sullivan told a conference in Washington that he hopes that negotiations on the Trans-Atlantic Trade and Investment Partnership will go on despite President-elect Donald Trump's negative comments on trade. Trump has spoken out against various trade deals during the presidential campaign.

The Obama administration has been negotiating the agreement, also known as TTIP, for three years. TTIP aims to remove barriers to trade between the world's two largest economies, to boost economic growth and employment and harmonize labor, safety and environmental standards.

"We stand ready to continue these negotiations and bring them to successful conclusion," O'Sullivan told a conference on EU-U.S. relations. "We still think the objective arguments... in favor of a good trans-Atlantic deal remain valid."

O'Sullivan added that if trade talks were to resume next year, a deal could be reached in a year or two.

At the same time O'Sullivan noted that Trump has yet to formulate his position on TTIP. During a heated presidential campaign, where trade was a central issue, Trump has said that international deals cost Americans theirs jobs.

"We simply do not know in the light of everything that has been said about trade where this new administration will stand. So we are being respectful of that," he added.

Proponents of the agreement argue that lowering tariffs and harmonizing rules would give a much-needed boost to businesses at a time of global economic uncertainty. But trade unions, nationalists and green groups in Europe have lobbied hard against the deal. In the U.S., labor unions have complained that the deal is aimed at lowering, not improving standards.

Japan Ratifies Pacific Trade Pact That Trump Plans to Dump

http://www.nytimes.com/aponline/2016/12/09/world/asia/ap-as-japan-us-trade-pact.html

By THE ASSOCIATED PRESS

DEC. 9, 2016, 1:33 A.M. E.S.T.

TOKYO — Japanese Prime Minister Shinzo Abe won parliamentary approval Friday for ratification of the Trans-Pacific Partnership, despite U.S. President-elect Donald Trump's plan to withdraw from the 12-nation trade pact.

Upper house lawmakers approved the TPP on Friday, heeding Abe's calls to push ahead with it despite Trump's rejection of the free-trade initiative championed by President Barack Obama.

Abe's ruling Liberal Democratic Party has an ample majority in both houses of parliament. Ratification of needed regulatory revisions by the Cabinet is expected soon.

The market opening measures required by the trade pact are seen as a way for Abe to push through difficult reforms of the agricultural and health sectors. So far, Abe has made scant progress on a slew of changes he has proposed to help improve Japan's lagging productivity and competitiveness.

Trump has vowed to take steps to exit the pact right after he takes office.

A U.S. withdrawal would kill the trade pact unless its terms are revised. The agreement between the dozen members requires both the U.S. and Japan to join to attain the required 85 percent of the group's total GDP since the U.S. economy accounts for 60 percent of that total, and Japan less than 20 percent.

After expending political capital to fight vested interests fearful of market opening and reforms likely to be required by the trade pact, Abe and other leaders in Asia have bemoaned the impending loss of the U.S. as TPP flag bearer.

"We want to carry this out and expect others will follow suit," Abe recently told a parliamentary committee.

An opposition lawmaker, Eri Tokunaga, derided Abe's insistence on going ahead with ratification as "egocentric."

"There is basically zero chance of this coming into effect since the next president, Trump, plans to leave it," Tokunaga told fellow lawmakers Friday.

Leaders in New Zealand and several other countries have said they still hope to find a way to rescue the initiative.

The outgoing Obama administration welcomed Japan's parliamentary approval of TPP.

State Department spokesman Mark Toner said that TPP was important for establishing trade rules in the Asia-Pacific and it was in everyone's interest who has signed on to it to see it come into effect. He said that regardless of what happens in the U.S., "the rest of the world is moving forward."

The TPP was meant to help give the U.S. a leading role in setting trade rules reaching beyond tariffs and other conventional trade barriers. It's possible demise could spur faster progress on another, much less discussed trade agreement called the RCEP, or Regional Comprehensive Economic Partnership. That trade grouping includes no countries from the Americas but all the big hitters in Asia: China, India, Japan, South Korea as well as Australia, New Zealand and the 10 members of the Association of Southeast Asian Nations.

How Trump-era trade policy threatens to send up the prices you see on store shelves

https://www.washingtonpost.com/news/business/wp/2016/12/09/how-trump-era-trade-policy-threatens-to-send-up-the-prices-you-see-on-store-shelves/?utm_term=.933dbb1f48ba

By Sarah Halzack December 9

President-elect Trump has offered plenty of tough talk on his way to the White House. And while the businessman has turned his rhetorical fire to everything from the Iran nuclear deal to the Affordable Care Act, perhaps no issue has been as consistent a target for his ire than trade policy.

Trump has talked often of introducing soaring new tariffs, pulling out of trade agreements, and recently, punishing American companies who move jobs overseas. These moves, he says, would be aimed at encouraging companies to create jobs in the United States by making goods here at home.

If a Trump administration ends up pushing for these or other major policy changes on trade, few industries are likely to feel the jolt more acutely than retail, which sells you smartphones made in China, sneakers made in Vietnam and furniture made in Mexico. With that in mind, it's worth examining what is at stake in this debate for retailers and consumer goods importers. A sweeping change could alter how they do business and, in turn, could affect the prices or merchandise selection available to you, the consumer.

Let's start with a look at the status quo. Retail industry experts often point out that tariffs are unusually high on many of the items that fill store shelves. For certain types of apparel, tariffs can go up to 32 percent; on footwear, they can soar over 67 percent. That is significantly higher than the 1.5 percent average seen across all imports including goods such as automobiles and oil.

Retailers, along with apparel and shoe brands, feel choked by these taxes. The National Retail Federation, an industry trade group, says bringing these taxes down could allow stores to reduce the prices you see on their shelves. (And in theory, they could sell more.) This is why the NRF was an ardent supporter of the Trans Pacific Partnership, which would eliminate tariffs on thousands of products coming to the U.S. from the 11 other participating Pacific Rim countries. In particular, as Vietnam emerges as an important garment and footwear manufacturing center, the removal of tariffs under this deal could have allowed retailers of these goods to offer cheaper prices to consumers.

NRF says in a report that the TPP could boost annual spending power by more than $1,000 per household per year, in part because of lower prices.

Want a real-world example of how an industry executive thinks about this issue? Danielle DiFerdinando is the founder and creative director of Danielle Nicole, a handbag brand carried at retailers such as Macy's and HSN. The purses are assembled in China, using fabrics, fasteners and zippers from Chinese suppliers; DiFerdinando says this means her import taxes can be up to 20 percent on some of her brand's larger handbags. When asked what she'd do if those tariffs were slashed, DiFerdinando said she could lower her prices for shoppers and order more bags from her suppliers so as to reach more of them. And she even said it could lead to some added creative freedom.

"We could use more hardware, play around more with the design," DiFerdinando said, because it would give her a cushion to put more detail or different fabrics into her bags while keeping the consumer-facing prices the same.

Given that context, you can imagine how the industry is looking at Trump's posturing on this issue. For one, Trump has been a fierce critic of the TPP, so that deal — which already looked doomed — now truly seems like a pipe dream.

And then there's his other pronouncements, including that he'd like to pull out from the North American Free Trade Agreement, or put 45 percent tariffs on goods coming from China.

Before diving into what those kinds of moves could mean for retailers, it's worth noting that these are not easy changes to execute, apparently not even for Trump as president. Even if Trump were to withdraw from NAFTA, Congress would still have to repeal the related implementation act. And as part of the World Trade Organization with China and more than 160 other countries, the United States is obligated to adhere to rules that mean it can't set tariffs over a certain threshold.

But, let's say Trump was able to orchestrate a move to withdraw the U.S. from NAFTA. Experts say retailers that import from Mexico and Canada would likely be forced to rethink their supply chains and perhaps raise their prices to offset higher tariffs.

"It's hard to envision a scenario where we re-open NAFTA that's a positive for the business," said Edward Rosenfeld, the chief executive of footwear brand Steve Madden, at a conference in November.

And if Trump were to push for a surge in tariffs on goods from a only single country, such as China, it's likely that U.S. retailers and brands would simply move their manufacturing to overseas facilities in a different nation instead of bringing them stateside, because it would simply be too expensive.

"You can try to drive domestic production as much as possible," said Hun Quach, vice president of international trade at the Retail Industry Leaders Association (RILA), a trade group representing large retailers. "But if you look at our members, the volume in which we would need to source some of these products, I think, is a challenge here in the United States."

Plus, China would likely retaliate by adding tariffs of its own that would hit U.S. companies that export to that fast-growing economy.

Meanwhile, there's at least one Trump trade idea that probably wouldn't have much impact for the retail and consumer goods world: His latest statements that there would be "retribution" for corporations that moved jobs overseas, in the form of a 35 percent tax. While this particular decree may sound chilling for many corporations, it doesn't matter much in retail. For one, store positions — cashiers, clerks, stockroom workers — are essentially impossible to outsource. And garments, shoes and other items have been manufactured in Asia, Central America and other regions for decades. So it's not as if many businesses are currently contemplating moving these kinds of roles abroad. In this industry, that moment has long since passed.

Trump’s pick for secretary of state argued against one of the president-elect’s biggest promises

https://www.washingtonpost.com/news/wonk/wp/2016/12/13/trumps-pick-for-secretary-of-state-argued-against-one-of-the-president-elects-biggest-promises/?utm_term=.ed734a9b0f4f

By Ana Swanson December 13

Trump’s Transition: Who is Rex Tillerson?

President-elect Donald Trump has picked Rex Tillerson as his nominee for secretary of state. Here's what you need to know about Tillerson. (Thomas Johnson/The Washington Post)

In an interview on Monday, Trump campaign manager Kellyanne Conway called Rex Tillerson, the current chief executive of ExxonMobil and President-elect Donald Trump’s newly announced pick for secretary of state, “a very Trumpian-inspired pick.” Tillerson is someone who has spent his career outside politics crafting big deals and making a big impact, she said.

But there’s an aspect of Tillerson’s biography that is not so Trumpian. As an energy executive, Tillerson voiced support for global free trade and the Trans-Pacific Partnership, a 12-nation trade pact that was one of Trump's favorite targets during the campaign.

Trump denounced the TPP, President Obama’s signature deal, as a "potential disaster." He argued it was a terrible deal for American workers and said he would withdraw the United States from the deal on his first day in office. Republican congressional leaders have said they are unwilling to bring the deal to a vote in Obama's remaining months in office, meaning the TPP is almost certainly dead.

This hardly appears to be a fleeting policy position: Trump throughout his career has consistently criticized global free trade deals as disadvantaging American workers.

Tillerson has maintained a very different stance. In a speech he gave to the Asia Society Global Forum on June 13, 2013, Tillerson talked about his support for the Trans-Pacific Partnership, which he said would provide the open markets that would allow the United States and countries in Asia and elsewhere to grow and progress.

“We must embrace the free flow of energy, capital, and human talent across oceans and borders,” Tillerson told the crowd.

As reports emerged that the incoming Trump administration was considering Tillerson for secretary of state, his position on trade attracted attention and criticism from some.

“America First? Um...not so fast,” conservative political analyst Bill Kristol tweeted Sunday. “As SecState, CEO of multinational that cuts deal with one and all – the very definition of a ‘globalist.’”

As secretary of state, Tillerson wouldn’t be directly involved in negotiating trade deals — that’s primarily the job of the United States trade representative.

But the State Department does play a prominent role in helping to promote the president’s international trade agenda and broadly guiding trade policy as part of the Trade Promotion Coordinating Committee, an interagency committee that coordinates export promotion and finance.

In addition, trade could figure prominently in Tillerson’s job if Trump pursues some of his biggest campaign promises. Trump has pledged to seek better terms of trade with major economic partners such as Mexico and China, a likely source of conflict that could easily define the diplomatic relationship with these countries for years to come.

Last week, the Obama administration said it wouldn’t grant China the official title of a “market economy” at the World Trade Organization, a move that might significantly lower the punitive tariffs other countries could apply to China if the country violates agreed-upon trade terms. Trump has also indicated that he does not see China as a market economy.

The move has provoked a strong response from China, which launched a legal challenge under WTO rules.

Tillerson’s past support of the TPP may not be terribly surprising, given the pact's likely benefits for the U.S. energy industry. The trade pact could have resulted in an increase in U.S. exports of liquefied natural gas to Asia, due to increased access to Japan’s profitable market, Michael Levi, a senior fellow at the Council on Foreign Relations, wrote last year.

If his nomination is approved, Tillerson will not be alone in Trump's Cabinet in his previous support of the TPP. Wilbur Ross, Trump’s pick for commerce secretary; Iowa Gov. Terry Branstad, nominated to serve as Trump’s ambassador to China; and even Vice President-elect Mike Pence have all been past supporters of the deal.

Asian Envoys Urge Trump to Reconsider on TPP Trade Pact

http://www.nytimes.com/aponline/2016/12/13/us/politics/ap-us-trump-asia.html

By THE ASSOCIATED PRESS

DEC. 13, 2016, 2:25 P.M. E.S.T.

WASHINGTON — U.S.-allied Asian ambassadors on Tuesday urged President-elect Donald Trump to reconsider his opposition to the Trans-Pacific Partnership trade agreement and keep the U.S. engaged in Asia.

Ambassadors from Australia, South Korean and Singapore made the appeal at a Washington think tank.

The Obama administration championed the trade pact which was signed by 12 nations in February but has run into a wall of congressional and public opposition.

Trump has vowed to withdraw from TPP on his first day in office, calling it a "disaster" for American jobs.

Australian Ambassador Joe Hockey said, "America has to engage with Asia if it is going to be great," because that's where most global economic growth is happening.

"The fact that the U.S. was very involved in leadership of it (TPP) then could not deliver and has chosen now not to deliver is hugely damaging to the United States' reputation in Asia," Hockey said.

He said that in the meantime, Asian nations are focusing on an alternative trade pact supported by China, the Regional Comprehensive Economic Partnership.

South Korean Ambassador Ahn Ho-young acknowledged that anti-trade and globalization sentiment had surged during the U.S. election but said that in the long-term, all nations benefit from trade liberalization.

He said South Korea wants to join TPP if it progresses.

The three envoys steered clear of the controversy over Trump's recent pronouncements on China and Taiwan.

Singaporean Ambassador Ashok Mirpuri said that U.S. global leadership is needed in the Asia-Pacific, but Southeast Asian nations also want calm between the U.S. and China.

Japan, EU in Talks Seeking Free-Trade Deal by Year-End

http://www.nytimes.com/reuters/2016/12/14/business/14reuters-japan-eu-trade.html

By REUTERSDEC. 14, 2016, 12:54 A.M. E.S.T.

TOKYO — Japan and the European Union are holding last-ditch talks this week to try reach a broad free trade agreement by the end of the year, Japanese government officials said.

The two-way trade talks have taken on greater significance after U.S. President-elect Donald Trump said Washington would withdraw from the Trans-Pacific Partnership, a 12-nation deal Prime Minister Shinzo Abe has said is key to his reforms and once a pillar of Washington's pivot to the Asia-Pacific.

"Prime Minister Abe has said he aims to reach an agreement this year," said a trade official who declined to be identified because he was not authorised to speak to media.

Japan is seeking cuts in EU tariffs on Japanese autos, auto parts and electric devices. Tokyo also wants the EU to cut red tape it says Japanese companies face doing business with the EU.

The EU will likely scrap duties on about 80 percent of auto parts imported from Japan by amount of trade immediately after a bilateral accord goes into effect, but Japan wants further concessions, the Nikkei business daily reported on Wednesday.

Japan, for its part, could ease the process for foreign companies bidding on construction and materials procurement for public entities, the Nikkei said.

The EU wants Japan to scrap tariffs on agriculture products such as cheese and wine and lower duties on pork, according to the report. Brussels has also complained about non-tariff barriers to auto imports.

If the two can work out the framework for a trade deal, EU Trade Commissioner Cecilia Malmstrom will visit Japan next week for talks with Japanese Foreign Minister Fumio Kishida, the Nikkei said.

Tokyo last week ratified the TPP despite Trump's pledge to pull the U.S. out of the TPP pact, which does not include China.

(Reporting by Kaori Kaneko; Editing by Linda Sieg and Kim Coghill)

After Campaigning Against Free Trade Deals, Donald Trump May Make A Corporate Free Trade Lobbyists His Trade Negotiator

http://www.ibtimes.com/political-capital/after-campaigning-against-free-trade-deals-donald-trump-may-make-corporate-free

By Avi Asher-Schapiro On 12/16/16 AT 9:17 AM

In 2010, as the Obama administration worked to put the finishing touches on a free trade agreement with South Korea, Donald Trump called into Fox News and slammed the deal. "Only an idiot" would sign the pact in its current form, Trump told the hosts of Fox and Friends. “South Korea has treated us very badly,” he said.

Now, six years after Trump criticized the pact, a corporate lobbyist who worked on the deal may become the president-elect’s top trade negotiator.

On Monday, Wayne Berman, a Republican mega-donor and a longtime trade lobbyist, met with Trump in New York City. Despite federal records showing Berman lobbied on the deal for Chevron, Trump transition team officials told Politico that Berman’s name had been added to a list of potential appointees to become the next United States Trade Representative. That key cabinet post could play an outsized role in shaping economic policy for an administration that’s expected to make renegotiating trade deals a core priority.

Chevron was strongly supportive of the Korea pact, which makes for an awkward pairing of Berman and Trump. The crux of the president-elect’s message on trade — an issue he hammered away at throughout the 2016 campaign— is that the deals cut by previous administrations were crafted by narrow special interest groups and their lobbyists, without taking into account the priorities of American workers. Trump even went as far as to liken the pending Trans-Pacific Partnership trade deal — which is modeled on the U.S.-Korea Free Trade Agreement —to rape.

“It's a harsh word — it's a rape of our country,” he said. “This is done by wealthy people that want to take advantage of us.”

Berman’s potential appointment appears to undercut Trump’s promise to put worker’s interests front and center, says Robert E. Scott, the director of Trade and Manufacturing Policy Research, at the Economic Policy Institute.

“Trump said he was going to drain the swamp,” Scott told International Business Times. “But now he’s considering the kind of guy who lobbies for multinational corporations, then comes to Washington and works for those same companies on the inside.”

Berman has been through the revolving Washington door several times. He was an assistant secretary of commerce in the first President George Bush administration, went on to found his own lobbying firm and then worked for the second Bush administration as a senior advisor. For the past 4 years, Berman has worked as the in-house lobbyist for the private equity firm Blackstone.

Lobbying records reviewed by IBT show that before joining Blackstone, Berman was a prolific and well-paid lobbyist on trade issues. He has represented a range of corporations, including the American Petroleum Institute, the Carlyle Group, and Viacom, and lobbied to influence trade policies towards Russia, South America, and Korea.

In fact, when Berman was chairman of Ogilvy Government Relations, the lobbying firm was hired by companies like Chevron and Motorola to sway the very trade representative’s office he might be heading up in a Trump administration. Between 2006 and 2010, Ogilvy records detailing nearly $3 million of lobbying expenditures show Berman’s firm was specifically aiming to influence the trade representative.

In one instance, first reported by Politico in 2009, Chevron dispatched Berman as part of a team of lobbyists tasked with convincing Obama’s U.S. Trade Representative to pressure the government of Ecuador into relieving the oil company of liability from allegations that it dumped toxic waste into the Amazon.

Berman was also enlisted by Chevron to influence pending free trade negotiations between South Korea and the U.S. The deal, which was slammed by Trump on Fox, would open up Korean markets to U.S. companies, lower tariffs and provide corporations like Chevron avenues to resolve legal disputes with the Korean government.

Neither Chevron nor Ogilvy responded to IBT’s request for comment. It was not immediately clear what exactly Berman did behind the scenes for Chevron on the Korea trade pact. However, the oil giant has long been one of the largest U.S. based investors in South Korea. The company also helped found the U.S.-Korea Free Trade Agreement Coalition, an alliance of corporations that sought to influence the terms of the deal in their favor. While Berman was lobbying for Chevron, the company threatened to withdraw industry support for the deal unless certain “investor protections” — a mechanism for U.S. companies to shield themselves from liabilities in foreign courts — were inserted into the final copy.

When the trade pact faltered in Congress in 2010, Chevron applauded the Obama administration for pushing it through and predicted the deal would “advance the economic agendas of both countries, create jobs and spur economic growth.”

Since the free trade pact was finalized in 2012, Chevron has stepped up its investments in South Korea, inking a multibillion dollar natural gas agreement with the Korean company Hyundai. It also purchased $1.9 billion worth of floating oil equipment from Hyundai.

Critics of the deal, including the AFL-CIO, thought it rewarded companies for investing overseas.

“We've seen U.S. multinational companies take advantage of the investment and other corporate protections in past trade deals to shift production offshore,” AFL-CIO president Richard Trumka said back in 2010. “So long as these agreements fall short of protecting the broad interests of American workers and their counterparts around the world in these uncertain economic times, we will oppose them.”

That criticism was echoed by Trump on the campaign trail, where he railed against free-trade deals in general and singled out the Korea deal as a job-killer.

“Hillary Clinton supported and lobbied for the South Korea trade agreement, you know that one, that's been another disaster, on the promise of 75,000 new jobs. Instead, her trade deal destroyed 100,000 jobs, mostly in the auto industry,” Trump said during the rally in October.

Experts were divided on the Korea deal’s impact, but the EPI’s analysis supports Trump’s campaign-trial assessment. While the Obama administration and pact supporters like Chevron promised it would lead to more U.S. exports and generate domestic job growth, it never did, according to Scott from the EPI.

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“In the first four years after KORUS took effect, there was absolutely no growth in total U.S. exports to Korea,” Scott wrote in a report assessing the deal 4 years after its implementation. “Imports from Korea increased $15.2 billion, an increase of 26.8 percent. As a result, the U.S. trade deficit with Korea increased $15.1 billion between 2011 and 2015, an increase of 114.6 percent, more than doubling in just four years.”

That trade deficit was the equivalent of eliminating 100,000 American jobs, according to the Obama administration’s own method for translating trade deficits into job losses.

If Trump names Berman the next U.S. Trade Representative, one of Berman’s prime responsibilities will be to assimilate the input of the more than 500 members of the various Trade Advisory Committees, which the government consults on trade deals. The committees are currently dominated by industry groups — and some, like the American Petroleum Institute, are former Berman lobbying clients.

Berman is not the only candidate for U.S. Trade Representative. Trump is also reportedly considering David McCormick, who heads up the private equity firm Bridgewater Associates, Dan DiMicco, a former steel industry CEO and Robert Lighthizer a former Reagan administration trade official.

A Plan B for the TPP trade pact

http://www.bangkokpost.com/opinion/opinion/1163865/a-plan-b-for-the-tpp-trade-pact

- 20 Dec 2016 at 04:05 929
- NEWS | WRITER: DANIEL BOB

Japanese Prime Minister Shinzo Abe was the first foreign leader to meet US President Donald Trump in New York, in early November. (File photo)

Since Dec 9, Japan has become the first country that ratified the Trans-Pacific Partnership trade agreement, which includes the United States and other countries representing almost 40% of global gross domestic product (GDP). As a group, Japan and those other nations represent the largest market for US exports of goods (44%) and services (27%) in the world. If the agreement were to go into effect, it would boost American growth and job creation, spur Japan's structural reforms, enhance regional confidence in America's commitment to the Asia Pacific, bolster US-Japan relations, and reinforce US and Japanese regional leadership.

Yet Washington is poised to withdraw from the agreement with no ready alternative available. One that holds great promise, however, is a bilateral free trade agreement between Japan and the United States.

Both US presidential candidates opposed TPP, so the chances of the trade deal's passage were always slim. On Nov 21, that slim chance effectively disappeared when President-elect Donald Trump announced in a video message that he would withdraw the US from the agreement on his first day in office, and instead seek "fair bilateral trade deals".

Key members of Congress, including Senate Finance Committee Chairman Orrin Hatch and House Ways and Means Committee Chairman Kevin Brady, have responded by stressing the need for US engagement in Asia and new trade initiatives that enhance US global competitiveness, while others, such as Senate Armed Services Chairman John McCain, have focused on a new US trade agenda for the Asia Pacific for national security reasons. Some TPP member countries have called for a revision to the agreement that would allow it to come into force without the United States, but Japanese Prime Shinzo Abe has labelled such plans "meaningless".

The concern over the president-elect's decision on TPP reflects the agreement's economic and geopolitical significance for the United States, Japan and the broader Asia Pacific. TPP would have constituted a major advance in eliminating or reducing tariff and non-tariff barriers to trade in most goods and services as well as barriers to cross-border investment, and would have addressed such challenges as the rise of the digital economy and state-owned enterprises, even as it included economies in widely different stages of development. Moreover, the agreement would

have been open to new members able to meet its high standards, thus providing the best platform for regional economic integration.

For the US, TPP also represented the majority of the non-military rebalance to Asia; and so a US withdrawal could exacerbate existing scepticism in the region over America's true commitment to Asia.

For Japan, TPP served as a centrepiece both for the country's regional economic agenda and its domestic economic reform. The Regional Comprehensive Economic Partnership (RCEP), led by China and includes Japan but not the US, provides an alternative regional trade agreement for Tokyo, but one with lower standards that neither furthers Japan's interest in playing a leading role in writing the rules for twenty-first century trade in Asia nor provides impetus for the reforms the country needs to sustain its economy.

China is pushing for RCEP's early completion; Beijing is also seeking a Free Trade Area of the Asia Pacific that will align with its ambitious One Belt, One Road initiative, which aims to bolster its economic influence across Asia into Europe and Africa, and its new Asian Infrastructure Investment Bank, which stands ready to help finance many of the projects Beijing needs to achieve its goals.

Meanwhile, Japan is pursuing an economic partnership agreement with the EU -- and aiming for its completion by the end of the year -- as well as a trilateral Japan-ROK-China trade agreement. None of these trade deals, however, would advance Japanese interests in ways comparable to TPP, and none include the US. Indeed, in the absence of a credible alternative to TPP that includes both Washington and Tokyo, China will have a clear path toward undisputed regional economic leadership -- with follow-on political and security repercussions for the US, Japan and the rest of the Asia Pacific.

Are there alternatives to TPP for the US and Japan? One that holds most promise, as Sen Hatch has suggested, is a bilateral trade deal between them. The two countries represent four-fifths of the total GDP of TPP's member states, and many of the elements of such a deal could be drawn from the existing TPP text.

A bilateral pact would also demonstrate that the US commitment to the region remains intact, provide impetus for the structural reforms Japan seeks, and reinforce critical bilateral ties.

Tokyo has responded warily to the idea, however, fearing the anti-trade sentiment that took centre stage during the US presidential election would find a single target in Japan.

The country's leaders have not forgotten the bilateral trade tensions of the late 1980s and early 1990s, particularly as recent anti-Japan rhetoric appeared unexpectedly -- and untenably -- eerily similar to that of a quarter century ago.

Japanese concerns cannot be dismissed, but they can be allayed to some extent if the incoming Trump economic team acknowledges the enormous strides made in US-Japan trade relations over the past quarter century. Just as important, the president-elect should revisit his statements about Tokyo not providing a fair share of the costs of US troops based in Japan by acknowledging the benefits America derives from their forward deployment and by recognising that Japan contributes more toward the costs of the US troops it hosts, by far, than any other US ally.

More broadly, the incoming administration and leaders in Congress should address some of the legitimate concerns Americans have over trade. The benefits of trade easily outweigh the costs, but even as many gain from jobs created by increased exports and even more from lower prices of goods and services, some will lose out. We must not ignore their plight. Indeed, we must take steps to help them develop new skills and find new opportunities in an ever more interdependent world.

At the same, the American public needs to understand that the number of manufacturing jobs eliminated because of free trade agreements pales in comparison to those lost due to technology and new, less labour-intensive manufacturing techniques.

A US trade agreement with Japan, coupled with responsible and effective trade adjustment assistance, would support growth and job creation in both countries, reinforce US and Japanese economic leadership in Asia, enhance regional integration, and provide a viable alternative, not just to TPP, but also to China's mercantile approach to trade and zero-sum view of international affairs.

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IDSA COMMENT

Japan's Trump Dilemma

Institute For Defense Studies and Analysis

http://www.idsa.in/idsacomments/japan-trump-dilemma_tbasu_20122016

Print

Titli Basu

December 20, 2016

In the wake of Donald Trump's election as U.S. president, Japan is weighing the geopolitical and geo-economic implications of the new economic and security policies that his administration may adopt. While the alliance with the U.S. has lain at the heart of post-war Japanese foreign and security policy, Trump's emphasis on "America first" and his reservations with regard to alliance commitments have made Tokyo deeply anxious.

Geo-economics: TPP and beyond

Early signals indicate that the Trump administration is likely to depart from Obama's pivot or rebalance to Asia. The most important indicator in this regard has been Trump's description of the Trans-Pacific Partnership (TPP) – often touted the economic pillar of the pivot – as a "potential disaster" and his declared intent to withdraw from it upon assuming office in January 2017. Japan is hesitant to process the harsh reality of such an impending U.S. decision, continuing to argue that the TPP is not "completely dead".[1] As the second-largest economy in the TPP after the U.S., Japan hurriedly ratified the free trade agreement in an extended session of the Diet, making it the only member country to do so. But Japan is likely to find it extremely difficult to convince other countries to ratify the TPP in its present form. Even Abe himself had earlier acknowledged that a TPP without the US market is "meaningless".[2]

Whether TPP fades away or emerges in a new shape remains to be seen. But Japan cannot afford to let go of the TPP easily. Abe in particular considers TPP as an essential mechanism to capitalise on the Asia-Pacific's growth potential and revive Japanese economic development. He considers TPP as a base for Abenomics and for

his trade strategy. World Bank assessments indicate that, with TPP, Japan's growth rate is likely to increase by an additional 2.7 per cent by 2030,[3] with exports rising by USD 23.2 billion annually.[4] Consequently, Abe has invested considerable political capital to overcome resistance from the farm lobby to the TPP.

Earlier in November, in an attempt to highlight the advantages of the TPP, the White House's Council of Economic Advisers pointed out that Washington would have to sacrifice significant economic gains and suffer trade diversion as well as lesser market access in comparison to China if the TPP were to be dropped. Moreover, 35 U.S. industries that export a combined USD 5.3 billion worth of goods to Japan are likely to witness a loss of market in comparison to Chinese contenders due to tariff cuts under the Regional Comprehensive Economic Partnership (RCEP) that is being negotiated.[5] Jason Furman has argued that in a scenario where the TPP does not fructify and China manages to bring RCEP into effect, the U.S. will be adversely affected. [6]

But with Trump seemingly determined to drop the TPP, Japan is being pushed into seriously reconsidering and prioritizing other opportunities including the 16-nation RCEP, and negotiating free trade agreements with other partners such as the European Union and a trilateral China-Japan-South Korea FTA. While Japan is a member of the RCEP, it has certain reservations towards this mega-regional trade deal, which lacks the "gold standards" of the TPP in protecting intellectual property rights and does not insist upon state-owned enterprises following strictly commercial practices. Even more importantly, RCEP excludes the U.S., which provides China – the world's second largest economy – a greater role in shaping this regional trade arrangement.

As far as the U.S. is concerned, Trump is an advocate of negotiating "fair bilateral trade deals that bring jobs and industry back onto American shores".[7] Trump's designate as Commerce Secretary, Wilbur Ross, has also categorically stated in a letter to the Japanese Finance Minister Taro Aso that his focus would be on strengthening bilateral economic ties. However, drawing from its own experience in the 1980s and 1990s on the size and composition of the trade deficit and issues of market barriers, Tokyo is likely to be cautious when it comes to negotiating a bilateral free-trade agreement with the U.S.

While Japan pushed hard to conclude a broad free trade agreement with the EU by 2016 in the wake of Brexit and Trump's posture on TPP, negotiations are most likely to continue into early 2017.[8] Here, it is important to note that negotiators would also have to overcome a rift concerning tariff issues and operational safety clause. Britain has until now served as Tokyo's platform for trade and investment in the broader EU single market. With Brexit, Japan faces a new urgency in concluding a free trade agreement with the EU.

Geopolitics in the post-rebalancing era

Japan requires the U.S. alliance more than ever given the evolving regional security dynamics marked by an increasingly defiant North Korea claiming to possess miniaturised nuclear warheads and aggressive Chinese strategic ambitions in the East and South China Seas. Moreover, with the region getting engulfed in history issues and intensified nationalism, Japan is locked in sovereignty disputes with most of its neighbours including, Russia, China, South Korea, and Taiwan. Even as Japan invests energy on regional diplomacy, the Abe administration managing to bridge the trust deficit in Northeast Asia appears to be a remote possibility. With Chinese adventurism in the East China Sea, Russian deployment of the state-of-the-art anti-ship Bastion missile system and the Bal system in Etorofu and Kunashiri Islands, respectively, and a North Korean ballistic missile landing in Japan's exclusive economic zone, Japan is increasingly looking for reassurance from the U.S. under Article 5 of their security treaty.

While Japan seemingly prefers Republican Presidents,[9] this time around it desperately hoped for a Hillary Clinton administration which would have ensured continuity instead of the uncertainties surrounding the U.S.'s Asia policy under a Trump presidency. Clinton was the key architect of the rebalancing strategy. In 2011, she had argued that the security alliances with Japan, South Korea, Australia, the Philippines, and Thailand constitute the fulcrum of U.S. efforts in the Asia Pacific. In contrast, the Trump campaign had categorically articulated the candidate's dissatisfaction with Japan on the issue of burden-sharing within the alliance.[10] The Trump campaign perceived the alliance with Japan as costly and one-sided despite Tokyo reportedly sharing 48.3 per cent of the costs involved.[11] The direct cost of stationing U.S. forces in Japan is valued at USD 5.47 billion for fiscal 2016. Japan shelled out USD 1.7 billion for direct sustenance of the base in fiscal 2015. Besides,

Japan has decided to devote USD 3.1 billion for the relocation of 4,000 U.S. troops to Guam, accounting for 36 per cent of the estimated cost of USD 8.6 billion.

Trump's rhetoric during the campaign was very critical of the asymmetrical partnership between the U.S. and Japan. However, campaign rhetoric does not necessarily translate into concrete policy. Candidate Trump and President Trump are unlikely to talk or act in the same manner. Be that as it may, Trump did terrify Japan when he argued that the U.S. should be "prepared to walk"[12] and Tokyo consider defending itself against Pyongyang. In addition, Japan's nuclear sensitivities and crusade against nuclear proliferation received a shock when Trump suggested that a nuclear Japan may not be a bad idea.[13] This stand was contrary to the April 2015 Joint Statement of the Security Consultative Committee (2+2) meeting, which articulated the case of "ironclad U.S. commitment to the defense of Japan, through the full range of U.S. military capabilities, including nuclear and conventional".[14]

While Japanese Defence Minister Tomomi Inada stated during Defence Secretary Ashton Carter's December 2016 visit that the debate should be centred on shared security capabilities rather than financial burdens, uncertainty looms large in the wake of Trump's election. The debate on burden sharing within the alliance is hardly a new issue. Tokyo has long been pushed by the U.S. to assume a greater role within the alliance instead of being a 'passive free rider'. For instance, the October 2000 Armitage Report pointed out that "Japan's prohibition against collective self-defence is a constraint on alliance cooperation. Lifting this prohibition would allow for closer and more efficient security cooperation".[15]

The burden sharing issue has been widely debated in the U.S. strategic community since the Cold War years. Japan opted for the Yoshida Doctrine as an effective approach to escape entrapment in the US-Cold War scheme of things. This enabled Japan to focus solely on its economic development and spend minimally on defence while relying on the U.S. security umbrella. However, with the trade wars intensifying with the U.S. and the fear of abandonment gripping the leadership, Japan has over the decades incrementally expanded its role and redefined its security identity with overseas deployment of Self Defence Force (SDF). Now with a fast altering East Asian security setting, Japan has initiated a fresh debate on the scope of Article 9 and taken definitive steps in assuming greater responsibilities with the enactment of the 2015 Legislation for Peace and Security. The year 2015 also saw Abe demonstrating willingness to accept greater responsibilities within the framework of the US-Japan

security alliance by revising, after 18 years, the Guidelines for US-Japan Defence Cooperation.

Road Ahead

Japan worries that in case the U.S. refrains from playing a major role in the regional architecture building process, China will have an easier path in crafting a Sino-centric order in the Asia-Pacific.16 Such a development is likely to prove to be a monumental challenge for Japan as geopolitical and geo-economic uncertainties intensify regional complexity. With Washington opting for a more inward-looking policy, it will be increasingly problematic for U.S. allies to persuade their security provider of the need to maintain the alliance network in its existing form. While Japan's decades-old alliance with the U.S. is likely to stand the test of time since it is mutually beneficial, Tokyo certainly will have to deliver more than it is used to in order to convince President Trump that Japan is not a liability but an asset as an ally.

Since the Asia-Pacific region is emerging as the epicentre of economic growth, Trump is likely to remain invested in the region. While the U.S. will continue to work closely with its long term partners in the region, Trump may reorient the nature of the asymmetrical alliance partnerships in Asia. Besides, what shape other important bilateral relations such as the U.S.-China, U.S.-Russia, U.S.-Korean Peninsula and U.S.-ASEAN relations take under President Trump will also determine the U.S.'s overall approach towards this region. As Japan adapts to the new geo-strategic and geo-economic realities in the midst of profound changes unfolding in the global power structure, its strategic choices in turn will play a crucial role in shaping the East Asian security environment.

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RCEP won’t replace TPP, but can strengthen trade

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Whether the Trans-Pacific Partnership (TPP) comes to a complete stop or enters into dormancy remains an open question. The TPP was signed by the 12 member nations early this year and its full text became available to the public one year ago, and after being reviewed intensely it clearly is the highest-standard free trade deal ever. However, the trade deal has encountered setbacks and with the TPP temporarily held down by US President-elect **Donald Trump**'s statement of intent to withdraw, could there be a chance that the Regional Comprehensive Economic Partnership (RCEP) will replace the TPP?

Recently, the 16th round of RCEP talks concluded a chapter concerning small and medium-sized enterprises (SMEs). This marks another substantial step following the end of negotiations over economic and technological cooperation. In light of this, RCEP talks are likely to wrap up in 2017. Worth pointing out is that the countries that both signed the TPP and are participating in RCEP talks, including Brunei, Malaysia, Singapore, Vietnam and Japan, might possibly pivot toward the RCEP to push for trade liberalization given the TPP's bleak outlook.

With the global economy and trade still sluggish, the RCEP's finalization in the shortest possible period of time would convey a positive signal that trade liberalization will continue. But it can't be said it will supplant the TPP.

First, the texts reveal a critical difference between the two trade deals. The RCEP is indicative of an action in progress versus the finished action described by the TPP. The TPP scales up the current trade rules of the WTO, especially in areas including state-owned enterprises and designated monopolies, SMEs, e-commerce and regulatory coherence. As such, it lives up to its reputation as the highest-standard new free trade deal in terms of both breadth and depth. Therefore, even if the TPP dies on the day Trump is sworn in, the standards it set, which have already become the template for global trade rules, will still essentially lead the way in building the new trade and investment paradigm worldwide. Since the first round of TPP negotiations in 2009, participating countries have modified and revised their domestic laws in accordance with the negotiated terms. Even in the US, Trade Promotion Authority legislation was signed by President Barack Obama. While it is a concern that the TPP might fail to be ratified in the US, it's not a castle in the air for the world's largest economy.

Second, in comparison with the TPP's high standards, the RCEP only covers traditional areas, with an emphasis on goods trade, and is incapable of covering labor and environmental standards at its current stage. More so, the RCEP chapters on economic cooperation and SMEs simply follow the TPP but with lower standards. The reason lies in the varying goals of the two trade pacts - the TPP signifies an attempt by developed economies to revise current international trade and investment rules so as to set the future trend of global trade, while the majority of members in the RCEP are

developing countries and underdeveloped countries which are seeking to hug each other to get warm. The two regional trade agreements won't replace or substitute one another considering the different goals they pursue. Overall, the RCEP is far from reaching the levels of openness advocated by the TPP. Hence it is too early to conclude that the RCEP will overtake the TPP.

Last, the finalization of the RCEP seems to be easier in reality, as the trade pact allows new issues to be covered with the addition of new member countries. The TPP, however, will only accept new member countries based on its existing issues and standards. The RCEP and the TPP were to serve as a stepping stone for the Free Trade Area of the Asia-Pacific (FTAAP), but considering the low likelihood of TPP ratification, the RCEP may play a bigger role in facilitating the FTAAP.

To be fair, no free trade talk ensures a smooth sailing, particularly ones involving different types of economies and diversified political and cultural regimes. Uncertainties throughout the RCEP talks include issues such as the fact that the 10 Association of Southeast Asian Nations members are comparatively behind in terms of economic development, Japan and South Korea as developed countries might not be satisfied by the RCEP promising only low levels of openness, and India might have concerns over whether the trade deal sufficiently appeals to its interests. It is also unclear whether China has enough wisdom and courage to speed up the negotiations to quickly wrap up the trade deal.

Coordinated efforts by all participating members lie at the heart of the RCEP's conclusion next year. And regardless of the TPP's outcome, the RCEP won't likely replace it either realistically or theoretically. Instead, the two trade deals will help advance trade liberalization across the globe.

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https://www.buzzfeed.com/chrishamby/not-just-a-court-system-its-a-gold-mine?utm_term=.ntL4nOlL3#.ddmyWw94K

Not Just A Court System, It's a Gold Mine

Buzzfeed, 8/31/16

By Chris Hamby

In 2006, near the height of Wall Street's disastrous speculative frenzy, some of the world's biggest banks smelled an opportunity.

They saw a way to turn the soaring price of oil into hefty profits. And it involved the tiny island nation of Sri Lanka.

The bankers presented officials who ran the state oil venture there with a way to hedge against further price hikes.

What the banks were selling were derivatives, an often complex and risky type of financial instrument that became associated with the financial crisis. They amounted to a bet on the price of oil, but it was a lopsided bet. The banks — including giants such as Citibank, Deutsche Bank, and Standard Chartered Bank — bore very little risk. The risk for Sri Lanka, if the price of oil fell, was potentially catastrophic.

One Standard Chartered executive found the terms to be so "one sided" that she actually refused to sign off on the transaction, protesting to her colleagues that it could cause "unbearable losses" for the already-struggling oil venture, according to a sworn statement she later gave. But one of her bosses, she said, ridiculed her in a meeting and told her not to stand in the way of several million dollars of profits.

The deal went through, and the other banks struck similar arrangements. Then, instead of rising, the price of oil crashed. The Sri Lankan state company found itself forced to pay the banks millions. Sri Lanka's Supreme Court ordered a temporary freeze of payments while authorities scrutinized the deals.

Deutsche Bank's response was swift. It had already made more than $6 million on the deal, but it demanded to be paid more — much more. More than $60 million, which was 24 times more than the bank ever could have lost on the deal.

Deutsche Bank didn't bother pressing its case in Sri Lankan courts or even in the business-friendly English court where the bank and the state oil company had agreed in their contract to settle disputes. Instead, the bank pursued an audacious strategy. It turned to a powerful worldwide legal system and commandeered it for a novel purpose: helping financiers profit from some of their most controversial and speculative practices.

It was a gamble, but it worked; the tribunal accepted the case. This breakthrough came as a delightful surprise to some lawyers around the world who specialize in this legal system, known as investor-state dispute settlement, or ISDS. They saw in it not just a single judgment, but also a lucrative new horizon for the financial industry.

"I admire the boldness of counsel and the vision of the management of Deutsche Bank to opt for investment arbitration at a time when there were no precedents," said Georges Affaki, a lawyer with a large ISDS practice. Calling the case "a huge step," he said he is leading an International Chamber of Commerce task force to advise financial firms on how they can use ISDS.

An 18-month BuzzFeed News investigation reveals how the financial industry is elbowing its way inside the doors of this global super court, transforming a system of justice into an engine of profit. Spanning three continents, more than 200 interviews, and thousands of pages of documents, the investigation has already shown how executives have used ISDS to help escape punishments for crimes they were convicted of committing, and how the system is so powerful and tilted that the mere threat of an ISDS suit can intimidate nations into rolling back their own laws. Now, it shows how the financial industry, once largely absent from the system, is increasingly pressing ISDS claims, often against nations that are poor or in the throes of economic crises.

Enshrined in thousands of trade and investment treaties such as the North American Free Trade Agreement, ISDS was designed as a careful bargain. Poorer nations needed foreign businesses to invest in projects that could spur economic development — bridges, pipelines, mines, factories — but foreign businesses needed a stable, independent legal system to protect them from rogue politicians and biased local courts.

The solution was ISDS, a form of binding arbitration that was granted exceptional power. Countries often must give its rulings the same deference as those from their own highest courts, and there is effectively no means of appeal. The system was meant to be available only to those companies that had invested the time and money to create something of broad economic value.

But over the past two decades, corporate attorneys have stretched the parameters of ISDS, allowing banks, hedge funds, and private equity firms to shatter the careful bargain that participating nations thought they had made. Indeed, financiers and ISDS lawyers have created a whole new business: prowling for ways to sue nations in ISDS and make their taxpayers fork over huge sums, sometimes in retribution for enforcing basic laws or regulations.

In South Korea, for example, a US private equity firm and a Middle Eastern investment fund bought and then sold companies at a large profit. When the Korean government tried to tax these gains, both firms ran to ISDS arbitrators, alleging violations of international treaties. Both cases are ongoing. The US firm declined to comment, and the Middle Eastern fund did not respond to requests for comment.

The financial industry is pushing novel ISDS claims that countries never could have anticipated — claims that, in some instances, would be barred in US courts and those of other developed nations, or that strike at emergency decisions nations make to cope with crises. When Spain, in

the throes of economic distress, announced it would reduce subsidies to the solar energy industry, more than 2o businesses — many of them investment funds associated with big banks or venture capital firms — brought ISDS claims alleging that the government had broken its promises and rendered their investments unprofitable.

To be sure, some cases involving financial firms are straightforward. Sometimes countries do mistreat the companies that operate within their borders, deliberately doing harm in order to favor domestic competitors, exact political revenge, or brazenly steal profits. Pointing to such cases, defenders of ISDS insist it is a crucial check on rogue acts by autocratic or corrupt regimes.

But critics say that ISDS is vulnerable to exploitation by elite corporate lawyers and their financial-industry clients. The three-person arbitration tribunals that decide the cases tend to be made up of corporate lawyers; they may argue for a company in one case and sit in judgment in another. And they are not bound by precedent; they have broad license to interpret the rules however they want. Most of the time, not even transparency serves as a check on their power, because hearings, evidence, and, in some cases, the judgments themselves remain secret. And the field is tilted in yet another way: Only companies can bring an ISDS suit. Countries cannot sue the companies that operate within their borders. They can only try to defend themselves, which typically costs millions of dollars.

ISDS gives particular leverage to traders and speculators who chase outsize profits in the developing world. They can buy into local disputes that they have no connection to, then turn the disputes into costly international showdowns. Standard Chartered, for example, bought the debt of a Tanzanian company that was in dire financial straits and racked by scandal; now, the bank has filed an ISDS claim demanding that the nation's taxpayers hand over the full amount that the private company owed — more than $100 million. Asked to comment, Standard Chartered said its claim is "valid."

This tactic is especially damaging to nations battling an economic crisis or struggling to lift their people from endemic poverty. Companies in crisis can declare bankruptcy, forcing the debt collectors to back off, but countries can't do this, which can lead to a feeding frenzy.

The World Bank and the International Monetary Fund have a debt-forgiveness program for impoverished nations. When a country in crisis owes more than it can pay, international organizations often coordinate a negotiation in which all creditors share the pain.

ISDS, however, allows investors to pull an end run around these efforts and demand that their one debt get paid no matter what. They remove their claim from a public process — one that weighs the interests of the population that stands to suffer — and instead place it before a private tribunal designed only to protect the investor.

Michael Waibel, a lawyer specializing in international economics, warned in a 2006 legal journal article titled "Opening Pandora's Box" that allowing creditors to use ISDS could "blow a hole" in the crucial negotiations that allow nations to emerge from crises.

Nonetheless, in 2011, a panel of arbitrators did just that. After Argentina plunged into economic free fall, the government negotiated a restructuring deal. But a group of investors rejected the deal and went to ISDS, arguing that Argentina was negotiating in bad faith.

The tribunal allowed the case to go forward, prompting Georges Abi-Saab, the arbitrator appointed by Argentina and a veteran international lawyer, to resign from the case. In a scathing dissent, he warned that allowing creditors to use ISDS in this way opened a "vast new field" of litigation in support of "all manners of financial transactions, including the most speculative varieties." These deals, he said, were "light years away from the economic investment" that ISDS was designed to protect.

Within ISDS circles, some worried that case had handed a bazooka to so-called "vulture funds" — predatory investors who buy bad debt for pennies on the dollar and sue to collect the full amount.

Even some ISDS lawyers and arbitrators think that using the system for this purpose is going too far. "I see it as a new form of investing, which is, let's make them poorer, and we'll get rich," said Mark Cymrot, an attorney at BakerHostetler. "I find that to be economically inefficient and geopolitically dangerous."

Many ISDS lawyers defend the new types of claims they're bringing for the financial industry. At issue, they say, is basic fairness: Countries should keep their promises and pay their debts.

"It's rather an old-fashioned view to say that an investment has to have only a physical, bricks-and-mortar characteristic," said Matthew Gearing, the global co-head of international arbitration at the firm Allen & Overy and one of the lawyers who represented Deutsche Bank against Sri Lanka.

But Abi-Saab said these cases go far beyond the natural evolution any legal system undergoes. "It has reached the point that the system has lost its legitimacy," he told BuzzFeed News. This new species of case, he said, is "a kind of speculation in order to suck the last cent or the last drop of blood of poor countries."

The man tasked with shielding Sri Lanka from high oil prices was already famous — as a star in the nation's favorite sport, cricket. Ashantha de Mel went on to a career as a manager for clothing manufacturers before he took on a new role: leading the state-owned oil venture. He had been on the job only a few months when he found himself sitting across the table from some of the world's leading banks, negotiating complex financial deals.

His experience in high finance? Pretty much just playing the stock market, he told BuzzFeed News. He didn't even have consultants to help him, noted one Standard Chartered executive in

an internal email. In fact, the bank executive warned that "they really need expert and disinterested advice on this subject."

The banks were happy to oblige. They whisked him on trips around the world — Deutsche flew him to Singapore, others to trading floors in New York and London, and an oil refinery in Houston. Standard Chartered hosted de Mel and his family at a conference in a beach-resort city in India, and the bank later gave his daughter an internship — unpaid and only for a month, de Mel told BuzzFeed News, dismissing any notion of undue influence as "just bogus."

The jaunts were intended to educate de Mel on how derivatives work, the banks said. "We learned quite a lot" from the trips, de Mel said. "We were relying on the banks."

De Mel generally didn't read the whole contract before signing, he later admitted. But he told BuzzFeed News that he understood most everything about the deals, except for one detail: Sri Lanka couldn't get out if they went south. "They didn't explain that," he said.

When the price of oil cratered and the deals blew up in his face, de Mel resigned but denied any wrongdoing.

Sri Lanka's Central Bank investigated the deals. It ended up faulting the state oil venture for skirting normal government procedures and entering the deals without the authority to do so. But it also faulted the banks, accusing them of failing to tell the company just how risky the deals were. Moreover, it said, the banks failed to perform due diligence on whether the Sri Lankan venture had the authority to make the deals or the ability to cover potential losses. The Central Bank concluded that the deals were "substantially tainted" and ordered an end to all payments.

Deutsche Bank wanted the $60 million it said it was owed, and ISDS offered by far the best way to help it collect. Thanks to the international treaties that established the system, failure to heed ISDS rulings can carry such severe penalties that even combative countries usually comply. Nations that try to ignore ISDS decisions risk not only having their assets seized but also losing out on much-needed loans and access to global markets.

"It could have a major impact on the macroeconomics and the finance of that country," said Kenneth Reisenfeld, an international lawyer based in Washington, DC.

The main obstacle for Deutsche Bank, however, was getting access to ISDS.

The treaties and conventions that created the system generally contain lofty language about promoting economic development. The original purpose was to protect businesses that had built something of enduring value — protection that apparently had never been granted to a derivative.

What's more, by the time the bank filed its claim in 2009, the very thing it stood accused of doing — hawking complex derivatives to people who couldn't afford the downside and who

hadn't been given fair warning of the risks — had become synonymous with the global financial crisis and the enormous bailout it occasioned. Deutsche Bank itself, through the bailout of AIG, would receive more than $11 billion from US taxpayers.

Two of the three ISDS arbitrators, however, found that the derivative the bank had sold Sri Lanka was not risky speculation but a "substantial contribution" that had "substantial economic value to Sri Lanka" — meaning it qualified for protection under ISDS.

They also blasted Sri Lanka's Supreme Court and Central Bank: The government's actions were bad-faith attempts to get out of paying a debt. But the third arbitrator, the one appointed to the panel by Sri Lanka, sharply disagreed. In his biting dissent, Makhdoom Ali Khan, a veteran international lawyer and former attorney general of Pakistan, wrote, "This is an extra-ordinary finding without any credible evidence to support it."

"The rational[e] underpinning the entire system of investment treaty arbitration is a quid pro quo between private foreign investors and host countries," he added. "The former seek profitable avenues for investing their resources and the latter seek investment for their economic development." The majority's decision, he wrote, threw that bargain out the window.

Regardless, Sri Lanka was ordered to pay Deutsche Bank not only the $60 million plus interest it had demanded but also the roughly $8 million in legal fees the bank's London-based lawyers had racked up. Sri Lanka applied to have the award annulled. But this type of review is extremely limited — it's not an appeal — and very rarely successful.

Weeks after BuzzFeed News first approached Deutsche Bank for comment, a spokesperson sent an email saying that the bank had settled with the Sri Lankan state oil venture. In response to a detailed summary of the story, a bank spokesperson said only that "Deutsche Bank disagrees with several of the inferences, conclusions and statements." The spokesperson declined to provide any specifics.

Standard Chartered noted that it took its dispute with Sri Lanka to a British court, where it won. Citi, which declined to comment, went to yet a third forum, a type of arbitration for disputes between companies. It lost. The Sri Lankan state oil company did not respond to repeated requests for comment.

At the time the ISDS tribunal issued its decision, in 2012, the settlement with Deutsche Bank was nowhere on the horizon. By a majority vote, the tribunal had extended ISDS's extraordinary protection to include a paper transaction that had been in effect for just 125 days — during which Deutsche Bank paid the Sri Lankan oil venture about $35,000 and the Sri Lankans paid the bank about $6.2 million.

While that landmark decision helped open ISDS to new kinds of financial claims, entrepreneurial lawyers and financiers are now devising even more ways to profit from the system.

The oil-industry lawyers gathered at a Houston law office to hear a trio of financiers deliver a presentation titled "Do You Want Someone Else to Pay Your Legal Fees? It's Possible."

No longer did a company's legal department have to be a budget drain; it could become a moneymaker, said the financiers, beaming in by videoconference from New York and Chicago. International arbitration — for ordinary claims against other companies as well as ISDS claims against governments — had exploded in popularity in recent years, but some opportunities seemed too expensive to pursue.

The financiers had a solution: "third-party funding," a fast-growing, secretive, and controversial field of investing in lawsuits, footing the legal bills in exchange for a cut of the eventual award. Attracted to ISDS by the staggering sums in play, financiers have created an increasingly sophisticated marketplace around the claim itself.

"We try to look at all of the different ways you can make money out of this," said Peter Griffin, a London-based lawyer and consultant who works with companies and funders.

The New York hedge fund Tenor Capital Management just scored big by injecting $36 million into a small Canadian mining company in exchange for, among other things, 35% of whatever arbitrators awarded in the company's ISDS claim against Venezuela. This year, a tribunal ordered that country to pay a whopping $1.4 billion. Tenor did not respond to repeated requests for comment.

Sometimes, a funder will wait until an ISDS panel has actually issued its ruling, then buy the award outright. According to brokers and lawyers who said they've been involved in such deals but were not authorized to provide details, an investor — often a savvy hedge fund — buys the award before the government has paid it. The investor might pay $20 million for a $100 million award, then hound the government to collect the full payout.

"One of the attractions for some of these folks," Griffin said, is anonymity: "They kind of hide behind the entity that's suing."

Indeed, one such deal came to light only when WikiLeaks released tens of thousands of US diplomatic cables. One of those cables described how Blue Ridge Investments LLC, a Bank of America subsidiary, bought an almost $180 million ISDS award that an American gas company originally had won against Argentina. Blue Ridge, the cable said, was rumored to have paid roughly 30% of the award's value.

"'Vulture fund' Blue Ridge belongs to a new class of financial market players" that views ISDS "claims against Argentina as just another attractive class of assets to be appropriately discounted and traded," a diplomatic officer in Buenos Aires wrote. Blue Ridge's parent company, Bank of America, declined to comment.

Griffin said he expects large trading houses will soon emerge to trade ISDS and other legal cases "on an industrial scale." Indeed, the industry seems to be moving in this direction already with firms such as ClaimTrading, which promises "secure immediate access" to "several billions of

USD" to underwrite lawsuits. A managing director at the firm, John Mooren, said it connects clients looking to sue with the best-matched funder from a list of more than 30 financial institutions with which the firm often does business.

The rise of this new industry means that nations can suddenly find themselves pursued by debt collectors with vast legal resources. Large financial companies aren't likely to go away, no matter how long it takes. Indeed, Griffin said his firm helps investors put together "a playbook" with "a plan of escalation" that often includes suing to seize assets around the world, intervening in other deals the country wants to get done, and launching a PR campaign.

Another option for companies that want to make sure they get paid: Buy an insurance policy that kicks in if a government resists forking over the amount ordered by the tribunal. The insurance company will take it from there, thanks to a policy arranged by leading brokerage Arthur J. Gallagher & Co. The insurer pays the company — either the full amount of the award or just part of it, depending on the terms of the policy — then pressures the country to pay. Steve Jones, an executive with Gallagher, declined to provide specifics but said it had arranged policies for cases against impoverished countries "with some of the lowest GDPs in the world."

When third parties invest in ISDS suits, critics say, new and difficult-to-unearth conflicts of interest can arise. Financiers that fund ISDS claims have enticed some arbitrators and attorneys to consult for them or even to join their staffs. Because funding arrangements generally haven't been disclosed, critics worry that arbitrators might have a vested interest in a claim they are tasked with deciding, or that an outside funder may have bankrolled a separate claim in which the arbitrator acted as counsel.

The biggest concern, though, is that access to all of this "litigation capital" could encourage more and more ISDS claims that have little merit or that are downright abusive. Some funders attend conferences and socialize with attorneys in the hopes of getting a call when a potential client needs money to sue.

"It's like ambulance-chasing," said Muthucumaraswamy Sornarajah, an international lawyer and arbitrator who has been involved in the system since its early days.

Third-party funding does not in and of itself make an ISDS claim dubious. In some cases, it may make it possible for a company, especially a smaller company with limited resources, to fight for rights that a host country has trampled.

"Does the funding give access to justice, or does it give access to injustice?" said Selvyn Seidel, founder of Fulbrook Capital Management and a lawyer himself. "Despite the dangers and despite some of the injustices, this is an industry which adds to justice. It's another form of trying to help the inequality that everybody is complaining about today."

As for the possibility that third-party funding encourages nuisance lawsuits, he called it a "valid concern." Outside funding, he said, "can be a vicious weapon for a plaintiff that is unscrupulous and also a funder who's unscrupulous." His proposed solution is to enable arbitrators to impose

stiff penalties against those who fund frivolous claims and to allow the market to weed out bad actors.

Even if third-party funding does provide access to justice, this access is available almost exclusively to businesses, not governments. Examples of funding arrangements for countries that have been sued are rare, funders and lawyers said. That's a product of ISDS's design: Only businesses can hit pay dirt and pass along a chunk to a funder. Governments can't win; they can only try to contain the damage.

On the 17th floor of a glimmering office tower on Manhattan's Madison Avenue, men in dark suits picked over a catered spread, munching on shrimp cocktail and sharing war stories.

They were gathered for an event at the headquarters of the Emerging Markets Traders Association, the trade organization for investment firms that buy the higher-risk, higher-reward debt of countries such as Greece, Argentina, and Russia.

Billed as a panel discussion, the gathering quickly became an attack on the government of Peru. Gramercy Funds Management, a hedge fund, was turning up the heat in its battle to collect a debt from the South American nation. The fund already had tried public pressure. Now it was announcing a dramatic escalation: That very day, Gramercy had filed an ISDS claim against Peru, the fund's lawyer told those in attendance.

This was the moment some lawyers and economists had feared: What some people call a vulture fund (Gramercy rejects the label) had deployed ISDS in a public assault on a developing nation's government.

In this instance, Gramercy bought into a 45-year-old domestic dispute and turned it into an international controversy.

Back in the late 1960s, Peru's leftist dictator seized some wealthy farmers' land and redistributed it to the poor. To compensate the original owners, the government issued bonds, to be paid out over the coming decades. But by the 1980s, following a series of economic crises, supersized inflation, and changes in currency, the bonds were basically worthless. Since at least 1992, the government hasn't been paying the bondholders anything at all.

In 2001, however, a Peruvian court ruled that the government ought to pay some approximation of fair value. It didn't specify what that would be.

Meanwhile, Gramercy, which is headquartered in Greenwich, Connecticut, and manages $6 billion in assets, saw an opportunity. Starting in 2006, company officials traveled to Peru, finding individual bondholders and paying them far less than what Gramercy now claims the bonds are

worth. The fund has said it bought almost 10,000 bonds, or somewhere between 15% and 20% of the total thought to exist.

In 2013, a Peruvian court issued a decision on how the government should value the bonds, and the government later decreed how much bondholders would actually get paid.

From the conference room in Manhattan, Gramercy's ISDS lawyer, Mark Friedman, derided the court decision as a "scandal," alleging that it had been doctored using Wite-Out and a typewriter so that the government wouldn't have to pay bondholders a fair value. By Gramercy's calculations, Peru had wiped out 99% of the bonds' value.

"Fortunately, we have this investment treaty," he said, referring to the US–Peru Trade Promotion Agreement that took effect in 2009. "They're now going to finally, at last, have to answer in an international forum under international law."

Mark Cymrot, a lawyer who also was on that panel at the Emerging Markets Traders Association, told BuzzFeed News that Gramercy was misusing ISDS by injecting itself in a longstanding domestic dispute. "Why should three foreign arbitrators who have no view on the local, internal political give-and-take of a democracy make this decision?" he said.

In a public statement, Peru accused Gramercy of waging a "smear campaign" in an attempt to collect an undeserved windfall at the expense of Peruvian bondholders.

Gramercy has argued that it is trying to remedy a "longstanding injustice" and help all bondholders. But if Gramercy prevails in the ISDS case, the Peruvians who still own bonds — the people whose land actually was taken by the government — won't get a cent of those spoils. They're not part of the case, and they can't be. ISDS is available not to them, but only to foreign investors — in this case, the Americans who bought the bonds decades after the fact.

Friedman, Gramercy's ISDS lawyer, nevertheless argued that a victory could help other bondholders by pushing the government toward some sort of settlement. If that were to happen, then Cymrot's family could benefit. In a strange happenstance, he said, his wife's grandfather and uncle were among the original group of people who were given bonds after the government seized their land decades ago. Yet that hasn't changed Cymrot's view on the hedge fund's tactics.

"They're weeping crocodile tears over what happened to the local people," he said, while Gramercy is "probably going to reap a huge profit."

(from Inside U.S. trade)

Daily News
Slow-Moving EU 'Solvency' Negotiations Test Patience Of U.S. Insurance Industry
August 31, 2016

Patience is wearing thin within the United States' insurance industry -- with some companies contemplating the idea of retaliation against Germany -- as bilateral negotiations meant to ensure unfettered access to European Union insurance markets drag on.

Insurance companies and industry groups directed a wave of frustration at the U.S. government this past week and called for the Obama administration to quickly reach an agreement that deems domestic insurance regulations equivalent to the EU's new Solvency II prudential requirements.

Industry representatives made their critical comments during the National Association of Insurance Commission's summer meeting in San Diego on Aug. 26-29.

Solvency II guidelines require that U.S. insurance regulations be deemed equivalent to the EU's prudential requirements in order for companies to continue operating as they had. Short of a formal equivalency finding, there can be a temporary one for five years, with the option to renew for one year. Neither of those equivalency determinations applies to the United States at this point.

The U.S. and EU are in ongoing negotiations meant to reach a covered agreement to determine equivalency. Negotiating rounds were previously held in May and July, and a third round is scheduled for September.

Property Casualty Insurers Vice President of International Policy David Snyder, who attended the conference, said some companies specifically called for retaliation against Germany if equivalency is not granted soon, citing the mounting market barriers they face across the Atlantic. That could involve curtailing Germany's access to U.S. insurance markets.

State-level solvency regulations in the U.S. require foreign markets to to grant equivalent access.

No one has put a specific timeline on what soon means, Snyder said.

Germany is requiring certain U.S. companies conducting reinsurance business within its borders to have either a branch or a subsidiary physically located within Germany. This means U.S. companies can no longer access the German market through an existing branch in Paris or London.

Companies also discussed the possibility of a World Trade Organization case, which has also been mentioned by U.S. lawmakers following negotiations.

Such a challenge would focus on the EU giving its own industries "transitional equivalency," which protects subsidiaries of a European company operating in a non-equivalent market from Solvency II requirements. The U.S. industry believes this unfairly benefits EU companies over their U.S. counterparts and could violate national treatment requirements outlined in Article XVII of the General Agreement on Trade in Services.

Insurance industry sources said they would like to see the U.S. and EU reach a mutual agreement by the end of the year, avoiding a tit-for-tat scenario where both industries are imposing market barriers on the other.

"We believe that mutual recognition is the way to go," Snyder said. "We're not pushing for any type of retaliation right now, but all the instruments of diplomacy ought to be used. If that fails, other measures may be necessary."

Part of the problem is the lack of transparency surrounding negotiations, according to U.S. industry sources.

The Office of the U.S. Trade Representative and Treasury Department have not released any details on where talks stand after the two previous negotiations. Any NAIC commissioners participating in the negotiations as an observer

also must sign a confidentiality agreement, limiting their ability to communicate with other commissioners.

NAIC President John M. Huff, during his opening remarks at the summer conference on Aug. 26, warned industry members to "be careful what you wish for," given that secrecy means no one knows what may be included in a final agreement.

Huff cautioned the deal could require changes required by the federal government that preempt state policies -- a touchy subject since the U.S. industry is regulated at the state level.

"Neither the Treasury Department nor the U.S. Trade Representative have offered to provide any insight on even high-level expectations, let alone negotiating objectives," Huff said. "To those who have called for a covered agreement to resolve the disparate treatment that European regulators are not imposing on U.S. firms, be careful what you wish for."

While not explicitly mentioned, that appears to be a reference to a confidentiality close the U.S. and EU have required participants to sign. Even though NAIC does have a small group of insurance commissioners involved in negotiations as "observers," they cannot gather feedback or consult with other commissioners.

"Perhaps most troubling about the covered agreement negotiations is how little state insurance commissioners, governors, state and federal legislators, consumers or anyone else in this room for that matter, know about them," Huff said. "There is much speculation about what might be included or resolved, but no actual knowledge or insight except for a select few."

Huff was critical of European Union member states imposing additional or potentially discriminatory requirements on the United States' industry at the same time U.S. states have made progress in reducing consumer protection collateral requirements for foreign reinsurers.

The NAIC was not alone in its criticism of USTR and Treasury over the secrecy blanketing negotiations. Several insurance industry sources said their groups are also frustrated by the lack of information, especially as more U.S. companies report running in market access barriers in the EU.

Poland is prohibiting U.S. companies from doing business in its reinsurance market, blocking at least six U.S. companies earlier this year.

France has implemented a policy that discourages the purchase of reinsurance from non-equivalent markets by refusing to give French companies credit for reinsurance purchased from companies located in non-equivalent markets.

The United Kingdom also implemented an in-depth waiver process that allows companies to continue operations temporarily

Phillip Carson, associate general counsel and director of financial regulatory police for the American Insurance Association, said no country has been forced to leave the European market yet, but the changes implemented by EU member states are adding on to the cost of doing business.

The U.S. industry has also been in constant contact with USTR and Treasury in order to share its concerns even though feedback has been limited due to secrecy.

"Due to the lack of transparency, we're just on a wing and a prayer here that our concerns are actually being translated into the negotiating table," Carson said.

The Climate Cost of FREE TRADE

How the TPP and trade deals undermine the Paris climate agreement

EXECUTIVE SUMMARY

On Earth Day 2016, the U.S. joined 175 countries in signing the United Nations Paris climate agreement setting a path forward to reduce global greenhouse gas emissions. A few months earlier, the U.S., along with 11 other countries, signed the Trans Pacific Partnership (TPP) trade and investment deal.[1] Remarkably, neither agreement acknowledged the other. The Paris agreement was silent on trade, and the TPP ignored the climate. As countries take action to protect the climate, conflicts between trade rules and climate goals will escalate. The intentional separation of these two global priorities is becoming increasingly untenable.

At the heart of the Paris climate agreement are national-level plans, called Intended Nationally Determined Contributions (INDCs), to reduce greenhouse gas (GHG) emissions. Within each INDC are goals, policies and strategies to reduce GHG emissions and adapt to climate change in various sectors.

The goals of trade agreements including the TPP are much different, and frequently conflict with climate objectives. Trade agreements are foremost about expanding trade, often in highly extractive, energy-intensive sectors that effect the climate. But modern trade deals like the TPP also include issues like expanded corporate legal rights, the lowering of regulations for the public good, rules for government spending, and strengthening intellectual property rights.

Conflicts between climate goals and trade rules will multiply should TPP go into effect. The massive, 30 chapter, 5,000-page, 12-nation deal is the largest free trade agreement ever negotiated – setting rules for 40 percent of the world's Gross Domestic Product.

In this paper we look at real world examples of how trade rules already conflict with climate goals, and dig into the TPP more deeply to project how the proposed deal creates barriers for countries trying to meet their Paris climate pledges. We also review a variety of trade reform proposals designed to address our climate- damaging trade regime.

Trade rules vs. renewable energy policy

In February 2016, a WTO dispute panel ruled that India's solar program, which provides preferences and subsidies for the local production of solar panels, discriminated against foreign (in this case, U.S.) solar panel producers. India defended its support for local production of solar panels citing its Paris climate commitments. The WTO determined, however, that India's climate obligations did not protect the solar program from existing trade rules. Many other national and local governments (including many U.S. States) have programs similar to India's solar policy. WTO rulings have already knocked down a

30 years 1986–2016 INSTITUTE FOR AGRICULTURE & TRADE POLICY

Written by Ben Lilliston, September 2016

comparable solar program in Ontario, Canada and a wind program in China.

Free trade agreements like the proposed TPP go beyond WTO rules, particularly in granting multinational corporations' special legal rights through a provision called the Investor State Dispute Settlement (ISDS) system. In June, TransCanada filed an ISDS suit seeking $15 billion in damages from the U.S. government under NAFTA, charging that President Obama's Administration had unfairly rejected the Keystone Pipeline.[2] Other corporate rights cases with climate implications have challenged bans on offshore drilling to protect wildlife, and a ban on fracking to protect waterways. According to the UN Conference on Trade And Development, more than 600 ISDS cases have been filed worldwide, with the most common cases challenging policies on energy and oil, gas and mining.

Trade rules vs agriculture, food security and land use policy

Nearly 80 percent of countries' INDCs include policies and actions related to agriculture, according to the Consultative Group on International Agricultural Research (CGIAR). The global food system, including agricultural production and associated land use, is responsible for one-third of global GHGs.[3] The UN Food and Agriculture Organization identifies the top sources of agricultural emissions as coming from methane produced by livestock (with much of this from large-scale, confined operations) and nitrous oxide from synthetic fertilizers used to grow commodity crops, such as corn and soybeans.

Most of agriculture's global emissions are associated with an industrial model of agriculture designed to compete in global markets and take advantage of international trade rules put in place over the last several decades. Trade rules governing agriculture reinforce a high GHG-emitting form of industrial production in a number of ways:

- They seek to harmonize food safety rules between countries, including rules governing pesticide and veterinary drug residues, demanding they be "least trade restrictive," rather than prioritizing public health and the environmental sustainability.
- Intellectual property rights provisions limit farmers and breeders from exchanging protected seeds, hindering climate adaptation efforts.
- Rules often limit a country's ability to build strong national and local food systems by placing restrictions on the extent to which governments can support farmers.
- Rules restrict tariffs countries use to slow an influx of below cost imports that undercut their domestic production, known as dumping.
- Trade and investment rules are increasingly linked to "land grabs"—large-scale land leases or purchases by foreign corporations or governments to gain access to agricultural or forest land.

Trade rules vs. carbon pricing and regulation

As we enter into this new era of post-Paris climate policy, approaches like a carbon tax or carbon markets will undoubtedly be affected by trade rules. TPP countries that already have some type of carbon pricing policy in place include the U.S., Mexico, Canada, Japan, New Zealand, and Chile—with others in the exploration phase.

The practice of moving GHG emissions from one country to another, without actually reducing the total level of global emissions, (aka carbon leakage) remains a serious problem for carbon taxes and markets. One leading proposal to address carbon leakage is through border taxes or tariffs, though doing so would run counter to the trade liberalization goal of tariff reduction or elimination found in the TPP and other trade regimes.

The Tip of the TPP iceberg

When looking at the TPP from a climate impact lens, it becomes clear that many of the chapters could in various ways, big and small, impact the climate. The ISDS and intellectual property provisions are clear examples. This paper doesn't review the climate implications of all 30 TPP chapters, but we highlight a few that may have important implications for the climate:

THE TRADE PART OF TPP: Tariff reduction has been traditionally considered the heart of trade agreements. The tariff cuts within the TPP cover a variety of goods, from agricultural to forestry to mining to auto parts.[4] Expanded trade in energy intensive and resource extractive sectors could have important impacts on the climate.

REGULATORY COHERENCE: The TPP is the first U.S. free trade agreement to include a Regulatory Coherence chapter.[5] The chapter, which emanated from corporate lobbyists, requires countries to fully report publicly on planned regulations (including at the state level), provide justification and pre-implementation impact assessments.

FOOD SAFETY (SANITARY AND PHYTOSANITARY STANDARDS OR SPS): Climate change is expected to increase risks related to food safety, plant and animal health due to variances of temperatures, and the spread of animal and plant diseases.[6,7] To expedite food exports, the TPP includes a Rapid Response Mechanism managed by trade officials, not food safety experts. The TPP also sets low standards for using of scientific data in assessing risks of new food and agricultural technologies that go beyond WTO standards.[8]

FINANCIAL SERVICES: Poorly regulated financial markets can hinder our ability to respond to climate change by undermining food security and slowing emerging markets for renewable energy. TPP's financial services chapter (which governs financial markets) grants financial firms expanded power to legally challenge national level regulations intended to limit excessive speculation.[9] Carbon markets are also vulnerable to financial speculators.[10,11]

OPENING THE DOOR FOR MORE GMO CROPS AND GHG EMISSIONS: Numerous international assessments have pointed to the imperative of greater biodiversity in agricultural systems to adapt to climate change. The TPP is the first agreement to specifically identify rules for expanding trade in GMOs, which are used in primarily as part of single crop, less diverse systems. The GMO section is not within the food safety chapter, but rather within the chapter related to market access. The result is that human and environmental safety criteria involving GMOs and products derived from new technologies like plant synthetic biology will not be adequately considered.

GOVERNMENT PROCUREMENT: Governments use preferential procurement policies to promote renewable energy development or local food systems. Local renewable energy production and requirements, as well as other green purchasing requirements are likely to run into new obstacles under the TPP. The agreement requires countries to begin negotiations on procurement policies at the sub-federal (or state) level within three years.[12]

ENVIRONMENT CHAPTER: The TPP does contain an Environment Chapter, but some TPP commitments on the environment are actually weaker than in previous U.S. Free Trade Agreements.[13] The TPP simply reaffirms already existing commitments to seven multilateral environmental agreements. Some TPP environmental commitments, like for illegal logging, are actually weaker than those in previous U.S. Free Trade Agreements.[14] As in past free trade deals, enforcement of environmental commitments is expected to be limited under the TPP.

TPP countries and climate concerns

The INDCs by TPP countries are voluntary as opposed to the mandatory legal requirements of the TPP. There is no indication that countries who signed the TPP have considered how the trade deal might impact their Paris climate commitments. We looked at TPP member countries' climate commitments, their major sources of GHG emissions, and some considerations for how those commitments might be effected by the TPP. Some areas of concerns among TPP countries include:

AUSTRALIA: Australia is a major global exporter of liquefied natural gas, coal, iron and beef. It expects the TPP to expand exports in each of these high GHG emitting industries. Additionally, the TPP will expose Australian policies to U.S. based investor state challenges for the first time.

CANADA: Canada is home to more than half of the world's publicly listed mining companies. Nitrogen fertilizers used in agriculture, crude oil and related products, are among Canada's largest exports. Several NAFTA-related cases have already challenged Canadian policies regulating offshore drilling, mining and fracking.[15] The TPP will increase Canada's exposure to future ISDS cases.

CHILE: Chile's top five exports are refined copper, copper ore, sulfate chemical wood pulp (used to make paper products), and fish.[16] In preparation for the TPP, the state-owned copper company Codelco is now opening itself to private investors. The melting of Andean glaciers (brought about by climate change) is already affecting water systems, and public debate is growing about private ownership of the diminishing fresh water supply.

JAPAN: Japan is the world's largest importer of liquefied natural gas (accounting for 35 percent of global LNG trade), and is positioning itself to become a major LNG trading hub under the TPP.[17] Japan has become increasingly dependent on coal since the Fukushima nuclear disaster. In agriculture, Japan is a major meat importer, and is the largest buyer of U.S. exported beef and pork.

MALAYSIA: Malaysia has the highest rate of deforestation in the tropical world.[18] Much of that deforestation in linked to expanded palm oil production, expected to increase under the TPP.[19]

MEXICO: Mexico's top exports include crude petroleum. In 2013, Mexico amended its constitution to open its oil and gas reserves to private investment. U.S. and Canadian oil companies are investing billions in Mexico—so are electric companies as the country updates its power grid. Mexico has also seen significant growth in beef exports, with feed coming from the U.S.[20]

NEW ZEALAND: Agriculture accounts for half of GHG emissions in New Zealand,[21] with dairy production the largest GHG contributor.[22] The government says 445,000 hectares of forest (over one million acres) are under threat of clearing for pastoral use, mainly for the dairy sector.[23] TPP's Intellectual Property chapter will require New Zealand to make changes to law that will limit the ability of farmers to share seeds. The country also faces expanded exposure to ISDS challenges.[24]

PERU: Peru is home to the second largest share of the Amazon, one of the most important carbon sinks (capturing carbon from the air) in the world.[25] One third of the country's emissions are linked to land use —forestry, agriculture and mining.[26] The oil and gas industry's extensive presence in Peru is tied directly to Amazonian forest clearance and illegal logging.

UNITED STATES: The energy sector (production and distribution) is by far the largest contributor of U.S. GHG emissions.[27] The TransCanada Keystone Pipeline investor state challenge highlights the growing legal exposure U.S. government entities will be under with TPP. The U.S. will be obligated to automatically approve *all* exports of Liquefied Natural Gas (LNG) to TPP countries. The TPP is also expected to open markets for U.S. based industrial meat companies. Finally, the U.S. has numerous local content requirements among various state-level renewable energy mandates that could face challenges.[28]

VIETNAM: Coal-fired power plants are the country's leading source of carbon emissions. Vietnam, a Communist country, reported a total of 3,135 state-owned enterprises in 2013. The TPP limits state-owned enterprises, so the country will experience a major restructuring in some industries, including the energy. Agriculture is also among the country's top GHG sources. Vietnam is a major pork producer, and already a big importer of dried distillers grains (animal feed from corn ethanol) from the U.S.[29]

New Approach on Trade needed

In this paper we have raised a number of points of conflict between trade and climate policy. At a minimum, improvements and more detailed climate assessments should be completed for future trade agreements, including the Transatlantic Trade and Investment Partnership, prior to any signing. But ultimately, climate goals and commitments should be integrated trade objectives at the beginning – before negotiations even begin.

It is impossible to separate the outcomes of current trade regimes from the ways in which they were negotiated – often in secret, with heavy corporate influence and very little public scrutiny or input. Further, trade agreements should no longer be considered in isolation, or given legal priority over other global agreements. Trade policy is too influential, and provides too many obstacles for successful governing on issues like climate change, health, food security and natural resource management.

The official signing of the Paris climate treaty is an important first step toward a global response to climate change. But no climate deal will work if it is not supported by other policies. The TPP and the WTO are outdated trade regimes modeled on 19th century ideas of "big power" treaties and commercial might. The 21st century demands something very different—trade rules that move countries together towards sustainability, starting with the urgent need to curb greenhouse gas emissions and support adaptations to climate change.

Find the endnotes and full report at
iatp.org/climate-cost-of-free-trade.

INSIDE US TRADE

Consumer Groups Charge TPP Provisions Undermine Important Consumer Protections

September 06, 2016

With Congress back in town, consumer groups on Sept. 6 ramped up their lobbying efforts against a lame-duck vote on the Trans-Pacific Partnership -- citing provisions that could undermine important consumer protections like the inclusion of an investor-state dispute settlement mechanism, which they call the agreement's "fatal flaw."

The two groups – Consumer Union and Consumer Federation of America – represent more than 250 consumer organizations. In separate but identical letters to the Senate and the House urge lawmakers "not to support approval of the Trans-Pacific Partnership (TPP) trade agreement if presented to you this year, or if presented at any time in its current form."

Shortfalls of the deal, as laid out in the groups' letters, include provisions "not found in past trade pacts, that allow international food shippers to challenge food safety inspection procedures at the border," and provisions that "could enable pharmaceutical companies to challenge Medicare drug listing decisions and Medicaid reimbursements, as well as to constrain future U.S. policy reforms aimed at reducing healthcare costs."
According to the groups, "the risk that the TPP will become a vehicle for undermining important consumer protections is further exacerbated by the inclusion of the Investor-State Dispute Settlement procedure."

"There is no actual need, and therefore no justification, for including ISDS in this agreement," they wrote. "And there is considerable risk of significant harm to the public. ISDS does not belong in the TPP, and its inclusion is a fatal flaw."

While noting that a "sensitivity" for ISDS during negotiations led to the carveout of tobacco products and regulation from being subject to litigation under ISDS, the groups warn that inclusion of the procedure in TPP means "the door remains open for other industries to bring challenges to these other important policies."

More from the letter:

Notably, there was sensitivity during the TPP negotiations to this potential for ISDS to undermine effective regulation, as to one industry in particular – tobacco products. And the TPP accordingly excludes tobacco regulation from ISDS. We completely understand and fully support efforts to ensure that tobacco companies continue to be fully accountable under each country's laws and regulations. But these same considerations apply to a wide range of regulatory policies, including important policies that relate to public health and consumer safety, that would be similarly vulnerable under ISDS. The door remains open for other industries to bring challenges to these other important policies.

The TPP goes far beyond what are traditional mechanisms for facilitating trade – reducing tariffs, lifting or relaxing quotas, and promoting non-discriminatory treatment of goods and services. The TPP addresses a wide range of so-called "non-tariff trade barriers," implicating important government regulatory policies that have only an incidental, and often unintended, effect on international trade. Speaking of these regulatory policies as "barriers" inherently skews the focus to the costs they impose on industry, to the exclusion of the benefits they provide consumers and the public. And using international agreements to reduce or remove these supposed "barriers" in the name of facilitating international trade makes them susceptible to undue influence from industry interests seeking to relax regulatory compliance requirements.

http://www.citizen.org/documents/ISDS-TPP-Academics-Letter-Sept-2016.pdf

Public Citizen, 9/7/16

As White House Spotlights Conflict With Democratic Presidential and Congressional Candidates by Escalating Toward TPP Lame-Duck Vote, Sen. Warren and Hundreds of Academics Urge Rejection

Economic and Legal Scholars Cite Multinational Corporate Rights to Unlimited Taxpayer Funds Via ISDS Tribunal System Named by VP Candidate Kaine as Basis for His Opposition

WASHINGTON, D.C. – The investor-state dispute settlement (ISDS) regime at the heart of the Trans-Pacific Partnership (TPP) that would newly empower thousands of multinational corporations to challenge U.S. policies before panels of three private lawyers to demand taxpayer compensation is the target of a lettersent to Congress today by leading pro-free trade U.S. economics and law professors calling on Congress to reject the TPP.

The White House has escalated its efforts to pass the TPP in the lame-duck session, with Cabinet secretaries who are promoting the TPP crossing paths with Democratic presidential and congressional candidates campaigning against the TPP.

Last year, several dozen legal scholars joined congressional Democrats in raising concerns about the ISDS regime and demanding that a final TPP deal exclude the parallel legal system for multinational corporations. President Barack Obama scorned the critics, declaring they were "making this stuff up." Today's letter, signed by more than 200 prominent academics, including Obama's Harvard Law School mentor Professor Larry Tribe, warns that the ISDS regime threatens the rule of law and undermines our nation's democratic institutions. The academics call on Congress to reject the pact because the final deal would greatly expand the ISDS regime.

U.S. Sen. Elizabeth Warren (D-Mass.) praised the letter: "Today's letter from top legal experts makes clear: ISDS undermines the American judicial system and tilts the playing field further in favor of big multinational corporations," Warren said. "This provision empowers companies to challenge laws and regulations they don't like, with friendly corporate lawyers instead of judges deciding their disputes. Congress should not approve a TPP agreement that includes ISDS." Tribe, Nobel laureate Joseph Stiglitz, former California Supreme Court Justice Cruz Reynoso, andColumbia University Professor and UN Senior Adviser Jeffrey Sachs are among the signers, many of whom have supported past U.S. trade agreements. The letter spotlights the danger of the ISDS provisions, which was the same reason Democratic vice presidential nominee Tim Kaine cited for opposing the final TPP deal.

The U.S. has dodged ISDS liability to date because past treaties have covered only a limited number offoreign investors operating here. Research conducted by Public Citizen shows that the TPP, which includes Japan, Australia and other nations with more than 9,000 corporate subsidiaries in the United States, would double U.S. ISDS exposure. Nearly $3 billion in ISDS

awards has been paid to corporations under U.S. treaties alone and claims worth more than $70 billion are pending.

Recent investigative reports by a Pulitzer-Prize-winning journalist and a new Columbia Global Reports book reveal how critics have understated the threats posed by the ISDS regime, which – if the TPP is approved – would empower thousands more multinational corporations to challenge U.S. federal, state and local laws, court decisions and government actions before panels of three private lawyers. Under ISDS, the panel of lawyers can award the companies unlimited taxpayer money, including for loss of expected future profits. The decisions cannot be appealed.

"In recent years, corporations have challenged a wide range of environmental, health and safety regulations, fiscal policies, bans on toxins, denials of permits including for toxic waste dumps, moratoria on extraction of natural resources, measures taken in response to financial crises, court decisions on issues ranging from the scope of intellectual property rights to the resolution of bankruptcy claims, policy decisions on privatizations of prisons and health care, and efforts to combat tax evasion, among others," the letter notes.

The experts lament that despite the Obama administration's claims to have addressed growing concerns about the ISDS system, "the final TPP text simply replicates nearly word-for-word many of the problematic provisions from past agreements, and indeed would vastly expand the U.S. government's potential liability under the ISDS system." They fear that the expansion of ISDS in the TPP and in ongoing negotiations with Europe "threatens to dilute constitutional protections, weaken the judicial branch and outsource our domestic legal system to a system of private arbitration that is isolated from essential checks and balances."

This letter adds to a rising chorus of opposition to ISDS from prominent members of Congress such asWarren; the National Conference of State Legislatures; pro-free trade think tanks such as the Cato Institute; and hundreds of labor, environmental, consumer and faith organizations.

View the letter and list of signers.

What the signers are saying:

Jeffrey Sachs, professor of economics, Columbia University:

"We need trade agreements that protect worker rights and the environment. ISDS gravely threatens environmental protection and worker rights, and the rule of law more generally, as evidenced by the current lawsuit by TransCanada suing the U.S. government for $15 billion over the cancellation of the climate-wrecking Keystone XL Pipeline."

Cruz Reynoso, former California Supreme Court Justice and professor of law emeritus, University of California, Davis:

"The right of foreign corporations and investors to challenge U.S. policies which allegedly violate investor rights is a frontal attack on our judicial system."

Alan Morrison, associate dean, George Washington Law School:

"The United States Constitution simply does not allow Congress to assign the duty to assess the legality under the TPP of federal and state laws to the unreviewable discretion of three private individuals, instead of to our federal court system with full-time and unconflicted judges."

Lisa Sachs, professor of law, director of Columbia Center on Sustainable Investment:

"A multilateral agreement presents an opportunity to promote the rule of law, strengthen domestic judicial systems and ensure the rights of all, including the most vulnerable, are equally advanced. ISDS in its current form undermines each of those objectives. The whole system needs a rethink to better balance all stakeholders' interests and rights."

Kevin Gallagher, professor of economics, Boston University:

"ISDS accentuates the regulatory risks that characterize the latest trade and investment pacts by granting foreign investors far greater rights over national democratic decision-making. Putting governments and their citizens back in charge of settling disputes is the first step toward the comprehensive reform that is needed."

http://www.nytimes.com/2016/09/29/business/economy/more-wealth-more-jobs-but-not-for-everyone-what-fuels-the-backlash-on-trade.html?emc=edit_ta_20160928&nlid=41564781&ref=cta&_r=1

New York Times, 9/29/16

More Wealth, More Jobs, but Not for Everyone: What Fuels the Backlash on Trade

Trade is under attack in much of the world, because economists failed to anticipate the accompanying joblessness, and governments failed to help.

By PETER S. GOODMANSEPT. 28, 2016

ROTTERDAM, the Netherlands — For as long as ships have ventured across water, laborers like Patrick Duijzers have tied their fortunes to trade.

He is a longshoreman here at Europe's largest port, and his black Jack Daniel's T-shirt, hoop earrings and copious rings give Mr. Duijzers the look of a bohemian pirate. His wages put him solidly in the Dutch middle class: He has earned enough to buy an apartment and enjoy vacations to Spain.

Lately, though, Mr. Duijzers has come to see global trade as a malevolent force. His employer — a unit of the Maersk Group, the Danish shipping conglomerate — is locked in a fiercely competitive battle around the world.

He sees trucking companies replacing Dutch drivers with immigrants from Eastern Europe. He bids farewell to older co-workers reluctantly taking early retirement as robots capture their jobs. Over the last three decades, the ranks of his union have dwindled to about 7,000 members, from 25,000.

"More global trade is a good thing if we get a piece of the cake," Mr. Duijzers said. "But that's the problem. We're not getting our piece of the cake."

Far beyond the docks of the North Sea, such laments now resonate as the soundtrack for an increasingly vigorous rejection of free trade.

For generations, libraries full of economics textbooks have rightly promised that global trade expands national wealth by lowering the price of goods, lifting wages and amplifying growth. The powers that emerged victorious from World War II championed globalization as the antidote to future conflicts. In Asia, Europe and North America, governments of every ideological persuasion have focused on trade as their guiding economic force.

But trade comes with no assurances that the spoils will be shared equitably. Across much of the industrialized world, an outsize share of the winnings have been harvested by people with advanced degrees, stock options and the need for accountants. Ordinary laborers have borne the costs and suffered from joblessness and deepening economic anxiety.

These costs have proved overwhelming in communities that depend on industry for sustenance, vastly exceeding what economists anticipated. Policy makers under the thrall of neoliberal economic philosophy put stock in the notion that markets could be trusted to bolster social welfare.

In doing so, they failed to plan for the trauma that has accompanied the benefits of trade. When millions of workers lost paychecks to foreign competition, they lacked government supports to cushion the blow. As a result, seething anger is upending politics in Europe and North America.

In the United States, the Republican presidential aspirant Donald J. Trump has tapped into the rage of communities reeling from factory closings, denouncing trade with China and Mexico as a mortal threat to American prosperity. The Democratic nominee, Hillary Clinton, has done an about-face, opposing an enormous free-trade deal spanning the Pacific that she supported while secretary of state.

In Britain, the vote in a June referendum to abandon the European Union was in part a rebuke of the establishment, from laborers who blame trade for declining pay. Across the European Union, populist movements have gained adherents as an outraged response to globalization, imperiling the future of major trade deals, including a pact with the United States and another with Canada.

"The trade policy of the European Union is paralyzed," said the Italian minister of economic development, Carlo Calenda, during a recent interview in Rome. "This is a tragic situation."

The anti-trade backlash, building for years, has become explosive because the global economy has arrived at a sobering period of reckoning. Years of investment manias and financial machinations that powered the job market have lost potency, exposing longstanding downsides of trade that had previously been masked by illusive prosperity.

This tide of animosity may prove nearly impossible to reverse, given that technological disruption and economic upheaval are now at work in an era of scarcity. Today, many major nations are grappling with weak growth, tight credit and a gnawing sense that a lean future may persist indefinitely.

The worst financial crisis since the Great Depression has left banks in Europe and the United States reluctant to lend. Real estate bonanzas from Spain to Southern California gave way to a disastrous wave of foreclosures, eliminating construction jobs. China's slowdown has diminished its appetite for raw materials, sowing unemployment from the iron ore mines of Brazil to the coal pits of Indonesia.

Trade did not cause the breakdown in economic growth. Indeed, trade has helped generate what growth remains. But the pervasive stagnation has left little cover for those set back by globalization.

The North American Free Trade Agreement, or Nafta, exposed workers in the United States to competition with Mexico, but its passage came in the mid-1990s, just as investment was pouring into the web, creating demand for a range of manufactured goods — office furniture for Silicon Valley coders, trucks for the couriers delivering e-commerce wares. China's entry into the World Trade Organization in 2001 unleashed a far larger shock, but a construction boom absorbed many laid-off workers.

The dot-com boom is now a distant memory. The housing bubble burst. Much of the global economy is operating free of artificial enhancements. Lower-skilled workers confront bleak opportunities and intense competition, especially in the United States. Even as recent data shows middle-class Americans are finally starting to share in the gains from the recovery, incomes for many remain below where they were a decade ago.

"The debates that we are having about globalization and the adjustment cost, these are the conversations that we should have been having when we did Nafta, and when China entered the W.T.O.," said Chad P. Bown, a trade expert at the Peterson Institute for International Economics in Washington. "There were people talking about these things, but they weren't taken very seriously at the time. There's a lot of policy regret."

"We do need to have these trade agreements," Mr. Bown said, "but we do need to be cognizant that there are going to be losers, and we need to have policies to address them."

The extent of the damage suffered by these "losers" has accelerated an erosion of faith in the wealth-creating powers of free trade. A profound skepticism has taken root in some of the largest trading powers, notably the United States, France, Italy and Japan.

Successive administrations in the United States, led by Democrats and Republicans alike, have embraced liberalized trade as a central component of the nation's foreign policy. Yet only 19 percent of American voters said trade with other countries created more jobs in the United States, according to a New York Times/CBS News poll released in July.

Even among those who support trade, doubts are growing about its ability to deliver on crucial promises. A 2014 Pew Research Center survey of people in 44 countries found that only 45 percent of respondents believed trade raised wages. Only 26 percent believed that trade lowered prices.

Volumes of economic data tell a different story.

Workers employed in major export industries earn higher wages than those in domestically focused sectors.

Americans saw their choice of products expand by one-third in recent decades, the Federal Reserve Bank of Dallas found. Trade is how raspberries appear on store shelves in the dead of winter.

The Export Effect

Lower-income households have benefited from better prices on basic goods. As imports surged, the cost of baby and toddler clothes in the United States dropped by 10 percent from 1999 to 2013, according to an analysis by Pietra Rivoli, a trade expert at the McDonough School of Business at Georgetown University. The price of shoes went up much more slowly than the overall cost of living.

But the fear and anger over trade are well founded.

Vast numbers of laborers have lost jobs as imported goods from low-wage countries arrived. Mills have closed, while strip malls fill with dollar stores and payday lenders.

In the fallout, the United States maintained limits on unemployment benefits, leaving American workers vulnerable to plummeting fortunes. Social welfare systems have limited the toll in Europe, but economic growth has been weak, so jobs are scarce.

All the while, automation has grown in sophistication and reach. From 2000 to 2010, the United States lost some 5.6 million manufacturing jobs, by the government's calculation. Only 13 percent of those job losses can be explained by trade, according to an analysis by the Center for Business and Economic Research at Ball State University in Indiana. The rest were casualties of automation or the result of tweaks to factory operations that enabled more production with less labor.

American factories produced more goods last year than ever, by many indications. Yet they did so while employing about 12.3 million workers — roughly the same number as in 2009, when production was roughly three-fourths what it is today.

At APM Terminals, where Mr. Duijzers works, a symphony of motion greets every arriving container ship. Cranes rev, lifting containers. But people are scarce. "Robots Running Things in Rotterdam," proclaims an article on the company website. "Of the 74 machines operating in the yard, 63 run on their own with no human intervention."

Manufacturing Losses

Since 2000, manufacturing employment in the United States has fallen about 30 percent, the most among major job sectors.

Yet if robots are a more significant threat to paychecks, they are also harder to blame than hordes of low-wage workers in overseas factories.

"We have a public policy toward trade," said Douglas A. Irwin, an economist at Dartmouth College. "We don't have a public policy on automation."

The China Syndrome

When Michael Morrison took a job at the steel mill in the center of Granite City, Ill., in 1999, he assumed his future was ironclad.

He was 38, a father with three young children.

"I felt like I had finally gotten into a place that was so reliable I could retire there," he said.

The mill had been there — just across the Mississippi River from St. Louis — since the end of the 19th century. It had changed hands, ultimately landing in the portfolio of United States Steel. But the basics held. For those willing to sweat, the mill was a reliable means of supporting a family.

Mr. Morrison began by shoveling slag out of the furnaces, working his way up to crane driver. From inside a cockpit tucked in the rafters of a cavernous building, he manned the controls, guiding a 350-ton ladle that spilled molten iron.

It was a difficult job requiring finesse and perpetual focus. He was compensated accordingly, earning $24.62 an hour.

He worked overtime shifts, amassing savings to send his children to college. Last year, he took home $86,000.

His eldest daughter recently finished her master's in epidemiology. His son completed his sophomore year at McKendree University in nearby Lebanon.

But events playing out on the other side of the world would soon upend his life.

China's relentless development was turning farmland into factories, accelerated by a landmark in the history of trade: the country's inclusion in the World Trade Organization.

The W.T.O. was born out of the General Agreement on Tariffs and Trade, a compact forged in 1947 that lowered barriers to international commerce in an effort to prevent a repeat of global hostilities.

In the first four decades, tariffs on manufactured wares plunged to nearly 6 percent from about 35 percent, according to the Federal Reserve Bank of Chicago. By 2000, the volume of trade among members had swelled to 25 times that of a half-century earlier.

Most of this trade took place between wealthy countries with similar wages and labor standards. But the rollout of Nafta in the 1990s put American workers in direct competition with counterparts in Mexico, where wages were much lower and labor rights and environmental standards were minimal.

A washing machine maker with factories in the United States now had a ready way to cut costs: set up a plant in Mexico.

Still, Mexico — home to about 123 million people — was not big enough to refashion the terms of trade. When China joined the W.T.O. in 2001, that added a country of 1.3 billion people to the global trading system.

China targeted crucial industries for domination, lavishing favored companies with sweetheart credit terms while investing aggressively in ports, highways and electrical generation. Anyone with ideas about organizing Chinese labor risked landing behind bars.

In the first 13 years after China entered the W.T.O., its exports of goods swelled to nearly $2.3 trillion in 2014 from $266 billion, according to the World Bank.

The beneficiaries of this surge include anyone who has bought practically anything touched by human hands — an iPhone, a car, a Christmas ornament. Corporations that used China to cut costs raised their value, enriching executives and ordinary investors.

The casualties of China's exports are far fewer, but they are concentrated. The rugged country of western North Carolina suffered mass unemployment as Chinese-made wooden furniture put local plants out of business. So did glassmakers in Toledo, Ohio, and auto parts manufacturers across the Midwest.

A paper published last year by a trio of economists — David H. Autor at the Massachusetts Institute of Technology, David Dorn at the University of Zurich and Gordon H. Hanson at the University of California, San Diego — concludes that Chinese imports eliminated nearly one million American manufacturing jobs from 1999 to 2011. Add in suppliers and other related industries, and the total job losses reach 2.4 million.

Mr. Trump vows to slap punitive tariffs on Chinese goods. But that would very likely just shift production to other low-wage countries like Vietnam and Mexico. It would not turn the lights on at shuttered textile plants in the Carolinas. (Even if it did, robots would probably take most of the jobs.)

Granite City sat smack in the middle of this gathering storm.

From 2005 to 2015, China's share of global steel production swelled from just less than one-third to fully half, according to data compiled by the Peterson Institute for International Economics. China's steel exports more than quadrupled.

Last fall, United States Steel began slowing production in Granite City, laying off 40 or so apprentices. As layoffs accelerated, they reached the ranks of more senior workers.

Two days before Christmas, Mr. Morrison finished his shift and went into the break room. "Everybody was standing there like zombies, looking at the bulletin board," he said. A list of names was tacked there, along with instructions for those workers to clean out their lockers.

This is how Mr. Morrison found himself confronting a bewildering new state of affairs — joblessness.

"I've worked since I was 12," he said, recalling a paper route, then a job as a cook at his brother's taco place.

A blue Steelworkers union T-shirt hugs his burly frame. His calloused hands attest to years of physical labor. Suddenly, his $2,000 biweekly paycheck shrank to a $425-a-week unemployment check, plus some severance. In July, the unemployment checks stopped. He had reached the six-month limit.

He interviewed for a job as a supervisor at an Amazon warehouse, but it required computer skills that he lacked. So he took a position as a "fulfillment associate," working the night shift, pulling products off warehouse shelves and putting them in boxes. It paid $13 an hour — a little more than half his United States Steel wages.

His first night on the job, his knees gave out. He took painkillers. The next morning he could barely stand up. He called in and said he would not be coming back. He has an interview coming up for a forklift driving position at a warehouse. It pays $12 an hour, another step down.

"I had to tell my son that he can't go back to McKendree for his junior year," Mr. Morrison says, straining to choke back tears. "He has to go to community college."

He swallows hard. Tears emerge from the corners of his eyes.

"It just crushes you," he says. "I didn't get to go to college. I wanted my kids to succeed. When you see the disappointment in your kids' eyes. …"

Falling Without a Net

When Dan Simmons started working at the mill 38 years ago, talk centered on how to make steel. These days, he spends his days at a job for which he feels little prepared — de facto social worker.

Mr. Simmons is the president of the Steelworkers Local 1899, which represents 1,250 workers at the Granite City plant. On a recent morning, only about 375 of his people are employed. He sits at his desk inside the brick union hall, greeting laid-off workers who arrive seeking help.

One man wants guidance scanning online job listings. Another has hit a snag with his unemployment benefits.

A night earlier, Mr. Simmons took a call on his cellphone from the niece of a high school classmate, a laid-off millworker. He had shot himself to death, leaving behind two children.

Trade Adjustment Assistance, a government program started in 1962 and expanded significantly a dozen years later, is supposed to support workers whose jobs are casualties of overseas competition. The program pays for job training.

But Mr. Simmons rolls his eyes at mention of the program. Training has almost become a joke. Skills often do not translate from old jobs to new. Many workers just draw a check while they attend training and then remain jobless.

A 2012 assessment of the program prepared for the Labor Department found that four years after completing training, only 37 percent of those employed were working in their targeted industries. Many of those enrolled had lower incomes than those who simply signed up for unemployment benefits and looked for other work.

European workers have fared better. In wealthy countries like Germany, the Netherlands, Sweden and Denmark, unemployment benefits, housing subsidies and government-provided health care are far more generous than in the United States.

In the five years after a job loss, an American family of four that is eligible for housing assistance receives average benefits equal to 25 percent of the unemployed person's previous wages, according to data from the Organization for Economic Cooperation and Development. For a similar family in the Netherlands, benefits reach 70 percent.

Yet in Europe, too, the impacts of trade have been uneven, in part because of the quirks of the European Union. Trade deals are cut by Brussels, setting the terms for the 28 member nations. Social programs are left to national governments.

"You're pursuing trade and liberalization agreements at the E.U. level, and then leaving to the individual member countries how to deal with the damage," said Andrew Lang, a law professor at the London School of Economics.

In Granite City, the damage now dominates Mr. Simmons's day.

Inside the union hall, a supply cabinet has been outfitted as a food pantry. He hands out plastic bags full of canned foods — yellow corn, peas, green beans. He hands one to Mr. Morrison, who initially refuses to take it.

"These are some proud steelworkers, and it's very difficult for them to do this," Mr. Simmons says. "These guys are used to making a living, and not asking for handouts."

Kenneth Hahn had been working at the plant for more than 40 years when he was laid off in February. He spends most of his time in his garden, tending to vegetables.

His father lived on a Missouri farm without plumbing or electricity during the Great Depression.

"They grew everything they needed," he said.

If the mill does not start up again soon, Mr. Hahn is thinking about doing likewise.

"Move down to the holler," he said. "I can always eat squirrel and rabbit."

In China, farmers whose land has been turned into factories are making more steel than the world needs.

In America, idled steelworkers are contemplating how to live off the land.

The Bounty of the Sea

Rotterdam has a history of looking across the water and finding things that can be turned into money.

In the 16th century, it was herring. A burgeoning fleet set sail in pursuit. Merchants began salting and drying the catch in barrels for an emerging export trade. By the 17th century, local shipyards were clattering away, constructing vessels for the Dutch East India Company as it plied the spice routes to Southeast Asia.

As waterways linking the port to the industrial communities of the Rhine were deepened and channelized, German automobiles and machinery began flowing through Rotterdam on the way to the rest of the planet. Offices filled with law firms, insurance agents and logistics companies.

"The fortunes of this country have been built on trade," said Wouter Jacobs, a transportation economist at Erasmus University Rotterdam. "It's our lifeline."

Yet even here, unease has entered the conversation.

Jacob van der Vis is paid to promote trade. An adviser on international business for the Netherlands Chamber of Commerce, he advertises innovations playing out at the port. He speaks of trade with China as a golden opportunity.

But Mr. van der Vis is skeptical of the enormous trade deal being negotiated between the United States and the European Union, the Transatlantic Trade and Investment Partnership, better known as T.T.I.P. He singles out a provision that would enable multinational companies to sue governments for compensation when regulations dent their profits.

Esso, a subsidiary of Exxon Mobil, the American petroleum company, has operations in the Netherlands. Suppose the government went ahead with plans to limit drilling to protect the environment?

"They could sue the Dutch state," he fumed. "We are not so sure in the Netherlands whether we want to give the multinationals so much power. We are a trading country, but it's not always that trade should prevail against quality of life."

Out at the docks, the longshoremen fret about robots.

On a recent afternoon, the Mette Maersk, a Danish-flagged behemoth, sat tethered at APM Terminals. Some 18,000 shipping containers are stacked like children's blocks on a deck longer than three football fields, bearing auto parts, scrap metal, electronics — any conceivable thing made on one continent and sold on another.

Robotic arms grip containers, lift them and deposit them on deck with thunderous rumbles. Trucks drive themselves.

Yet to absorb this scene and conclude that robots are about to render humanity jobless is to miss something vital. At offices a few miles away, coders are designing the software powering the automated port system, earning wages they distribute through the economy.

For the longshoremen still employed, automation has tamed their work.

John Arkenbout remembers working through ceaseless wind and drizzle when he started at the port 25 years ago. He lifted huge bricks from a pile and dropped them into rope sacks that a crane operator lifted skyward. He saw three people die — one crushed by a truck, two flattened by wayward containers.

Now many longshoremen sit in glass-fronted offices set back from the docks, controlling robotic arms via computer terminals.

"Before, it was physically taxing," Mr. Arkenbout, 51, said. "Now it's more mental."

Most longshoremen earn about 50,000 euros a year, or $56,000. Mr. Arkenbout works a maximum of 40 hours a week.

But he sees the robots becoming more sophisticated. He hears from union leadership that as many as 800 jobs could be eliminated by 2020.

The union held a rare strike in January, winning job guarantees while robots are phased in gradually. But labor is playing defense. The robots will win in the end, because robots never strike. Robots improve with time.

Mr. Arkenbout scoffs at the notion that automation and trade are separate. The shipping companies are deploying robots to cut costs.

Trade deals, immigrant labor, automation: As Mr. Arkenbout sees it, these are all just instruments wielded in pursuit of the same goal — paying him less so corporations can keep more.

"When they don't need me anymore," he said, "I'm nothing."

TOXIC BUFFET

HOW THE TPP TRADES AWAY SEAFOOD SAFETY

food&waterwatch

About Food & Water Watch

Food & Water Watch champions healthy food and clean water for all. We stand up to corporations that put profits before people, and advocate for a democracy that improves people's lives and protects our environment. We envision a healthy future for our families and for generations to come, a world where all people have the wholesome food, clean water and sustainable energy they need to thrive. We believe this will happen when people become involved in making democracy work and when people, not corporations, control the decisions that affect their lives and communities.

Food & Water Watch has state and regional offices across the country to help engage concerned citizens on the issues they care about. For the most up-to-date contact information for our field offices, visit *foodandwaterwatch.org*.

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TOXIC BUFFET

HOW THE TPP TRADES AWAY SEAFOOD SAFETY

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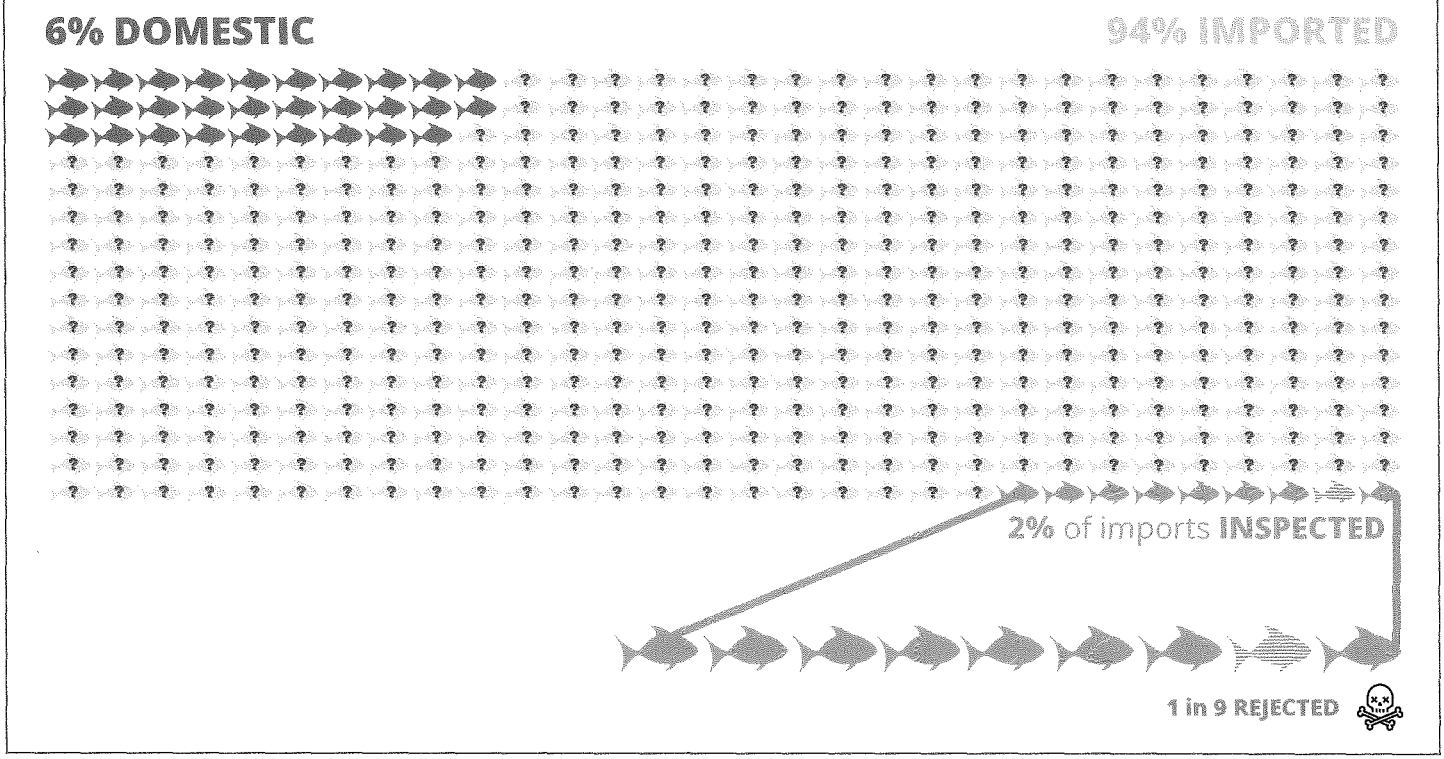


SOURCE: F&WW Analysis of FDA,NOAA Data.

Executive Summary

Americans eat billions of pounds of seafood each year, but few know that almost all of the fish on our dinner plates is imported. Fish is nutritious and provides important health benefits, but seafood also is the largest identified source of foodborne illness, according to the U.S. Centers for Disease Control and Prevention (CDC).

International trade deals have brought a rising tide of imported seafood, which has overtaxed the ability of U.S. border inspectors to ensure that it is safe to eat. By 2015, the United States imported 5.5 billion pounds of seafood, representing more than 90 percent of U.S. seafood consumption.

A large portion of the imported seafood is not caught by fishing fleets but is raised on large-scale fish farms. These factory farms on water raise hundreds of thousands of tightly packed carp, shrimp, tilapia, crab and catfish in one location in often unhygienic conditions. To combat widespread disease, fish farmers in the developing world that supply the U.S. market often use drugs and chemicals that are banned in the United States.

Border inspectors with the U.S. Food and Drug Administration (FDA) examine only a tiny portion of these imports, and the FDA conducts even fewer tests in laboratories to screen imports for illegal drug residues, pathogens like *Salmonella* or other contaminants. The currently pending Trans-Pacific Partnership (TPP) would only increase imports further — including from major fish farming nations like Vietnam and Malaysia that already have a checkered safety record.

Food & Water Watch examined a decade of FDA seafood import shipment, inspection, laboratory test and refusal data from 2006 to 2015, exposing substantial weaknesses in the inspection system for imported seafood. Key findings include:

- The FDA inspects only 2 percent of imported seafood; more than 5.3 billion pounds of seafood entered the U.S. food supply without even a cursory examination in 2015;
- Less than 1 percent of seafood imports are tested by the FDA at a laboratory for pathogens like *Salmonella* or *Listeria* or the presence of illegal veterinary drugs;
- Although few imports are examined, the FDA rejected 11 percent of inspected shipments for significant food safety problems;

- *Salmonella, Listeria*, filth and illegal veterinary medicines were the most common reasons that imported seafood was rejected; and
- The number of imports rejected for illegal veterinary drugs nearly tripled over the past decade, and made up one-fourth of all FDA refusals between 2014 and 2015.

Seafood imports have exceeded the FDA's ability to ensure that the fish that reaches our supermarkets and restaurants is safe to eat. More trade deals like the TPP would further overtax FDA inspectors and deliver more uninspected seafood to the U.S. food supply.

Introduction

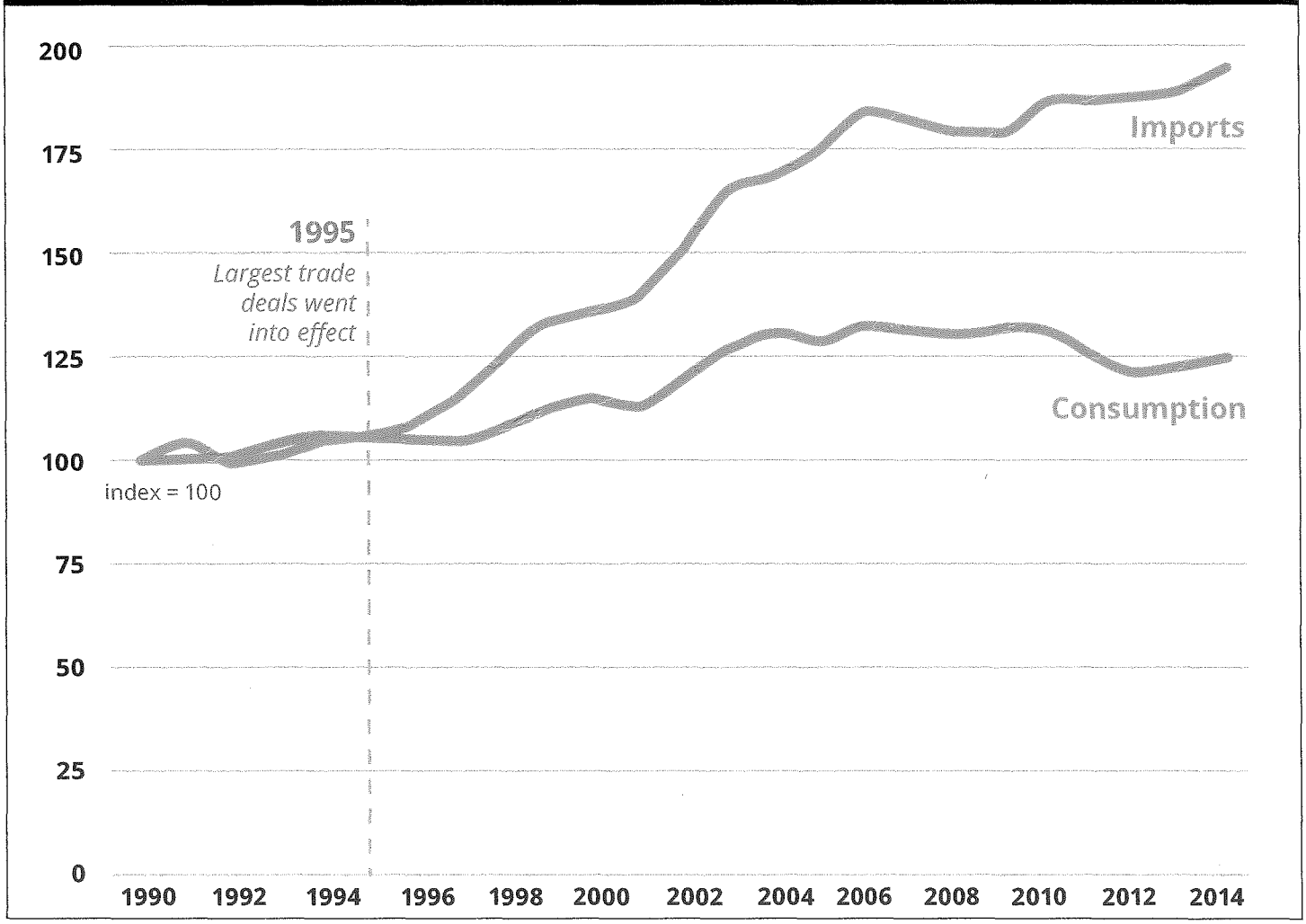
Americans ate 4.6 billion pounds of fish and seafood in 2014 — about 15 pounds per person.[1] But most people are unaware that almost all of the seafood sold in the United States is imported and that federal safety inspectors examine only about 2 percent of the imports.[2]

Increasingly, these imports are not caught by fishing fleets but are raised on high-density fish farms. The growing fish farming industry (known as aquaculture) can present new hazards to consumers. In the developing world, a thriving fish farming industry generates lucrative export opportunities for high-value shrimp, tilapia, crab and other fish.

But the pursuit of profits can encourage aquaculture facilities to cut corners and compromise food safety. The crowded and unsanitary conditions on factory fish farms make the fish vulnerable to disease. Fish farms often use drugs and chemicals that are banned in the United States to ensure that their products survive to harvest. The overuse of some of these antibiotics contributes to the growing public health threat from antibiotic-resistant bacteria.

Americans know that fish and seafood are an important part of a healthy diet and contribute to cardiovascular health.[3] But foodborne illnesses from seafood are far from uncommon. In 2013, the CDC estimated that fish and

Figure 1: Imports Rise Faster than Consumption
U.S. Seafood Import and Seafood Consumption Index, 1990-2014



SOURCE: F&WW Analysis of USDA, NOAA Data.

seafood caused more than one-third of foodborne illness outbreaks — and fish and shellfish individually were the cause of more outbreaks than any other single food source identified as a cause of illness.[4] Between 2004 and 2013, fish and seafood products instigated more than 540 foodborne illness outbreaks that sickened almost 5,200 people.[5]

U.S. import inspectors are responsible for ensuring the safety of the seafood that Americans eat. Seafood consumption has grown modestly over the years, but seafood imports have skyrocketed, driven largely by international trade deals that have globalized the seafood industry. Since 1995, when the largest trade deals went into effect, U.S. seafood consumption has grown by about 1 percent annually, but seafood imports have jumped by 84 percent — more than 4 percent a year (see Figure 1 on page 3).[6]

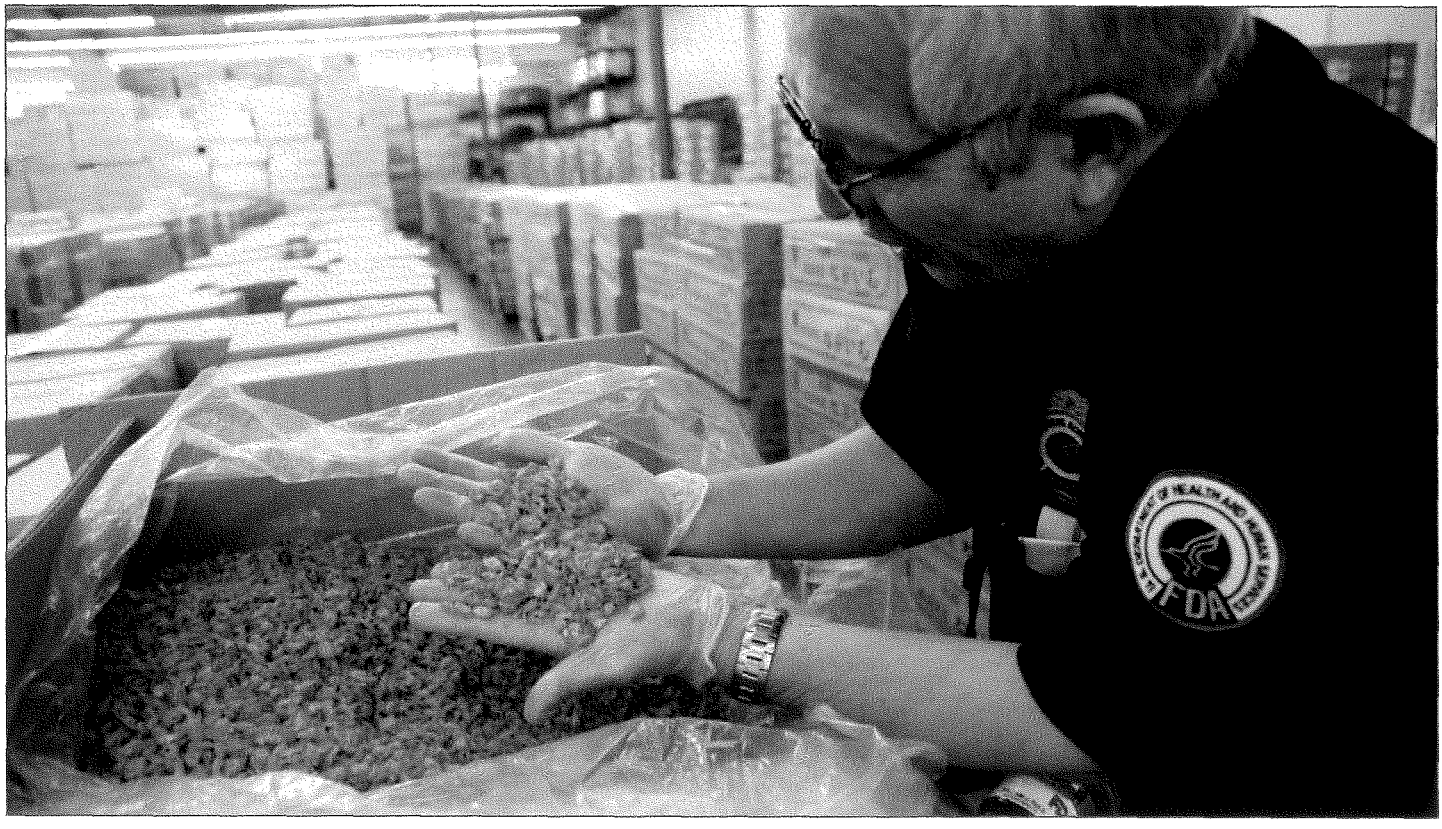
In 2015, the United States imported 5.5 billion pounds of fish and seafood products.[7] The rising tide of imports now represents the vast majority of seafood that Americans eat — 94 percent in 2014.[8] Half of these imports are not wild-caught but are farm-raised in squalid conditions in ponds and river cages.[9]

Americans are largely unaware of the health concerns associated with imported farmed fish. High-density fish farms frequently use antibiotics and chemicals to combat disease outbreaks in the crowded, unsanitary conditions that foster bacteria and parasites. To fight these diseases, many major fish farming countries use veterinary drugs and fungicides that are unapproved in the United States. The FDA is increasingly concerned that U.S. fish imports contain residues of these drugs and chemicals, which can cause cancer and allergic reactions and contribute to the creation of antibiotic-resistant bacteria.[10]

U.S. border inspectors do not examine enough imports to find these unapproved and dangerous chemicals and other food safety problems on imported fish. FDA officials have blamed past trade deals for the steep increase in imports that have overtaxed the ability of U.S. border inspectors to protect the food supply.[11] Proposed trade deals like the pending Trans-Pacific Partnership would only further increase the volume of imported fish and overtax U.S. border inspectors.

Seafood Imports Rise, Inspections Barely Keep Pace

U.S. border inspectors struggle to keep up with the massive volume of products coming across the border, making it harder to prevent pathogens, filth and antibiotic residues on seafood from entering the food supply. Much of the increase in imports was facilitated by international trade deals that went into effect in the mid 1990s, bringing



cheap — and often risky — fish imports. In 1995, just over half (54 percent) of fish consumed in the United States was imported. By 2014, 94 percent of the seafood that Americans ate was imported.[12]

Imports make up the vast majority of many kinds of commonly eaten fish and seafood products (see Figure 2).[13] Shrimp is the most popular seafood in the United States — consumption doubled over the past 30 years — and while shrimp make up one-fourth of the seafood that Americans eat, 93 percent of that shrimp was imported.[14]

The U.S. import safety inspection system is unable to ensure that imported seafood is safe. The U.S. Government Accountability Office (GAO) has reported that, "Given the volume of imports into the country, there is considerable potential for violative items — products that do not meet U.S. safety standards or labeling requirements — to enter the U.S. food supply."[15]

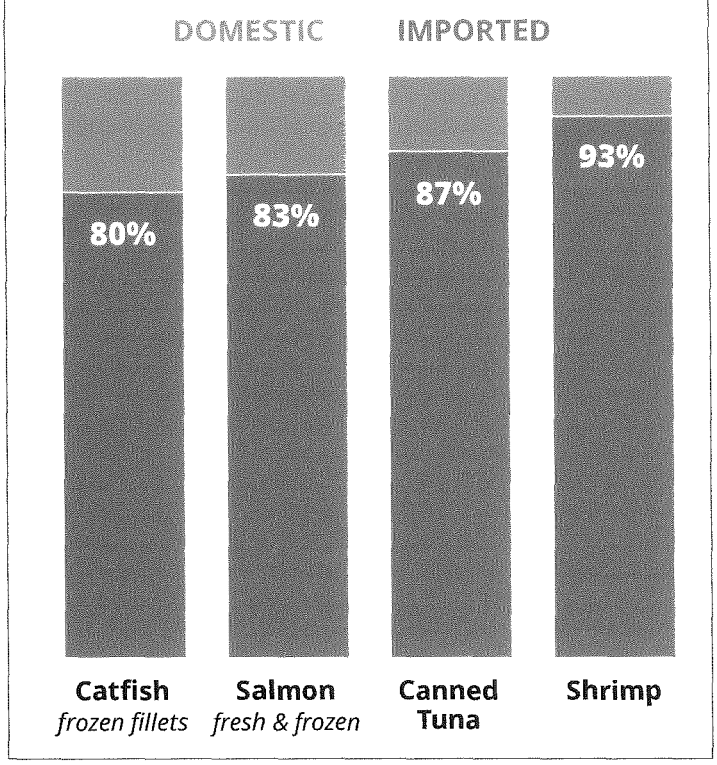
The FDA is responsible for inspecting virtually all imported fish.[16] But the FDA lacks the resources necessary to inspect and sample all — or even a sufficiently large sample of — seafood imports.[17] Instead, the FDA focuses on the imports that it believes are the riskiest. This strategy may prevent some of the most dangerous seafood imports from entering the food supply, but the FDA's pitifully low level of inspection cannot guarantee that all dangerous imports are blocked at the border. The FDA also performs far too few inspections of foreign seafood processors and exporters — fewer than 90 annual inspections of 17,000 foreign seafood plants.[18]

More importantly, the absence of statistically valid random testing means that the FDA cannot be certain that the uninspected seafood is safe to eat. The FDA uses a computer program to screen seafood import risks based on the type of fish, the safety record of the exporting company, foreign inspection records (if any), the country of origin and the safety history of the importing company.[19] If the FDA determines that an import shipment poses a safety risk, it can physically inspect the shipment and take a sample for laboratory analysis.[20]

But the steady surge of imported seafood has overtaxed the FDA's border inspectors. There are fewer than 100 FDA inspectors assigned to examine the 5.5 billion pounds of imported seafood — meaning that each inspector monitors 220,000 pounds of seafood every day.[21]

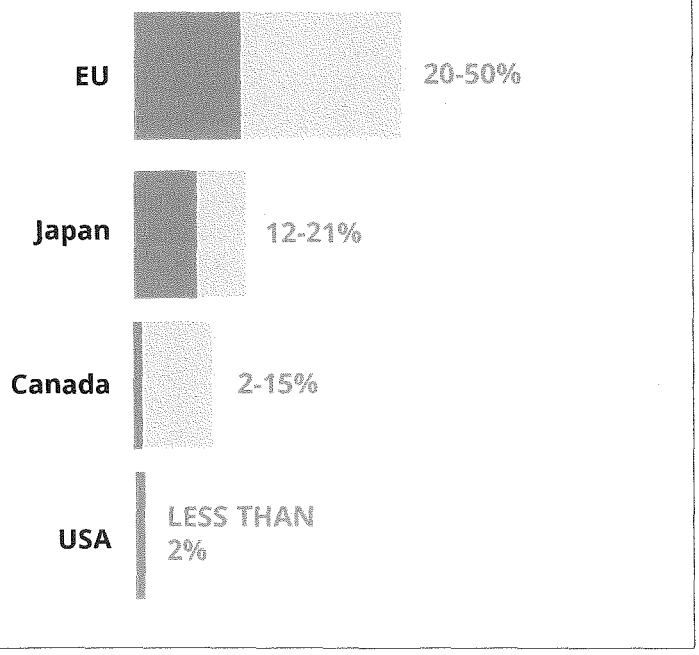
Food & Water Watch found that the FDA inspected less than 2 percent of seafood import shipments between 2006 and 2015. Although the number of inspections has risen

Figure 2: Import Share of Selected Seafood, 2014



SOURCE: NOAA; Auburn University; imported tuna share includes imported tuna canned in United States.

Figure 3: Percent of Seafood Imports That Are Inspected



SOURCE: F&WW analysis of FDA FOIA data; Love; see endnote 22.

in recent years, because imports have continued to rise, the FDA still inspected only 2.1 percent of shipments between 2014 and 2015 (see Figure 3 on page 5).[a] The U.S. inspection rate is far below that of other major seafood importers. The European Union (EU) inspects between 20 and 50 percent of seafood imports (based on product type), Japan inspects between 12 and 21 percent, and Canada inspects between 2 and 15 percent.[22]

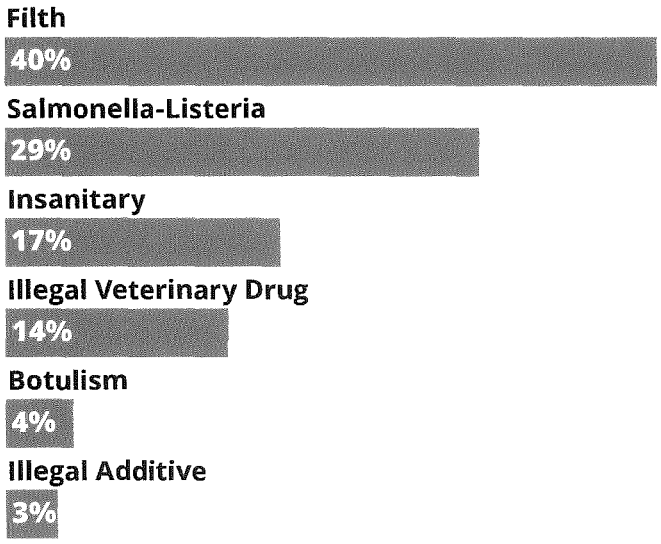
Even fewer imports get tested in a laboratory, which is necessary to discover pathogens like *Salmonella* and *Listeria* as well as illegal drug or chemical residues. Over the past decade, fewer than 1 percent (0.9 percent) of imported seafood shipments received laboratory tests of any kind. This consistently low level of laboratory testing has continued even as the FDA has recognized the growing public health risk from illegal veterinary drug and chemical residues.

Although the FDA allows the overwhelming majority of seafood imports into the country without any inspection, when the FDA does inspect seafood imports, it routinely rejects a substantial number for food safety problems. Seafood was the most commonly rejected food by the FDA from 2005 to 2013, according to a recent study from the U.S. Department of Agriculture (USDA).[23]

Food & Water Watch found that between 2006 and 2015, the FDA rejected 11.1 percent of all the seafood shipments that were inspected for failing to meet U.S. safety standards. The most common reasons that the FDA rejected seafood imports were for harmful pathogens like *Salmonella* and *Listeria*, filth and decomposition, insanitary processing and packaging, unsafe additives, illegal veterinary drugs and other food safety concerns (see Figure 4). Although the refusal rate has fallen somewhat over the years, the USDA says that this decline is not necessarily because imported safety is getting safer; instead, it "may reflect [the] FDA's limited resources and capacity to inspect, detain and refuse imported food."[24]

The paltry inspection rate allows billions of pounds of uninspected seafood into the U.S. food supply. The volume of uninspected seafood that entered the United States rose to 5.3 billion pounds in 2015 (see Figure 5).[25] The FDA's limited and targeted risk-based inspection does not examine enough imports to know that the uninspected seafood is safe. In 2016, the USDA found that the FDA's failure to "randomly sample import shipments for inspection" meant that it is impossible to know if the FDA's import inspection system was adequately protecting the food supply.[26] In 2014, the GAO found that the FDA's testing of imports for pesticides was not a statistically valid random sample sufficient to detect illegal pesticide levels in the food supply.[27]

Figure 4: Percentage of FDA Seafood Import Rejection by Food Safety Concern, 2006-2015

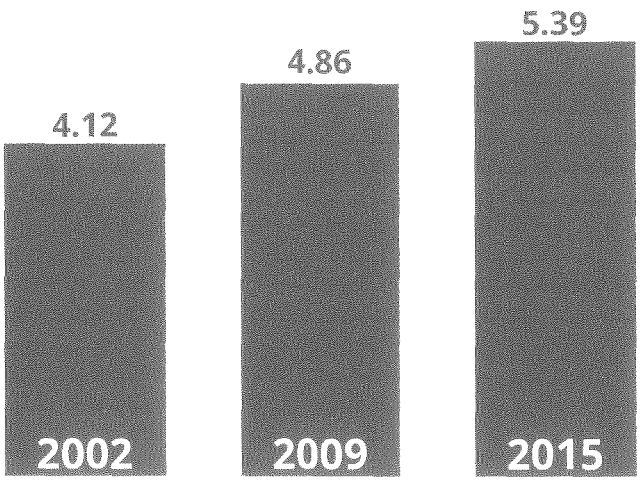


NOTE: Imports can be rejected for more than one safety reason

SOURCE: F&WW analysis of FDA data.

Figure 5: Uninspected Seafood Imports

IN BILLIONS OF POUNDS



SOURCE: F&WW Analysis of USDA, FDA data.

a The FDA does not always inspect, perform laboratory tests or determine whether or not to refuse import shipments in the same calendar year that the shipments enter the country. Food & Water Watch used rolling two-year averages to account for FDA evaluations and determinations that occur in more than one calendar year.

We know that the FDA's inspection screening is not catching all of the unsafe imported seafood because tainted seafood ends up on supermarket shelves and restaurant tables. The USDA noted that the persistent detection of the same problems means that the FDA's border inspections are not "deterring producers and importers from offering food shipments that violate U.S. laws."[28] Between 2006 and 2015, the FDA issued more than 60 recalls of imported fish that made it to supermarkets and restaurants for problems including botulism, *Listeria* and *Salmonella*.[29]

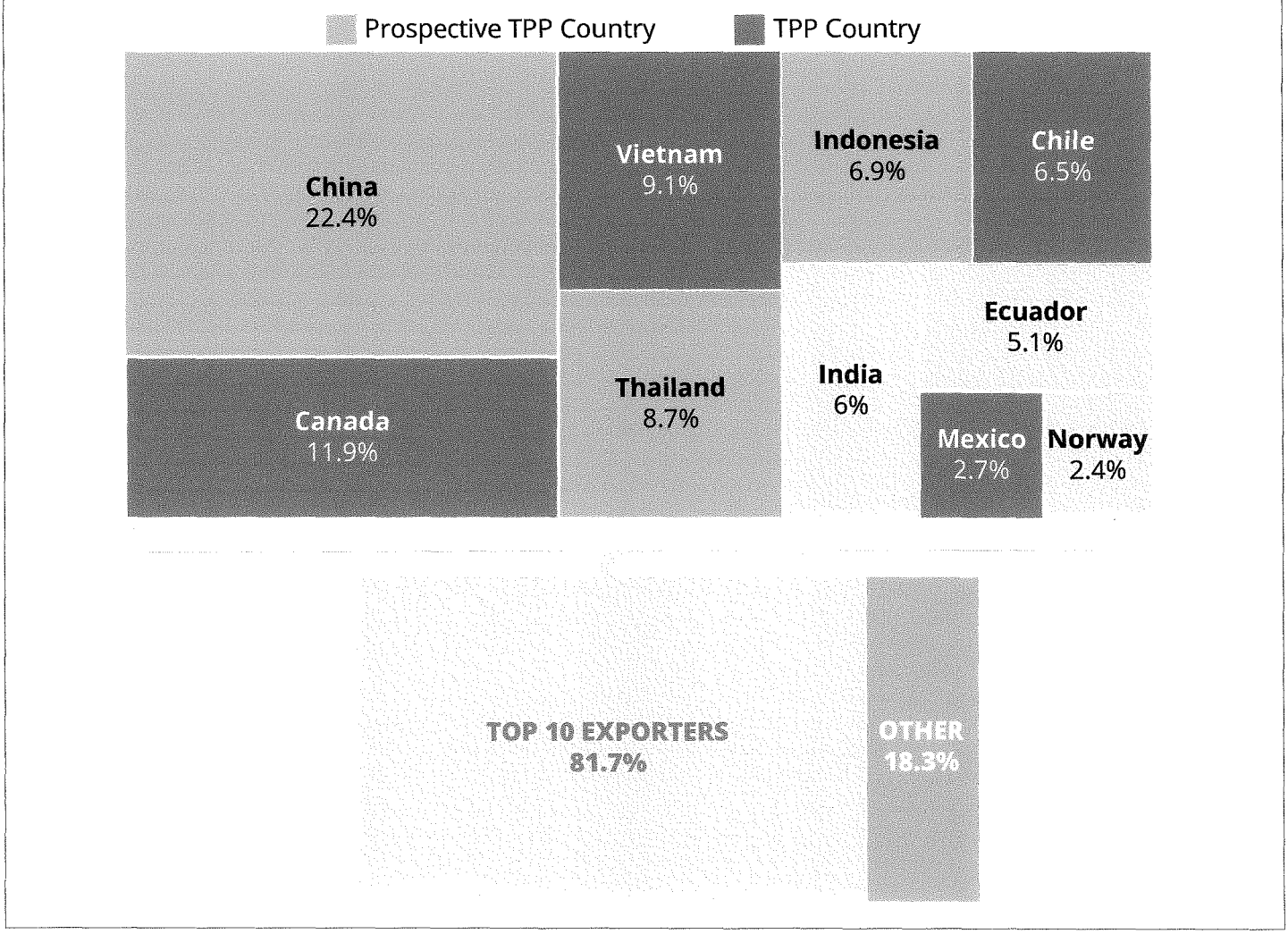
Studies also have found foodborne hazards on imported seafood sold in supermarkets. In 2015, *Consumer Reports* found that at least 70 percent of shrimp samples from Bangladesh, India, Indonesia and Vietnam tested positive for at least one pathogen such as *E. coli* and *Salmonella*.[30] A 2013 study from North Carolina State University found the carcinogen formaldehyde on one-quarter of imported fish bought at a local supermarket.[31]

The limitations of the FDA's seafood import regime are especially troubling because of the emerging public health threat from antibiotic-resistant bacteria. More U.S. seafood imports are coming from large-scale fish farms that rely on a constant supply of antibiotics to maintain production, and these antibiotics are often still on the fish when they arrive at the U.S. border.

The Rise and Risk of the Global Trade in Farmed Fish

Fish farming — or aquaculture — has become a major force in the global seafood trade. Aquaculture is not new. Coastal communities have farmed fish, crustaceans and shellfish for centuries on a small scale. However, today's industrial-scale fish farming raises fish intensively in densely packed ponds and pens that allow pathogens and disease to flourish.

Figure 6: Top 10 Seafood Exporters to United States, 2015



SOURCE: F&WW analysis of USDA GATS database.

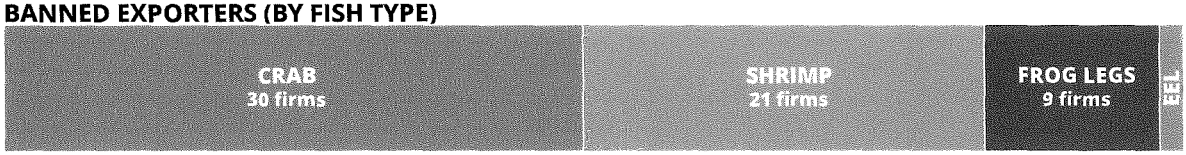
Figure 7: Exporters Banned for Repeat Violations of Prohibited Veterinary Drugs with Human Health Hazards

CHLORAMPHENICOL
Antimicrobial

- Potentially fatal blood disorders
- Suspected carcinogen
- Potential impact on reproductive system

61 BANNED EXPORTERS (BY COUNTRY)

BANNED EXPORTERS (BY FISH TYPE)



NITROFURANS
Antibiotic

- Carcinogenic, genotoxic

32 BANNED EXPORTERS (BY COUNTRY)

BANNED EXPORTERS (BY FISH TYPE)

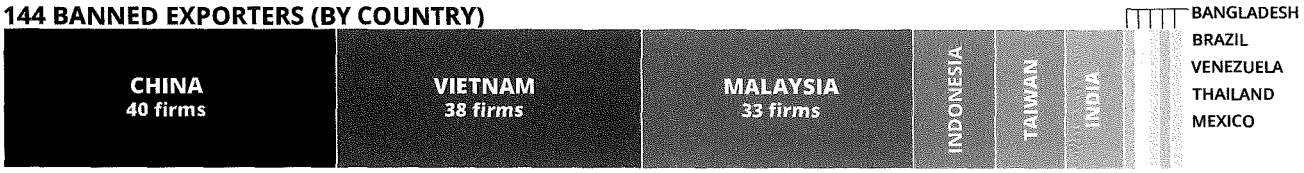
MALACHITE GREEN
Antifungal/antimicrobial dye

- Carcinogenic, mutagenic

GENTIAN VIOLET
Antiparasitic dye

- Potentially mutagenic, potentially carcinogenic

144 BANNED EXPORTERS (BY COUNTRY)



BANNED EXPORTERS (BY FISH TYPE)

SOURCE: FDA; F&WW analysis of FDA Import Alerts as of August 2016; FDA banned 144 exporting firms for violations of both Malachite Green and Gentian Violet.

Since 2000, worldwide fish farming production has more than doubled to 155 billion pounds in 2013.[32] Aquaculture is one of the fastest-growing food production industries, supplying nearly half (42.2 percent) of worldwide seafood consumption.[33] The industry has ballooned as ocean catches have stagnated due to overfishing.[34]

The high-value farmed fish like shrimp, crab, tilapia and salmon can generate substantial export earnings.[35] The top-five fish farming countries — China, India, Indonesia, Vietnam and Bangladesh — produced 79.8 percent of the farmed fish worldwide in 2012, and they increasingly dominate the global seafood trade (see Figure 6 on page 7).[36] Vietnam exports almost all (96 percent) of its farmed fish.[37] Over the past two decades, U.S. imports from these top fish farming countries surged nearly seven-fold to 2.4 billion pounds in 2015, supplying 44 percent of U.S. imports.[38]

The drive to promote aquaculture export earnings has led to a global fish farming industry that pushes increased production but often skimps on food safety and environmental protection. Too many fish raised intensively in often dirty water is a recipe for disease and has encouraged the use of drugs and chemicals that are banned by the FDA. These problems easily land on our plates, since 47 percent of the seafood that Americans eat is imported from fish farms.[39]

Crowded fish farms, pervasive disease and rampant antibiotic use

The growth in global fish farming was fueled by intensifying production: cramming more and more fish into the same ponds or pens.[40] High-density fish farming causes more frequent infectious disease outbreaks.[41] Health problems spread rapidly in tightly packed, unhygienic conditions as highly contagious diseases can transfer easily from sick to healthy fish.[42] The fish farming industry has been overwhelmed by viruses, bacteria, fungi and parasites.[43] These conditions can create "massive disease outbreaks" that can destroy the fish farm's production — sometimes killing half of the fish.[44]

The fish are raised in water that is often far from pristine, only making disease more likely. Industrial toxins, agrochemical runoff and sewage can all taint water used for fish farms.[45] Some Asian fish farms fill ponds with wastewater, including animal manure and human sewage.[46] In Vietnam, the use of wastewater is widespread, and a survey found that two-thirds of the Mekong River delta toilets — approximately 360,000 toilets used by more than 6 million people — emptied into fish ponds.[47]

Box 1: *Antibiotics on fish farms contribute to antibiotic-resistant bacteria*

The widespread use of antibiotics on fish farms contributes to the growing public health threat from antibiotic-resistant infections. The antibiotics used by fish farms in the developing world are the same antibiotics used for humans; if bacteria develop resistance to these antibiotics, then they won't work for people when they get sick. The most common antibiotics used on fish farms are all on the World Health Organization's list of critical or highly important antibiotics for humans, and there already is significant resistance to some of these antibiotics.[72]

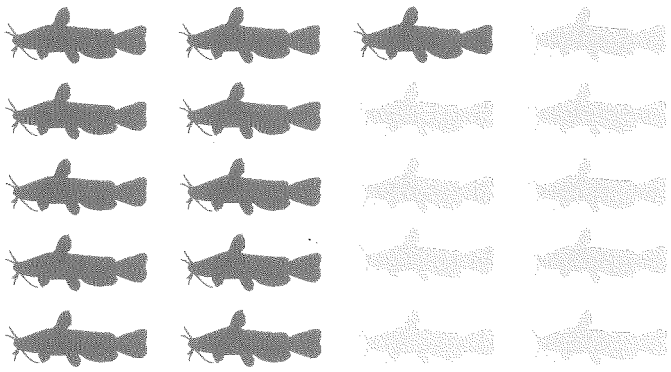
The CDC estimates that at least 2 million Americans experience antibiotic-resistant infections every year.[73] These infections lead directly to at least 23,000 deaths annually and to many more deaths from antibiotic-resistant complications.[74] Approximately 22 percent of those infections originate from foodborne pathogens.[75]

Antibiotic-resistant bacteria can be transferred directly to people through tainted fish.[76] Consumers can be exposed to antibiotic-resistant strains by eating or simply preparing seafood.[77] A 2012 study by FDA researchers found that the consumption of shrimp treated with antibiotics could expose consumers to antibiotic-resistant bacteria that would be harder to treat with common medicines.[78] The number of different antibiotic-resistant strains of bacteria found in fish has been increasing significantly.[79] To reduce the risk of infection, the USDA urges consumers to cook fish fully and to avoid cross-contamination between the fish and other foods.[80]

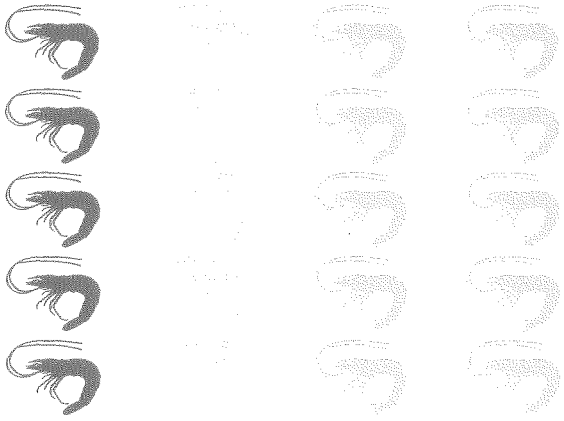
Beyond the risk to individuals eating or preparing fish, the overuse of antibiotics in aquaculture is driving a larger public health risk. The high doses of unnecessary antibiotics given to fish have to end up somewhere — either as residues in the fish or discharged into water and soil through the fish waste.[81] These antibiotics accumulate in the water and sediment surrounding the fish farms.[82] The long-term exposure to antibiotics pushes the bacteria in the fish, water and soil to develop resistance to these antibiotics, creating a reservoir of antibiotic-resistant bacteria on fish farms and in the surrounding environment.[83] Fish farming in Vietnam's mangrove regions has led to high levels of antibiotic residues and resistant bacteria in the surrounding ecosystems.[84] Even wild-caught fish can contain antibiotic-resistant bacteria from exposure to fish farm runoff that reaches distant waterways.[85]

(continued on page 11)

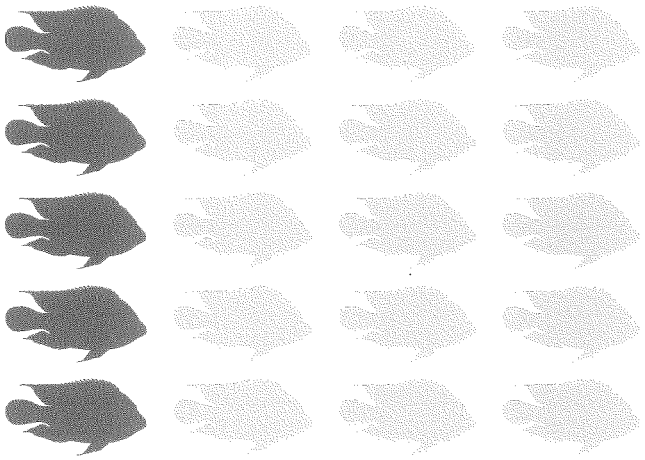
Figure 8: Share of Rejections for Illegal Veterinary Drugs



55% of catfish

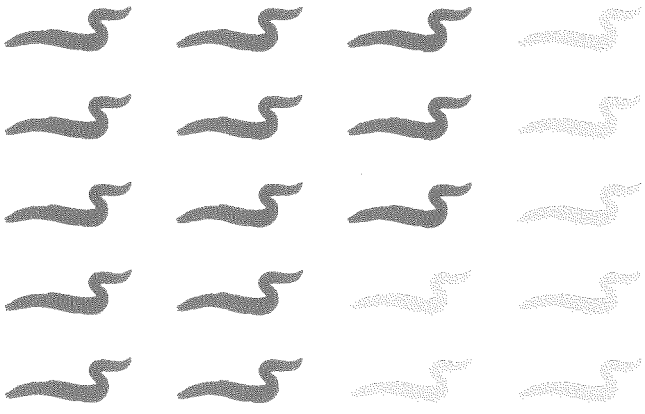


25% of shrimp

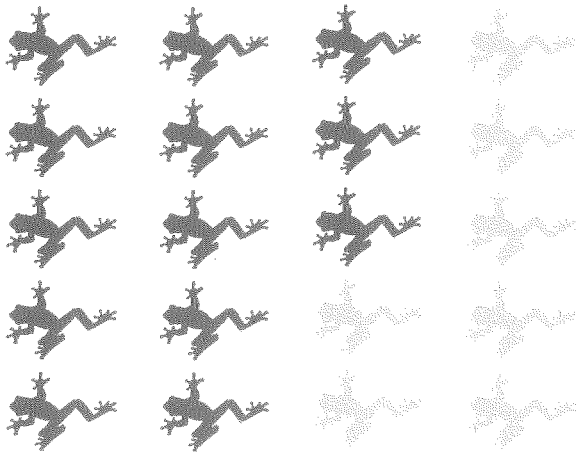


26% of tilapia

38% of crab



66% of eel



65% of frogs

SOURCE: F&WW analysis of FDA data.

To combat these pervasive diseases, the fish farming industry in the developing world often resorts to antibiotics, fungicides and antiparasitics that are prohibited in the United States. The antibiotics may keep the fish alive, but they pose significant human health risks. The FDA has prohibited several classes of antibiotics for fish farming and banned the import of fish raised with these drugs and chemicals into the United States.[48] The FDA is increasingly concerned that U.S. fish imports contain residues of these drugs and chemicals, which can cause cancer and allergic reactions and contribute to the development of antibiotic-resistant bacteria (see Figure 7 on page 8 and Box 1 on page 9).[49]

Antibiotics help prevent and control the diseases common on fish farms.[51] They are typically administered in the fish feed or water, indiscriminately dosing both diseased and healthy fish alike.[52] These drugs also promote growth, so the farmed fish can quickly grow and gain weight, increasing the fish farms' earnings.[53] Fish farming exporters often deploy banned drugs and chemicals to maximize profits — and they can get away with it because of the FDA's weak import inspection system.

The use of antibiotics that are illegal in the United States is widespread in fish farming in the developing world.[54] A 2013 study found that all surveyed Vietnamese catfish farms used antibiotics that were unapproved in the United States.[55] A 2015 survey found widespread use of antibiotics in Vietnamese carp, tilapia and catfish hatcheries as well as catfish farms.[56] The robust farmed salmon industry in Chile was fueled with heavy antibiotic use.[57] A 2003 study found that three-quarters of shrimp farmers in Thailand used antibiotics.[58] The countries that supply the vast majority of U.S. shrimp imports use antibiotics that are prohibited in the United States.[59] The FDA frequently rejects eel, catfish, crab, tilapia and shrimp for illegal drug residues (see Figure 8 on page 10).

Most fish farming occurs in countries with little oversight of antibiotic use.[60] In Malaysia, aquaculture antibiotic use is poorly regulated with little enforcement of its lax rules.[61] Chile neither effectively regulates nor tracks antibiotic use in the salmon industry and allows several classes of antibiotics that are banned in the United States.[62] In 2008, FDA inspectors in Vietnam found that the government allowed the use of 38 veterinary drugs banned in the United States and asked the government to test all U.S.-bound seafood, but Vietnam refused and only promised additional enforcement.[63] In 2015, the Vietnam Association of Seafood Exporters and Producers acknowledged persistent problems with antibiotic use in fish farming.[64] Although China banned several antibiotics for aquaculture in 2002, the FDA continues to find illegal antibiotic residues on Chinese imports.[65]

Weak inspection allows tainted fish to enter the food supply

The FDA's weak inspection system is exposing consumers to illegal antibiotics. The combination of exporters' widespread antibiotic use and exporting countries' weak oversight puts the burden of preventing these illegal drugs and chemicals entirely on U.S. border inspectors.

The volume of imported seafood containing illegal antibiotic residues has skyrocketed. Food & Water Watch found that the number of imported seafood shipments that the FDA rejected for illegal veterinary drugs nearly tripled over the past decade, rising from just under 200 in 2006 to 535 in 2015 (see Figure 9 on page 12). These illegal drug residues made up one-fourth (24.8 percent) of all FDA refusals between 2014 and 2015. But despite the rapid emergence of a new public health risk, the FDA has not increased the number of laboratory tests of imported seafood. Over the past five years, the FDA has performed an average of 8,700 laboratory tests — but laboratory tests declined by 19.3 percent over the past three years, from 10,591 in 2013 to 8,539 in 2015.

Box 1: *Antibiotics on fish farms contribute to antibiotic-resistant bacteria* *(continued from page 9)*

The overuse of antibiotics promotes resistance not only in fish bacteria, but also in human pathogens.[86] When bacteria in the aquaculture reservoirs develop antibiotic resistance, the genes for the resistance can be transferred to other human pathogens such as *Salmonella*, making them resistant as well.[87]

Many countries with intensive fish farming industries are already facing problems with antibiotic resistance. Vietnam has the one of the highest levels of antibiotic resistance in the world, with several "super-bugs" that are completely resistant to all antibiotics, making them impossible to treat.[88] In Chile, the antibiotic resistance found in farmed salmon has spread to people living near salmon farms and to the surrounding environment.[89]

The lower level of laboratory scrutiny likely means that the FDA is letting shipments containing illegal drug residues into the food supply.[b] The United States tests for a smaller number of antibiotics and veterinary drugs than the EU and Japan and is likely missing violations that these other countries found.[66] The EU found four times the number of veterinary drug violations on imported seafood annually than the United States, likely because it inspects 10 times more imported fish (at least 20 percent of fish is inspected in the EU, compared to 2 percent in the United States).[67]

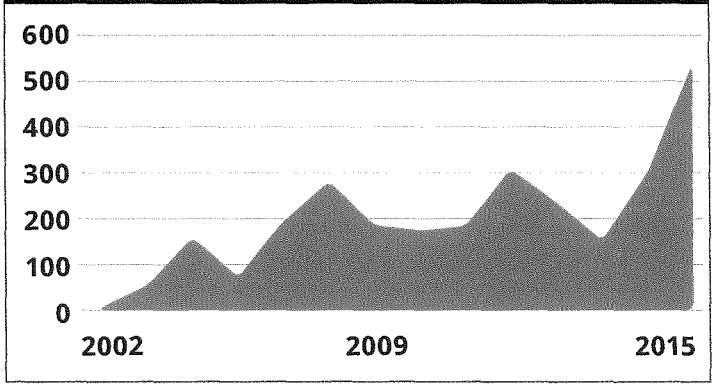
Studies of imported fish collected from U.S. grocery stores demonstrate that the FDA is allowing seafood containing illegal antibiotic residues to enter the food supply. The low level of FDA border inspections and laboratory tests allows these illegal antibiotic residues to enter the U.S. food supply. In 2015, *Consumer Reports* tested shrimp from grocery stores across the country and found antibiotics and antibiotic-resistant bacteria on about 80 percent of the samples from Vietnam, Bangladesh and Ecuador.[68] A 2012 study found antibiotic-resistant bacteria on about one-fifth of imported shrimp samples from U.S. supermarkets.[69] In 2012, researchers from Texas Tech University found antibiotics on 10 percent of imported farm-raised fish sampled from U.S. supermarkets.[70]

Despite the low level of inspection and laboratory testing, the FDA has been concerned enough about illegal antibiotics to ban seafood imports from companies because of repeated problems with illegal antibiotics and antiparasitics that pose significant public health threats. As of August 2016, the FDA had four "Import Alerts" banning seafood imports from 70 exporters in 8 countries for shipping seafood containing illegal veterinary drugs to the United States (see Figure 10 on page 13).[71] Four-fifths of the firms (82.8 percent) banned for illegal antibiotics were from China, Malaysia and Vietnam. More than half of the Import Alerts prohibited companies from exporting shrimp and crab for longstanding problems with illegal antibiotic residues.

Trans-Pacific Partnership Will Make It Harder to Stem a Rising Tide of Dangerous Fish Imports

Many of the problems caused by aquaculture production are due to the continued globalization of the food supply. New trade deals, like the proposed Trans-Pacific Partnership, will only increase the volume of imported seafood and further overwhelm U.S. border inspectors. Moreover, the TPP makes it easier for foreign governments to challenge U.S. food safety rules — including border inspection protocols and prohibitions against certain fish farming drugs and chemicals — as illegal trade barriers. And because the TPP food safety dictates are stronger than in prior trade deals, it would be easier for exporting countries to successfully challenge U.S. food safety laws and would make it even harder to stop unsafe fish shipments at the border.

Figure 9: Number of Imported Seafood Shipments Rejected for Illegal Veterinary Drugs



SOURCE: F&WW analysis of FDA data.

The TPP is a 12-nation trade deal with some of the biggest seafood exporters to the United States including Vietnam, Canada, Mexico and Malaysia.[c]

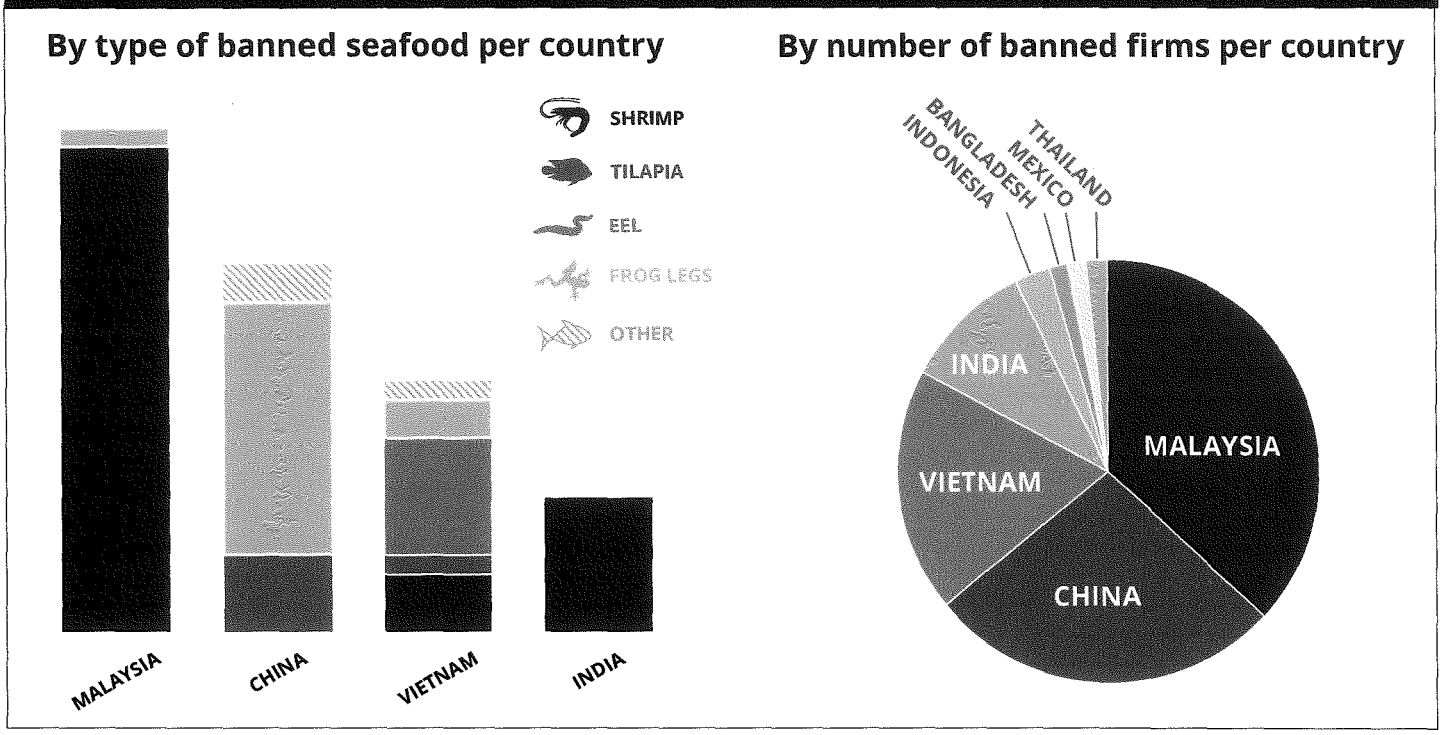
The TPP lowers tariffs (taxes levied on imports) on nearly 140 kinds of seafood, and the United Nations has found that existing trade pacts that reduced seafood tariffs fueled the rise in fish exports from the developing world.[90] U.S. seafood imports increased nearly twice as fast in the 15 years after the North American Free Trade Agreement and World Trade Organization went into effect.[91] Even the U.S. International Trade Commission estimates that the TPP would increase seafood imports from countries like Vietnam and Malaysia by 9.0 percent.[92]

Even more alarming is that the TPP is designed to allow additional countries to join in the future.[93] Already, the major fish farming countries China, Indonesia, the Philippines, South Korea, Taiwan and Thailand are interested in joining the TPP.[94] These aquaculture powerhouses — along with TPP members Vietnam and Malaysia — have some of the worst seafood safety records of any exporters.

b The term "shipment" refers to the entry of a single customs entry of seafood products into the United States. Shipments can be any size, from a shipping container of canned tuna to a crate of frozen shrimp. In 2015, the average shipment weighed 5,400 pounds.

c The other TPP nations are Australia, Brunei, Chile, Japan, New Zealand, Singapore and the United States.

Figure 10: 70 Total Seafood Exporters With FDA Import Alerts for Illegal Antibiotics



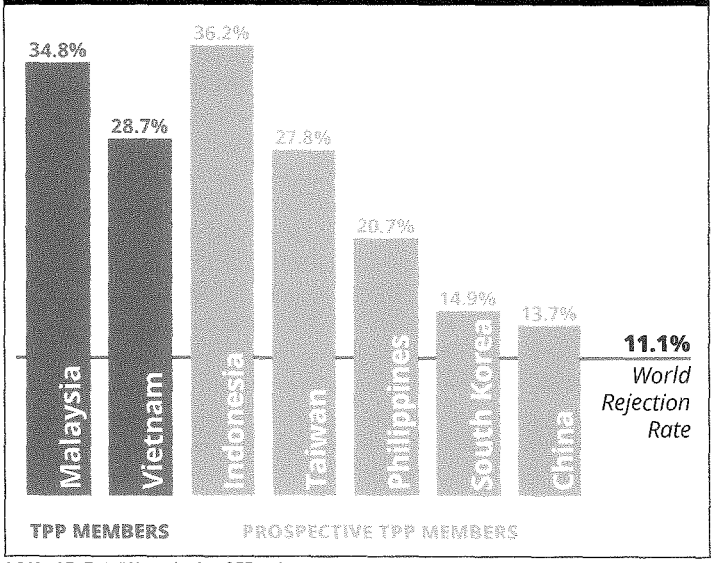
SOURCE: FDA; F&WW analysis of FDA Import Alerts as of August 2016.

The FDA rejects shipments from many of these countries more frequently than average. Over the past decade, Malaysian seafood exports to the United States have been rejected three times more frequently than average, and Vietnam's exports have been rejected twice as frequently (see Figure 11). And the FDA finds antibiotics on large portions of the exports from some countries. From 2006 to 2015, illegal antibiotics were the reason for a large portion of the FDA rejections from Malaysia, China and Vietnam (64.1, 43.5 and 17.2 percent, respectively), far above the overall detection of illegal antibiotics.

FDA ban on antibiotics on fish farms could be unraveled by the TPP

The TPP food safety language presumes that protecting consumers from unsafe food can be an illegitimate trade barrier. The TPP limits our ability to establish strong food safety standards and makes it easier for foreign countries to successfully challenge food safety rules as illegal trade barriers. The TPP's tougher rules could be used to challenge U.S. seafood border inspection and laboratory testing rules and prohibitions on illegal antibiotics in fish farming. The TPP only permits food safety standards that "facilitat[e] and expan[d] trade" — meaning that rules that interfere with the speedy shipment of suspicious or unsafe seafood could be challenged as illegal trade barriers.[95]

Figure 11: FDA Seafood Rejection Rates From TPP and Prospective TPP Countries, 2006-2015



SOURCE: F&WW analysis of FDA data.

Under the TPP, standards must meet tough burdens of scientific proof.[96] Food safety rules must be "based on scientific principles" and on "appropriate" risk assessments and use all "reasonably available and relevant scientific data."[97] In addition, food safety standards cannot be

"more trade restrictive than required," making it difficult to establish protections stronger than international guidelines.[98] These provisions make it more difficult to establish reasonable food safety protections under the TPP and are similar to the "sound science" red herring that delayed or derailed regulations over well-understood public health threats including asbestos, tobacco, lead and dioxin.[99]

The FDA's prohibition against using some veterinary drugs on fish farms, including fluoroquinolones (the class of antibiotics that includes Cipro) and clenbuterol, is vulnerable to a TPP challenge. The FDA standard is higher than the international standard, the underlying science is hotly disputed by the food animal industry, and the outright ban is far from the least trade-restrictive policy.[100] If Vietnam brought a TPP challenge against the FDA ban on fluoroquinolones, it likely would prevail and the United States could be forced to weaken or eliminate the ban.

The TPP also allows exporters to challenge decisions made by border inspectors who stop suspicious food imports — including detaining suspect shipments pending laboratory test results.[101] The TPP requires FDA inspectors to notify exporters within seven days of restricting an import shipment.[102] But FDA laboratory testing can take a week or two — or longer — before dangerous food shipments are identified and safe shipments are released into the food supply.[103]

Under the TPP, exporters must get an "opportunity for a review of the decision" by border inspectors — essentially letting foreign governments second-guess U.S. inspectors.[104] This means that if the FDA stops a shipment of farmed fish to test for illegal antibiotics, the exporting country could challenge the FDA's detention and push potentially unsafe seafood into the U.S. food supply. The U.S. trade ambassador described the new TPP tool as a way for trade experts to "clear up the problem and allow the shipments to move forward."[105]

Conclusions and Recommendations

More of the seafood that Americans eat is imported than ever before, and about half of these imports are raised on fish farms in the developing world that commonly use veterinary drugs and chemicals that are banned in the United States. U.S. border inspectors are overwhelmed by the rising tide of imported seafood. The FDA inspects only about 2 percent of imported seafood shipments and tests only 1 percent in a laboratory for bacteriological or chemical hazards.

International trade deals have driven the rise in seafood imports and further compromise the FDA's ability to ensure that seafood imports are safe. Additionally, the trade deals allow foreign governments to challenge our food safety laws, rules and procedures as illegal trade barriers, potentially eroding U.S. food safety standards. The federal government needs to strengthen and provide sufficient funding for U.S. seafood import inspection and ensure that international trade deals do not undermine U.S. food safety standards.

Food & Water Watch recommends:

- **Strengthen oversight of imported seafood:** The FDA needs to increase the volume and percentage of imported seafood that is inspected at the border and to implement a statistically valid random sampling program to supplement its current risk-based inspection system. Other governments inspect much more imported seafood (the EU inspects at least 20 percent of seafood imports, and Japan inspects at least 12 percent of imports). Congress should provide the necessary funding and directives for the United States to inspect at least 10 percent of seafood imports — far greater than the 2 percent currently inspected at the border.
- **Strengthen laboratory testing of imported seafood for illegal veterinary drugs and chemicals:** The number of seafood shipments rejected for illegal veterinary drugs has tripled over the past decade, and these illegal drug residues now account for one-fourth of all imported seafood rejections. But over the past few years the number of laboratory tests has declined, and the United States tests less than 1 percent of seafood imports in a laboratory. The FDA needs to increase the number of laboratory tests and to test for a wider range of illegal veterinary drugs and chemicals.
- **Increase and sustain the number of domestic and foreign seafood inspections:** The FDA inspects an estimated 80 foreign seafood processing plants

annually, and few domestic processing plants receive FDA inspections. The FDA performs very few — if any — inspections of feed mills that supply fish farms either in the United States or overseas, but these feed mills can be the source of the illegal veterinary drugs and chemicals. Congress must provide more funding for the FDA to perform more physical inspections of foreign facilities, and the FDA needs to prioritize these inspections at its foreign offices and to coordinate with other agencies as necessary to inspect foreign seafood processing plants. This oversight must be sustained and not merely rise at times when public scrutiny is heightened.

- **Increase the transparency of the FDA's seafood inspection program:** The FDA should annually disclose the number of foreign and domestic facility inspections, the number of feed mill inspections and the results of those inspections, as well as the number of seafood border inspectors.
- **Congress should reject trade deals that undermine U.S. food safety standards:** The trade deals of the past quarter-century have brought a tidal wave of imported food that has overwhelmed border inspectors. But more importantly, past trade deals and the proposed Trans-Pacific Partnership have included language that allows foreign governments to challenge U.S. food safety laws, rules and practices as illegal trade barriers. The TPP makes it easier to successfully attack U.S. food safety standards at foreign trade tribunals. Our food safety standards should be determined through Congress and executive branch agencies that can be held accountable by the public — not adjudicated by international trade tribunals.

Methodology and Data

Food & Water Watch examined all import shipments, FDA border inspections, FDA and FDA-contracted laboratory tests and FDA import refusals for food safety reasons and import tonnage for all fish and seafood imports by country from 2006 to 2015. This included 51.8 billion pounds of seafood imports, 8.8 million import shipments, 169,400 FDA border inspections, 80,670 laboratory tests and 18,760 import rejections. The term "shipment" refers to the entry of a single customs entry of seafood products into the United States. Shipments can be any size, from a shipping container of canned tuna to a crate of frozen shrimp. In 2015, the average shipment weighed 5,400 pounds.

Food & Water Watch examined only refusals for food safety reasons (adulteration) and undeclared allergens

(the only examined misbranding violation) but not refusals for other labeling and misbranding problems. The USDA found that 80 percent of import seafood refusals were for adulteration.[106] Similarly, Food & Water Watch excluded laboratory tests aimed at economic deception, labeling, narrative record, net contents, nutrition, product security and integrity, standard of identity and standard of quality. The type of seafood by FDA rejection was determined based on the description recorded by the import certificates included in the FDA refusal data.

The analysis does not cover imports from the United States or territories of the United States including American Samoa, Puerto Rico and the U.S. Virgin Islands. Territories of other exporters were aggregated: Australia includes Christmas Island, Cocos Islands, Heard and McDonald Islands and Norfolk Island; China includes Hong Kong and Macao; and New Zealand includes Cook Islands, Niue and Tokelau.

Food & Water Watch combined publicly available data with data received from Freedom of Information Act (FOIA) requests. The import tonnage volume was downloaded from the USDA's Global Agricultural Trade System database, available at apps.fas.usda.gov/GATS/default.aspx. The FDA import refusals were downloaded from the FDA Import Refusal Reports for OASIS database, available at accessdata.fda.gov/scripts/importrefusals. Food & Water Watch filed FOIAs with the FDA for the seafood import shipment, inspection and laboratory test data by year by country.

Appendix: Top 25 Seafood Exporters to the United States, 2006-2015

	Seafood Imports (millions of pounds)			FDA Border Inspection Rate		Lab Test Rate	Food Safety Rejections and Rejection Rates		
Country	**2015**	**10-Year Total (2006-2015)**	**2006-2015 Change**	**2014-2015‡**	**10-Year (2006-2015)**	**10-Year (2006-2015)**	**2014-15‡**	**10-Year (2006-2015)**	**Total Rejections (2006-2015)**
World	5,516.4	51,751.7	8.2%	2.1%	1.9%	0.9%	8.1%	11.1%	18,763
*Top 20 Aquaculture Countries**	*4,063.2*	*37,344.3*	*13.5%*	*2.5%*	*2.3%*	*1.5%*	*10.6%*	*15.4%*	*15,009*
Top Ten 2015 Exporters	4,510.2	41,138.6	15.1%	2.2%	1.9%	1.1%	5.9%	10.0%	10,501
TPP Members†	**1,848.0**	**16,159.5**	**21.2%**	**1.5%**	**1.7%**	**0.4%**	**6.3%**	**6.0%**	**4,911**
China	*1,238.4*	*12,016.3*	*7.4%*	*4.4%*	*3.3%*	*3.7%*	*7.9%*	*13.7%*	*2,608*
Thailand	*481.2*	*7,109.5*	*-39.7%*	*4.4%*	*2.6%*	*1.6%*	*5.9%*	*9.7%*	*1,057*
Canada	**658.4**	**6,469.8**	**-3.5%**	**1.3%**	**1.2%**	**0.1%**	**0.3%**	**0.9%**	**277**
Vietnam	***503.1***	***3,508.2***	***144.8%***	***3.1%***	***3.0%***	***2.9%***	***16.6%***	***28.7%***	***2,171***
Indonesia	*380.0*	*2,967.4*	*50.2%*	*3.5%*	*2.7%*	*2.5%*	*12.8%*	*36.2%*	*2,669*
Chile	***358.9***	***2,762.2***	***20.1%***	***0.6%***	***0.8%***	***0.7%***	***4.8%***	***8.5%***	***248***
Ecuador	*283.4*	*2,546.9*	*16.9%*	*1.9%*	*1.4%*	*0.7%*	*4.6%*	*7.3%*	*425*
India	*330.4*	*1,597.8*	*212.1%*	*2.7%*	*2.4%*	*3.1%*	*14.2%*	*22.4%*	*654*
Mexico	**146.6**	**1,363.1**	**10.1%**	**2.9%**	**3.4%**	**0.6%**	**1.3%**	**2.0%**	**360**
Philippines	*86.0*	*1,114.8*	*-41.9%*	*3.9%*	*3.0%*	*1.9%*	*8.6%*	*20.7%*	*887*
Taiwan	*77.7*	*878.4*	*-20.7%*	*5.2%*	*4.0%*	*4.7%*	*33.8%*	*27.8%*	*755*
Norway	*129.8*	*797.4*	*182.4%*	*1.2%*	*1.2%*	*0.6%*	*2.3%*	*3.4%*	*32*
Russia	52.2	594.3	-34.8%	4.5%	3.2%	1.4%	4.4%	6.2%	54
Malaysia	***28.0***	***555.1***	***-52.8%***	***10.7%***	***4.5%***	***3.4%***	***64.8%***	***34.8%***	***777***
Argentina	57.3	524.4	-16.1%	2.3%	2.4%	1.7%	2.0%	4.5%	28
Peru	**64.9**	**492.8**	**138.0%**	**3.8%**	**2.8%**	**1.9%**	**15.0%**	**17.7%**	**305**
New Zealand	**35.7**	**455.3**	**-39.2%**	**0.7%**	**0.6%**	**0.4%**	**0.0%**	**2.3%**	**12**
Japan	***44.1***	***430.6***	***11.6%***	***1.0%***	***1.7%***	***0.1%***	***2.4%***	***2.6%***	***514***
South Korea	*50.3*	*420.0*	*43.4%*	*3.6%*	*2.8%*	*1.2%*	*7.9%*	*14.9%*	*820*
Honduras	37.3	414.3	-9.5%	2.1%	2.0%	0.6%	1.7%	18.6%	206
Iceland	40.8	347.6	-10.0%	0.6%	0.4%	0.1%	0.0%	2.2%	11
United Kingdom	31.8	336.9	61.0%	0.6%	0.7%	0.2%	2.6%	33.3%	209
Panama	23.5	266.0	-29.5%	1.6%	1.6%	0.4%	2.5%	4.7%	82
Denmark	31.0	251.5	633.7%	2.1%	2.8%	1.2%	19.4%	5.0%	7
Costa Rica	21.1	228.0	8.0%	0.6%	0.7%	0.2%	7.2%	5.7%	54

* Top 20 aquaculture countries in italics, total includes Bangladesh, Brazil, Burma, Egypt, Nigeria, Spain and Turkey that are not among the top 25 seafood exporters to the United States; † TPP countries in bold, total includes Australia, Brunei and Singapore; ‡ Inspection rate is percent of import shipments examined; 2014-2015 rate combines inspections and shipments for two years to account for inspections that occur across calendar year. Source: Food & Water Watch analysis of FDA and USDA data, see Methodology at 15.

Appendix: Top 25 Seafood Exporters to the United States, 2006-2015

Illegal Veterinary Drugs/Chemicals		Share of Imports, Inspections, Rejections and Veterinary Drug Rejections 2006-2016				
10-Year Vet. Med. Rejections	**Share of Rejections From Vet. Meds.**	**% of Exports**	**% of Inspections**	**% of Rejections**	**% of Veterinary Drug Rejections**	**Country**
2,550	13.6%					World
2,523	*16.8%*	*72.2%*	*57.7%*	*80.0%*	*43.5%*	*Top 20 Aquaculture Countries*[*]
1,936	18.4%	79.5%	61.7%	56.0%	1.0%	Top Ten 2015 Exporters
900	**18.3%**	**31.2%**	**48.5%**	**26.2%**	**0.7%**	**TPP Members**[†]
1,135	*43.5%*	*23.2%*	*11.3%*	*13.9%*	*44.5%*	*China*
11	*1.0%*	*13.7%*	*6.4%*	*5.6%*	*0.4%*	*Thailand*
2	**0.7%**	**12.5%**	**17.3%**	**1.5%**	**0.1%**	**Canada**
373	***17.2%***	***6.8%***	***4.5%***	***11.6%***	***14.6%***	***Vietnam***
297	*11.1%*	*5.7%*	*4.4%*	*14.2%*	*11.6%*	*Indonesia*
15	***6.0%***	***5.3%***	***1.7%***	***1.3%***	***0.6%***	***Chile***
6	*1.4%*	*4.9%*	*3.5%*	*2.3%*	*0.2%*	*Ecuador*
87	*13.3%*	*3.1%*	*1.7%*	*3.5%*	*3.4%*	*India*
9	**2.5%**	**2.6%**	**10.4%**	**1.9%**	**0.4%**	**Mexico**
14	*1.6%*	*2.2%*	*2.5%*	*4.7%*	*0.5%*	*Philippines*
64	*8.5%*	*1.7%*	*1.6%*	*4.0%*	*2.5%*	*Taiwan*
1	*3.1%*	*1.5%*	*0.6%*	*0.2%*	*0.0%*	*Norway*
-	0.0%	1.1%	0.5%	0.3%	0.0%	Russia
498	***64.1%***	***1.1%***	***1.3%***	***4.1%***	***19.5%***	***Malaysia***
-	0.0%	1.0%	0.4%	0.1%	0.0%	Argentina
1	**0.3%**	**1.0%**	**1.0%**	**1.6%**	**0.0%**	**Peru**
-	**0.0%**	**0.9%**	**0.3%**	**0.1%**	**0.0%**	**New Zealand**
2	***0.4%***	***0.8%***	***11.5%***	***2.7%***	***0.1%***	***Japan***
1	*0.1%*	*0.8%*	*3.3%*	*4.4%*	*0.0%*	*South Korea*
-	0.0%	0.8%	0.7%	1.1%	0.0%	Honduras
-	0.0%	0.7%	0.3%	0.1%	0.0%	Iceland
-	0.0%	0.7%	0.4%	1.1%	0.0%	United Kingdom
-	0.0%	0.5%	1.0%	0.4%	0.0%	Panama
-	0.0%	0.5%	0.1%	0.0%	0.0%	Denmark
-	0.0%	0.4%	0.6%	0.3%	0.0%	Costa Rica

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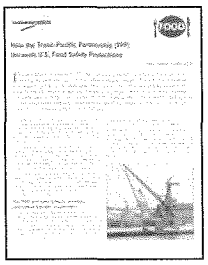
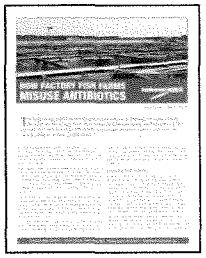
More Food & Water Watch Research on Food Safety and Global Trade



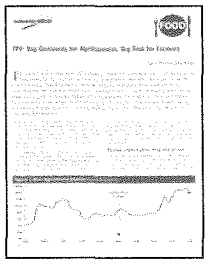
How the Trans-Pacific Partnership (TPP) Unravels U.S. Food Safety Protections

The Trans-Pacific Partnership (TPP) puts agribusiness and food industry interests ahead of keeping our food safe, with TPP food safety language presuming that protecting consumers from unsafe food can be an "illegitimate trade barrier." The TPP limits our ability to establish strong food safety standards and makes it easier for foreign countries to successfully challenge food safety rules as illegal trade barriers. The TPP's tougher rules could be used to challenge domestic food safety laws and regulations including border inspection laboratory testing and standards on chemicals, additives and pesticides.



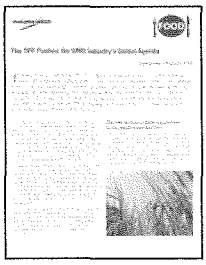
How Factory Fish Farms Misuse Antibiotics

The frightening public health impacts of the overuse of antibiotics to raise animals for food are becoming clear, with the Centers for Disease Control and Prevention (CDC) estimating that over 2 million Americans contract an antibiotic-resistant infection each year, learning to at least 23,000 deaths. Fewer people realize that the aquaculture industry also has an antibiotics problem. Just like raising livestock and poultry, many large-scale fish farming operations rely on the misuse and overuse of antibiotics to compensate for crowded, stressful conditions.



TPP: Big Giveaway for Agribusiness, Big Risk for Farmers

The Trans-Pacific Partnership primarily benefits the agribusiness and food manufacturing companies that buy, process and ship raw agricultural commodities. The controversial deal poses more risks than benefits for American farmers and ranchers. While agribusiness has promoted the TPP as an export bonanza, farmers will receive only a tiny fraction of any export gains. Instead, the modest agricultural export opportunities for farmers would be outweighed by competition from rising food and farm imports. The surge in often low-priced farm imports would worsen today's already precarious farm economy, with falling prices, declining income and rising debt burdens.



The TPP Pushes the GMO Industry's Global Agenda

The Trans-Pacific Partnership is the first trade deal that includes special provisions on genetically engineered (GMO) crops. It would encourage countries to approve and cultivate GMO crops and would make it harder to regulate GMO crops or foods, including overseeing the safety of GMO ingredients and requiring labeling. The TPP fulfilled the GMO industry's demands on food safety and seed patents, giving seed companies more leverage over farmers. The GMO industry can use the TPP to challenge and eliminate other countries laws and to promote the export of GMO crops and foods.

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https://medium.com/economic-policy/7-ways-the-trans-pacific-partnership-threatens-people-and-the-planet-ad49815f337b#.j8vx4enjb

Friends of the Earth; 10/7/16

7 ways the Trans Pacific Partnership threatens people and the planet

by Bill Waren, senior trade analyst

The Trans Pacific Partnership trade deal is not so much about trade as it is about deregulation and forcing governments to pay corporations and wealthy investors for the cost of complying with environmental and other public interest safeguards. The TPP broadly restricts the policy space for governments to take effective environmental and climate action.

Unlike most international agreements, tribunals of trade lawyers would effectively enforce the TPP. Such tribunals could impose retaliatory sanctions like higher tariffs on the non-complying countries' exports or award money damages that can run into millions or even billions of dollars.

Trade tribunals often treat environmental and public health regulations as trade barriers.

Until about twenty years ago, trade deals focused on reducing trade barriers like tariffs and quotas. Today's trade deals, by contrast, focus on curbing the authority of democratic governments and legitimate courts to regulate the global marketplace. Trade tribunals often treat environmental and public health regulations as trade barriers. Trade deals like the TPP focus on dismantling many regulations that are alleged to interfere with the profits of multinational corporations and wealthy foreign investors.

Multinational corporations have lined up behind the TPP, as have Wall Street banks and Big Oil. But over 1,500 public interest organizations, such as internet freedom groups, faith-based organizations, labor unions, women's & LBGT advocates and environmentalists, are standing up to oppose TPP.

It appears that President Obama wants to force a post-election, "lame-duck" vote on the TPP. That is a unique moment in the political calendar when members of Congress who are retiring or have been voted out of office are least accountable to their constituents.
Here are seven ways that the Trans Pacific Partnership trade deal threatens people and the planet:

1) TPP investment tribunals subvert democracy. TPP would allow firms to turn to secretive international tribunals where they can sue governments for millions or billions of dollars if environmental or other public interest regulations interfere with expected future profits. This would discourage government action like restricting oil and gas drilling, imposing pollution controls, and limiting the use of fracking (hydraulic fracturing). TransCanada, for example, is using a similar provision in the North American Free Trade Agreement to sue the U.S. for $15 billion for stopping construction of the Keystone XL pipeline.

2) The TPP undermines sound climate policy. The TPP would ramp up global warming by increasing U.S. coal, oil and gas exports to the world. The TPP is designed to protect "free trade" in such dirty energy products shipped out of West Coast ports. The result would be worsened climate change from carbon emissions across the Pacific.

3) The TPP deal threatens bees. The TPP could thwart efforts to stop the use of bee-killing neonicotinoid (neonic) pesticides. Neonics are believed to be a leading cause of bee declines. But, multinational chemical companies want to use the TPP and similar deals to stop future action to save the bees and the crops that depend on bees for pollination.

4) TPP threatens deregulation of chemical safety standards. TPP could result in suits before trade tribunals imposing retaliatory trade sanctions such as higher tariffs on U.S. exports to force the roll back of effective state regulation in California and other jurisdictions of dangerous chemicals associated with breast cancer, autism, infertility and other illnesses.

5) TPP undercuts prudent food safety regulations. Food safety protections are also put at risk. The TPP would give foreign food exporters greater powers to challenge border inspections, as well as authorize legal attacks on food safety standards before corporate dominated trade and investment tribunals. This dirty deal would also substitute private food safety certifications for government inspections in many cases. In particular, TPP promises to unleash a tsunami of unsafe seafood exports to the United States. Vietnam and several other Pacific basin countries are notorious for their unclean and toxic factory fish farming operations.

6) TPP encourages GMOs. The TPP provides new protections for biotechnology and use of genetically modified organisms. Obligations are established for TPP countries to quickly approve GMO crops and products, unless very high standards of scientific certainty regarding the risk to health and the environment are met. GMO labeling requirements at the state or local level could be put at risk. In addition to that, significant patent protections are provided to biotech seed companies. All of this runs counter to a central tenet of sound environmental regulation, the "precautionary principle", the precept that deregulatory action should not be taken if the consequences are highly uncertain and potentially quite dangerous.

7) TPP puts family farms at risk. The TPP is likely to increase the volatility of agricultural markets, putting sustainable family farms at risk and increasing corporate control of markets and production practices.

http://www.nakedcapitalism.com/2016/10/the-ceta-trade-pact-will-add-to-the-groundswell-of-discontent-why-we-need-more-informed-decision-making.html

The CETA Trade Pact Will Add to the Groundswell of Discontent: Why We Need More Informed Decision-Making

Posted on October 7, 2016 by Yves Smith

By Servass Storm, Department of Economics, Faculty TPM, Delft University of Technology and Pierre Kohler an Economic Affairs Officer at UNDESA whose research focuses on sustainability, redistributive policies as well as on global macroeconomic models applied to trade and fiscal policy

Things have changed. Until just a few weeks ago it was easy for economists and trade policymakers to discard the massive waves of protest across European countries against two controversial transatlantic free trade agreements as mere "irrational", "protectionist" or "dangerously populist" impulses. But not so anymore. About the same time when hundreds of thousands of concerned German citizens took to the streets to protest against the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement (CETA), a growing chorus of senior policymakers started urging governments to heed the rising discontent, anxiety and economic insecurity among the vast majority of the populations in the advanced world.

Most prominently, in a speech[1] titled "Making Globalisation Work For All" given in Canada on September 13th, I.M.F. managing director Ms. Christine Lagarde stated that many people felt they "lack control" in a "system [that] is somehow against them" and that growing inequalities have "added to a groundswell of discontent, especially in the industrialized world." Lagarde's plea for boosting support for low-income workers and reducing inequality came on exactly the same day Mr. Mario Draghi, the president of the E.C.B. stated —in his *Premio De Gasperi* lecture in Trento, Italy[2]—that the E.U. should pay greater attention to "the demands of those left behind by a society built on the pursuit of wealth and power", and do more to help globalization's losers by moderating its outcomes. Globalization has certainly caused dislocation and hardship, as the recent McKinsey report titled "*Poorer than Their Parents? Flat or Falling Incomes in Advanced Economies*" found: 65 to 70% of households in 25 advanced economies had experienced no real income growth between 2005 and 2014, up from just 2 percent of households with stagnant incomes during 1993-2005. This was known, of course, but McKinsey's report helped publicize the facts.

The bottom line should be clear: citizens are rightly concerned about the distributional consequences of TTIP and CETA — a concern which policymakers and politicians can ignore only at their own peril. The justified skepticism of German voters has already dealt a possibly

fatal blow to TTIP negotiations. Sigmar Gabriel, Germany's vice-chancellor and economics minister, and an early proponent of TTIP, admitted last month that negotiations had "de facto failed". However, while TTIP may have reached a dead end, the CETA trade deal between the E.U. and Canada is on its way to ratification, albeit on increasingly rocky ground. The CETA deal has the political support of key European social democrats, such as the SPD's Gabriel but also French President Francois Hollande and the Dutch PvdA Minister for Trade Liliane Ploumen, who point to economic studies that unequivocally predict that CETA will raise incomes and create additional jobs in the E.U. CETA will supposedly benefit "left-behind" constituencies—which would make the concerns of Ms. Lagarde and Mr. Draghi appear unwarranted. We must note right here that these estimated unequivocal income gains are extremely small—less than 0.1% of GDP in 2023.

However, CETA proponents fail to point out that the standard economic model studies on the effects of CETA, on which they are basing their claims, are incapable of tracing out any distributional consequences of the agreement, because they assume that the Canadian and European economies always operate at full employment. In addition, these studies manage to inflate the so-called dynamic gains from the trade agreement, by assuming that all (extra) savings are automatically re-invested into the real economy. Both assumptions are empirically untenable and combined they help define away the real problem: trade liberalization in these models is "win-win" by design of the modeler, who assumes away unemployment, shortage of investment, and any adjustment costs or uncertainties (associated with searching new jobs, moving houses, going for additional schooling, closing down one's factory, taking a new loan for setting up a new firm).

In a recent Tufts University working paper[3], we provide alternative projections of CETA's economic effects in which we allow for changes in employment and income distribution and the economic adjustment to the trade deal is modelled in a realistic and empirically grounded manner. In contrast to the "win-win" outcomes, we find that CETA will lead to intra-E.U. trade diversion and to net losses in terms of employment, personal incomes and GDP in both Canada and the E.U. By 2023, we project that 30 thousand jobs will be lost in Canada and 200 thousand jobs in the E.U. Higher unemployment will depress wage growth and by 2023, workers will have foregone average annual earnings of €1776 in Canada and between €316 and €1331 in the E.U. depending on the country (compared to the base run without CETA). Aggregate demand shortfalls nurtured by heightened unemployment will also hurt productivity and cause a decline in national income of 0.96% in Canada and 0.49% in the EU.

We do not, of course, claim to possess perfect foresight. But we can claim that our model analysis is based on more realistic assumptions than the standard full-employment models—and that unlike these earlier studies, we face up to the risks, the distributional impacts and the non-negligible transitional costs of freeing trade—which are worrying not just Ms. Lagarde and Mr. Draghi but also the majority of the European and Canadian citizens. We concur with Mr. Draghi that further fragmentation of our already divided societies will be "most dangerous" politically and carries the risk of reversing integration. It is high time that Europe's and Canada's policymakers wake up to the fact that freeing trade does not necessarily create extra jobs but instead carries a high risk of welfare losses, heightened inequality and fragmentation—all

sources feeding the groundswell of discontent. The decision on CETA needs to be an informed decision—one that takes the many downsides of the trade agreement very seriously.

INSIDE US TRADE

Report: EU Geographical Indication Policies Would Hurt U.S. Dairy Industry

October 11, 2016

European Union polices on geographical indications could cost the U.S. dairy industry $59 billion over 10 years and lead to 175,000 job losses, according to a new report.
The Consortium for Common Food Names commissioned the report, conducted by market research company Informa Economics IEG, to assess the economic impacts of the GI policies, which have been an issue in Transatlantic Trade and Investment Partnership talks.

U.S. dairy groups contend the EU policies would "require U.S. cheese makers to stop marketing cheeses under protected names (like 'feta')," the report states. "Economic theory suggests that consumers, faced with the decision of purchasing an imported product with a 'familiar' but GI-protected name or a product with a 'new' name, would purchase less of the 'new' name cheese and pay less for it. This study estimated the magnitude of the consumer response and the implications for the U.S. Dairy industry."

The U.S. has held that its legal system already provides adequate protection for EU food names.

The report was unveiled today via a webinar hosted by the consortium and the International Dairy Foods Association, the National Milk Producers Federation and the U.S. Dairy Export Council.

"On the backs of U.S. companies that built this market, Europe would prosper at the expense of American manufacturing jobs and farmers," the report says. "These policies will also increase prices for consumers and hurt the overall U.S. economy."

A few key findings:

In 10 years, these policies could:

- *Reduce U.S. cheese consumption up to 21 percent, or 2.3 billion pounds. At today's prices, this consumption decline would equal up to $5.2 billion in lost cheese sales.*
- *Push U.S. dairy farm margins below the break-even point in up to six out of 10 years, costing farmers a cumulative $59 billion in revenues.*
- *Reduce the size of the national dairy herd up to 9 percent, or 852,000 cows, putting many farms out of business.*
- *Close numerous cheese plants, especially specialty cheese manufacturing plants.*
- *Create havoc in the supermarket dairy case, limiting choices and forcing consumers to pay more for cheese varieties with familiar names.*

The report also found a possible loss of up to 175,000 "rural jobs."

Officials from the consortium and the dairy groups told reporters today that the U.S. government has "long recognized the importance of this issue" in TTIP talks.

http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/windstream-energy-awarded-damages-after-ontario-cancels-wind-farm-project/article32358505/

Windstream Energy awarded damages after Ontario cancels wind farm project

RICHARD BLACKWELL

The Globe and Mail
Published Thursday, Oct. 13, 2016 6:33PM EDT

"A company that planned a huge offshore wind farm in Lake Ontario says it has been awarded more than $25-million in damages, because the Ontario government cancelled its project.Windstream Energy LLC made the claim under NAFTA rules, saying that its proposed 100-turbine wind farm five kilometres offshore near Kingston had the legs knocked out from under it when the Ontario government suddenly announced a moratorium on offshore wind developments in February, 2011.

The case pitted U.S.-based Windstream against the Government of Canada, rather than Ontario, because under the North American free-trade agreement, Ottawa is considered to be responsible for the actions of the provinces. The claim was filed under the "Chapter 11" investor protection sections of NAFTA."

"A hearing was held in front of a three-member panel convened by the Netherlands-based Permanent Court of Arbitration in February. Windstream said Thursday that the panel has now ruled in its favour.The PCA has not publicly released its decision, and won't do so until it and the company agree to any revisions made to the final version.According to Windstream, the tribunal said Ontario "on the whole did relatively little to address the scientific uncertainty surrounding offshore wind that it relied upon as the main publicly cited reason for the moratorium." Further, the province "did little to address the legal and contractual limbo in which Windstream found itself after the imposition of the moratorium."The tribunal awarded the company damages of about $25.2-million and about $2.9-million in legal costs, Windstream said. In its claim, Windstream had asked for damages of up to $568-million.The tribunal also ruled that the company's contract with Ontario is formally in force and has not been unilaterally terminated, Windstream said.In its claim, Windstream said it had signed a power contract with Ontario's power authority and had posted $6-million as security before the moratorium was announced. Under NAFTA, investments by U.S. companies in Canada cannot be expropriated without compensation, Windstream said in its claim, and the moratorium amounted to an expropriation that made its investment in the wind project worthless."

"In its filings with the tribunal, the federal government said Ontario had the "right to proceed with caution" on offshore wind developments, and NAFTA doesn't prohibit "reasonable regulatory delays." The Windstream project was high risk in any event, the government submission said, and it had no investment value because it could never have been built within the deadlines of the contract."

From: Windstream Energy awarded damages after Ontario cancels wind farm project - The Globe and Mail
http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/windstream-energy-awarded-damages-after-ontario-cancels-wind-farm-project/article32358505/

AARP Real Possibilities

AFL-CIO AMERICA'S UNIONS

OXFAM America

ConsumersUnion POLICY & ACTION FROM CONSUMER REPORTS

MEDECINS SANS FRONTIERES DOCTORS WITHOUT BORDERS

October 26, 2016

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

Dear President Obama:

As organizations that represent millions of Americans, including consumers, retirees, and patients, and that provide medical care globally, we are concerned about recent reports that your Administration is working behind the scenes to craft Trans-Pacific Partnership (TPP) implementing legislation and possibly enter into side letters that would mean even more lengthy monopoly protections for biologics than the already onerous provisions in the TPP agreement. It is our understanding that this could bind the United States to a 12-year market exclusivity period for biologics and block the U.S. and other countries from reducing the amount of time expensive biologic drugs are protected from competition from less expensive biosimilar drugs.

Throughout the TPP negotiations, our organizations called for provisions that improve both innovation and access to affordable medicines. Though we each have our own critiques of the TPP, we share a view that no TPP commitment should be taken to worsen the plight of Americans already struggling to afford the high and growing prices of prescription drugs, as are millions of people around the world. We salute your Administration for using your budget proposals to suggest ways to improve the affordability of prescription drugs, including reducing the current 12-year market exclusivity period for biologic drugs. We also strongly support your work to continue implementing the new biosimilar approval pathway to increase price competition.

Biologics are fast becoming the future of pharmaceuticals. These drugs are used to treat many diseases – such as multiple sclerosis, rheumatoid arthritis, cancer and others – that often affect older populations. However, the cost of these drugs can put these treatments out of reach for those who need them most, even those with comprehensive health

insurance. The daily costs associated with biologics are approximately 22 times higher than the daily costs associated with small-molecule drugs. With annual costs that can reach as high as $600,000 per individual, the high price of biologic drugs not only has adverse effects on consumers, but also on taxpayer-funded programs like Medicare and Medicaid.

Reportedly, under your Administration's discussions with key legislators the United States' current 12-year market exclusivity period would be included in TPP implementing legislation. This would go beyond the TPP provisions that already require at least eight years of exclusivity, or at least five years of exclusivity plus additional protections. Binding the U.S. and any other TPP party to an international obligation that requires a 12 year exclusivity period would not only undermine your proposal but future proposals to provide no more than seven years of market exclusivity to enable lower cost biosimilars to come to market sooner.

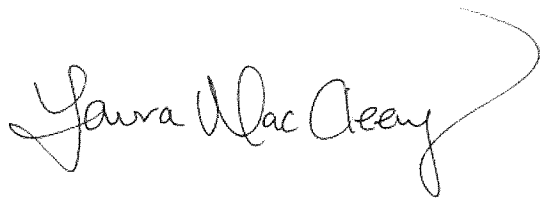
A change that binds the U.S. government to a 12-year market exclusivity period for brand-name biologics would prevent U.S. policymakers from taking action to reduce the costs associated with biologic drugs. In fact, Senators Sherrod Brown (D-OH) and John McCain (R-AZ) and several House Democrats have introduced the Price Relief, Innovation, and Competition for Essential Drugs Act (PRICED Act), which would reduce the biologic market exclusivity period from 12 to seven years, as you have proposed in your budget. Providing for 12-years of market exclusivity as part of U.S. implementation of the TPP would mean accepting unnecessarily long drug monopolies at the expense of people's health and financial solvency. According to the Federal Trade Commission, no exclusivity time is needed to promote innovation given patent protections and other market pricing incentives.

We strongly urge you not to include language in the TPP implementing legislation committing the United States to 12-years of exclusivity or enter into side letters to extend the biologics exclusivity period for any TPP signatory country. We ask you to stand by your previous support for reducing U.S. market exclusivity to seven years for high cost biologic medicines.

Sincerely,

Nancy A. LeaMond
Executive Vice President and Chief Advocacy & Engagement Officer
AARP

Richard L. Trumka
President, AFL-CIO



Laura MacCleery
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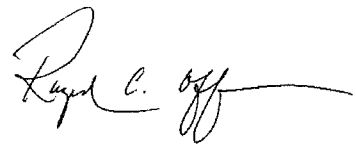

Raymond C. Offenheiser
President, Oxfam America

CC: Ambassador Michael Froman, United States Trade Representative

Inside U.S. Trade - 06/17/2016, Vol. 34, No. 24

After TISA Ministerial, Focus Is On What Provisions Get Into Final Deal

This month's meeting of trade ministers from countries participating in the Trade in Services Agreement (TISA) brought to the forefront the issue of which rules and disciplines will ultimately make it into a final deal, according to Geneva negotiators.

At the June 1 TISA ministerial, ministers discussed the fact that parties ultimately have to decide which annexes have enough support to be part of a final deal and which provisions in otherwise broadly supported annexes will not make the cut, sources said.

However, ministers did not make a specific recommendation on which annexes and provisions to take off the table, these sources emphasized. Instead, European Trade Commissioner Cecilia Malmstrom in her role as chair of the ministerial invited participants to evaluate annexes and provisions along those lines, sources said.

The next TISA round is scheduled to start in the first full week of July and is expected to include a further stocktaking of annexes' status. The European Commission has announced the round is taking place from July 8-18, according to a June 13 report it issued on the last round. But a Geneva source said this week that the date could still be changed.

Ministers also reviewed the revised market access offers, which will be superseded by a second round of revised offers in early October, sources said. The U.S. revised offer did not include concessions on maritime services and the temporary movement of persons, and the EU only minimally changed its initial offer.

However, in the last TISA round, the EU signaled it is willing to improve its offer if other trading partners do as well, sources said. However, this did not amount to firm assurances to do so nor a commitment by the EU to offer in TISA what it has given to Canada in a bilateral free trade agreement struck in August 2014.

The EU is very focused on getting the U.S. to improve its offer on telecommunications services by lifting U.S. equity caps, sources said. The U.S. so far has taken the position that the Federal Communications Commission is open to lifting the caps on a case-by-case basis and has done so for T-Mobile from Germany, for example.

But a review of the offers showed that one hotly debated issue has evolved, though it is not yet solved, sources said. The issue is the extent to which members can take so-called policy space exemptions on new services, which means they reserve the right to impose new regulations in the future.

The U.S. opposes these broad exemptions with the argument that they amount to undermining the national treatment commitment that countries agreed to apply across the board with limited exemptions in TISA. National treatment obliges countries to treat foreign service suppliers no less favorably than domestic ones and exemptions for new services could lead to discriminatory regulations.

In their revised offers, Norway, Korea, and Japan scaled back their policy space reservations, and Japan, along with other countries, said it would eliminate them provided other countries did as well.

That is not likely to happen with the EU, which has taken multiple policy space reservations, and is under strict instructions from member states and the European Parliament to preserve the right to regulate for new services that have not yet been invented and go beyond those listed in the so-called W120 document, a services classification system used in the World Trade Organization.

The document covers the universe of all services in 12 sectors, and in the past 25 years there has not been an instance of a new service being developed outside this classification. The only new developments in services have been different modes of supply and delivery. For example, instead of conducting banking operations from a brick and mortar building, banking services can be offered via internet, sources said.

The July meeting will include a stocktaking by capital-based officials that will move to the next phase of identifying the status of annexes or certain provisions in otherwise broadly supported annexes.

The stocktaking officials will try to establish which annexes are advanced or "stabilized" to the point of having only issues that must be decided at the political level, Geneva sources said. They will also identify which annexes still have technical issues to resolve. The third task will be to identify the annexes and provisions that must have more support to survive, they said.

That latter category could include two annexes that are a priority for the U.S. and the European Union; the first deals with delivery and postal services and the second with direct selling, sources said. Also lacking support is a Turkish proposal on road transport that is now part of a transportation annex that also covers maritime services and specialty air services, such as aerial firefighting.

One informed source said the road transport issue will likely be addressed bilaterally between Turkey and the EU in their new trade negotiations that have been announced as the EU courts the Turkish government due to its role in stemming the flow of refugees to the EU.

But even in the core annexes on which negotiators have been most focused, there are many outstanding issues. For example, the data flow and data privacy issues raised in the annex on electronic commerce have not yet been discussed in detail, sources said.

This is partially because the EU does not have in place the three key elements on data privacy that it has said are needed to engage in such negotiations. They are the U.S.-EU framework on

protecting personal data of EU citizens known as the Privacy Shield, the umbrella agreement that governs the transfer of data for law enforcement use, and the Judicial Redress Act passed in the U.S. that gives EU citizens the right to litigate in the U.S. if they feel their data have been misused.

The other core annexes are telecommunication services, financial services, transport and temporary movement of people for services delivery.

There will be no decision in the July stocktaking on which annex or provisions to jettison over lack of support, Geneva sources said. Instead, that decision to do so will emerge more organically, they said.

There are two more rounds scheduled for September and November, but a December negotiating round is also under active discussion, according to a Geneva source. Nevertheless, the goal of concluding TISA this year remains a highly ambitious target given the number of outstanding issues that remain to be solved.

Among those issues are the institutional provisions of a TISA deal, which participants have just begun to tackle in the last round (see related story). There is also the controversial U.S. demand for an most-favored nation forward provision, which would obligate countries to automatically extend to TISA participants any trade concessions they have made to other trading partners in a separate bilateral or regional deal. This MFN forward fight pits the U.S. against the EU, which opposes it.

Related News | World Trade Organization |

Inside U.S. Trade - 06/17/2016 , Vol. 34, No. 24

Inside U.S. Trade

6/20/16

Administration Drafts TPP Implementing Bill In Preparation Of Potential Lame-Duck Vote

U.S. Trade Representative Michael Froman today (June 20) said the Obama administration is drafting the implementing bill and other reports required for a potential lame-duck vote on the Trans-Pacific Partnership under the fast-track law. He said the lame duck represents the earliest window of opportunity given Senate Majority Leader Mitch McConnell's (R-KY) opposition of a vote before the election.

"We're working with congressional leaders and with the leaders of the Finance Committee and the Ways & Means Committee to chart that pathway forward, laying the groundwork, doing the preparatory work, drafting the bills, drafting the reports that need to get done so that when that window of opportunity opens, we'll be ready to walk through it," he said. "That's what the work over the next few months is going to take."

According to the fast-track law, the president must submit to Congress a copy of the final legal text of the agreement; a draft statement of administrative action (SAA) proposed to implement the agreement; and a plan for implementing and enforcing the agreement thirty days prior to formal submission of the draft TPP implementing bill to Congress.

At the same time, he must also submit to the House Ways & Means and Senate Finance committees three reports that spell out how the deal will impact U.S. employment, labor rights in the U.S. and FTA partners, and the environment. USTR has said earlier this year that these reports will promptly be made available to the public "to the maximum extent possible."

On the timing of the vote, McConnell "has made clear publicly that he doesn't want to see a vote before the election, so that really means, from the Senate perspective anyway, in the lame-duck period," Froman said. "But to even do this in the lame duck, you want to do as much of the preparatory work as possible under Trade Promotion Authority beforehand, and that's what we're working on now."

Froman spoke to the Council on Foreign Relations in New York City about the future of the TPP and the importance of U.S. engagement in defining trade rules in the Asia-Pacific region. He is the first administration official to acknowledge that the administration is working on the implementing bill, when other officials both publicly and behind closed doors have sidestepped this issue.

Froman highlighted that there is "a certain urgency" to get TPP done this year because the speaker of the House, the Senate majority leader and the president are all pro-trade but warned "that all could be different a year from now."

He noted that President Obama is "fully invested" in pushing for a TPP vote this year. "We have a whole White House, whole cabinet effort underway with hundreds of events around the country by cabinet and sub-cabinet officials," he said.

Obama's level of engagement was apparent when he reached out to Senate Finance Committee Chairman Orrin Hatch (R-UT) last week to discuss the outstanding issue of market exclusivity for biologic drugs. Hatch and Obama on June 15, however, were not able to reach an agreement on the provision that would satisfy Hatch's demands of 12 years of market exclusivity. But the

exchange was proof that Obama sought to address Hatch's complaints rather than have his trade officials try to go around him.

Froman said the administration "bit by bit" has been able to address issues that were flagged by Congress after the TPP deal was concluded last year. He reiterated his comments from last week that market exclusivity for biologics is the "main outstanding issue right now."

Froman said USTR is working with Congress and stakeholders to find solutions that do not require reopening or renegotiating the agreement. Renegotiation on one issue, Froman warned, will lead to "unraveling across several other issues." But he held open the possibility of gaining additional commitments through implementation plans.

"That doesn't mean that in the process of implementation -- and we have a robust process of making sure countries are meeting their obligations, we're working with Congress on that -- that there aren't things that we can do to give reassurance that we are addressing the issues with the countries and with Congress. But I think opening up the Pandora's box of renegotiation I think will ultimately lead to it unraveling itself."

He said TPP has "broad support across the economy" and mentioned the pork and dairy industry groups, which have previously taken issue with the market access granted in TPP, are "now fully supportive." On the financial services fix, Froman said that the administration and stakeholders are "quite close to reaching a solution." The administration plans to present the legal text of the fix to cleared industry advisory groups next week.

FOR IMMEDIATE RELEASE

June 22, 2016

Maine Congressional Delegation Applauds the Consideration of Critical Findings that Conclude the Lobster Would Not Be Invasive to Europe

WASHINGTON, D.C. – U.S. Senators Susan Collins and Angus King and U.S. Representatives Chellie Pingree and Bruce Poliquin said today that a scientific committee of the European Union is considering arguments presented by U.S. and Canadian researchers in response to a Swedish request to ban the import of American lobsters into the EU. The researchers, who prepared their report at the request of the Maine Congressional delegation, found that there was no valid scientific evidence that lobsters are an invasive species. That report was then submitted to the EU Scientific Forum on Invasive Alien Species to counter a claim from Swedish scientists that American lobsters were posing a threat to the European environment.

"We are pleased that both U.S. and Canadian experts have found there is no firm evidence that American lobsters are an invasive threat to Europe and that their analyses will be considered in the risk assessment," **Senators Collins and King and Representatives Pingree and Poliquin said in a joint statement.** "We will continue to fight for Maine's lobster industry and do everything we can to ensure that all of the facts are considered in this assessment."

After reviewing the Swedish request and reviewing information from U.S. and Canadian scientists, an EU official told the Maine Congressional delegation that "the feedback provided by Canada and the U.S. provided new elements, some of which were not yet considered in the risk assessment. Therefore, the Scientific Forum requested Sweden to update the risk assessment taking into account these elements as appropriate."

EU officials have told the Maine delegation that Swedish scientists have until July 31 to provide additional information and the Scientific Forum will then issue a decision on the scientific evidence by August 31. If the Scientific Forum finds the scientific evidence convincing, it will be

then up to the Committee on Invasive Alien Species to take other factors, including economic considerations, into account before ruling on a proposed ban.

Top U.S. and Canadian scientists, including Dr. Bob Steneck of the University of Maine, produced this joint paper concluding that there was no scientific evidence to support that Maine lobsters could survive long enough in European waters to be considered an invasive species.

In recent months, the Maine Congressional delegation, along with other members of the New England delegation, has rallied against a proposal by Sweden to ban the import of live Maine lobsters to the European Union.

http://www.politico.eu/article/trade-agenda-will-wobble-but-continue-despite-brexit/

'A midsummer night's nightmare' for European trade

UK's EU exit will make transatlantic trade talks even tougher.

By
Hans von der Burchard and Alberto Mucci

6/26/16, 12:00 PM CET

Updated 6/28/16, 6:17 AM CET

The U.K.'s decision to leave the EU means the loss of a major political and economic partner with a history of championing free trade at a critical moment for a mammoth agreement being negotiated with the U.S.

At the very least, this latest blow to an already strained effort is sure to make the task of reaching an EU-U.S. trade deal that much more difficult.

"A midsummer night's nightmare" was how European Commissioner for Trade Cecilia Malmström labeled the Brexit decision on Twitter.

Some are putting the best face on it they can, saying they will redouble efforts to keep momentum going for the Transatlantic Trade and Investment Partnership with the U.S., negotiations with the South American bloc Mercosur, Mexico and Asian countries, and ratifying a trade pact with Canada, a Commission official said.

"Brexit makes our trade agenda much more urgent," said Daniel Caspary, a German Christian Democrat MEP and spokesman of the center-right EPP group in the European Parliament's Committee on International Trade.

"There is no plan B ready for changing our trade policy" — *MEP Bernd Lange*

The U.K. is typically viewed in Brussels circles as the EU's liberal force, a counterweight to more state-driven European countries including France and Italy.

"Without the U.K., we lose influence on the international economic scene, an influence we are already losing to China and other Asian nations … meaning that we have even less time to do these necessary trade agreements," Caspary said. "We must now move swiftly ahead."

No plan B for trade

When European trade negotiators met with their counterparts from Mercosur on Friday, however, they had to deliver the message that the EU market will be getting a bit smaller.

"We certainly lose an important market," said MEP Bernd Lange, the chair of the European Parliament's international trade committee, of the U.K. "In a way, that means losing leverage."

"There is no plan B ready for changing our trade policy," he added.

On the other side of the Atlantic, U.S. Trade Representative Michael Froman said that "the importance of trade and investment is indisputable in our relationships with both the European Union and the United Kingdom."

He added, however, that while "the economic and strategic rationale for a transatlantic trade deal remains strong," the U.S. is "evaluating the impact of the United Kingdom's decision on TTIP."

"The U.K. has been a force for greater liberalization, and in TTIP, losing that voice in negotiations would be a blow," former Acting U.S. Trade Representative Miriam Sapiro said.

TTIP campaigners in London, where the trade agreement thew fuel onto the euroskeptic fire | Rob Stothard/Getty Images

Negotiations for the TTIP began three years ago. European Commission estimates say that once ratified it would add €120 billion (or 0.5 percent of GDP) to the EU economy and €95 billion (or 0.4 percent of GDP) to the same measure in the U.S.

The next round of TTIP negotiations will be in July. Despite calls from both sides to wrap up talks by the end of the year, the deal has several stubborn sticking points. They include the protection of regional specialty foods, called geographical indications.

Zsolt Darvas, a senior fellow at the think tank Bruegel, noted that the EU is still a 450-million-strong market, without the U.K. but "there might be reason to worry about the impact of Brexit on populist movements in France and Italy and the repercussions on the growing German anti-TTIP sentiment." He predicted the worst-case scenario means that negotiations will be delayed.

His confidence stems from the fact that trade is a competence of the European Commission, and commissioners aren't elected. They are technically free to ignore the rise in anti-trade sentiment and populism that could grow further in Europe following Brexit.

Not that TTIP faces unilateral opposition. Hosuk Lee-Makiyama, director of the European Centre for International Political Economy, pointed out that many European capitals want to see trade talks with Washington persist despite the U.K. leaving.

"The U.K., partly because of what's been going on with Brexit … hasn't had much political capital" anyways, he said. "Sure, they're very strongly in favor, but [Britain] has played a very little role in how the Council has moved so far."

The Council, the body of the European Union representing the 28 member countries, gives the European Commission guidelines on how to approach the bloc's trade policy.

Tim Bennett, director-general of the Transatlantic Business Council, has a similar view.

"There's been historically strong support for TTIP in countries such as Sweden, Denmark, Italy. That will remain," he said. "The concerns have primarily been in Germany and Austria, and that's going to be there with or without Brexit."

Changing course

With U.K. involvement in TTIP potentially off the table, anti-TTIP activists in the U.K. expressed worries over another scenario. They fear an individual free trade agreement negotiated between London and Washington will be "even worse" than one negotiated by the EU.

"There's every reason to believe that the right-wing lurch of Brexit could turn the U.K. into a paradise for free market capitalism: a TTIP on steroids," said Nick Dearden, the director of Global Justice Now.

Swati Dhingra, assistant professor of economics at the London School of Economics, said such fears are not unwarranted. "During a trade negotiation, when a smaller country negotiates with a bigger one, in this case the largest in the world, it often ends up conceding much more than it wants in order to be granted market access."

In Brussels, trade committee chief Lange said the EU must use Brexit to reconsider how trade deals are done. "TTIP and CETA weren't the main arguments in this campaign, but the fact that trade negotiations are not transparent enough, and their merits not clear enough to the people, do play a role in the rising Euroskepticism all over the continent," he said.

He added that he expects the U.K. to push for getting access to the EU's single market and trade agreements, like the Canada agreement that it "always wanted."

He also mentioned that Brexit could help unlock some aspects of EU trade policy.

"The U.K. has also been blocking in some areas of trade, particularly concerning the reinforcing of trade defense instruments," Lange said. "There, the EU could actually become stronger in action" without Britain.

Victoria Guida and Benjamin Oreskes contributed reporting.

http://insidetrade.com/daily-news/uk-vote-exit-casts-doubt-over-ttip-despite-froman-malmstrom-reassurances?s=em

UK Vote To Exit Casts Doubt Over TTIP Despite Froman, Malmstrom Reassurances

June 27, 2016

The United Kingdom's decision to leave the European Union will have a damaging effect on the Transatlantic Trade and Investment Partnership negotiations, experts say, but they disagree on how bad that impact will be and whether it will produce a materially different outcome since the negotiations were already lagging and unlikely to conclude this year.

The scenarios laid out by former negotiators and lobbyists range from TTIP simply being pushed aside as heads of government wrestle with the fallout of the UK vote in an effort to prevent a deeper economic crisis, to TTIP being slowed by the fact that it is hard for the U.S. to assess the value of a deal when the final terms of the UK departure are unknown.

One of the key issues in the withdrawal negotiations is to what degree the UK will retain access to the single market. Until the negotiations between the EU and UK are finished, the UK will remain an official member of the EU.

Sources in the first camp say it will be critical to deal with the internal EU fallout of the vote first, such as the timing of notifying the UK withdrawal and setting up the negotiations for the terms of the withdrawal. Some sources also noted that the fallout of the UK vote goes way beyond economic and trade issues to border security issues, for example.

Former EU Ambassador and senior negotiator Roderick Abbott said in an interview with *Inside U.S. Trade* that these issues are far more important than TTIP. "It is just not credible to talk about TTIP" [given these larger issues,]" he said.

The sources who focus more on the details of the TTIP negotiations post-Brexit say that the progress will be limited by the fact that the final terms of the UK withdrawal will not be known for a number of years. This means the U.S. cannot measure benefits of a potential TTIP deal nor the trade flows within a 27-member state EU, they said.

Peter Chase, a senior fellow at the German Marshall Fund and former vice president for Europe at the American Chamber of Commerce in the EU noted that the value of the EU procurement market is reduced if the UK withdraws. This means the EU can offer the U.S. less in terms of market access, which reduces its negotiating leverage in that area to get U.S. concessions. He also said that without the UK, the EU has also lost negotiating leverage on its demand that TTIP include regulatory cooperation for financial services. Financial services regulatory cooperation was a key offensive interest for the UK as London is a hub for that industry, but the Treasury Department continues to oppose that. According to Chase, it is now even more unlikely that it will be included in TTIP than it was before the Brexit vote.

He also said that the UK accounts for roughly 16 percent of the EU economy and therefore the U.S. offers to the EU will have to account for that reduction in size. Michelle Egan, a professor at American University and fellow at The Wilson Center signaled that the negotiating dynamic could change because the EU loses a "a key liberalization voice" with the departure of the UK. One informed source said these uncertainties could lead the U.S. to withdraw or decide to suspend the negotiations. In a related development, member state trade ministers have also been slated to make a decision on whether to enter the final phase of TTIP negotiations at a Sept. 22-23 stocktaking, which was planned well before the Brexit vote took place.

These scenarios stand in stark contrast to the official statements made June 27 by U.S. Trade Representative Michael Froman and EU Trade Commissioner Cecilia Malmstrom. Malmstrom is scheduled to meet with Froman this week for a stocktaking on TTIP and give a speech to the Atlantic Council in advance of the 14th round of negotiations to be held in Brussels from July 11-15.

Froman emphasized that Brexit does not diminish the economic and strategic rationale for TTIP, but that the U.S. would have to evaluate how it would impact the negotiations. "We've made a lot of progress on the agreement during the last eight months, and our goal remains to continue working with the EU to conclude an ambitious, comprehensive and high standard agreement this year," he said in June 27 remarks at the Bretton Woods Committee annual meeting.

He said the U.S. is evaluating the effect of Brexit on the TTIP negotiations, echoing a similar message from White House principal deputy press secretary Eric Schultz.

In her June 27 statement, Malmstrom said that the EU will be engaged in pursuing its ambitious trade agenda with the U.S. and Canada, as well as plurilaterally and multilaterally. For example, the European Commission will soon make a proposal for the ratification of the Comprehensive Economic and Trade Agreement, she said.

"I am determined to make as much progress as possible in the months to come," she said. This is particularly true for our negotiations with the United States on a [TTIP]."

EU Ambassador to the U.S. David O'Sullivan also reiterated the commission's goal of concluding TTIP in 2016 in a statement. "The most important thing now is to reach a conclusion between the negotiators this year, and that is how we will go forward, and then it will be for the U.K. to decide what kind of trade relationship it wants with the United States," he said. Along those lines, Tim Bennett, Director-General and CEO of the Transatlantic Business Council in a June 24 interview with *Inside U.S. Trade* argued that completing TTIP is more important than ever. The vote to leave "reinforces the need to complete a TTIP deal this year in order to demonstrate that the U.S. and EU can still complete major initiatives and can still play a key role" in global economic developments, he said.

Bennett made the case that completing TTIP this year is not hindered by the UK's exit from the EU because that will not occur before the negotiations are concluded. He referred to Prime Minister David Cameron's plan to leave it to the next prime minister, who will not be chosen until October, to formally notify the EU of the UK withdrawal. This would coincide with the

final stages of the TTIP negotiations if the U.S. and EU will try to conclude it this year, Bennett said.
But that time line is now in dispute as Commission President Jean-Claude Juncker is pushing for quicker notification.

Bennett noted that the conditions for concluding TTIP may not be favorable next year, when the Netherlands, France and Germany have elections. The elections in the Netherlands are to take place no later than mid-March, April and May for France and between August 27 and October 22 for Germany.

https://www.crowell.com/NewsEvents/AlertsNewsletters/all/International-Trade-Implications-of-Brexit-What-Companies-Should-Do-Now

International Trade Implications of Brexit – What Companies Should Do Now

Jun.27.2016

The ramifications of the United Kingdom's decision to leave the European Union will be significant, but as of today nothing has changed in practical terms. What does this mean for trade – imports, exports, sanctions, antidumping, and other daily trade issues for global business? Not very much immediately, but now is time to plan and develop a strategy for the weeks and months ahead. Isolate your U.K. operations in the supply chain, gather data, and identify options. You will then be ready to act when the time comes.

Legal Background

The U.K. remains a member of the EU, at least for now. The European Communities Act 1972 remains in force throughout the U.K., and the U.K. remains subject to its obligations under the EU Treaties. Article 50 of the Treaty on European Union provides a two-year period from a Member State notifying its intention to leave the EU to that state's withdrawal, although this period can be extended by agreement with the European Council. It is not currently clear when the U.K. will formally submit its notification under Article 50. Until a clear picture of the post-Brexit world emerges, there may only be limited change to contend with in the short term. However, even at this early stage one thing is for sure: the consequences of the Brexit vote will be wide-reaching, and cannot be ignored by those doing business in or with the U.K.

Trade Background

Over the years, the EU has come to assume exclusive competence over international trade in a broad sense, including the promotion of trade liberalization and the negotiation of trade agreements, the establishment of tariff rates and the imposition of trade remedies, as well as aspects of export policy and foreign direct investment. As a Member State, the U.K. has thus ceded much of its competence to the EU in the negotiation and implementation of international trade rules. Upon the U.K.'s departure from the EU, it will regain exclusive competence in the areas enumerated above. However, much will ultimately depend on the trade arrangement the U.K. will be able to agree to with the EU.

Import Duties

Absent a customs union between the parties once the U.K. leaves the EU, the U.K. will have to issue its own tariff schedule to remain a Member of the World Trade Organization. All other WTO Members will have to approve this schedule, which could lead to the burdensome renegotiation of tariff commitments between the U.K. and key trading partners.

In the European context, not much is likely to change regarding trade between the U.K. and the EU if the U.K. obtains preferential access to the EU market equivalent to that enjoyed by Norway and Switzerland. However, a number of restrictions on trade could still apply with respect to rules of origin, trade remedies, and trade in services. Short of a preferential access arrangement, the parties may otherwise negotiate a trading arrangement based on the principle of Most-Favored Nation (MFN), the implications of which would vary much more considerably by sector.

Therefore, companies will have to follow closely and analyze carefully the negotiation of the new EU-U.K. trade arrangement and related developments at the multilateral level. The effects of the resulting changes may have a significant impact on companies' duty planning and supply chain management activities, including the location of new production facilities or the relocation of existing ones.

Trade Agreements

As a result of leaving the EU, the U.K. will no longer be a party to the trade agreements between the EU and third countries. It will also forego the considerable weight of the EU in trade negotiations. Although it may thus enjoy greater autonomy in setting its negotiating objectives and positions (*e.g.*, with respect to market access in services), the U.K. may be forced to make greater concessions to trading partners enjoying equal or greater bargaining power over it alone.

In practice, the U.K. may also be required to agree to terms fairly similar to those between a particular trading partner and the EU, as countries may seek to achieve a degree of uniformity across multiple trade agreements. Therefore, the likelihood U.K. independence over its trade policy would lead to more favorable outcomes for the U.K. in its negotiation of trade agreements with third countries is unclear.

Special Measures

The EU and U.K. could initiate trade defense proceedings and impose additional duties against unfairly traded imports from one another once the U.K. leaves the EU, whether their trade relations are governed by a preferential access or MFN-based arrangement. Although the EU currently has the administrative capability to conduct trade defense investigations, the U.K. does not. Thus, it will have to develop such a capability and related rules to conduct independent trade defense investigations to protect British domestic industries from unfair foreign competition in the future.

As these industries are currently protected by EU trade defense orders imposed on the basis of EU-wide conditions and analyses, the U.K. cannot automatically maintain these measures once it leaves the EU without exposing itself to significant challenge under the WTO rules by the trading partners whose industries are affected. Considerable time and effort will be required for the U.K. to afford WTO-consistent protection to the full range of its industries affected by unfairly traded imports.

By virtue of limiting its analyses to its own territory in this context, the U.K. might be able to more easily impose trade defense measures in certain cases. However, in others, in which its domestic industry may currently be enjoying protection as part of the EU-wide affected industry, it may be difficult for the U.K. to find injury within its own territory and impose measures. The ultimate outcome will thus once again be mixed.

Export Controls

The U.K. itself is currently a member of all the relevant international agreements in the context of export controls (*i.e.*, the Wassenaar Arrangement, the Missile Technology Control Regime, the Nuclear Suppliers Group, and the Australia Group). These memberships are not contingent on the U.K.'s EU membership and the U.K. Secretary of State has the statutory power to elaborate and impose export controls under domestic U.K. legislation. Therefore, the U.K. will most certainly maintain its own export control regime upon leaving the EU and there will likely be little change in the manner in which the U.K. will continue issuing licenses for exports to third countries.

A rare strong proponent and enforcer of export controls within the EU, the U.K. after its departure from the EU will no longer participate in EU-wide efforts to ensure greater harmonization in the interpretation and application of export control rules by EU Member States' authorities. This will constitute a loss to the EU and may lead allies like the U.S. to view the EU export control regime to be weaker than when it included the U.K. The grant of authorizations to EU Member States remaining within the EU may thus be affected.

The extent to which U.K. export control authorities may continue to coordinate with certain of their counterparts remaining in the EU will also have to be monitored closely. The U.K. will likely provide for preferential treatment of exports to more trusted Member States with a view to preserving existing collaboration with those Member States' authorities. However, given persistent concerns regarding the integrity and uniformity of export control enforcement in certain other Member States, the U.K. will likely impose stricter controls over exports to such Member States. Upon the U.K.'s departure from the EU, transfers of dual-use items from the U.K. to the remaining 27 EU Member States will officially become exports the licensing of which will have to be reviewed carefully for compliance purposes.

Economic Sanctions

Similar to the other areas of international trade compliance, the U.K.'s departure from the EU will lead to an increasingly complicated economic sanctions compliance landscape. It may take years for all of the effects to be understood fully, but the following represent a few initial thoughts.

Nothing will change immediately. The U.K. will continue to implement all United Nations (as a permanent member on the United Nations Security Council), EU, and national sanctions until Brexit is fully implemented. Yet, even if these negotiations take months or years, the referendum outcome will have an impact, not least in the marginalized influence of the U.K. in ongoing EU discussions. For example, the EU's sectoral sanctions against Russia may be the first victim.

Despite strong pressure from Russia and substantial question from Eastern European countries, the EU was successfully able to extend its sectoral sanctions for six months last week, in part as a result of strong U.K. advocacy. Without the U.K., will the EU have the political will to overcome the internal and external opposition to extend them? If it does not, it will create a transatlantic regulatory divide with which compliance officials will need to grapple.

These impacts will only grow more acute once the Article 50 process has been completed. Yet, even then the impacts will be difficult to determine. Given the U.K.'s strong support for economic sanctions, as well as its role (at least currently) as the global center of international finance, it seems likely that the U.K. will continue to rely heavily upon economic sanctions as a tool of foreign policy. Without the limitations imposed by a 28-country consensus-based negotiation, the U.K. will be free to pursue the strong sanctions for which it often advocates. While it will likely, for pragmatic reasons, closely follow EU sanctions, it will now be free to react more quickly, and more aggressively, if it chooses.

This could include closer alignment with the U.S., a path that may be facilitated by the U.K.'s recent creation of an Office of Financial Sanctions Implementation (OFSI) modeled, in part, on the U.S.'s Office of Foreign Assets Control (OFAC). Nevertheless, despite the easy impulse to assume stronger U.K.-U.S. alignment, their approaches to certain foreign policy matters remain fundamentally divergent. For example, the U.K. has been actively encouraging its businesses to pursue business in Iran, while the U.S. has retained virtually all current primary sanctions on Iran, pursuant to the recent Joint Comprehensive Plan of Action (JCPOA).

From the perspective of economic sanctions, the real victim of Brexit may be the global centrality of the EU's sanctions regime. To date, the U.K. has been one of the strongest proponents of economic sanctions within the trading bloc. With its departure, it remains to be seen whether the other Member States will have the political will, or interest, to enact strong economic sanctions that will, inevitably, impose disproportionate costs on at least one of the EU's Member States. France remains a permanent member of the UN Security Council and Germany a strong proponent of tailored sanctions, but it only takes one EU Member State's disagreement to disrupt consensus and bring down an entire regime.

Compliance Management Challenges Ahead

Until the U.K. officially exits the EU, current laws remain applicable without any gaps. Nonetheless, the Brexit vote and the ongoing negotiations will no doubt have an impact on Commission decisions implementing EU trade laws in many ways. For example, how will decisions on trade defense cases be affected? Might the maintenance of sanctions against Russia or the implementation of sanctions relief for Iran be altered? These questions form only the beginning of what will no doubt be a new art form: predicting the extent and nature of the gap between London and Brussels as the daily work of government collides with the Article 50 negotiations.

http://www.foe.org/news/blog/2016-06-500000-petitions-to-congress-demand-rejection-of-tpp

Friends of the Earth, U.S.

500,000 petitions to Congress demand rejection of TPP

Posted Jun. 29, 2016

Today, June 29, Friends of the Earth, Sierra Club, Food and Water Watch and other environmental advocates delivered more than 500,000 petitions to Congress demanding the rejection of a Trans Pacific Partnership trade deal that promises to ramp up fossil fuel exports, accelerate climate change and encourage deregulation of environmental safeguards across the board.

Among other anti-environment provisions, the Trans Pacific Partnership would offer thousands of new foreign firms virtually the same broad rights included in NAFTA and similar deals that have resulted in an explosion lawsuits before private tribunals successfully challenging safeguards for our air, water and climate.

For example, TransCanada has filed a NAFTA suit, using virtually the same rules included in the TPP, to demand that U.S. taxpayers pay the pipeline company over $15 billion because of the U.S. rejection of the Canadian firm's environmentally dangerous Keystone XL Pipeline.

Ironically, President Obama is meeting today in Ottawa with NAFTA and TPP partners, Prime Minister Justin Trudeau of Canada and Mexican President Enrique Pena Nieto, for a North American Leaders' Summit in Ottawa that allegedly will focus on the environment and trade policy.

Malmström says EU-US trade talks can survive Brexit

June 30, 2016

By EurActiv.com with Reuters
7:21 (updated: 7:56)

The European Union's top trade official said on Wednesday (29 June) that she is still aiming to complete negotiations for a sweeping free trade deal with the United States this year, despite Britain's vote last week to leave the 28-nation bloc.

EU Trade Commissioner Cecilia Malmström said her team is pressing ahead with talks over the Trans-Atlantic Trade and Investment Partnership and is still negotiating on behalf of Britain as a member state, a condition that will continue for perhaps more than two years as London negotiates an exit.

"We will do whatever we can to make sure that we make as much progress as possible in the coming month, and, if possible, conclude it before the Obama administration leaves office," Malmström said at an Atlantic Council event in Washington. "That is still the 'Plan A' and that has not changed even if the (British) referendum is there."

Trade experts have said that Britain's looming departure from the EU will dash hopes for completing TTIP in the final months of Obama's term, cutting out Europe's second-largest economy and diverting attention and political capital to sorting out the UK-EU relationship.

But Malmström insisted that the TTIP deal would survive the Brexit decision. She met on Tuesday with US Trade Representative Michael Froman in Washington to make preparations for the 14th round of TTIP negotiations in Brussels starting 11 July.

"There are a lot of uncertainties related to Brexit. We can't answer them now we will have to wait until we see a clearer picture," she said. "But for now and for the immediate future, the United Kingdom is a member of the European Union, and we negotiate this on behalf of all 28 members."

EU prime ministers and heads of state on Tuesday (28 June) affirmed that the bloc's trade agenda, which includes TTIP and a number of other prospective trade deals, would continue.

She said EU negotiators who are British citizens will continue to participate in the talks, adding, "They do not work for the UK, they work for the European Union and they will stay."

Background

Negotiations between the United States and the European Union to forge an ambitious Transatlantic Trade and Investment Partnership (TTIP) started in July 2013.

If successful, the deal would cover more than 40% of global GDP and account for large shares of world trade and foreign direct investment. The EU-US trade relationship is already the biggest in the world. Traded goods and services between the two partners are worth €2 billion daily.

But the path to reach an acceptable deal is not without hurdles. Citizens all over Europe are petitioning against TTIP and CETA, the newly agreed Comprehensive Economic and Trade Agreement with Canada.

Brussels and Washington had initially set an ambitious goal of completing negotiations by the end of 2015, a target it already missed. Negotiators are now hoping to conclude talks before the end Barack Obama's mandate as US President, on 19 January 2017.

In the wake of the global economic crisis and the deadlocked Doha round of international trade talks, the EU and the United States started negotiating a Transatlantic Trade and Investment Partnership, which seeks to go beyond traditional trade deals and create a genuine transatlantic single market. But the road ahead is paved with hurdles.

http://insidetrade.com/daily-news/us-shoemakers-importers-could-clash-over-ttip-footwear-provisions?s=em

U.S. Shoemakers, Importers Could Clash Over TTIP Footwear Provisions

July 11, 2016

A group of U.S. footwear manufacturers is at odds with an alliance of U.S. and European Union footwear distributors and retailers over demands for provisions in the Transatlantic Trade and Investment Partnership that the U.S. shoemakers charge would incentivize fraudulent transshipment through immediate tariff elimination and too flexible rules of origin.

In a joint declaration signed last month by the American Apparel & Footwear Association (AAFA), Footwear Distributors and Retailers of America (FDRA) and the European Confederation of the Footwear Industry (CEC), the distributors and retailers urged "the negotiators to reach a satisfactory T-TIP that ensures full, immediate, and reciprocal elimination of all tariffs for duty-free access to footwear products." They further asked in the June 8 declaration for TTIP to "allow more flexibility in the determination of the rules of origin."

But the Outdoor Industry Association (OIA) and the Rubber and Plastic Footwear Manufacturers Association (RPFMA), which represent made-in-USA shoemakers as well as importers, were not asked to participate in formulating those demands, informed sources said. And RPFMA trade counsel Marc Fleischaker in an interview with *Inside U.S. Trade* criticized the demands laid out in the joint declaration, mainly because the tariff elimination upon entry into force would incentivize countries like Vietnam -- which under the Trans-Pacific Partnership faces tariff phaseouts of up to 12 years for footwear -- to fraudulently transship products through the European Union and take advantage of the tariff treatment under TTIP.

He said immediate tariff elimination for all footwear would create "too much of a risk that products coming from China or Vietnam would enter through the EU."

While one U.S. industry source said the groups are not trying to put the provisions in a priority list, FDRA President Matt Priest said there is no need for tariffs to phase out and made clear that the immediate elimination of all footwear tariffs is the groups' highest priority. "We don't see any reason for any sort of phase-out in this agreement, and tariff elimination is our top priority," Priest told *Inside U.S. Trade*.

He said this demand is due to the fact that the U.S. paid $196.6 million on the $2.058 billion in footwear imports from the EU in 2015, which implies an average duty rate of 9.55 percent. According to AAFA Senior Vice President of Supply Chain Nate Herman, the U.S. primarily imports leather upper footwear from the EU -- most of which are women's leather upper footwear at a 10 percent duty and some men's leather upper footwear at a 8.5 percent duty.

Herman said U.S. exports to the EU include leather upper footwear and waterproof boots as well as work and hunting boots. Those tariffs range from 5 percent to 17 percent, depending on the footwear, he said.

The 14th TTIP round kicked off in Brussels today (July 11) and will last until July 15, but some U.S. industry sources said the footwear provisions are likely to be part of the endgame of the talks because they consider them to be "much less controversial" and "politically much easier to navigate" than other outstanding issues.

Fleischaker told *Inside U.S. Trade* on June 27 that RPFMA has made it clear to the Office of the U.S. Trade Representative that it opposes immediate tariff elimination and flexible rules of origin. Instead, the group is asking negotiators to establish rules of origin that are akin to the ones in TPP or the North American Free Trade Agreement (NAFTA).

"Our major concern is shipments originating in Asia, and then going through Europe if there are easy -- flexible -- rules of origin that would enable preferential duty rates by qualifying as a shipment from Europe," Fleischaker said. "So the rules of origin need to be equivalent to those in the TPP and NAFTA to avoid this problem."

Under TPP, there are two options for companies to qualify footwear as originating. The first one requires a company to fully assemble footwear in the region but allows using materials of any origin, given the materials are classified in any chapter of the tariff code except the one covering footwear.

The second option requires 55 percent of the value of the footwear to come from the region, which is calculated through a formula. An additional requirement for option two is that an upper or hanging upper -- which is a partially assembled upper that is open at the bottom -- must also come from the region.

Priest said FDRA is pushing for "the most flexible rule [of origin] available that allows producers in the EU to import materials from outside of the EU to make footwear that is still duty free." He added that the group is seeking such rules of origin in all trade agreements.

Other demands of the joint declaration include the harmonization of labeling, product safety, testing regulations, and prohibitive substances; the facilitation of customs procedures; as well as the promotion of regulatory convergence and/or mutual recognition of regulations and standards.

An AAFA source said this declaration is not a statement of support or opposition for TTIP but rather "an outline of what the groups think is a good deal." That source said the demands laid out in the joint declaration are aiming to "give advice for the negotiators" to ensure they know what is required "if you want a commercially meaningful outcome." -- *Jenny Leonard* (jleonard@iwpnews.com)

http://iatp.org/selling-off-the-farm

Selling Off the Farm: Corporate Meat's Takeover Through TTIP

By Sharon Anglin Treat Shefali Sharma
Published July 11, 2016

Executive Summary

Citizens in both the European Union (EU) and the United States (U.S.) are demanding a healthier, more just and more sustainable food system. As parties negotiate the Transatlantic Trade and Investment Partnership (TTIP), proposed trade rules threaten to undermine the good food and farm movements on both sides of the Atlantic. The negotiations are taking place at a formative time: consumer interest in locally grown, organic and minimally-processed food is expanding in both regions, along with public policy supporting these consumer choices. At the same time, globalisation and an increasingly concentrated and vertically integrated agricultural sector are pushing food production, in particular the meat sector, toward increasing overall production through industrialised systems located where labour is cheap and environmental and animal welfare standards are weak or non-existent.

If agreed to, TTIP would be the largest and most comprehensive bilateral trade agreement ever signed, as well as a blueprint for future international agreements. Consequently, TTIP not only threatens current efforts in the EU and U.S. to build a healthier, more compassionate and more sustainable food system, but the trade deal could also expand factory farming worldwide by harmonising standards of two of the largest meat markets (U.S. and EU) and setting the terms for global standards in future trade deals. Eliminating all tariffs on agricultural products in the market-access chapter as proposed would favor ever cheaper production methods. Likewise, TTIP's focus on reducing or eliminating regulatory differences and protections—"regulatory harmonisation"—would promote cheaper industrialised practices prevalent in the U.S. and increasingly prevalent in the EU. As a result, TTIP is likely to stand in the way of much-needed regulatory reform in the U.S. as well as proposals in the EU that seek to address climate change, animal welfare and the role of GMOs in the food system.

Chapter 1: The current U.S. and EU meat industries

The U.S. is the largest producer of beef in the world at 11.4 million tonnes (over 12.5 million American tons), and large-scale industrial feedlots dominate the U.S. industry. Such facilities can hold more than 18,000 head of cattle at a time. In comparison, a feedlot with 200 head of cattle is considered "large" in the EU. The U.S. is also the largest exporter of pork, and both sectors have experienced a shift from family farms to large operations controlled by consolidated global corporations. Over the last two decades, 90 percent of the independent pig farms in the U.S. have been wiped out, leaving one company in control of over half of the pork production in the country and depressing prices paid to farmers. A similar story can be told about chicken

production. In 2012, the average size of U.S. broiler chicken operations was 166,000 birds, a number that pales in comparison with the largest operations, such as in California, where the average broiler inventory per operation at any one time exceeded 1.7 million birds, making the U.S. the largest poultry meat producer and second largest exporter.

The expansion of industrialised farming in the EU has been slower than in the U.S. About 40 percent of the land area in the EU's 28 Member States (EU-28) is farmed, and family farms in the EU's 28 Member States were responsible for rearing 71.1 percent of all livestock in 2010. Organic farms are a growing share of EU agricultural holdings, comprising a significant percentage in some countries such as Austria. The family farm model is nonetheless threatened as the EU's meat sector becomes increasingly concentrated. Through mergers and acquisitions and expansions into additional countries, five producers now dominate in the major meat-producing countries.

Although the EU beef industry has contracted since the early 2000s, Europe remains third in global production of beef at over eight million tonnes. EU beef production is considered at a competitive disadvantage compared to the U.S., with higher costs and more regulatory restrictions. Three countries—France, Germany and the U.K.—accounted for roughly half of the total EU beef production in 2013. Instead of the feedlot system, pasture finishing of beef is common in Ireland and to a lesser degree in the U.K. and France, while silage systems predominate in the rest of Europe.

The EU is the second largest exporter of pork. With stagnating EU demand, the focus on export markets has driven overproduction, bigger farms and intense price pressures, ultimately lowering the prices pig farmers receive. While the sector is less consolidated than in the U.S., the industry has experienced similar structural change, including more vertical integration and increasing control by slaughtering firms. By 2012, 55 percent of the commercial value of pork in Germany was in the hands of the four biggest slaughtering companies operating in the EU—Danish Crown, Tonnies, Vion and Westfleisch. In fact, fully 42 percent of German pig producers went out of business between 2001 and 2009 during a period of rapid consolidation.

The European broiler business is currently a domestic-focused industry. Here as well, vertical integration of production and slaughtering, pushed by mergers and acquisitions, is increasing. According to the 2010 Farm Structure Survey, 18.5 percent of all European farms raised broilers. "Professional farms"—barely one percent of the total number of broiler farms—are considered those with more than 5,000 birds. More than three-quarters of farms with more than 5,000 broilers were located in France, Spain, Poland, Italy, Germany and the U.K.

Chapter 2

Climate

The U.S. lacks binding regulations to cap methane and nitrous oxide emissions resulting from feedlots or livestock production, and government estimates may understate the amount of methane in the country's annual greenhouse gas inventory by as much as half. In the EU, agriculture has been deemed responsible for 40 percent of the EU's methane emissions, and the

recently revised National Emissions Ceilings Directive includes a cap of 30 percent on methane emissions. Nonetheless, the agriculture-related provisions of the Directive have come under attack by the European livestock industry. Lobbyists specifically identified the TTIP negotiations as a reason not to cap agriculture-related emissions. Thus, the prospect of increased competition resulting from TTIP is already providing incentives for deregulatory harmonization, and new trade-based rules will make it even more difficult to effectively address climate change.

Labour

In both the U.S. and EU, meat operations exploit some of the most vulnerable workers who often lack full legal protections accorded employees in other sectors of the economy and who work in unsafe and dehumanizing conditions. In the U.S., animal agricultural operations are exempted from many wage, hour and other labour standards applicable to other industries, and many operations are located in states with weak environmental standards that also discourage collective bargaining. In the EU, agribusiness operations take advantage of the Posting of Workers Directive that allows them to skirt wage standards and collective bargaining protections available to other workers. These companies have also greatly expanded their operations into newer Member States in Eastern Europe, taking advantage of weaker economies and fewer environmental and other protections. Increased competition through TTIP would exacerbate these terrible labour conditions and diminish possibilities for trade unions to push for needed reforms on both sides of the Atlantic.

Animal Welfare

Significant disparities between the EU's modern-day animal welfare standards and those in the U.S. which are based on 19th century sensibilities and law, make this policy area ripe for agribusiness attacks through trade rules. The EU's enhanced animal welfare standards are already being blamed for higher production costs, and efforts to continue to improve are meeting resistance because of competition. TTIP negotiations will be a large "elephant in the room" if and when the Commission decides to embark on a new strategy on animal welfare based on its recent survey of public opinion, which demonstrated that an overwhelming majority of EU citizens support even stronger animal welfare protections.

Environment

Both U.S. and EU governments have failed to recognise and adequately address the environmental damage and climate impacts caused by industrialised agriculture. A UN Food and Agriculture Organisation (FAO) report found that livestock farming alone costs the environment $1.81 trillion per year, equivalent to 134 percent of its production value. Our review of environmental regulations on air, water and soil governing the meat sector shows an urgent need to address the gross environmental externalities of industrial animal production on both sides of the Atlantic.

Cloning

The European Parliament resolution on the TTIP negotiations identified animal cloning for farming purposes as a policy area where the EU and U.S. have very different rules and where changes to the EU ban should be "nonnegotiable." Nonetheless, with cloning legal in the U.S., the TTIP negotiations appear to be adding pressure on the European Commission to accede to agribusiness interests and modify its policies. In 2013, following the initiation of TTIP negotiations, the Commission put forward two linked proposals that would ban farm animal cloning but allow the sale of meat and milk produced by descendants of cloned animals. To date, negotiations on the Commission proposals have been stalled, but this is an emerging policy area that could be at risk under TTIP's regulatory cooperation provisions.

Public health and antibiotic resistance

Threats of increasing bacterial resistance to antibiotics have been recognised since the 1970s, yet antibiotic use in food animal production continues to rise. At least two million Americans are infected with antibiotic-resistant bacteria each year and a minimum of 23,000 die as a result. In the EU, infections from antimicrobial resistant bacteria kill 25,000 people annually. In response to this public health crisis, governments in 2015 agreed to launch the Global Action Plan on Antimicrobial Resistance led by the World Health Organisation. The U.S. currently has only voluntary restrictions on antibiotics use in animal production, and its SPS proposals encourage mutual recognition of its policies. The EU's proposed article in TTIP's SPS chapter on anti-microbial resistance suggests creating a technical working group and harmonising data collection on the use of antibiotics. However, it is highly unlikely that U.S. negotiators would agree to this weak proposal, given the power of the U.S. meat industry, which spent considerable resources to undermine even non-binding federal dietary guidelines suggesting eating less processed and red meat.

Traceability and accountability

A key requirement of EU food safety policy is traceability, which aims at tracking food and ingredients for human consumption at all stages of production, processing and distribution. This approach is based on the precautionary principle and incorporates food hygiene throughout the production chain, providing the legal and policy basis for restrictions on the use of antibiotics, hormones and other chemical inputs in meat production, as well as strict GMO regulation. The U.S. lacks both the authority and the capacity to insure traceability, and the U.S. meat industry has stressed that to be acceptable to the industry, participation in this system must be voluntary. In short, traceability is bad for the U.S. industry's bottom line.

Assessing risk-precaution versus cost-benefit

Both the EU and U.S. regulatory systems look to science to assess, manage and communicate risk, but there are key differences in how each government uses science in developing its regulations and how scientific uncertainty is dealt with. The EU uses the precautionary principle to prioritise public health and the environment, whereas the U.S. uses the cost-benefit approach that tends towards regulating the safety of the end product rather than focus on preventing contamination throughout food production, processing and distribution. The U.S. meat industry

continues to challenge the precautionary principle and expects convergence with the U.S. approach through TTIP.

Genetically modified (GM) feed and zero tolerance

GM risk assessment, approval and labeling issues have been highly contentious on both sides of the Atlantic. Policies of EU Member States and U.S. states have been inconsistent with central government decisions, often taking a more cautious approach and supporting more comprehensive labeling. The biotech and feed industries have made it clear that they see TTIP as a prime opportunity to speed up GM approvals and to centralize decision-making at the EU and U.S. levels of government. Even before the formal initiation of TTIP negotiations, the European Commission started relaxing its biotech rules under industry pressure. Europe's zero tolerance contamination policy was watered down in 2010 to allow for a low-level presence of GMOs in animal feed under certain conditions.

In each issue area—be it climate and the environment, GMOs, antibiotics, animal welfare, food safety or social justice—citizens in both Europe and the United States are interested in seeing stronger, more effective regulations. And they are interested in reining in the excesses of transnational corporations. TTIP will take us in the opposite direction and set the global standard for other trade deals.

Chapter 3: Corporate Meat's takeover through TTIP

Liberalised tariffs

Industrialised practices prevalent in the U.S. produce meat more cheaply than in the EU. Farm gate prices for beef, pork and poultry for U.S. and EU farmers in the last ten years demonstrate that U.S. farmers are paid consistently lower prices for their animals. Such cost-cutting is only possible with the extreme corporate concentration of the meat industry that allows for exploitation of farmers and workers and shifts environmental and public health costs onto the taxpayer. The EU lacks the reliable livestock supplies, low-cost feed and economies of scale that define the U.S. meat industry. Studies by the United States Department of Agriculture (USDA), European Commission, European Parliament, NGOs and farming interests all find that TTIP, as currently proposed, will increase meat imports to the EU from the U.S. and could seriously disrupt the meat sector and other agricultural sectors of Europe's economy. The EU meat industry will likely respond by further concentrating market power and in the process, price out many more independent and small producers.

While EU officials insist that the most sensitive agricultural products will be exempt from "complete tariff liberalisation," leaked documents demonstrate that negotiators' actions do not match the rhetoric. Live beef cattle, animal and dairy products, and animal feed products are all slated for tariff liberalisation, even up to zero tariffs over time. The EU has also indicated that although some tariffs will not be eliminated, tariff rate quotas for hormone-free beef are likely to be expanded. These market access offers alone will result in a "race to the bottom" for EU production as European meat processors compete with the U.S. However, combined with TTIP's

deregulatory agenda, food and agriculture in the EU are likely to undergo their biggest industrial transformation yet.

Threats from regulatory cooperation

TTIP's goal to eliminate "non-tariff barriers" or "trade irritants" threatens sustainable farming regulations on the environment, public health and animal welfare. Where there are vast differences between regulatory regimes, those standards that are more protective (and usually, more costly to implement) are at significant risk. With TTIP envisioned as a "living agreement," future rulemaking processes at the EU and Member State levels (and likewise at U.S. federal, state and local levels) will be affected. Proposals on regulatory cooperation that would lower food and farming standards run throughout TTIP both in a "horizontal" chapter on domestic regulatory practices intended to apply across the entire agreement, and embedded in specific chapters.

These provisions would grant unparalleled influence to business as a key stakeholder, screening regulations to insure that only the "least trade restrictive" can go forward and shifting policy-making from open, democratic processes to informal, less accountable negotiations. Many civil society organizations have identified the real dangers presented by increased corporate influence on the development of public health and safety standards posed by both the U.S. and EU regulatory cooperation texts.

Taken together, these measures implement a deregulatory agenda that will:

- Prioritise trade effects over the public interest
- Undermine the precautionary principle
- Weaken protective standards through mutual recognition and harmonisation of standards
- Streamline "modern agricultural technology" approvals relying on confidential industry studies
- Heighten the burden of proof on regulators to make and defend regulatory decisions
- Delay protective regulations through "paralysis by analysis"
- Create a regulatory chokepoint by "managing" regulations
- Chill the development of new standards addressing changing circumstances and new data
- Institutionalize and expand corporate influence throughout the standard-setting process
- Limit more protective standards at EU Member State and U.S. state levels of government
- Create new possibilities for trade-based corporate legal challenges and new pools of data to support those challenges

State to state and investor-state dispute settlement (ISDS)

Combined with these provisions in the agreement, public interest regulations may be at serious risk when considered more trade restrictive than "necessary" and when they impinge on a corporation's expected profits. This has great significance for a number of rules that are being revised or created in the EU, such as the Posting of Workers Directive, cloning, Country-of-Origin-Labeling (COOL), climate legislation and future Animal Welfare rules, as well as policies adopted by U.S. state governments that go beyond federal standards, such as GMO and chemical

labeling requirements. With transnational meat corporations such as JBS, Cargill and Smithfield present and expanding on both sides of the Atlantic, ISDS could newly empower these firms to challenge food and farming policies that hurt their bottom line—even if they are nominally headquartered in other countries such as Brazil or China.

Conclusion

TTIP threatens citizen-led movements toward a healthier, more just and more sustainable food system in the EU and the U.S. It will promote the expansion of industrial meat production at a time when civil society is demanding the opposite—meat produced humanely, locally, free of harmful substances and benefiting rather than degrading the environment. Both by eliminating tariffs and through its regulatory cooperation provisions, TTIP will encourage a race to the bottom to achieve the cheapest methods of production and processing at the expense of other public goods. While undermining EU food policies that are strongly supported by consumers, it will also provide the framework for corporate attacks on U.S. state-level policies that go beyond federal minimum standards, undermining progress made by the U.S. food justice, farmer and consumer movement to regulate the meat industry and ultimately transform the U.S. food system. Negotiators' statements to the contrary, TTIP must be recognised for what it is: a multi-pronged strategy promoted by global agribusiness concerns on both sides of the Atlantic that will establish an ongoing mechanism for deregulation and meat industry consolidation. It is undemocratic; the policies it promotes are unsustainable; and it must be rejected by anyone who cares about good food and farming, human and animal rights and the future of our planet.

Senators: Politics again gives Malaysia a pass on human trafficking rating
Politico Pro

July 12, 2016

By Megan Cassella

Senators on both sides of the aisle today criticized the State Department's decision to give Malaysia, a member of the Trans-Pacific Partnership, a mid-level rating in its annual human trafficking report, saying the designation was undeserved and given for political reasons.

At a Senate Foreign Relations Committee hearing, Republican Chairman Bob Corker and ranking member Democrat Ben Cardin said they remained concerned about the department's decision to preserve Malaysia's standing on its so-called "Tier 2 watchlist," a rating that makes it legally easier for the country to remain a member of the TPP.

"Malaysia is simply not doing enough, and the facts bear this out," Cardin said. "It's hard to justify the fact that we did not downgrade them to Tier 3."

Cardin said this year's report showed remnants of the same problem the committee saw last year, when Malaysia was upgraded from the list of worst human trafficking offenders — a move that sparked outrageamong lawmakers. He requested that the committee receive regular updates on Malaysia's efforts to combat trafficking.

"I think we get the sense that a politically motivated decision was made last year, and therefore it's very difficult to back off of that this year," Corker added, saying doing so would make it look like last year's upgrade was indeed done for political reasons.

Susan Coppedge, an ambassador-at-large in State's Office To Monitor And Combat Trafficking In Persons, repeated at the hearing the department's stance that no political factors affected the decision-making process.

INSIDE US TRADE

Lange: TTIP Deal In 2016 Is 'Unrealistic' Because U.S. Won't Move On EU Priorities

July 12, 2016

BRUSSELS -- Bernd Lange, the chairman of the European Parliament's International Trade Committee said Tuesday it is 'unrealistic' that the U.S. and EU will be able to close a deal in 2016 due in part to the U.S. refusal to move on key EU priorities such as market access on procurement and services.

In an interview with *Inside U.S. Trade*, Lange also said his assessment was based on the negative trade rhetoric by U.S. presidential candidates, the uncertainty of whether the U.S. Congress would approve the Trans-Pacific Partnership, and the simple fact that negotiators are running out of time to complete a deal this year.

This would push back negotiations on the politically sensitive issues to the next U.S. administration, Lange said. Those discussions could start as soon as the second half of 2016. Member state trade ministers are set to meet in Bratislava, Slovakia, on Sept. 23 to decide on whether the TTIP negotiations are mature enough to enter into the final stage of discussions, but Lange said he doubts such a decision will be taken.

"I assume they will have a similar assessment as me that we could agree on some more or less technical issues, but the hot potatoes in the room aren't so close that a deal could be possible," he said. In addition to procurement and services, Lange also cited agriculture, geographical indications, investor protections, labor standards and climate change provisions as areas where the U.S. and EU are far apart.

For instance, Lange said negotiators are expected to discuss the substance of the sustainable development chapter, but not how those provisions would be enforced, which is one of the key differences between the U.S. and EU approaches.

The fate of TTIP will lay in the hands of the next U.S. president and administration as the political issues will likely fall to them, according to Lange. Giving negotiators more time could also inject "rationality" in the conversation and lead to stronger engagement by "some governments," Lange said, signaling hope that a new U.S. administration may be more willing to address EU priorities in a way the Obama administration has not.

The textual work expected at this round could provide the foundation of a final agreement, even though it is unlikely the politically sensitive issues will be tackled, Lange said. Commission sources last week reiterated their goal of consolidating all texts so that the final version of an agreement can start to take form.

But consolidating texts does not mean the two sides have narrowed the gaps on any given position, Lange said. For example, Lange said the agriculture chapter has been consolidated, but that it is rife with brackets stating the different U.S. and EU positions. Even this will not be possible unless the U.S. offers proposals in all areas, but Lange said he was uncertain if that would happen.

However, the textual work as well as the progress made on tariffs is not enough to conclude a partial agreement he said, and a so-called "TTIP light" deal is not an option. Rather, these aspects can be used as a basis for negotiations to continue with the new U.S. administration, according to Lange.

"Perhaps this is the package we have to put in the icebox and take it from there in the next year," Lange said.

On investor protections, Lange said he envisions only two possible outcomes: either the U.S. accepts the EU's proposal for an international investment court system (ICS) or the deal is concluded without investor protections as the U.S. did in its trade agreement with Australia. Either way, parliament has made clear that it will not accept the investor-state dispute settlement (ISDS) mechanism used by the U.S. in its other trade agreements.

The biggest sticking point on the EU's ICS proposal is its change to how judges are selected to hear cases, Lange said. The EU proposal would establish a 15-member roster of judges as opposed to utilizing the International Center for Settlement of Investment Disputes (ICSID) roster of nearly 700 judges, which is the practice of the U.S. in the investor-state dispute settlement mechanism included in its trade agreements. The U.S. has refused to accept this change at least in part because it claims that a 15-member roster of judges inherently lacks the specific expertise that can be offered by the ICSID roster.

The dispute over investment protections is not a deal-breaker, according to Lange, who also reiterated his preference for a deal without a mechanism for investment protections. -- *Brett Fortnam*(bfortnam@iwpnews.com)

http://www.euractiv.com/section/trade-society/news/eu-us-negotiators-falter-to-make-decisive-progress-on-ttip-destabilised-by-brexit/

July15,2016

EU-US negotiators falter to make decisive progress on TTIP, destabilised by Brexit – EurActiv.com

EU and U.S. negotiators said on Friday (15 July) that they still needed to overcome large differences for a transatlantic free trade deal to be sealed this year, and factor in the setback of Brexit, as the UK is one of the United States' biggest export markets.

The two sides are trying to agree on the Transatlantic Trade and Investment Partnership (TTIP), which supporters say could boost each economy by some €90 billion at a time when growth in China and emerging markets is slowing.

Chief EU negotiator Ignacio Garcia Bercero and U.S. counterpart Dan Mullaney told a news conference after a 14th round of talks that both sides were committed to sealing a deal before U.S. President Barack Obama leaves office at the turn of the year.

The partners have made progress on tariff elimination and on regulatory cooperation. However, they are stuck over EU demands including greater access to public sector tenders; Garcia Bercero described the U.S. offer as a serious cause of concern.

Likewise, Washington is unhappy with the EU offer on services.

"Given the importance of this sector to both of our economies … progress here has been noticeably and painfully slow," said Mullaney.

He also said that, while the economic rationale for TTIP remained strong, Britain's exit from the European Union would force a rethink as it was the largest market anywhere for U.S. services, and took 25 percent of U.S. exports to the EU.

"Imagine if the United States said, for instance, 'Well, maybe TTIP will not apply to California'. There is a certain reflection that the parties need to have on those kind of developments."

The two sides had previously planned to produce a single consolidated TTIP text by the end of July. Garcia Bercero said that was now more likely to come by the end of September after further meetings between U.S. trade chief Michael Froman and EU commissioner Cecilia Malmström.

Garcia Bercero acknowledged that the political environment was becoming more challenging. The environmental group Greenpeace echoed the view of many anti-TTIP campaigners on Friday by saying that it was time to hit the 'Stop' button.

But the EU negotiator said TTIP was instead a positive response to concerns about globalisation.

"If we want to have a shot at shaping globalisation, we need a like-minded partner that shares largely our views," he said.

Mullaney talked of a "unique window of opportunity" to complete TTIP this year that should not be allowed to slip away.

"After this year, with one political transition after another over the next few years, it could be quite a while before we pick up negotiations again."

From: Matthew Porterfield <porterfm@law.georgetown.edu>
Date: August 15, 2016 at 1:12:20 PM EDT
To: Kay Wilkie, "Hamilton, Robert, Sharon Treat
Cc: Robert Stumberg
Subject: The TPP implementing legislation conflicts with TPA on state sovereignty

Sharon, Kay & Robert –

I wanted to call your attention to language in the recently released Draft Statement of Administrative Action (Draft SAA) for the TPP that appears to contradict assurances that were made in the Trade Promotion Authority (TPA) bill last summer concerning state and local law. Basically, the TPA legislation indicated that, contrary to prior practice with trade agreements, the federal government would *not* be able to sue to preempt state or local law based on a conflict with a provision of the TPP. The Draft SAA, however, indicates that the TPP's implementing legislation will retain the federal government's ability to seek preemption of state and local laws.

The standard implementing legislation for trade agreements states that provisions of trade agreements do not "have effect" to the extent that they violate "United States" law, which refers only to federal law. *See, e.g.,* the implementing legislation for the U.S.–Korea FTA (*available at* https://www.congress.gov/112/plaws/publ41/PLAW-112publ41.pdf):

SEC. 102. RELATIONSHIP OF THE AGREEMENT TO UNITED STATES AND STATE LAW.

(a) RELATIONSHIP OF AGREEMENT TO UNITED STATES LAW.—
(1) UNITED STATES LAW TO PREVAIL IN CONFLICT.—No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.

The TPA legislation passed last summer extends this protection to state and local law:

SEC. 108. SOVEREIGNTY.

(a) UNITED STATES LAW TO PREVAIL IN EVENT OF CONFLICT.—
No provision of any trade agreement entered into under section 103(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.

H.R. 2146, Defending Public Safety Employees' Retirement Act (2015), *available at* https://www.congress.gov/114/plaws/publ26/PLAW-114publ26.pdf.

The Senate Committee Report indicates that this provision "specifies, for the first time, that no provision of any trade agreement entered into under trade authorities procedures that is inconsistent with the laws of the United States or any State or locality will have effect."
https://www.congress.gov/114/crpt/srpt42/CRPT-114srpt42.pdf

The Draft SAA for the TPP, however, indicates that the TPP's implementing legislation will allow the federal government – as under other FTAs – to sue to preempt state and local law based on inconsistency with the TPP:

Section 102(b)(1) of the bill makes clear that only the United States is entitled to bring an action in court in the event of an unresolved conflict between a state law, or the application of a state law, and the TPP Agreement. The authority conferred on the United States under this paragraph is intended to be used only as a "last resort," in the unlikely event that efforts to achieve consistency through consultations have not succeeded.

Draft TPP SAA at 5, *available at* http://0-insidetrade.com.gull.georgetown.edu/sites/insidetrade.com/files/documents/aug2016/wto2016_1547.pdf.

Let me know if your have any questions. We'd also be interested in any information you might have about how the new language ended up in the TPA legislation, and whether there is anyone in Congress who is interested in preserving the protection for state law.

Regards,

Matt

http://www.msn.com/en-nz/news/other/obama-set-for-full-fledged-tpp-push/ar-BBvGV07

Obama set for 'full-fledged' TPP push

August 17, 2016

NZ Newswire
Peter Mitchell, NZN US Correspondent 16 hrs ago

US President Barack Obama is launching "a full-fledged, full-throated effort" to push the Trans-Pacific Partnership mega trade deal through Congress in the final lame duck months of his presidency.

This is despite vocal opposition from the leading candidates to replace him, Hillary Clinton and Donald Trump, and labour unions that helped Mr Obama win two terms in the White House. The TPP, a mega trade deal proposal between the US, Australia, New Zealand, Japan, Canada and seven other key Pacific Rim nations, would be the final landmark piece of Mr Obama's presidency.

"This will be a full-fledged, full-throated effort," Mr Obama's deputy US trade representative, Robert Holleyman, told an event this week at Atlanta's Commerce Club.

The Atlanta event reflected the huge divide between TPP supporters and critics in the US. David Abney, the chief executive of the world's largest package delivery company UPS, talked up what he believed would be the TPP's ability to cut red tape for US small and mid-sized businesses entering new Asia-Pacific markets.

As Mr Abney spoke, UPS drivers and union representatives supporting them protested outside the Commerce Club.

"We're opposed to the TPP because we feel like it's going to undermine American workers' standard of living," Teamsters Local 728 political director Eric Robertson told the Atlanta Journal-Constitution.

Mr Obama has put Congress on notice he will be sending a TPP bill their way.
The White House has also organised 30 pro-TPP events to support Democrat and Republican members of Congress who favour the legislation.

http://thebusinessgrowthfoundation.co.uk/bgf-opinion/ttip-facts
http://thebusinessgrowthfoundation.co.uk/bgf-opinion/business-growth-foundation-calls-freeze-ttip-negotiations-light-newly-commissioned-yougov-research-highlighting-sme-concerns/

Business Growth Foundation calls for a freeze on TTIP negotiations in light of newly commissioned YouGov research highlighting SME concerns

Ninder Johal, new Chair of the Business Growth Foundation (BGF), has today released research findings that highlight the dire need for meaningful engagement with UK SMEs on the subject of international trade deals.

Today, The Business Growth Foundation (BGF) has published the results of its recently commissioned[1] YouGov research[2] , which surveyed more than 1,000 UK SMEs and their views on international trade. The findings reveal profound concerns amongst SMEs about the potential impacts of the Transatlantic Trade and Investment Partnership (TTIP).

Iain Hasdell, Chief Executive of the BGF said:

"Our research shows only 14% of SMEs can see any benefit of the TTIP to their business. It also shows how concerned SMEs are about the detailed implications of the TTIP. Almost half feel it is being framed to help large, non-SME companies.

"These findings are a stark reality check to pro TTIP politicians and business membership organisations. This new trade deal with the US is not by definition good for UK SMEs but it can be if the terms are right and if it gains the endorsement of SMEs. Our research illustrates how very far away from that we are right now. That is why we are calling for a pause in the TTIP negotiations and a major re-think on the UK's approach."

The findings in summary:

- Only 14% feel the TTIP (and similar deals) will benefit their own SME.
- Only 25% of SMEs believe the TTIP will benefit UK SMEs generally.
- Almost half of SMEs feel the TTIP and similar deals will benefit larger (non SME) companies.
- Nearly 2/3rds of SMEs felt they were not informed about international trade deals including TTIP.
- 51% said they wanted more information from UK Government and political figures about TTIP and similar trade deals.
- Over half of respondents felt that the interests of UK SMEs were not sufficiently considered when international trade deals that affect them are agreed.

The Foundation is calling on the government to urgently commission a full, independent impact assessment of the TTIP proposals on UK SMEs sector by sector, so all the costs and benefits can be properly considered. It is also advocating a comprehensive Government backed debate directly with UK SMEs about every detailed implication of the TTIP proposals.
It is calling for the outcomes of debates with SMEs and the key findings of the impact assessment to be taken by the UK into the negotiations about the deal.
Leading UK businessman and Chair of the Business Growth Foundation, Ninder Johal is clear about the disconnect between SMEs and the bodies that represent them, and what needs to be achieved:
"Our findings follow on from the European Commission's own, paid consultants who, when looking at the TTIP in detail, said it was not good for SMEs and showed[3] that most sectors that benefit are not ones that SMEs are active in."
"Any deal that does not benefit a business sector, which is so fundamental to the UK economy is the wrong deal. Our role as a foundation is to give a voice to SMEs, and to bring about real change for the sector. Calling for an immediate freeze and renegotiation of TTIP is just the start, we want to work with the sector and its affiliated organisations to bridge this fundamental gap in knowledge and engagement."
"We understand that the SME sector is complex and disparate and we're not saying we have all of the answers, we simply wished to effectively highlight where the challenges are and to clearly state that there is an issue. The overall goal of any initiative such as this should be to create wealth and strengthen the economy and to achieve this, UK SMEs must have a seat at the table."
[1] The survey benefited from funding from the Schopflin Stiftung, Germany. The Schopflin Stiftung encourages public debate across Europe over the chances and risk of international trade agreements, particularly as they relate to SMEs.
[2] All figures, unless otherwise stated, are from YouGov Plc. Total sample size was 1014 SME Senior Decision Makers. Fieldwork was undertaken throughout May 2016. The survey was carried out online. The figures have been weighted and are representative of SME business sizes.
[3] http://www.trade-sia.com/ttip/wp-content/uploads/sites/6/2014/02/TSIA-TTIP-draft-Interim-Technical-Report.pdf

INSIDE US TRADE

Daily News

EU TTIP Stocktaking In September To Determine If End Phase Kicks Off

May 24, 2016

The European Commission will hold a detailed stocktaking with member state trade ministers in September to determine if enough progress has been made in the Transatlantic Trade and Investment Partnership negotiations to proceed to a final deal with the Obama administration, according to informed sources.

This stocktaking, which is scheduled for Sept. 22-23 in the Slovak capital, is the informal trade ministerial customarily held at the beginning of a new presidency of the Council. Slovakia will take over the rotating council presidency on Aug. 1.

The meeting is to cover technical issues as well as negotiating strategies and will be based on a detailed analysis prepared by experts from member states capitals in a Sept. 16 meeting. The September stocktaking infuses the upcoming July negotiating round with particular importance.

The ministerial is a way of assessing "where we are and what we can do" in the TTIP negotiations, one informed source said. September is the "last political opportunity" to decide on a push for a final deal before President Obama leaves office.

Given the vast differences that remain in the third year of the negotiations, sources said it is unlikely that there can be a deal with the Obama administration. "It just feels like they're pulling teeth," one source said. "They are at a stage where everything is difficult and things are just not moving."

But at this point, there is no common position among member state or commission officials on what action the EU will take if, in September, it finds that too few of its priorities are addressed in the TTIP negotiations, sources said.

Even if there were a consensus that not enough is on the table to make a push for a final deal, it is unlikely the commission would call for a freeze in the negotiations, as some have speculated it may, several sources close to the negotiations said.

One informed source said that even if ministers decide not to begin the final phase of the negotiations, there would be no formal decision to pause the negotiations. Instead, he and other sources said the negotiations would likely focus on less sensitive technical aspects as the U.S. moved toward November elections, which one source said would take the wind out of TTIP's sails.

As of the 13th negotiating round in April, work on the European Union's priorities on services and financial services regulatory cooperation, government procurement, and increased protection for food with geographic names falls far short of stated commission goals, according to a May 24 commission report on that meeting. It says "a lot of work remains to be done" for services and government procurement to reach the level of progress that has been made on tariffs.

On financial services cooperation in TTIP, the two sides "confirmed their respective positions," according to the commission's report, which does not point out that they are diametrically opposed.

U.S. priorities with respect to agriculture and sanitary and phytosanitary (SPS) measures, as well as instituting notice and comment periods for legislating akin to its own requirements also remain largely unaddressed, according to the May 24 commission report. One informed source said the commission has made clear that the notice and comment requirement, which critics charge would put business stakeholders on the same level as member state governments, is a red line that it will not cross. The EU's proposal on regulatory cooperation tabled in February included notice and comment provisions, but ultimately fell short of U.S. demands.

On agriculture, the two sides have made "good progress" on the least controversial provisions, such as cooperation and setting up a committee on agriculture and spirits, according to the May 24 commission report. "The Parties maintained their diverging positions regarding other aspects of the chapter," the report says. The U.S. has also publicly attacked the EU over its unwillingness to ultimately phase out its tariffs on its most sensitive agriculture items, such as beef and pork.

In the SPS area, the EU has rejected the U.S. proposal for speeding up the approval of products made with new agricultural technologies, according to the May 24 report. The U.S. proposal is worded so broadly that it covers genetically modified organisms, cloned products and products derived from a new gene editing technology called CRISPR.

The May 24 report also shows a division over an EU proposal in the SPS chapter aimed at curbing antimicrobial resistance (AMR). The U.S. at the round gave a "technical presentation" on the domestic and international measures it is undertaking to curb AMR while the EU stressed the importance of joint efforts to fight AMR on all levels in all forums, including in TTIP.

Also on SPS, the two sides are at odds on whether to include animal welfare measures in the TTIP, which the EU is seeking. The two sides held the first detailed discussions of this issue at the 13th round of negotiations.

There is also little indication that the U.S. is prepared to budge on other EU priority issues. On procurement, the U.S. has made clear that it does not intend to present an improved offer prior to the September stocktaking.

There is also no progress with respect to geographical indications even as the commission offered a scaled back list of names it seeks to protect at the 13th round. The May 24 report said that the EU highlighted to the U.S. that GIs are

a key priority in TTIP and that it is ready to pursue “better protection for a selected list of EU GIs with pragmatism and tabling creative ideas."

The U.S. is also reluctant to make any concessions on maritime services, which is linked to the Jones Act. Several EU sources said there is room for the U.S. to address EU priorities on maritime shipping without rolling back the Jones Act, such as allowing EU access to the U.S. dredging and specialty ship markets.

The technical work that could take place after September could focus on regulatory cooperation in nine sectors, specifically in the pharmaceutical and auto sectors.

For instance, the Food and Drug Administration is already scheduled to audit EU inspections of good manufacturing practices for pharmaceuticals through 2017. The FDA has not yet committed to including the potential mutual recognition of good manufacturing practices in TTIP, but leaked state of play document from March says that once the FDA gets reports for audited countries, it will begin its own process of assessment with the aim of including member states "progressively on a rolling basis."

EU and U.S. auto regulators have also expanded the list of regulations that are under consideration for mutual recognition or harmonization, but the list is not finalized, sources said.

The stated goal for the July round is for the U.S. and EU to have tabled texts for regulatory cooperation in nine sectors and to continue working through technical issues such as consolidating text. The U.S. tabled texts on pharmaceuticals, medical devices and cosmetics at the July round. The EU has tabled and published on its website a text for an annex on medicinal products, which goes beyond mutual recognition of good manufacturing practices.

The negotiations on tariffs are as advanced as they can be at this stage and are awaiting movement in other areas. For instance, the EU has linked the reduction of its auto tariff to the outcome of the regulatory cooperation negotiations on autos. The EU has placed auto tariffs in the so-called “T box,” which is a category for tariffs to be phased out over a yet undetermined period of time. The U.S. and EU have each reserved 2 percent of tariff lines in the T box and those tariffs were not discussed at the April TTIP round, sources said,

At the conclusion of the April round, negotiators said they pushed the number of tariffs set for immediate elimination upon entry-into-force of the agreement to nearly 90 percent from 87.5 percent. One source said they believed this change largely reflected commitments the U.S. and EU already took under the revised Information Technology Agreement that were previously slated for a three-year phaseout.

Global Development And Environment Institute
at Tufts University

Jomo Kwame Sundaram, co-author of the GDAE working paper Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement, authored the following opinion piece June 1, 2016, released by Project Syndicate. Jomo K.S. is on a multi-country speaking tour on the Trans-Pacific Partnership Agreement.

The Trans-Pacific Shell Game

Jomo Kwame Sundaram

Project Syndicate

June 1, 2016

ROME – The Trans-Pacific Partnership (TPP) trade agreement is being portrayed as a boon for all 12 of the countries involved. But opposition to the agreement may be the only issue that the remaining US presidential candidates can agree on, and Canada's trade minister has expressed serious reservations about it. Are the TPP's critics being unreasonable?

In a word, no. To be sure, the TPP might help the US to advance its goal of containing China's influence in the Asia-Pacific region, exemplified in US President Barack Obama's declaration that, "With TPP, China does not set the rules in that region; we do." But the economic case is not nearly as strong. In fact, though the TPP will bring some benefits, they will mainly accrue to large corporations and come at the expense of ordinary citizens. In terms of gains, one US government study on the topic projected that, by 2025, the TPP would augment its member countries' GDP growth by a meager 0.1% at most. More recently, the US International Trade Commission (ITC) estimated that, by 2032, the TPP would increase America's economic growth by 0.15% ($42.7 billion) and boost incomes by 0.23% ($57.3 billion).

But TPP advocates have largely ignored these results, preferring to cite two studies by the Peterson Institute of International Economics, a well-known cheerleader for economic globalization. In 2012, the PIIE claimed that the

TPP would boost total GDP in member countries by 0.4% after ten years. In January, it declared that TPP would augment total GDP by 0.5% over the next 15 years. In a World Bank study released the same month, the authors of the PIIE research projected a 1.1% average increase in GDP in TPP member countries by 2030.

Something is clearly amiss. A closer look reveals that these studies' findings concerning the TPP's purported benefits lack supporting economic theory, credible modeling, or empirical evidence. The only advantages presented that are consistent with mainstream research methodology are tariff-related trade benefits. But if the PIIE authors had used conventional methods to estimate total gains from trade, such benefits would comprise a very small share of the alleged gains from the TPP. According to the PIIE and the World Bank, about 85% of overall growth from the TPP is due to "non-trade measures" and related foreign investments.

Meanwhile, the studies ignore employment and income distribution – where some of the leading risks of trade liberalization lie. Instead, they simply assume that all countries are at full employment and have a consistent income distribution, trade balance, and fiscal position.

The ITC study, which used a slightly different model, predicts an increase in the trade deficit that would destroy 129,484 American jobs (yet, inexplicably, it estimates that the TPP would raise employment by 128,000 jobs). It also projects a net increase in exports of $25.2 billion in 2032 (in 2032 US dollars), a small fraction of the PIIE's projection of $357 billion in 2030 (in 2015 dollars).

For our study, my colleagues and I used the PIIE's own 2012 estimates of trade-related gains, despite our reservations, along with more realistic economic specifications, including for income distribution and employment. We projected downward wage pressure, which, by depressing domestic demand, would lead to lower employment and higher inequality in all country groupings. Projected job losses would total some 771,000 across the TPP countries, including 448,000 in the US alone. These losses would offset any growth benefits, with the US and Japan suffering small net income losses (-0.5% and -0.1%, respectively).

Even if the TPP is found to conflict with the national or public interest, participating countries are obliged to follow its provisions. Powerful lobbies, mainly from the US, made sure of that. And, unfortunately, that is not all they did.

Despite being portrayed as a trade deal, the TPP is not even really about trade. Many TPP countries are already among the world's most open economies, with most merchandise trade among them having already been liberalized by earlier agreements and unilateral initiatives. The main remaining trade constraints involve non-tariff barriers, such as US agricultural subsidies, which the TPP does not address.

Instead, the TPP's most important provisions strengthen, broaden, and extend intellectual property rights. That will give pharmaceutical companies much longer monopolies on patented medicines and keep cheaper options – both generics and alternatives that are deemed too similar – off the market, hurting both consumers and governments that provide subsidies.

Moreover, the TPP weakens national regulation, such as over financial services, and strengthens the rights of foreign investors, at the expense of local businesses and the public interest. Investor-state dispute settlement (ISDS) provisions allow foreign investors to pursue binding private arbitration against governments if new regulations reduce their expected future profits.

Governments that lose those lawsuits will be obliged to compensate foreign investors; but even those that win will incur high legal costs. In fact, potential ISDS compensation payments or settlements alone could far outweigh the TPP's limited economic benefits. Fear of incurring such high costs are likely to weaken governments' incentives to implement regulations that hurt foreign corporate interests, even if they serve the public good.

Finally, though the TPP's biggest impact will lie outside the trade realm, the agreement has been used to undermine multilateral trade-liberalization efforts. The most obvious victim has been the World Trade Organization's ongoing Doha Development Round negotiations, but Asia-Pacific Economic Cooperation and the ASEAN Economic Community will also suffer.

The TPP's advocates have, for years, been grossly exaggerating the deal's projected benefits, while downplaying its potentially high risks and costs, most of which will be incurred by ordinary citizens. The reality is that the TPP will have a barely perceptible impact on GDP, benefit large corporations almost exclusively, and significantly

constrain the policy space governments need to accelerate economic development and protect the public interest. Some partnership that is.

Daily News
Stabenow Says Getting TPP Right Trumps Obama Legacy, McConnell Cool To Lame-Duck Vote
June 03, 2016
Sen. Debbie Stabenow (D-MI) this week made clear that it is more important to her to ensure the Trans-Pacific Partnership will deliver benefits to the U.S. middle class and improve U.S. wages than to pass it this year as negotiated because it is a priority for President Obama.
"I do know it is a priority for the president, but again for me this is about the global economy," she said in a June 2 interview with a Michigan television station. "Are we creating a race up, lifting wages, protecting our air and water, making sure that we are protecting the middle class?"
She noted that TPP is a trade agreement that covers about 40 percent of the economies of the world, "so it's really important that it be done right" for American business, workers and farmers. In light of the size of the deal taking a stand on it is a "very big decision."
Stabenow said that she cannot see herself supporting the TPP as written because it fails to tackle currency manipulation, which she said was "one of the biggest issues that we've heard from the auto industry." She said that Ford Motor Company has been out front about the failure to include currency manipulation disciplines in TPP, which she said was a way Japan kept the price of its cars artificially low.
She said this is a big issue not only about getting U.S. cars into Japan, but also about competing with Japan in third country markets, including India and Brazil.
Ford has expressed opposition to TPP over the absence of enforceable currency disciplines, since a currency pledge by TPP nations that was negotiated in parallel is non-binding.
Stabenow hinted that TPP would need to be improved from its current version when she mentioned that the U.S.-Korea free trade agreement as negotiated by President George W. Bush was met with "great concerns" from the auto industry but that those concerns were then addressed by President Obama in a renegotiation. She said critics of the original U.S.-Korea FTA had raised a number of issues and once they were addressed there was support for the agreement. The renegotiation largely focused on altering the tariff phaseouts for cars and trucks.
She signaled that the only time TPP could come up for a vote this year is the lame-duck session. "I do think that's when it would pass if it were to pass," she said. The administration is focused on a lame-duck vote and is continuing its campaign to get business to do more lobbying, including measures to shore up support for TPP around the country, sources said.
The push for the vote is also evident in having come up with a financial services data fix for a problem the industry flagged in TPP.
Given that a lame-duck vote is a goal, sources said that the administration must be working on the implementing bill and the accompanying Statement Of Administration Action. However, administration officials in both public and closed-door sessions have sidestepped any questions on whether they are working on the implementation bill.
Beyond that, there is disagreement on when Congress would need to begin the process for preparing the vote. For example, two senior Democratic aides said that it is impossible to cram the process solely in the lame-duck and that therefore, the process has to begin before the election.
They said the first indication of whether there is a lame-duck vote would be a hearing on TPP scheduled for September and potentially the mock markups of the draft implementing bill which is traditionally done by the trade committees before the President formally submits the legislation to the Congress. That formal submission triggers the fast-track deadline.

On the opposite side is the assessment by a senior House aide that it would be almost impossible for the trade committees to take action on the controversial TPP so close to the elections. He argued there would be simply too much pressure on congressional Democrats and Republicans alike to support the presidential candidates who are opposing TPP.

But the House aide said not starting the TPP process before the election does not preclude having the TPP vote in the lame-duck, sources said.

Regarding a lame-duck vote for TPP, Senate Majority Leader Mitch McConnell (R-KY) expressed skepticism in a June 1 interview on Public Television's Charlie Rose show, given the anti-trade stance of the leading presidential candidates.

“It needs to pass, and the question is can you pass it,” he said. “I do not think it would do the [TPP] much good to be brought up and defeated.” He said the “worst thing” that could happen would be if the agreement were voted down.

McConnell sidestepped Charlie Rose's questions on whether he would bring up the agreement in the lame-duck. “If it is defeated, it is a big step back for international trade,” he said. “If it is not done before the president leaves office, it is still there.”

McConnell explained that the fast-track, which lasts six years and now covers the agreement, means it can be brought up under privileged procedures even after Obama leaves office. His tone in the June 1 interview was somewhat softer than his May 1 interview with the agriculture news service AgriPulse, where he said it looks bleak for a TPP vote and that the political climate is the worst since he has been in the Senate (Inside U.S. Trade, May 5).

In a related development, the American Automotive Policy Council (AAPC) highlighted currency manipulation by TPP trading partners as a problem in a May 26 statement but remained silent on whether this was a reason to oppose the TPP or not.

"American automakers remain concerned about possible currency manipulation by TPP trade partners, including Japan,” AAPC President Matt Blunt said in a May 26 statement on the International Trade Commission report on TPP. “AAPC, as well as economists from across the ideological spectrum, agree that the U.S. government should include enforceable rules prohibiting currency manipulation in its trade agreements to produce a positive economic impact on American manufacturing.”

His other comments are strictly focused on the ITC report assessing the economic impact of the TPP without ever saying where the AAPC stands on the agreement. “One of the requisite steps before trade agreements can be considered by Congress is a thorough review by the ITC on their economic impact,” he said. “We hope that Congress will carefully review this report, specifically how the ITC has measured the impact of the proposed Trans-Pacific Partnership on the U.S. auto industry and American manufacturing.”

AAPC in Washington represents the “the common public policy interests of its member companies FCA US, Ford Motor Company and General Motors Company,” the announcement said.

USITC MAKES DETERMINATION IN FIVE-YEAR (SUNSET) REVIEW CONCERNING CERTAIN TISSUE PAPER PRODUCTS FROM CHINA

The U.S. International Trade Commission (USITC) today determined that revoking the existing antidumping duty order on certain tissue paper products from China would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.

As a result of the Commission's affirmative determination, the existing antidumping duty order on imports of these products from China will remain in place.

All six Commissioners voted in the affirmative.

Today's action comes under the five-year (sunset) review process required by the Uruguay Round Agreements Act.

The Commission's public report *Certain Tissue Paper Products from China* (Inv. No. 731-TA-1070B (Second Review), USITC Publication 4617, June 2016) will contain the views of the Commission and information developed during the review.

The report will be available by July 12, 2016; when available, it may be accessed on the USITC website at: *http://pubapps.usitc.gov/applications/publogs/qry_publication_loglist.asp*.

BACKGROUND

The Uruguay Round Agreements Act requires the Department of Commerce to revoke an antidumping or countervailing duty order, or terminate a suspension agreement, after five years unless the Department of Commerce and the USITC determine that revoking the order or terminating the suspension agreement would be likely to lead to continuation or recurrence of dumping or subsidies (Commerce) and of material injury (USITC) within a reasonably foreseeable time.

The Commission's institution notice in five-year reviews requests that interested parties file responses with the Commission concerning the likely effects of revoking the order under review as well as other information. Generally within 95 days from institution, the Commission will determine whether the responses it has received reflect an adequate or inadequate level of interest in a full review. If responses to the USITC's notice of institution are adequate, or if other circumstances warrant a full review, the Commission conducts a full review, which includes a public hearing and issuance of questionnaires.

The Commission generally does not hold a hearing or conduct further investigative activities in expedited reviews. Commissioners base their injury determination in expedited reviews on the facts available, including the Commission's prior injury and review determinations, responses received to

its notice of institution, data collected by staff in connection with the review, and information provided by the Department of Commerce.

The five-year (sunset) review concerning *Certain Tissue Paper Products from China* was instituted on June 1, 2015.

On September 4, 2015, the Commission voted to conduct a full review. All six Commissioners concluded that the domestic group response for this review was adequate and that the respondent group response was inadequate. Chairman Meredith M. Broadbent and Commissioners David S. Johanson and F. Scott Kieff voted for a full review, finding that circumstances warranted a full review. Vice Chairman Dean A. Pinkert and Commissioners Irving A. Williamson and Rhonda K. Schmidtlein voted for an expedited review.

A record of the Commission's vote to conduct a full review is available from the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Requests may be made by telephone by calling 202-205-1802.

http://www.politico.com/tipsheets/morning-trade/2016/06/tpp-mired-as-congress-returns-214657

TPP mired as Congress returns

By Doug Palmer
06/06/16 10:00 AM EDT
With help from Victoria Guida and Willem Vancutsem

TPP MIRED AS CONGRESS RETURNS: It could be a long, sleepy summer for the Trans-Pacific Partnership one year after Congress nearly ripped itself apart to give President Barack Obama "fast track" authority to finish the landmark Asia-Pacific deal. The administration is trying to sell Congress and the American public on the economic and geostrategic benefits of TPP. But both Senate Majority Leader Mitch McConnell and House Speaker Paul Ryan are keeping their distance, while Donald Trump is promising to walk away from the 12-nation pact. Lawmakers return this week from their Memorial Day break with no indication that either House Ways and Means Committee Chairman Kevin Brady or Senate Finance Committee Chairman Orrin Hatch will take any action on the agreement before Congress leaves town in mid-July for a prolonged summer break because of the party nominating conventions.

For its part, the Obama administration still hasn't given Congress a draft statement of how it plans to implement the agreement, something it's required to do 30 days before submitting the pact for a vote. The Office of the U.S. Trade Representative says it's working on a handful of issues that have jeopardized support for the trade deal, but there's no sign of progress on Hatch's main concern that TPP doesn't provide 12 years of data protection for biologics medicine. "The longer it takes for outstanding TPP issues to be addressed, the less likely it is that TPP will be voted on during the Obama administration," one industry official said. And one Senate Democratic aide similarly noted that it isn't clear whether there's enough time in a lame-duck session of Congress to do hearings, the "mock markup," and the vote. "Working backwards, that means key issues need to be resolved by August to hold hearings by September," the aide said.

http://www.centralmaine.com/2016/06/16/move-that-would-have-stripped-the-defense-shoe-provision-defeated/

U.S. House shoots down move to strip athletic shoe funding from defense budget

The Sanford Amendment would have removed the requirement that the military buy U.S.-made athletic shoes, which would have been a blow to New Balance.

By Staff Report

An amendment that would have stripped language that requires the military to buy U.S.-made athletic shoes from the Department of Defense budget was defeated Thursday in the U.S. House of Representatives.

The amendment, proposed by Rep. Mark Sanford, R-S.C., would have withheld the money to make the requirement work from the National Defense Authorization Act of 2017. It failed, 155-265.

U.S. Rep. Bruce Poliquin, R-2nd District, holds aloft a New Balance sneaker in March at the Maine Republican convention. Poliquin pushed the House to defeat an amendment that would have defunded a provision that the Department of Defense buy U.S.-made shoes Thursday. Portland Press Herald file photo by Ben McCanna

Poliquin, as well as Rep. Niki Tsongas, a Massachusetts Democrat, had pushed for language in the defense budget that requires the military to issue recruits U.S.-made running shoes rather than give them vouchers to buy their own shoes. The 1941 Berry Amendment requires the military buy U.S.-made apparel for recruits, but the athletic shoe loophole allowed the vouchers because the military argued that no U.S.-made shoes conformed to the requirements of the amendment or the needs of troops. Poliquin and Tsongas' language to require the military to buy Berry-conforming shoes was included in both the House and Senate defense bills and passed in both chambers with broad bipartisan support.

The requirement is a boost to Boston-based New Balance shoes, which manufactures shoes at five factories, including three in Maine, in Skowhegan, Norridgewock and Norway. All three factories are in Poliquin's district.

Poliquin, who wore his own American-made New Balance shoes onto the House Floor, according to the news release, said, "This is a milestone victory in the fight for 900 hardworking Mainers in Norway, Skowhegan and Norridgewock.

“I thank all of my colleagues in the House for voting for American jobs and American workers, despite pressure from powerful special interest groups. This critical language will make sure that our U.S. taxpayer dollars go to U.S. workers and families, not to manufacturers overseas. I will continue to fight tooth and nail through every process until this critical language is signed into law.”

Sanford had argued that the requirement cost the military money because of injuries to military recruits who wear shoes that aren’t adequate for their needs.

New Balance applauded the defeat of the amendment Thursday.

“At New Balance we believe making things in the U.S. matters,” said Matt LeBretton, vice president of public affairs for New Balance. “We are overjoyed that the Congress, with Congressman Poliquin leading the way in the House, agrees. Today is a big day for manufacturing in Maine and throughout the country.”

He said the firm applauds Poliquin “for his doggedness in making sure that American soldiers will train in gear made in America. The efforts of Bruce Poliquin, and the entire Maine delegation, cannot be overstated. These efforts directly translate into more jobs for Maine and beyond.”

http://www.newyorker.com/magazine/2016/06/20/inside-the-gop-trump-dilemma

The New Yorker

THE POLITICAL SCENE
JUNE 20, 2016 ISSUE

OCCUPIED TERRITORY

By Ryan Lizza

Excerpted quotation from U.S. Senator Susan Collins (R; ME):

Maine's paper mills have been closing in the past few years, and she has become more skeptical about free trade than she [Senator Collins] used to be. "There's a feeling that's very strong in my state," she said, that trade deals have benefitted large corporations and hurt working people. "I understand completely why that resonates." Republicans argue that free trade lowers consumer prices. "Well, if you no longer have a job, lower consumer prices don't really do you a whole lot of good. You'd rather have the job."

Congress of the United States
Washington, DC 20515

March 28, 2016

The Honorable John F. Kerry
Secretary
Department of State
Washington, DC 20520

The Honorable Michael Froman
Office of the United States Trade Representative
600 17th Street NW
Washington, DC 20508

Dr. Kathryn Sullivan
Administrator
National Oceanic and Atmospheric Administration
Silver Spring, MD 20815

Dear Secretary Kerry, Ambassador Froman, and Administrator Sullivan:

We write to express our extreme concern over recent efforts by the Swedish Ministry of Environment and Energy to reclassify live Maine lobster as an invasive species and ban the importation of live lobsters to the entire 28-member European Union (EU). We urge you to engage in immediate efforts to ensure the continuation of safe and responsible import of live Maine lobsters, consistent with the EU's World Trade Organization (WTO) obligations.

The trans-Atlantic lobster trade, with an annual value of about $196 million, is important for both North America and Europe. As live lobsters are Maine's top export to the EU, any attempt to halt their import could have serious ramifications for Maine lobstermen and their families. Access to the European market is essential for the maritime economy of our state.

While we understand Sweden's desire to preserve the integrity of their native species, it is critical that any action taken by the European Commission be consistent with WTO rules. Among other rules, the WTO requires that animal health protection measures be based on scientific principles, supported by scientific evidence. Moreover, such measures may not be disguised restrictions on international trade.

For decades, Maine has safely exported live lobster around the world. Studies by the University of Maine, a global leader in the scientific study of lobsters, have indicated the risk of Maine lobsters interbreeding with European lobsters is extraordinarily low. They also report that disease transmission risks associated with inadvertent contact are small, for reasons related to significant differences between European and Maine sea

temperatures.

Statements by the European Commission do not deem the appearance of alien species in new locations as a necessary cause for concern. Since only a small number of Maine lobsters have been found in foreign waters, we believe regulators should take a more finely tuned approach before calling this an "invasion." Some reports have suggested that individuals are releasing lobsters into European waters after their arrival. If this is the case, such a violation should be handled first by local law enforcement, rather than used to erect a barrier to legitimate international trade. It is important that any action be as prescriptive as possible. We hope the European Commission with exhaust all other options before potentially alienating a successful trading market.

It is in the best interest of all parties involved to maintain this sector of trans-Atlantic trade that supports so many Mainers and their families. Our lobstermen have heeded calls by President Obama to build export markets. We now need your help to ensure that the EU does not erect unjustified barriers to these markets.

Thank you for your consideration of our request. We look forward to hearing from you about steps that you and others in the Administration are taking to ensure live Maine lobsters remain available throughout Europe.

Sincerely,

Susan M. Collins

SUSAN M. COLLINS
United States Senator

Chellie K

CHELLIE PINGREE
Member of Congress

Angus King

ANGUS S. KING, JR.
United States Senator

Bruce Poliquin

BRUCE POLIQUIN
Member of Congress

cc: Honorable Penny Pritzker, Secretary, United States Department of Commerce

http://www.iatp.org/blog/201604/tpp-dumping-on-us-dairy-farmers

TPP Dumping on U.S. Dairy Farmers

Posted April 7, 2016 by Dr. Steve Suppan

"Dairy in Crisis: TPP Dumping on Dairy Farmers," by IATP intern Erik Katovich, is a sober recitation of facts that raise important questions about the objectives of the U.S. Trade Representative's (USTR) negotiation of the Trans-Pacific Partnership (TPP) Agreement.

First, as Katovich reports, global dairy prices continue to drop due to worldwide oversupply of raw milk, and U.S. dairy processors are dumping millions of gallons of raw milk into sewers. The dumped milk contradicts the U.S. Department of Agriculture's (USDA) objectives to reduce food waste and conserve the natural resources used to grow dairy cattle feed. During the negotiations, the USDA projected a 20 percent increase in U.S. dairy imports by 2025 due to TPP rules. Given the vast U.S. oversupply of raw milk, why did the USTR lower the tariff rates on dairy products, including on milk protein concentrate (MPC), a powder that contains 30 to 40 percent of the protein of raw milk and casein, a starch used in processed cheese? In other words, why did the USTR favor MPC and casein importers to the detriment of U.S. dairy farmers?

Katovich quotes Darci Vetter, chief agricultural negotiator for the USTR: "US agriculture, as a whole, has a lot to gain from this agreement." (Cited in Jacqui Fatka, "Ag Support for TPP Remains Strong," *Feedstuffs*, January, 2016. Subscription required) Clearly this "whole" does not include the U.S. dairy farmers whose milk is dumped so that dairy processors, such as Kraft-Heinz and Dean Foods, can import much cheaper MPC and casein from the world's largest raw dairy materials exporter, New Zealand's Fonterra. These companies and other food processors can export processed cheese and other products containing dairy-like elements that do not meet the Food and Drug Administration's identity standard for cheese but can be sold as a processed good. Indeed, there is no international standard for processed cheese that would facilitate trade.

Food Chemical News (subscription required) reports that the Milk and Milk Products Committee of the Codex Alimentarius Commission, whose standards are presumed to be authoritative by the World Trade Organization, cannot agree on a standard for processed cheese. One proposed draft standard for processed cheese would facilitate trade if the product contained a minimum 51 percent of cheese content. (Declan Conroy, "Codex processed cheese standard remains elusive," March 28, 2015.) The U.S. Codex Office (kenneth.lowery@fsis.usda.gov) will continue to take comments on this draft standard until May 1.

The TPP dairy tariff reductions, flexible labeling rules and tariff classifications for MPC and casein, lauded by the U.S. Dairy Export [and Import] Council, are key elements of a trade policy strategy that continues to reduce the number of U.S. dairy farms and the benefits those farms provide to the families and counties in which they are located. On March 8, the Board of the National Milk Producers Association announced its resolution to support the TPP. The Board assumed that "the net effect of all TPP market access concessions is expected to be neutral to

slightly positive," but that the addition of other Asian countries joining the TPP later would make the net effect of import and export tariff concessions a positive for U.S. NMPA members.

The economic viability of the U.S. dairy trade model does not depend on a well-functioning, competitive and transparent market that pays farmers cost of production plus prices. Rather, as a March report by the USDA's Economic Research Service points out, the increasing concentration of U.S. raw milk production in fewer and fewer farm operations requires taxpayer subsidies, most recently in the form of the 2014 Farm Bill's Dairy Margin Protection Program (Dairy MPP), to offset the lower than cost of production prices received by farmers. (The ERS report does not evaluate the natural resource cost nor the environmental sustainability of the dairy industry in its econometric modeling).

Furthermore, the Farm Bill subsidizes the cost of feed grains consumed in the dairy Confined Animal Feeding Operations (CAFOs). As reported by Katovich, the Congressional Budget Office estimates the corn and soybean subsidies alone at $3.37 billion for Fiscal Year 2017.

Nevertheless, CoBank, which finances both CAFOs and family farm scale operations, opined in its March outlook report, "Our assessment of current market conditions is that dairy product prices still have a ways to go before they hit bottom" (p.12). CoBank doesn't estimate how far prices (an averaging of futures contract prices, such as those of cheese futures on the Chicago Mercantile Exchange) will fall nor explain why they might rebound. A plausible explanation for a modest rebound from the bottom is that a continuation of the dairy price collapse will force CAFOs, even subsidized by the Farm Bill, to liquidate their herds.

This crude and brutal form of supply management contrasts with the planned programs of Canadian dairy supply management that the USTR attacked throughout the TPP negotiations. Under the TPP, Canadian dairy farmers are projected to lose about four percent of their domestic market to cheaper imports, including those at below cost of production prices such as New Zealand's lower nutrient Ultra High Temperature milk, which has a shelf life of up to a year. Exporting at below the cost of production, colloquially termed "dumping," has been prohibited by the WTO in all industries but agriculture. Against the permanent pressure of lowered tariffs and no TPP discipline against dumping agricultural exports, the Canadian government plans to offer its dairy farmers compensatory subsidies in an amount and formula subject to parliamentary negotiations. TPP proponents exulted at the low tariff and the consequent below cost of production import erosion of Canada's supply management programs.

An extraordinary legislative procedure, known as "fast track" Trade Promotion Authority (TPA), requires the U.S. Congress to reduce its authority to an up or down vote on the TPP and other trade and investment agreements. The TPA also requires the U.S. International Trade Commission (USITC) to submit a study to Congress by May 18th before the Congress can vote on the TPP, at least until after the November U.S. elections, given the extent of popular opposition to the agreement.

IATP submitted comments to the USITC, urging its staff to analyze the impact of U.S. imports under the TPP tariff cuts. We further asked USITC to estimate the costs to consumer and environmental health that would result from the TPP's weak standards on risk assessment of

imported food and agricultural inputs, such as pesticide and veterinary drug residues in foods. For example, the Centers for Disease Control (CDC) identified foreign foods as the source for 18 out of a total 120 foodborne illness outbreaks. Given the very low percentage of foodborne illness that is reported, as estimated by the CDC, and the estimated $93.2 billion annual cost of U.S. foodborne-illness-related costs, weakening food inspection and testing intensity under the TPP is not only inhumane—it's bad business.

For those agribusiness exporters and importers that have already announced their support for the TPP, anything less than full-throated support for the TPP in the USITC report will be dismissed, if not simply ignored. But for those who are planning to vote in the fall elections and for whom the results of U.S. trade policy play a role in their vote, the USITC report, if it includes the true cost of this risky market opening, could provide important evidence of the need for a new approach to dairy markets and to agricultural trade policy more generally.

- See more at: http://www.iatp.org/blog/201604/tpp-dumping-on-us-dairy-farmers#sthash.wHYPpkiQ.dpuf

http://www.insidesources.com/point-we-had-trade-before-we-had-nafta-and-other-trade-deals/

Point: We Had Trade Before We Had NAFTA and Other Trade Deals

April 08, 2016 by Dean Baker

Editor's Note: For an alternative viewpoint, please see: Counterpoint: Free Trade Agreements Have Delivered for Americans

Supporters of the trade deals of the last quarter century, including the currently pending Trans-Pacific Partnership (TPP), invariably describe these deals as the alternative to autarky. They imply that the debate is between those who support opening up markets and increasing trade and those who would have the United States retreat into self-sufficiency.

This may be an effective sales pitch for these deals, but it has nothing to do with reality. The United States already had plenty of trade before NAFTA, CAFTA and the other trade deals negotiated over this period, just as it already has a huge amount of trade with the TPP countries. It will continue to have large amounts of trade with Canada, Japan and other TPP countries regardless of whether Congress approves the deal, so we are not arguing about whether or not the United States should trade.

Rather, NAFTA and subsequent trade deals are about putting in place a set of rules that structure the pattern of trade to favor some groups and disadvantage others. At the top of the list of beneficiaries of these deals are the multinational corporations that want more protections for their investment in other countries. A major part of NAFTA was the investment chapter that puts in place safeguards to ensure U.S. companies that Mexico's government will not confiscate their factories or restrict their ability to take profits out of the country.

This made it easier for companies like General Motors to set up assembly plants in Mexico and ship the finished cars back to the United States. This was good news for General Motors' efforts to boost profits. It was not good news to the autoworkers in the United States who lost jobs or were threatened with job loss if they did not accept pay cuts and other concessions.

There was nothing natural about this pattern of trade. Our negotiators could have focused on reducing the barriers that make it difficult for smart kids from Mexico to study to become doctors, to meet U.S. standards, and then practice in the United States. The arguments for gains from trade are the same with foreign doctors as with foreign cars, except the potential gains are far larger with doctors. But doctors have more political power than autoworkers, so our trade deals focused on driving down autoworkers' wages.

The trade deals of the last quarter century have also increased protectionism in important areas, notably patents for prescription drugs and copyrights for books, movies, software and recorded music. The effort to make drug patents and related protections ever longer and stronger has raised drug prices in the United States and around the world. We now spend more than $400 billion a year on prescription drugs ($1,300 per person) that would likely sell for one-tenth of this price in a free market.

Again, there was nothing inevitable about the strengthening of these protections as part of trade deals. This was the result of the power of the pharmaceutical, software and entertainment industries. As a result of their power, they were able to insert rules in trade deals that effectively redistributed money from the rest of us to them.

In addition, these trade deals have included a variety of rules that can interfere with the ability of people in the United States and elsewhere to implement health, safety and environmental regulations if they pose a threat to foreign investors. We saw a recent example of this when a law requiring that beef be labeled for its country of origin was ruled to be a violation of NAFTA. The TPP will include even stronger rules of this sort, which could hamper efforts to regulate fracking or measures designed to restrict greenhouse gas emissions. As a possible harbinger of things to come, the Canadian company that was going to build the Keystone Pipeline is suing the Obama administration over its refusal to approve the project. Even if they are unable to win this suit, the threat of legal action is likely to deter regulatory efforts at all levels of government.

In short, when we debate the merits of the TPP and other trade deals, we are not arguing about trade. We are arguing over specific rules in these trade deals that are intended to favor some interest groups at the expense of others. Making trade the issue is a deliberate distraction.

Pro-TPP Op-Eds Remarkably Similar to Drafts By Foreign Government Lobbyists
The Intercept
By Lee Fang
April 10, 2016
https://theintercept.com/2016/04/10/tpp-lobbyist-opeds/

Opinion columns published in California newspapers over the last year in support of the Trans-Pacific Partnership use language nearly identical to drafts written and distributed by public relations professionals who were retained by the Japanese government to build U.S. support for the controversial trade agreement.

Take this column by former San Diego mayor Jerry Sanders, who now serves as the president and CEO of the San Diego Regional Chamber of Commerce, in the San Diego Union-Tribune, titled: "Trans-Pacific trade pact benefits San Diego."

Much of the language in Sanders' op-ed also appears in a "San Diego Draft op-ed" distributed by Southwest Strategies, a consulting firm paid by the Japanese government to promote the TPP:

Jerry Sanders: "Notably, the TPP includes Japan, which is significant"
Southwest Strategies: "Notably, the TPP includes Japan, which is critical"

Jerry Sanders: "Trade is essential for sustaining America's role as the most innovative economy in the world"
Southwest Strategies: "Trade is essential for sustaining America's role as the most innovative economy in the world"

Jerry Sanders: "With more than 95 percent of the world's consumers outside of our borders, and with more than one in five U.S. jobs dependent on trade, it is essential that the U.S. continue to open new markets for American goods and services, while creating and sustaining jobs for American workers."
Southwest Strategies: "With more than 95 percent of the world's consumers outside of our borders, and with more than one in five U.S. jobs dependent on trade, it is critical that the U.S. continue to open new markets for American goods, intellectual property rights and services, and create and sustain high-skilled, high-wage jobs for American workers."

Or take this column, "TPP Will Strengthen California's Economy," by Pat Fong Kushida, the president and CEO of the CalAsian Chamber of Commerce, which was published in a Los Angeles daily newspaper called The Rafu Shimpo, with a truncated version appearing in the Sacramento Business Journal.

Kushida's pro-TPP column is word-for-word identical to a draft column distributed by Southwest Strategies. The only difference between the draft and the published op-ed are the verb tenses, such as changing "will be" to "was" and "addresses" to "addressed."

Foreign lobbying records required by the Department of Justice show that Southwest Strategies was retained on March 12, 2015, for a contract of $10,000 per month, to promote trade policies

favored by the Embassy of Japan. The relationship with Southwest Strategies, a San Diego-based company, was formed through KP Public Affairs, the highest grossing lobbying firm in Sacramento.

“We don’t have a policy on op-eds by third parties, but we do request that op-eds be exclusive to The San Diego Union-Tribune,” said Matthew Hall, the editorial and opinion director of the paper. “We understand that PR people may help others with op-eds and that some op-eds may contain talking points articulated elsewhere, but our intent is to have a broad conversation about topical issues and tap into multiple points of view as we did with op-eds supporting and opposing the Trans Pacific Partnership in our pages in August 2015.”

We reached out for comment to Southwest Strategies, Sanders and Kushida, but did not receive a response.

The Japanese government has been among the biggest trade-deal advocates in Washington, retaining a small army of lobbyists and consultants to build support among American policymakers. As the New York Times reported, lobbyists working for Japan helped organize a pro-TPP congressional caucus, along with a research and publicity effort housed at Center for Strategic and International Studies, a prominent Beltway think tank that receives funding from the Japanese government.

Critics of the TPP contend that the agreement will allow corporations to use special tribunals set up by the World Bank to block laws, including environmental protections, that have the potential to stifle future profits. A recent study also found that as many as 448,000 U.S. jobs could be lost as a result of the deal.

Last year, after a protracted fight in Congress, President Barack Obama won fast track authority for the TPP, setting the stage for the agreement to move forward.

United States Department of State

Washington, D.C. 20520

APR 12 2016

The Honorable
Chellie Pingree
House of Representatives
Washington, DC 20515

Dear Ms. Pingree:

Thank you for your March 28 letter regarding the Swedish Ministry of Environment and Energy's effort to classify American Lobster as an invasive species and ban imports of live lobsters into the European Union (EU). We are actively working to ensure that the European Commission does not impede the legitimate trade of live lobsters, including those from Maine.

In late February, the Swedish government introduced a risk assessment study to the EU Directorate-General for Environment's Working Group on Biodiversity concluding that the American Lobster, Homarus Americanus, has been found in Swedish, Norwegian, and English waters, and that this species threatens local lobster species. The risk assessment study is the basis for Sweden's request that the European Commission consider the possible inclusion of the American Lobster in the EU list of Invasive Alien Species. Such inclusion could lead to a ban of imported live lobsters from the United States and Canada. However, the Commission must also consider the economic consequences of such a ban. The State Department is engaged with other U.S. agencies on this matter, and the Administration is working with academic and industry experts to evaluate the scientific basis of Sweden's risk assessment.

We strongly agree that it is important to maintain trade that supports the economies on both sides of the Atlantic. The Administration is in close contact with European officials to try to ensure that U.S. exports of live lobsters are not unjustifiably restricted, and we are working through our missions in Europe to emphasize that the EU should only take measures based on sound science. Our Ambassador in Sweden has also engaged with senior Swedish officials on the matter.

Thank you for the information and views expressed in your letter. We will incorporate your concerns into our effort and welcome any additional information you believe can help us achieve our common goal of protecting the trade of live lobsters.

We hope this information is useful. Please do not hesitate to contact us if we can be of further assistance on this or any other matter.

Sincerely,

Julia Frifield

Julia Frifield
Assistant Secretary
Legislative Affairs

New Balance accuses Pentagon of reneging on sneaker deal
Boston Globe
By Jon Chesto
April 12, 2016
http://www.bostonglobe.com/business/2016/04/11/new-balance-says-obama-administration-reneged-deal-involving-military-business/zUdUWa23ZWv53D5a9AjNII/story.html

New Balance is renewing its opposition to the far-reaching Pacific Rim trade deal, saying the Obama administration reneged on a promise to give the sneaker maker a fair shot at military business if it stopped bad-mouthing the agreement.

After several years of resistance to the Trans-Pacific Partnership, a pact aimed at making it easier to conduct trade among the United States and 11 other countries, the Boston company had gone quiet last year. New Balance officials say one big reason is that they were told the Department of Defense would give them serious consideration for a contract to outfit recruits with athletic shoes.

But no order has been placed, and New Balance officials say the Pentagon is intentionally delaying any purchase.

New Balance is reviving its fight against the trade deal, which would, in part, gradually phase out tariffs on shoes made in Vietnam. A loss of those tariffs, the company says, would make imports cheaper and jeopardize its factory jobs in New England.

The administration has made the pact a priority. It could be voted on by Congress later this year, though possibly not until after the November elections.

“We swallowed the poison pill that is TPP so we could have a chance to bid on these contracts,” said Matt LeBretton, New Balance’s vice president of public affairs. “We were assured this would be a top-down approach at the Department of Defense if we agreed to either support or remain neutral on TPP. [But] the chances of the Department of Defense buying shoes that are made in the USA are slim to none while Obama is president.”

The administration says the issues of foreign tariffs and of whether the Pentagon should be required to buy shoes made domestically are entirely separate.

New Balance disagrees. Though most of the company’s shoes are made overseas, domestic manufacturing is a big priority for owner Jim Davis, a longtime Republican donor.

A running shoe is brushed in a final step before boxing them in Lawrence.

The company employs about 1,400 people at its five New England factories — one in Brighton, one in Lawrence, and three in Maine. Company officials say they are looking to add workers to those plants, and they see a major military contract, with potentially as many as 200,000 shoe orders a year, as a way to help reach that goal.

Nearly every piece of gear that military recruits wear is made in the United States, per a 1940s-era law known as the Berry Amendment. But for many years, athletic shoes were exempt, largely because of a lack of sufficient domestic options.

Hoping to change that, New Balance and other companies worked toward making an all-American shoe. New Balance even purchased an expensive machine to make midsoles, a key component that was nearly always made overseas.

In 2014, the Pentagon relented. With competition among US manufacturers, officials said they were ready to consider domestically made shoes.

LeBretton said a representative for the Obama administration then asked New Balance to accept a compromise version of the trade deal, partly in exchange for a pledge of help getting the Department the Defense to expedite the purchase of US-made shoes.

But that help never arrived, LeBretton said. The agency still hasn't ordered any US-made sneakers.

The problem, according to the Department of Defense, is that none of the three New Balance shoes offered for consideration met the agency's cost requirements and one didn't meet durability standards.

The administration portrays the delay as quality and cost control. But New Balance sees it as foot-dragging, and as reason enough to revive its fight against the Trans-Pacific Partnership.

"The Department of Defense has basically played a shell game with domestic footwear manufacturers to protect the profits of their [base stores]," said LeBretton, who added that the company has offered to sell its shoes to the military with no retail markup. "They've put up roadblock after roadblock. Our shoes are ready to go. It's a bureaucracy run amok."

A spokesman for the Office of the US Trade Representative said the Obama administration supports New Balance's efforts to develop a shoe that's compliant with the Berry Amendment. He said it is a mistake for the company to use that issue as a reason not to support the separate trade accord.

"It is unfortunate that, despite a strong outcome in TPP that advances the interest of US footwear workers, New Balance now appears to be changing its position on TPP in response to the Pentagon's separate procurement process," spokesman Matt McAlvanah said in a statement.

New Balance's stance also drew criticism from the Footwear Distributors and Retailers of America, which argues that eliminating the Asia tariffs would be good for consumers and could allow US companies to invest more in domestic operations. "We would have loved to have had all duties eliminated on Day One," said Matt Priest, the group's president. "That's not what we got. We got a compromise."

But like New Balance, Representative Niki Tsongas is tired of waiting for the domestic shoe contract.

The Lowell Democrat is trying to include legislation in the next big defense spending bill that would ensure the department's purchase of US-made shoes for recruits. She is expected to have assistance from members of Maine's delegation.

Wolverine Worldwide, another company looking to build an all-US running shoe for the military, backs the Asia-Pacific deal and will also support Tsongas's legislation. Spokesman David Costello said Wolverine, whose Saucony brand is based in Lexington, is also frustrated by the delays. Landing a Pentagon contract, he said, could create a positive impact that would ripple throughout Wolverine's and New Balance's supply chains and support smaller companies that make components for the shoes.

Executives at New Balance recognize that they risk alienating a big potential customer by challenging the US government over the trade agreement.

But LeBretton said it's worth the gamble.

"We make a lot fewer shoes in the US than we do overseas, but the point is we're trying to make more here, not less," LeBretton said. "When agreements like this go into place, what that says to us is that our president and our trade negotiators, they don't want us to make more products here."

https://www.washingtonpost.com/news/powerpost/wp/2016/04/12/more-than-50-health-religious-and-labor-groups-urge-congress-to-reject-tpp-trade-deal/

More than 50 health, religious and labor groups urge Congress to reject TPP trade deal

By Catherine Ho April 12

Supporters and individual patients living with cancer including (L-R) John Fortivin, Zak Norton and Greg Ames, protest outside the hotel where the Trans-Pacific Partnership Ministerial Meetings were being held in Atlanta, Georgia, September 30, 2015. (Reuters/Tami Chappell)

More than 50 public health, religious and labor groups — including Doctors Without Borders, the Catholic lobby group Network and the Communications Workers of America — are urging Congress to reject the Trans-Pacific Partnership, the 12-nation free trade agreement between the United States and Pacific Rim nations.

In a letter sent to Congress on Tuesday, the groups argue that the intellectual property and pharmaceutical provisions in the pact would make it more difficult for people in TPP countries to access affordable medicine. Among their concerns are that TPP grants several years of exclusivity to pharmaceutical makers for certain drugs that would delay the availability of generics.

"In the U.S., the TPP is a danger to public health and fiscal responsibility because it would lock in policies that keep prices of too many medicines unaffordably high," says the letter, which is also signed by AIDS and HIV prevention and advocacy groups, Oxfam America, National Nurses United and National Physicians Alliance.

The move comes a day after 225 agriculture, farm and food groups sent their own letter to Congressional leaders, urging them to approve TPP. In the letter, dated Monday, they applaud TPP's removal of many tariffs that allows them to better compete in the Asia market.

"TPP will help level the playing field for U.S. exports and create new opportunities for us in the highly competitive Asia-Pacific region," says the letter, which was signed by the National Cattlemen's Beef Association, National Association of Wheat Growers, National Corn Growers Association and others.

TPP was signed in New Zealand in February, but Congress must ratify it with an up-or-down vote. It is unlikely the vote will happen before the November presidential election. It is the largest regional trade deal in history, between nations that collectively make up nearly 40

percent of the world's gross domestic product. The other TPP countries are Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam.

It is not the first time outside interest groups are opposing TPP — environmental and labor organizations have vocally fought the deal for months, saying it would lead to an increase in harmful environmental emissions and erode labor conditions and wages for workers. But it does mark the first time such a large contingent of health organizations is signing onto the cause, said Nick Florko of Public Citizen, a consumer rights advocacy group that signed onto the letter.

The letters come about a month before the U.S. International Trade Commission, an independent federal agency, is expected to issue an influential report on the economic impacts of TPP. The report, which is slated to come out by May 18, is considered the most authoritative and official economic analysis of the pact, and will be sent to Congress and the president.

TPP is a one of President Obama's top economic priorities, and has garnered the support from heavy hitters now advocating for its ratification. Major business groups like the U.S. Chamber of Commerce and National Association of Manufacturers are in support of the deal, which they say will help U.S. companies sell their goods and services abroad.

https://euobserver.com/economic/132988

TTIP: EU exporters worry about US harmonisation issues

By **JUSTUS VON DANIELS AND MARTA OROSZ**
BERLIN, TODAY, 09:27

The EU is negotiating a trade and investment deal with the US that is supposed to harmonise standards to avoid unnecessary double testing, but in the US standards and norms are often set locally and not on a federal level.

For Europe, this means that the central promise of the Transatlantic Trade and Investment Partnership (TTIP) might not be kept because US negotiators are not actually in a position to decide on these regulatory issues.

On 15 March, the TTIP advisory board for Germany's economy minister Sigmar Gabriel discussed this problem.

According to information obtained by the Berlin-based newsroom Correctiv.org, Gabriel was informed about the issue shortly afterwards and thought it was "highly interesting".

It became clear to the German ministry that instead of one central testing and certifying organisation like the German TUV, in the US there are 17 so-called Nationally Recognised Testing Laboratories (NRTLs) issuing technical certifications.

Moreover, a certificate from one of these 17 laboratories does not automatically mean the product in question may actually go in use – this decision belongs to local authorities. This way it might be the local sheriff or the fire marshal deciding whether a grinder may eventually go into industrial use.

It is not only the certificates that are different, but the norms as well.

Volker Treier of the German Chambers of Commerce gives an example: "For machinery there is a different colour regulation in every US state for power, aerial and water cables, which makes it costly to adapt for exporting companies."

If a European manufacturer wants to export machinery in the US, it has to dig deep to pay for additional certifications. Products have to be tested again on the other side of the Atlantic.

These barriers should be eliminated with TTIP – at least this is one of the main arguments European governments try to win small and medium enterprises with (SMEs) for the trade agreement.

But as mentioned above, US negotiators are not able to control these regulatory issues. The 17 NRTLs are accredited by a federal agency - Occupational Safety and Health Administration - but they are not under its control.

While an EU regulation provides consistency and harmonisation among the national accreditation bodies across the member states, there is no such comprehensive guideline in the US.

Some of the US regulations on testing, verifying and authorising an engineering product were taken on a federal level, but many of these are state or local regulatory provisions defined by local NRTLs.

Commission's concern

A major problem with these testing laboratories (NRTLs) is that they do not recognise each other's test results.

This means that if a European manufacturer certifies its product at one of these NRTLs this does not automatically mean that it can be sold or put into operation in every federal state.
This mainly concerns electronic machinery, but the lack of an internal market in the US poses a costly obstacle for European exports in other areas too.
This fragmented market has been causing serious concerns for European manufacturers for decades.
An internal meeting report of the European Commission obtained by Correctiv quotes the concerns of the European engineering industry: “They noted strong divergences in regulatory approach, especially regarding liability issues.
“Their main concerns are the local element (local inspections and regulations), complexity of the US regulatory system, tariffs and certification its related costs – for instance number of audits by NRTLs.”
The meeting report concludes: “The US certification industry is a key player; It will prove difficult to change the status quo.”
The German Association for Small and Medium-sized Businesses representing over 270.000 German businesses is also concerned about the issue.
“Mutual recognition of norms is a one-way road,” says the association's president Mario Ohoven, who fears a distortion of competition causing disadvantages for the European industry.
While for US companies exporting to the EU there is a unitary EU guideline for standards and norms, European SMEs have to find their way in the US through the above mentioned maze of norms and certificates.
The German Electrical and Electronic Manufacturers Association suggests that the US should recognise the internationally accepted ISO and IEC standards. Big companies like Siemens support this claim.
Up to now the US is one of the countries adopting only a few of the international norms. This explains why the issue of standards and norms plays such a crucial role in the EU-US free trade agreement negotiations.

Food & Water Watch

April 27, 2016

160+ Farm and Food Groups Ask Congress to Reject TPP, Stand Up for Independent Farmers and Ranchers

WASHINGTON, D.C. (April 27, 2016) – The Trans-Pacific Partnership (TPP) has become a divisive issue in the nation's capital, and criticism intensified after 161 food, farm, faith and rural organizations sent a letter to Capitol Hill today, urging lawmakers to reject the trade pact.

"The main beneficiaries of the TPP are the companies that buy, process and ship raw agricultural commodities, not the farmers who face real risks from rising import competition. TPP imports will compete against U.S. farmers who are facing declining farm prices that are projected to stay low for years," the organizations wrote.

The White House has promoted the TPP as an export-boon for farmers to generate support for the agreement, but past trade agreements have not always delivered on export promises, the letter noted. For example, the United States' total combined exports of corn, soybeans and wheat have remained steady at about 100 million metric tons for the last 30 years despite a raft of free trade agreements since the mid-1990s.

"Trade deals do not just add new export markets – the flow of trade goes both ways – and the U.S. has committed to allowing significantly greater market access to imports under the TPP," the groups explained. Especially "alarming" to the organizations is the agreement's complete lack of enforceable provisions against currency manipulation, a substantial cause of America's debilitating $531 billion trade imbalance.

"In its current form, the TPP sets to bankroll global business rather than foster local economies. It fails to address our alarming trade deficit and other serious issues that will be passed on to the family farmer, the everyday consumer and the American worker," said Roger Johnson, president of National Farmers Union, one of the letter's signers. "NFU understands this trade agreement is not a good deal for our nearly 200,000 family farm and ranch members."

The TPP poses particular risks for cattle producers. In 2015, the United States imported nearly 2.3 billion pounds of beef from TPP partners but only exported about 1.2 billion pounds. The TPP will increase beef and cattle imports at a time when domestic cattle prices are plummeting.

"The TPP rolls out the red carpet for foreign cattle imports to undercut American family ranchers," said Mabel Dobbs, a rancher from Weiser, Idaho, on behalf of the Western Organization of Resource Councils. "We will face the added challenge of competing with cheap, unregulated and un-inspected imported beef. Like failed trade deals of the past, the beneficiaries of this agreement are the multi-national meatpackers at the expense of family farmers and ranchers."

The TPP also covers important agricultural policy areas such as investment, procurement, labeling, food safety, animal health and crop disease. The stringent rules and dispute system under the TPP make it easier to successfully challenge and overturn domestic laws, as happened last year to country of origin meat labels.

“The TPP will add to the rising tide of imported food that is already overwhelming U.S. farmers, eaters and border inspectors,” said Food & Water Watch Executive Director Wenonah Hauter. “Trade deals like the TPP make U.S. farm and food policy subservient to foreign trade tribunals that put global commerce ahead of the needs of American farmers and consumers.”

The letter was introduced at a press teleconference with House Agriculture Committee Member Rep. Rick Nolan, NFU President Roger Johnson, Auburn University agricultural economist Professor C. Robert Taylor and independent rancher and Rocky Mountain Farmers Union member Steve Nein**.**

The letter and complete list of signers can be read here: http://fwwat.ch/1qQ3Ux0

https://www.ttip-free-zones.eu/node/92

BARCELONA: The pan european meeting of TTIP, CETA and TiSA-free zones is the first step towards a big municipal movement

Fri, 29/04/2016

More than 40 mayors and local authorities replied to the call from the spanish NoalTTIP campaign, the european campaigns and the City Council of Barcelona. Adding to this, over 200 representatives of social movements, environmental organizations, trade unions, taxi associations, farmers organizations as well as political parties and representatives of the european parliament joined the two-day long encounter. It is the first meeting that gathers a diversity of groups with one unique concern: the defense of local democracy before global corporate profits.

On the 21st April, a round table discussion with the 40 municipalities took place resulting in a common agreement signed as the Declaration of Barcelona which demands the suspension of the current negotiations on TTIP and TiSA and to reject the CETA ratification. The debate gave voices to local representatives already facing numerous challenges in passing policies that support the local economy and the well being of their inhabitants. The 40 representatives saw TTIP as a great threat that will further undermine local sovereignty. The declaration also shows local authorities are not only opposing these treaties but also thinking of proposals and alternatives that emerge at the local level.

The following day was facilitated as a space to exchange information and ideas among local authorities, parlamentarians, experts and activists from the campaign across Europe on the different threats these treaties pose to local sovereingity. Different working groups were formed: to broaden the TTIP, CETA, TiSA-free zones, to guarantee the flow of information to citizens, to engage with other key actors (SMEs, agricultural sector, social economy, etc.), and the promotion of an enabling environment that gives support to social and economic alternatives.

The two days concluded with a public event on friday night led by the deputy major Gerardo Pisarello and representatives of the spanish state, Catalan and european campaigns against TTIP, CETA and TiSA. The event continued with an open air concert in Arc del Trionf of Barcelona with Che Sudaka performing to thousands of people.

The two-day long encounter proved the willingness of local authorities to move towards a coalition that does not just oppose these treaties but can say YES, that is able to defend the common fundamental rights for all in opposition to trade deals that put private profit and corproate greed ahead of the needs of the people. At the same time it was an opportunity to strenghten synergies among the multipe alternatives that come from the social and institutional municipalisms under a common umbrella, which is the fight against TTIP/CETA/TiSA.

Next steps

During the meeting the city council of Grenoble proposed to host the second pan-european meeting of local authorities. Meanwhile, the local campaigns will continue their work by strenghtening spaces of co-creation of municipal resistances to the treaties.

Regarding the declaration, the City Council of Barcelona will facilitate a space on their web page with information of the event including the declaration and the collection of signatures. Also, in the round table of the europarliamentarians an invitation to present the declaration in the European Parliament was tabled.

The minutes of the meeting will be shared in the following days and a new website has been designed to facilitate all the information flow and access: https://www.ttip-free-zones.eu/

You can find here a collection of **pictures** of the event: https://www.flickr.com/gp/140574978@N03/1TV1a7

To see how all **tweets** of the event: https://tagboard.com/BCNnoTTIP/search

and also: https://tagboard.com/TTIPFreeZone/search

More information of the #BCNnoTTIP event: www.noalttip.org

Institute for Trade and Agriculture Policy

May 2, 2016

Leaked TTIP text shows U.S. negotiators push to lower food safety standards, farmer protections
Corporate fingerprints evident in U.S. trade negotiating positions

Contact:
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Minneapolis – Leaked negotiating texts for the Transatlantic Trade and Investment Partnership (TTIP) expose the heavy influence of corporate agribusiness in the negotiations, pushing to lower trade restrictions and public health regulations affecting food production, according to analysis of the texts by the Institute for Agriculture and Trade Policy (IATP). The leaks, released by Greenpeace Netherlands today, provide compelling evidence in support of demands by opponents on both sides of the Atlantic for more democratic and transparent processes in trade negotiations.

Karen Hansen-Kuhn, IATP's Director of Trade, Technology and Global Governance, noted, "Food and farm groups have been weighing in since the inception of the talks on the rules needed to ensure that efforts to rebuild our food systems from the ground up are not undermined by the trade deal. Instead we see evidence that TTIP is following the lead of multinational corporations: weakening the use of the precautionary principle in setting food and plant safety standards; undermining food labeling rules; and eliminating preferences for local producers in public procurement programs."

IATP Senior Policy Analyst Steve Suppan commented, "The text shows the U.S. Trade Representative (USTR) protecting corporate interests by trying to shield environmental, health and safety data used in TTIP risk assessment as confidential business information, preventing peer scientific review. The end result of the U.S. proposal would be increasing the burden on governments to justify food safety rules while placing no burden on industry to demonstrate that its products—including new kinds of GMOs and food and agri-nanotechnology products—are safe."

"Our predictions about agriculture in TTIP have sadly been confirmed every step of the way. The EU and the U.S. are busy horse-trading the lives of small dairy and meat producers and processors for car parts and other goods each side is willing to liberalize, said Shefali Sharma, Director of the IATP Europe office. "Many products that are key to local livelihoods and food systems are slated to have duties slashed either immediately, after TTIP comes into force, or in stages. These negotiators are trading off some vulnerable sectors behind closed doors at the expense of farmers and consumers."

IATP Advisor Sharon Anglin Treat noted that, "The Regulatory Cooperation and Coherence texts proposed by EU and U.S. negotiators confirm both parties are seeking to use this international agreement to reach far into domestic policy decision-making in a way that undermines democratic processes on each side of the Atlantic. This would make it far more difficult to protect consumers, workers and the environment from pesticides and toxic chemicals, or even to inform them about food ingredients."

IATP has prepared analyses of these issues based on past leaks of draft text, including:

- Following Breadcrumbs: TPP Text Provides Clues to U.S. Positions in TTIP, by Karen Hansen-Kuhn
- TACD's recommendations on the proposed food safety chapter in TTIP, by Steve Suppan, with the Trans Atlantic Consumer Dialogue
- 10 reasons TTIP is bad for good food and farming, by Shefali Sharma
- States' Leadership on Healthy Food and Farming at Risk under Proposed Trade Deals, by Sharon Anglin Treat

The New York Times

Greenpeace Leaks U.S.-E.U. Trade Deal Documents

By SEWELL CHAN
MAY 2, 2016

LONDON — The Dutch chapter of the environmental activist group Greenpeace leaked on Monday a trove of documents from the talks over a proposed trade deal between the European Union and the United States.

The documents, Greenpeace said, showed that American trade negotiators had pressed their European counterparts to loosen important environmental, consumer protection and other provisions.

But American and European trade officials, while they did not deny the validity of the materials, insisted on Monday that the documents — 248 pages, which Greenpeace said amounted to two-thirds of the latest negotiating text — merely represented negotiating positions, and that the criticisms by the environmental groups were off base.

But the disclosures and criticisms are unlikely to help speed up the trade talks, which already seemed to have little chance of making progress until after the United States elects its next president in November — if even then, given how rancorous an issue foreign trade has become in the American political debate.

The deal, known as the Transatlantic Trade and Investment Partnership, would cover a huge range of goods and services between the world's largest national economy and the world's largest single market, spanning telecommunications, agricultural products, textiles, intellectual property, financial services and regulatory compatibility, among other topics.

Negotiations over the accord began in July 2013; and the latest round, the 13th, concluded on Friday in New York.

After decades of free-trade orthodoxy, there has been growing resistance to further liberalizing the movement of goods, services, capital and labor, fueled by fears that the benefits have flowed disproportionately to corporations, investors and well-educated workers, with the harm to less-educated workers outweighing the benefits for consumers. In the United States, the two leading contenders for the presidency, Donald J. Trump and Hillary Clinton, have both expressed skepticism about trade deals.

Last month, Mr. Obama traveled to a manufacturing fair in Hanover, Germany, to join the German chancellor, Angela Merkel, to urge the acceleration of negotiations. While expressing confidence that the talks would wrap up this year, Mr. Obama, who will leave office on Jan. 20, acknowledged that "time is not on our side."

That was an implicit acknowledgment of the skepticism held by Mrs. Clinton, the Democratic front-runner in the race to succeed him, toward multilateral trade agreements.

So Monday's revelations — like the Panama Papers, which disclosed vast amounts of information about the offshore wealth held by global elites — could further complicate efforts to finalize the sensitive trade talks, even if there did not appear to be big bombshells within the documents.

Perhaps the most sensitive issues are outlined in a document describing the "tactical state of play" on both sides. The document says, for example, that different approaches to animal testing "remain irreconcilable." Many American-made skin cosmetics use ultraviolet filters, for which animal testing is used to assess safety; the European Union bans such testing on animals.

The Americans expressed "particular sensitivity" around tariffs on dairy, sugar and tobacco, while the Europeans wanted restrictions on wine labeling included in the accord.

Environmental groups focused on the ecological impact of the deal.

Greenpeace accused the American negotiators of trying to weaken environmental protection standards; of taking a laxer approach to product regulation than the Europeans; and of trying to give corporate lobbyists greater say in decision-making.

"These leaked documents confirm what we have been saying for a long time: T.T.I.P. would put corporations at the center of policy making, to the detriment of environment and public health," said Jorgo Riss, director of Greenpeace E.U. "We have known that the E.U. position was bad, now we see the U.S. position is even worse. A compromise between the two would be unacceptable."

The Sierra Club, an American advocacy group that has offered a critique of trade deals, said it was dismayed that the words "climate change" were "not mentioned once in the 248 pages of text," and said the documents showed that the United States was using exports of natural gas "as a bargaining chip to use to extract further commitments from the E.U. on services and investment."

The Sierra Club said the documents showed that the Americans were proposing to allow corporations to "petition" for the repeal of a regulation if it was "more burdensome than necessary to achieve its objective," given its impact on trade, and that the Europeans had proposed allowing certain environmental standards to be deemed "technical barriers to trade," which would, perhaps, weaken labels that require the climate footprint of a product or service to be disclosed.

The group also warned that the text included trade rules that could be used against "buy local" programs that support local clean-energy jobs in nearly two dozen American states.

Although the leaks may have been embarrassing, officials on both sides tried to contain the fallout.

“The interpretations being given to these texts appear to be misleading at best and flat-out wrong at worst,” said Matthew McAlvanah, an assistant United States trade representative.

In a statement, he said the accord would “preserve, not undermine, our strong consumer, health, environmental standards, and position the U.S. and the E.U. to work together to push standards higher around the world.”

In a blog post, Cecilia Malmstrom, who as the European commissioner for trade is leading the 28-nation bloc’s negotiations with the United States, said that “many of today’s alarmist headlines are a storm in a teacup.”

Ms. Malmstrom said that the documents “ reflect each side’s negotiating position, nothing else.” Referring to genetically modified organisms, which are of particular concern to many European consumers, she added: “No E.U. trade agreement will ever lower our level of protection of consumers, or food safety, or of the environment. Trade agreements will not change our laws on G.M.O.s, or how to produce safe beef, or how to protect the environment.”

The documents were shared in advance with several European publications.

In Germany, the newspaper Süddeutsche Zeitung reported that the documents showed that the United States was threatening to prevent the easing of export controls on European cars in an attempt to compel Europe to buy more American agricultural products.

The French newspaper Le Monde, after reviewing the documents, said that the documents did not suggest that the Europeans were any more willing to make concessions than the Americans.

According to The Guardian, which reported that it was provided with the leaked documents by Greenpeace, the documents reveal “irreconcilable” differences in several areas: the use of animal testing for cosmetics; efforts by the Americans to give corporations like BASF, Nestlé and Coca-Cola more say in trade talks; and, potentially, an effort to expand the number of genetically modified foods that are sold in Europe.

In general, opposition to genetically modified organisms, or G.M.O.s, tends to be stronger in Europe than in the United States.

Selling the Trans-Atlantic Trade Deal
By THE EDITORIAL BOARD
MAY 2, 2016
http://www.nytimes.com/2016/05/03/opinion/selling-the-trans-atlantic-trade-deal.html?ref=opinion

President Obama delivered strong messages during his recent trip to Europe on the importance of European unity and of the trans-Atlantic alliance. In Britain, Mr. Obama weighed in on the question that will be put to British voters in a June 23 referendum on whether Britain should remain in the European Union. “The European Union doesn’t moderate British influence,” he said. “It magnifies it.”

That was music to the ears of those who have argued that the only way Britain can influence the final terms of the Transatlantic Trade and Investment Partnership, or T.T.I.P. — a free-trade deal between the United States and the E.U. — is to stay in the union. Mr. Obama reinforced this thought in Hanover, Germany, on April 25, warning Europeans that, on trade, “You can’t turn inward.”

But the T.T.I.P. is a hard sell in Europe. Many Europeans fear it will allow powerful corporations to force governments to weaken European food standards, environmental regulations and social welfare programs. A survey released on April 21 indicated that only 17 percent of Germans believe the trade partnership is “a good thing.” More than 40 European mayors and municipal representatives have signed a declaration demanding that “current negotiations” be suspended.

Sentiment against the deal is also running high in France — which has presidential elections next year. After a slew of pessimistic warnings on T.T.I.P. last week from members of his cabinet, President François Hollande declared on Sunday that France “will say no” to the T.T.I.P. if it is not reciprocal, endangers French agriculture or violates “environmental principles.”

Whether the deal can be closed before Mr. Obama’s term ends is an open question. That goal can’t be helped by documents leaked on Monday by Greenpeace that reveal to the public, for the first time, American positions going into last week’s T.T.I.P. negotiations in New York that indicate, as yet, irreconcilable differences with the E.U.

However it turns out, there are important lessons to be learned for the future. The first is transparency: The secretive nature of free-trade talks fuels citizen fears that powerful corporations are plotting behind closed doors against their interests. The European Commission has been posting all negotiating documents on its website, something the Americans should also have done.

The second is that the negotiating table should somehow be enlarged to include other voices — such as mayors, environmental groups or labor leaders. Ordinary citizens who do not feel informed and involved will inevitably fear that whatever is being negotiated is likely to do them

more harm than good — making life difficult for the negotiators, decreasing the chances of success and insuring a backlash at the polls.

http://insidetrade.com/daily-news/mcconnell-casts-serious-doubt-over-tpp-lame-duck-vote-says-deal-will-hold-next-president

McConnell Casts Serious Doubt Over TPP Lame-Duck Vote, Says Deal Will Hold For Next President

May 5, 2016

Senate Majority Leader Mitch McConnell (R-KY) this week strongly downplayed the chances for a congressional vote on the Trans-Pacific Partnership in a lame-duck session, though he stopped short of completely ruling it out.

McConnell, in a May 1 interview with the agriculture news service AgriPulse, declined to entirely rule out chances for a lame-duck vote, saying, "No, I make no guarantees about the outcome this year." But he emphasized that the deal's prospects appear "bleak" in 2016.

According to McConnell, the "biggest problem" for a TPP vote this year is a political environment in which all of the major presidential candidates are against the deal, but he also flagged problems with the tobacco and pharmaceutical provisions. He said the TPP does not deal "fairly" with these industries.

"The political environment to pass a trade bill is worse than any time in the time I have been in the Senate," he said.

"It looks bleak for this year [to have a TPP vote], that's the bad news" for supporters of free trade, he said.

"But the good news is the deal doesn't go away, it's still there" to be modified or dealt with by the next president under fast-track, he said. He noted that the fast-track, passed last spring, lasts for six years and creates procedures for expedited consideration of trade agreements in Congress.

McConnell acknowledged that President Obama is pushing for a TPP vote this year, but said that is just a matter of "bragging rights" for Obama, not a matter of getting a positive outcome on the trade agreement.

The Senate leader completely ruled out a TPP vote before the election. He said Rep. Collin Peterson's (D-MN) recent comment that the TPP would not pass the House if presented now was "probably" an accurate assessment of its chances in the Senate as well.

http://www.wsj.com/articles/marauding-american-lobsters-find-themselves-in-hot-water-1462457114

Marauding American Lobsters Find Themselves in Hot Water

A lobsterman checks a lobster while hauling traps on a boat near Cape Elizabeth, Maine, in August 2013. The state's congressional delegation is fighting Sweden's push to ban imports of live American lobsters to European Union countries. *Photo: Brian Snyder/Reuters*

By
William Mauldin
May 5, 2016 10:05 a.m. ET

The male American lobster is clawing his way toward hegemony. Scientists say his unusually large crusher claw compared with other species can be irresistible to female lobsters and menacing to less-endowed males.

This means war—or at least a trans-Atlantic trade war.

Claw size is at the center of a push by Sweden to ban imports of live Homarus americanus to all European Union countries. The effort began with the release of an 89-page report in December by the Swedish Agency for Marine and Water Management, featuring a full-color, half-page photo of an American lobster and 13 instances of the words "invasive alien species."

"Once the American lobster is established, it will be impossible to eradicate," says Gunvor Ericson, state secretary at the Swedish ministry for climate and the environment. The report contends that American lobsters have the potential to spread diseases to Europe's smaller, native Homarus gammarus.

Sweden says big-clawed Americans could spawn a new generation of hybrids and eventually crowd out European lobsters. The European Commission, the EU's executive body, is expected to start deliberating the import-ban proposal in June.

A shellshocked American and Canadian lobster industry is fighting back. On Monday, the Massachusetts congressional delegation complained in a letter to Secretary of State John Kerry and two other Obama administration officials that the proposed ban is based on dubious science.

"I think the issue is our lobsters are better," said Bill Morneau, Canada's finance minister, on a recent trip to Washington. Europeans cite a study in a food journal that argues European lobsters fetch a higher price because they taste better than the American ones.

Jamie Lane packed live lobsters last December in York, Maine, for shipment outside the U.S. European Union countries get about 20% of all U.S. lobster exports. *Photo: Robert F. Bukaty/Associated Press*

Trans-Atlantic sales of live lobsters total about $200 million a year. Major importers include Italy, Spain, France and Great Britain, according to the EU's statistics office. In Sweden, the most prized crustacean is actually crayfish, the centerpiece of a summertime party tradition.

In the long history of America's global cultural dominance, little has provoked horror as fast as Homarus americanus.

In 2014, about two dozen American lobsters were reported found in Gullmar Fiord, or "God's sea," on the western coast of Sweden. One of the recaptured American females carried eggs that were fertilized by a European male lobster. Swedish authorities launched an investigation.

It isn't clear how long the invaders had been there or how they got there. According to the report, some smaller lobsters were still wearing a fat rubber band, the telltale sign of an imported lobster. Wholesalers sometimes illegally store live imports in offshore nets, which are vulnerable to escape.

Other lobsters are deliberately released by softhearted Swedes and perhaps purposely introduced to local waters in hopes that a lucrative new lobster fishery will take hold there, some lobster-industry officials say.

U.S. officials scoff at the small number of lobsters cited in Sweden's report. The report also notes ominously: "One should bear in mind that the number of lobsters reported is probably only the tip of the iceberg."

Ann-Lisbeth Agnalt of Norway's Institute of Marine Research in Bergen, says her own research demonstrates the risks from marauding American lobsters.

A "very nice and beautiful" male named Allan had scars from shell disease, which returned, "ate up all his carapace" and killed him, Ms. Agnalt says.

European scientists say part of the Homarus americanus exoskeleton is thinner than in the Homarus gammarus, making American lobsters more susceptible to damage and shell disease. Ms. Agnalt says the Americans could spread their problems to Europe's smaller, native lobsters.

Norway banned the import of live American lobsters in January. Norway and Sweden also offer a reward for any captured Homarus americanus.

The biggest sticking point in the fight is the assertion by European scientists that male lobsters from across the Atlantic Ocean have overgrown crusher claws that could give Americans "an

advantage over a male European male when competing for a European female," as Ms. Agnalt puts it.

On the cold, cruel floor of the northern Atlantic, a powerful crusher claw is a vital tool for catching and dismembering prey. Big claws also help lobsters defend their home from intruders, doubly important during mating season.

Both types also have a slightly smaller claw used for cutting.

Robert Steneck, a lobster expert at the University of Maine, agrees that the American crusher claw does "get inflated in the males as they get bigger, and that does not happen in the European."

But he doubts claw size is that important. If big claws were so pivotal to mating, then evolution would have bestowed them on the European variety of lobster, too, Mr. Steneck says.

He says the size of a lobster's claw is only a small part of a complicated mating ritual that can involve everything from relaxing pheromones and ambient water temperature to the female's dramatic undressing, or removal of her shell during molting.

A worker at New Meadows Lobster in Portland, Maine, packs lobsters into a box. Some lobsters reported found in a Swedish fiord in 2014 were still wearing a fat rubber band, the telltale sign of an imported lobster. *Photo: Carl D. Walsh/Portland Press Herald/Getty Images*

"You have to wonder if this isn't protectionism wrapped up in a cloak of science," says Sen. Angus King of Maine, an independent.

Swedish officials say it isn't. The government report cites an eerie parallel to the country's endangered, indigenous Noble crayfish population, nearly wiped out since the 1960s by a plague that arrived with North American crayfish.

In the wild, lobster hegemony will remain murky no matter how EU officials rule on the proposed ban. European fishermen frequently find odd-looking lobsters. Shell color provides a clue, but the only way to reliably tell Homarus americanus and Homarus gammarus apart is genetic testing.

New GTW Researcher Keeping an Eye on Trade

Posted: 13 May 2016 06:31 AM PDT

Today, Public Citizen's Global Trade Watch (GTW) released a study on the United States International Trade Commission's (USITC) General Equilibrium Model for estimating export and import growth as a result of trade agreements. I helped compile the background of the report, and I wanted to take a second to introduce myself.

My name is Justin Fisk, and I am the Senior Researcher at GTW. Since I first arrived in Washington, D.C. four years ago, I have been increasingly interested in international trade and its impact on the United States. During my graduate work at George Washington University, I focused my studies on international trade. At the same time, I interned full-time in many positions within the federal government and the private sector, including the Trade Promotion Coordinating Committee at the Department of Commerce and the government affairs division of a trade law firm. After I completed graduate school, I worked for two years at the Council of State Governments helping states develop export promotion plans for small businesses in the United States.

I decided to leave the comforts of my previous job to take a more challenging role at Global Trade Watch. I am excited to be here, and I look forward to sharing the findings of our research in the coming months.

For my first blog, I wanted to discuss the USITC model. It is an important time to review and analyze this model since the USITC's next report is expected to be released next week on May 18, which will analyze the impact of the Trans-Pacific Partnership on the United States.

Policymakers need to understand the data limitations of the current model employed by the USITC. Not only does it fail to take into account currency manipulation – which the TPP has no enforceable provisions against – it also assumes that workers who lose jobs to trade can easily and seamlessly find other opportunities for work (more examples of the assumptions the model incorporates can be found in the official report here). It shouldn't be surprising that the USITC has consistently failed to estimate in any meaningful way the impacts of a free trade agreement.

Looking back, the USITC predicted improved trade balances as a result of the 1993 North American Free Trade Agreement (NAFTA) and 2007 U.S.-Korea Free Trade Agreement. The agency projected only a small deficit increase from China's 1999 World Trade Organization entry deal and the granting to China of Permanent Normal Trade Relations status.

Instead, the U.S. trade deficits with the trade partners increased dramatically and, as detailed in the text of the new study, manufacturing industries from autos to steel and farm sectors such as beef that were projected to "win" saw major losses. A government program to help Americans who lose jobs to trade certified 845,000 NAFTA jobs losses alone.

The USITC report also estimates changes of exports and imports of certain products. For example, the USITC concluded that NAFTA would result in little or no impact on meat imports into the United States because of already low U.S. tariff rates, and that if anything, U.S. exports of meat to Mexico would increase. The report projected that U.S. beef exports to Mexico would increase in the long-term by 16 percent or more. In reality, American cattle producers experienced the opposite outcome from NAFTA. In 1993, the United States exported 39,000 metric tons of beef and veal to Mexico and imported only 13,000 metric tons. By 2015, the United States imported more than 30,000 metric tons of beef and veal from Mexico more than it exported to Mexico.

In the China study, the USITC report estimated that U.S. exports of iron and steel would increase by 5.1 percent. The report does not project changes in import levels. In reality, U.S. exports of iron and steel increased by $1.1 billion or 239 percent. The USITC report did not however anticipate that U.S. imports from China of iron and steel would increase by $12.3 billion or by nearly 300 percent. The U.S. trade deficit with China in steel and iron products has worsened by nearly $7.9 billion, increasing from $2.7 billion in 2000 to $10.7 billion in 2015. In November 2015, nine steel associations wrote a joint letter insisting that China's "overwhelmingly state-owned and state-supported steel industry" is the root problem of the 700 million metric tons of excess steel capacity in the world today, which is making it difficult for private sector firms in the U.S. to compete."

The USITC report also projected that the U.S.-Korea FTA would likely increase exports of grain to Korea, "particularly exports of corn." In reality, U.S. exports of corn have decreased by $1

billion or by 64 percent in the first 4 years of the Korea FTA. The Center for Economic and Policy Research released an interesting study in April that found, “there is no clear relationship between the expected effect of the KORUS on exports to Korea and the actual change in exports relative to trend.”

As mentioned earlier, the USITC model utilizes false assumptions which surely impact its results. With this in mind, policy makers should approach USITC report on TPP’s impact with caution.

http://insidetrade.com/trade/white-house-spokesman-tpp-vote-might-still-happen-lame-duck-session?s=em

White House Spokesman: TPP Vote Might Still Happen Before A Lame-Duck Session

May 20, 2016

White House press secretary Josh Earnest suggested today that the Trans-Pacific Partnership might have a chance at a vote in Congress before a lame-duck session later this year, a possibility U.S. Trade Representative Michael Froman is said to have dismissed behind earlier this week.

Asked by a reporter at the White House if congressional consideration of the TPP agreement is "only going to be something that happens in the lame-duck session," Earnest replied, "Not necessarily."

"We're going to continue to consult about the best path forward," he said, adding:

You know, we would like to see Congress act ... soon to approve the agreement. And you know, the case that we have made is consistent with the argument that the Chamber of Commerce and other influential, Republican-leaning organizations have made, which is that every day that goes by is missed opportunity for American businesses and America workers to benefit from this agreement.

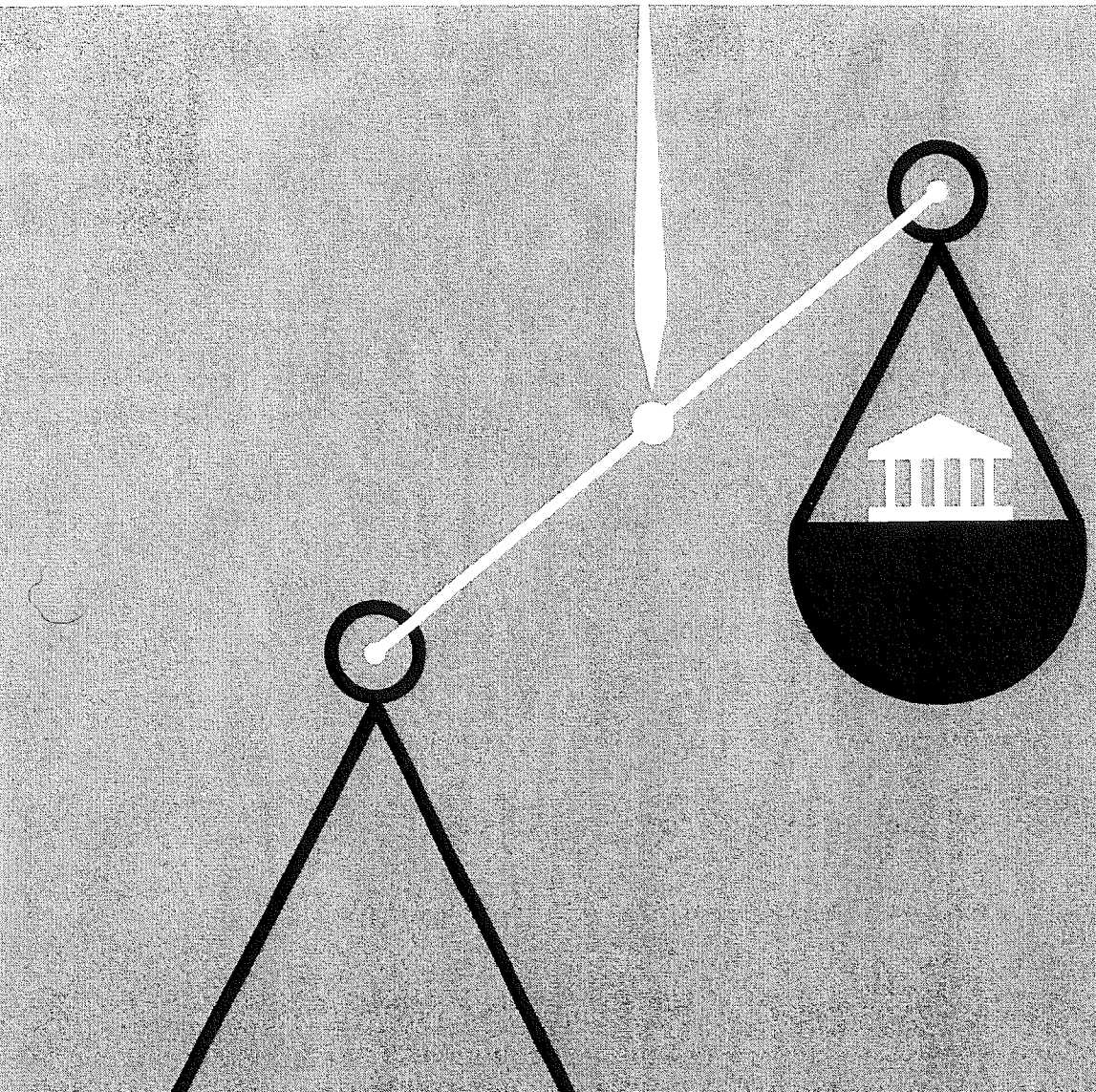
So, you know, we're hopeful that we'll build the same bipartisan coalition that we built last year to give the president the authority necessary to negotiate this agreement. And we're hopeful that we'll be able to build a similar bipartisan coalition to approve the agreement.

But Froman, participating in meetings with TPP ministers on the margins of the Asia Pacific Economic Cooperation forum's trade ministers meeting on the status of their domestic ratification processes this week, said a vote would not be possible before the lame-duck session, according to informed sources.

Earnest also addressed the U.S. International Trade Commission's economic analysis of the TPP, noting that "the overall numbers are … quite good."

He talked up manufacturing, using autos as an example: "The ITC report shows that nearly $2 billion in increased auto exports … is evidence of the impact of reducing the 70 percent tax that Vietnam currently imposes on American automobiles," Earnest said. "Malaysia imposes a 30 percent tax, and the reduction in those taxes would have a positive impact on U.S. workers and auto companies here at home."

Earnest did not, however, note that the report says U.S. auto imports are expected to increase by $4.3 billion over the projected 2047 baseline, primarily due to imports from Japan.



Profiting from injustice

How law firms, arbitrators and financiers are fuelling an investment arbitration boom

CEO TNI

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Executive summary

The last two decades have witnessed the silent rise of a powerful international investment regime that has ensnared hundreds of countries and put corporate profit before human rights and the environment.

International investment treaties are agreements made between states that determine the rights of investors in each other's territories. They are used by powerful companies to sue governments if policy changes – even ones to protect public health or the environment – are deemed to affect their profits. By the end of 2011, over 3,000 international investment treaties had been signed, leading to a surge in legal claims at international arbitration tribunals. The costs of these legal actions weigh on governments in the form of large legal bills, weakening of social and environmental regulation and increased tax burdens for people, often in countries with critical social and economic needs.

Yet while these financial and social costs have started to become ever more visible, one sector has remained largely obscured from public view and that is the legal industry that has profited from this litigation boom. This report seeks to address that by examining the key players in the investment arbitration industry for the first time. It seeks to shine a light on law firms, arbitrators and litigation funders that have profited handsomely from lawsuits against governments.

The report shows that the arbitration industry is far from a passive beneficiary of international investment law. They are rather highly active players, many with strong personal and commercial ties to multinational companies and prominent roles in academia who vigorously defend the international investment regime. They not only seek every opportunity to sue governments, but also have campaigned forcefully and successfully against any reforms to the international investment regime.

The international investment arbitration system was justified and put in place by Western governments with the argument that a fair and neutral dispute settlement system was needed to protect their corporations' investments from perceived bias and corruption within national courts. Investment arbitrators were to be the guardians and guarantors of this regime.

Yet rather than acting as fair and neutral intermediaries, it has become clear that the arbitration industry has a vested interest in perpetuating an investment regime that prioritises the rights of investors at the expense of democratically elected national governments and sovereign states. They have built a multimillion-dollar, self-serving industry, dominated by a narrow exclusive elite of law firms and lawyers whose interconnectedness and multiple financial interests raise serious concerns about their commitment to deliver fair and independent judgements.

As a result, the arbitration industry shares responsibility for an international investment regime that is neither fair, nor independent, but deeply flawed and business-biased.

Key findings:

1. **The number of investment arbitration cases, as well as the sum of money involved, has surged in the last two decades** from 38 cases in 1996 (registered at ICSID, the World Bank's body for administering such disputes) to 450 known investor-state cases in 2011. The amount of money involved has also expanded dramatically. In 2009/2010, 151 investment arbitration cases involved corporations demanding at least US$100 million from states.

2. **The boom in arbitration has created bonanza profits for investment lawyers paid for by taxpayers.** Legal and arbitration costs average over US$8 million per investor-state dispute, exceeding US$30 million in some cases. Elite law firms charge as much as US$1,000 per hour, per lawyer – with whole teams handling cases. Arbitrators also earn hefty salaries, amounting up to almost US$1 million in one reported case. These costs are paid by taxpayers, including in countries where people do not even have access to basic services. For example, the Philippine government spent US$58 million defending two cases against German airport operator Fraport; money that could have paid the salaries of 12,500 teachers for one year or vaccinated 3.8 million children against diseases such as TB, diphtheria, tetanus and polio.

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3. **The international investment arbitration industry is dominated by a small and tight-knit Northern hemisphere-based community of law firms and elite arbitrators.**

   a) Three top law firms – Freshfields (UK), White & Case (US) and King & Spalding (US) – claim to have been involved in 130 investment treaty cases in 2011 alone.

   b) Just 15 arbitrators, nearly all from Europe, the US or Canada, have decided 55% of all known investment-treaty disputes. This small group of lawyers, referred to by some as an 'inner mafia', sit on the same arbitration panels, act as both arbitrators and counsels and even call on each other as witnesses in arbitration cases. This has led to growing concerns, including within the broader legal community, over conflicts of interest.

4. **Arbitrators tend to defend private investor rights above public interest, revealing an inherent pro-corporate bias.** Several prominent arbitrators have been members of the board of major multinational corporations, including those which have filed cases against developing nations. Nearly all share businesses' belief in the paramount importance of protecting private profits. In many cases concerning public interest decisions, such as measures taken by Argentina in the context of its economic crisis, arbitrators have failed to consider anything but corporations' claims of lost profits in their rulings. Many arbitrators vocally rejected a proposal by International Court of Justice Judge Bruno Simma to give greater consideration to international environmental and human rights law in investment arbitration.

5. **Law firms with specialised arbitration departments seek out every opportunity to sue countries – encouraging lawsuits against governments in crisis,** most recently Greece and Libya, and promoting use of multiple investment treaties to secure the best advantages for corporations. They encourage corporations to use lawsuit threats as a political weapon in order to weaken or prevent laws on public health or environmental protection. Investment lawyers have become the new international 'ambulance chasers', in a similar way to lawyers who chase hospital wagons to the emergency room in search for legal clients.

6. **Investment lawyers, including elite arbitrators, have aggressively promoted investment arbitration as a necessary condition for the attraction of foreign investment, despite evidence to the contrary.** Risks to states of acceding to investor-state arbitration are downplayed or dismissed.

7. **Investment lawyers have encouraged governments to sign investment treaties using language that maximises possibilities for litigation. They have then used these vaguely worded treaty provisions to increase the number of cases.** Statistical study based on 140 investment-treaty cases shows that arbitrators consistently adopt an expansive (claimant-friendly) interpretation of various clauses, such as the concept of investment. Meanwhile arbitration lawyers have taken a restrictive approach in international law when it comes to human and social rights.

8. **Arbitration law firms as well as elite arbitrators have used positions of influence to actively lobby against any reforms to the international investment regime, notably in the US and the EU.** Their actions, backed by corporations, succeeded in preventing changes that would enhance government's policy space to regulate in the US investment treaties that had been proposed by US President Barack Obama when he came to office. Several arbitrators have also loudly denounced nations that have questioned the international investment regime.

9. **There is a revolving door between investment lawyers and government policy-makers that bolsters an unjust investment regime.** Several prominent investment lawyers were chief negotiators of investment treaties (or free trade agreements with investment protection chapters) and defended their governments in investor-state disputes. Others are actively sought as advisers and opinion-makers by government and influence legislation.

10. **Investment lawyers have a firm grip on academic discourse on investment law and arbitration,** producing a large part of the academic writings on the subject, controlling on average 74% of editorial boards of the key journals on investment law, and frequently failing to disclose the way they personally benefit from the system. This raises concerns over academic balance and independence.

11. **The investment arbitration system is becoming increasingly integrated with the speculative financial world,** with investment funds helping fund investor-state disputes in exchange for a share in any granted award or settlement. This is likely to further fuel the boom in arbitrations, increase costs for cash-strapped governments, and raises concerns of potential conflicts of interest because of a dense web of personal relationships that link financiers to arbitrators, lawyers and investors. Firms such as Juridica (UK), Burford (US) and Omni Bridgeway (NL) have already become an established part of international investment arbitration, in the absence of any regulation of their activities. This financialisation of investment arbitration has even extended to proposals to sell on packages of lawsuits to third parties, in the vein of the disastrous credit default swaps behind the global financial crisis.

Some countries have started to realise the injustices and inconsistencies of international investment arbitration and have initiated a retreat from the system. In spring 2011, the Australian government announced that it would no longer include investor-state dispute settlement provisions in its trade agreements. Bolivia, Ecuador and Venezuela have terminated several investment treaties and have withdrawn from ICSID. Argentina, which has been swamped with investor-claims related to emergency legislation in the context of its 2001-2002 economic crisis, refuses to pay arbitration awards. South Africa is engaged in a thorough overhaul of its investment policy to better align it with development considerations and has just announced that it will neither enter into new investment agreements nor renew old ones due to expire.

The backlash has not gone unnoticed by members of the investment arbitration industry. Some insiders are ready to confront the challenges with proposals for moderate reform, such as greater transparency. But these proposals do not address the inherent flaws and corporate bias of the investment arbitration system. We believe only systemic reform, based around principles that consider human rights and the environment as more important than corporate profits, can deliver necessary change. This must start with the termination of existing investment agreements and a moratorium on signing new ones.

Nevertheless even within the existing system, there are some steps that can be taken to help to roll back the power of the arbitration industry. This report calls for a switch to independent, transparent adjudicative bodies, where arbitrators' independence and impartiality is secured; the introduction of tough regulations to guard against conflicts of interest; a cap on legal costs; and greater transparency regarding government lobbying by the industry.

These steps will not by themselves transform the investor-state arbitration system. Without governments turning away from investment arbitration, the system will remain skewed in favour of big business and the highly lucrative arbitration industry.

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A DIRTY DEAL

How the Trans-Pacific Partnership Threatens our Climate

EXECUTIVE SUMMARY

After more than five years of closed-door negotiations, the governments of Trans-Pacific Partnership (TPP) countries have finally released the text of the controversial pact. The TPP is a broad trade, investment, and regulatory agreement between the United States and 11 Pacific Rim countries. In its more than 6,000 pages of binding rules, the deal fails to even mention the words "climate change"—a clear sign it is not "a 21st-century trade agreement," as some have claimed.

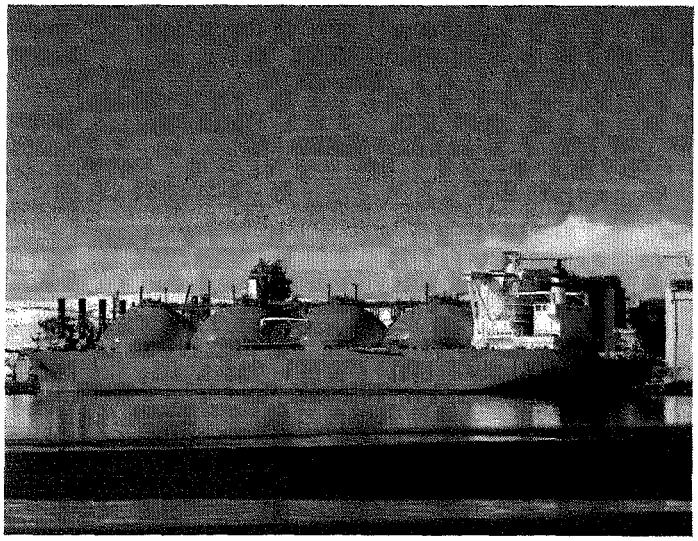
Beyond making no effort to combat climate disruption, the TPP would actually fuel the climate crisis. If approved, the pact would increase greenhouse gas emissions and undermine efforts to transition to clean energy. The TPP's biggest threats to our climate are as follows:

1. THE TPP WOULD EMPOWER FOSSIL FUEL CORPORATIONS TO ATTACK CLIMATE POLICIES IN PRIVATE TRIBUNALS.

- The TPP investment chapter would give foreign investors, including some of the world's largest fossil fuel corporations, expansive new rights to challenge climate protections in unaccountable trade tribunals. This includes the power for investors to demand compensation for climate policies that do not conform to their "expectations" or that they claim reduce the value of their investment.
- These challenges would be brought before trade tribunals, comprised of three private lawyers who could order governments to pay fossil fuel firms for the profits they hypothetically would have earned if the climate protections being challenged had not been enacted.
- Fossil fuel corporations, including ExxonMobil and Chevron, have used similar rules in past agreements to challenge policies. Targeted policies have included a natural gas fracking moratorium in Canada, a court order to pay for oil pollution in Ecuador, and environmental standards for a coal-fired power plant in Germany.
- The TPP would newly extend such foreign investor privileges to more than 9,000 firms in the United States, roughly doubling the number of firms that could use this "investor-state dispute settlement" system to challenge U.S. policies. 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.
- While the Office of the U.S. Trade Representative claims to have inserted "safeguards" into the investment chapter, an analysis of the final text reveals that these so-called safeguards, many of which are not new, are far too weak to protect climate and environmental policies challenged by corporations in private tribunals.

2. THE TPP WOULD LOCK IN DIRTY FOSSIL FUEL PRODUCTION BY EXPEDITING NATURAL GAS EXPORTS.

- The TPP would require the U.S. Department of Energy to automatically approve *all* exports of liquefied natural gas (LNG), a fossil fuel with high life-cycle greenhouse gas emissions, to *all* TPP countries including Japan, the world's largest LNG importer.
- By expediting U.S. LNG exports, the TPP would increase the world's dependence on a fossil fuel with significant climate impacts and would likely displace cleaner energy sources such as renewables.



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- The TPP would encourage construction of new fossil fuel infrastructure in the United States and in importing countries to enable trade in LNG, locking in the production of climate-disrupting fossil fuels for years to come.
- Increased LNG exports, which would be facilitated by the TPP, would also spur more fracking, leading to greater air and water pollution, and increased health risks.

3. THE TPP WOULD INCREASE CLIMATE-DISRUPTING EMISSIONS BY SHIFTING U.S. MANUFACTURING OVERSEAS.

- The TPP would force U.S. manufacturers to compete directly with firms in low-wage countries, like Vietnam and Malaysia. The resulting offshoring of U.S. manufacturing would spur not only U.S. job loss, but also increased climate-disrupting emissions, as production in Vietnam is more than four times as carbon-intensive, and production in Malaysia is twice as carbon-intensive, as U.S. production.
- A TPP-spurred shift in manufacturing from the United States to countries on the other side of the Pacific Ocean would also increase shipping-related greenhouse gas emissions, which are projected to increase by up to 250 percent by 2050 as demand for traded goods rises.

4. THE TPP WOULD IMPOSE NEW LIMITS ON GOVERNMENT EFFORTS TO COMBAT CLIMATE DISRUPTION.

- Renewable energy programs that encourage local job creation could run afoul of TPP rules. The deal includes terms that the World Trade Organization (WTO) used to rule against a successful clean energy program in Ontario that reduced emissions while creating thousands of local jobs.
- The TPP also replicates provisions that the WTO has used to rule against environmentally friendly consumer labels. These rules would prohibit labels seen as "more trade-restrictive than necessary," restricting policy space for energy-saving or other labels that diminish climate-disrupting emissions.
- The TPP's procurement rules would restrict governments' autonomy to mandate "green purchasing," such as requiring energy to come from renewable sources in government contracts. Such policies could be challenged for having the unintended "effect of creating an unnecessary obstacle to trade."

Government officials charged with promoting the TPP typically ignore these threats to our climate, claiming instead that the pact's environment chapter would "preserve the environment." However, the chapter includes no provision that would protect climate and environmental policies from the myriad threats posed by other parts of the TPP.

Moreover, while all U.S. trade agreements since 2007 have required trade partners to "adopt, maintain, and implement" policies to fulfill their obligations under seven core multilateral environmental agreements (MEAs), the TPP environment chapter only includes this requirement for *one* of the seven MEAs. This step backward from environmental protections negotiated under the George W. Bush administration contradicts the requirements of U.S. law for fast-tracked trade agreements, and would allow TPP countries to violate critical environmental commitments to boost trade or investment.

While the TPP environment chapter mentions a range of conservation issues, the TPP countries' obligations are generally weak. Rather than *prohibiting* trade in illegally taken timber and wildlife, for example, the text only asks countries "to combat" such trade with insufficient measures, while allowing governments to avoid this weak commitment at their "discretion."

Even if the TPP's conservation terms included stronger obligations, there is little evidence to suggest that they would be enforced. The United States has never once brought a trade case against another country for violating its environmental commitments in a trade agreement, even amid documented evidence of violations.

The TPP poses a panoply of threats to our climate and environment. The Sierra Club believes that a new model of trade that protects communities and the environment is urgently needed—one that overturns the polluter-friendly model of the TPP.

INTRODUCTION

The Trans-Pacific Partnership (TPP) is a broad trade, investment, and regulatory agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. Eventually, other Pacific Rim nations from Indonesia to China could be included, as the TPP is a "docking" agreement that other countries could join.[1] The deal, which is more than 6,000 pages long, would require each TPP government to conform its domestic policies to a broad array of binding TPP rules.

While government officials charged with promoting the pact have claimed the TPP would "preserve the environment,"[2] the Sierra Club's analysis of the final text reveals that the TPP would actually undermine efforts to combat climate disruption, and could threaten decades of progress on environmental protection.[3]

The health of our planet depends upon our ability to make big changes in our economy. These changes include moving beyond fossil fuels and transitioning to 100 percent clean energy. However, the TPP would create new barriers to this much-needed transition. The agreement would 1) empower fossil fuel corporations to attack climate and other public interest policies in private trade tribunals, 2) expedite natural gas exports, spurring additional hydraulic fracturing ("fracking"), 3) increase climate-disrupting emissions, and 4) impose new limits on climate and environmental regulations.

The pact, meanwhile, fails to even mention the words "climate change"[4]—a dead giveaway that it is not a "21st century trade agreement," as some have claimed.[5] It is hard to imagine significant environmental benefits resulting from the environment chapter's generally weak language, and any *potential* benefits would likely be overwhelmed by the negative effects of the deal's polluter-friendly terms.

After years of extraordinary secrecy, it's finally clear what TPP negotiators were trying to hide: The TPP is a raw deal for communities and our climate.

NEW RIGHTS FOR FOSSIL FUEL CORPORATIONS TO CHALLENGE CLIMATE POLICIES

To solve the climate crisis, we need bold policy changes to fully transition to clean energy. This requires reining in the power of (and pollution from) the fossil fuel industry. Yet, the TPP investment chapter gives foreign investors, including some of the world's largest fossil fuel corporations, expansive new rights to challenge climate protections. This includes a guaranteed "minimum standard of treatment,"[6] which has been interpreted as barring policy changes that do not conform to foreign investors' "expectations."[7]

If a foreign corporation believed a policy change (e.g., a new restriction on fossil fuel extraction) violated its special TPP rights, it could use the TPP's investor-state dispute settlement (ISDS) system to "sue" the government in an unaccountable trade tribunal for the profits it hypothetically would have earned without the new policy.

Using similar rules in past agreements, foreign investors, including corporations such as ExxonMobil, Dow Chemical, Chevron, and Occidental Petroleum,[8] have launched more than 600 ISDS cases against more than 100 governments.[9] Their targets have included a fracking moratorium in Quebec, a nuclear energy phase-out and new coal-fired power plant standards in Germany, a court order to pay for Amazon pollution in Ecuador, a requirement to remediate toxic metal smelter emissions in Peru, and an environmental panel's decision to reject a mining project in Canada.[10] Corporations' use of the ISDS system has surged: Foreign investors have launched more ISDS cases in *each* of the last four years, on average, than in the first three decades of the ISDS system combined.[11]

The TPP investment chapter replicates many of the most dangerous parts of investment chapters from past agreements, as described below. The TPP, however, would expand these rules more than any past U.S. trade agreement. In one fell swoop, the TPP would roughly double the number of firms that could use this system to challenge U.S. policies, as

foreign investor privileges would be newly extended to more than 9,000 firms doing business in the United States.[12] That includes, for example, the U.S. subsidiaries of Australian-based BHP Billiton, one of the world's largest mining companies, whose U.S. investments include coal mines in New Mexico, offshore oil drilling in the Gulf of Mexico, and natural gas fracking operations in Texas.[13]

Meanwhile, the TPP would newly empower U.S. corporations to challenge the policies of other TPP countries in private tribunals, on behalf of their more than 19,000 subsidiaries doing business in those countries. The U.S. corporations that would gain this power include oil giants ExxonMobil and Chevron, natural gas fracking pioneer Halliburton, and major coal corporations like Peabody Energy.[14]

While the Office of the U.S. Trade Representative (USTR) claims to have inserted "safeguards" into the investment chapter, a close analysis of the final text reveals that these so-called safeguards, many of which are not new, are far too weak to protect climate and environmental policies challenged by corporations in private tribunals. For example, USTR claims, "New TPP language underscores that countries retain the right to regulate in the public interest..."[15] The language in question, located in the preamble—a space generally reserved for toothless assertions—merely states that TPP governments "resolv[e] to...recognize" their theoretical right to regulate.[16] This good-faith effort at "recognition" would not prevent ISDS tribunals from ordering government compensation to foreign fossil fuel corporations if a government's exercise of its "right to regulate" interfered with the firms' far more enforceable rights under the TPP.[17]

Another TPP provision that some have claimed as a protection for environmental and other public interest policies is actually a legally meaningless clause included in U.S. trade agreements since the 1990s.[18] The provision is a self-cancelling statement that nothing in the investment chapter should prevent a government from implementing an environmental or other public interest policy, so long as that policy is "consistent with" the investment chapter's broad rights for foreign investors.[19] Even ISDS tribunalists have described this as an example of a "diplomatic rather than legal" statement.[20] A recent legal review calls the clause "a nebulous provision that can easily be marginalized."[21]

Without meaningful safeguards, the harmful investment rules in the TPP that threaten climate and environmental policies include:

1. INVESTOR-STATE DISPUTE SETTLEMENT: A PARALLEL LEGAL SYSTEM FOR FOREIGN CORPORATIONS

In a near word-for-word replication from past U.S. trade and investment agreements, the TPP would empower foreign investors to bypass domestic courts and challenge environmental and other public interest policies in trade tribunals.[22] The trade tribunals would be staffed by three private sector lawyers who are able to rotate between acting as "judges" and representing corporations in cases against governments. [23] Despite USTR's claim of a new "safeguard" regarding "arbitrator ethics,"[24] the TPP text includes no code of conduct to limit such conflicts of interest; it merely states that TPP countries will at some unspecified time "provide guidance" on the application of ethical guidelines to ISDS lawyers.[25] As in past agreements, the lawyers would not be bound by any system of legal precedent. They would be empowered to order governments to pay foreign firms compensation for what they deem to be violations of the TPP's broad foreign investor rights, and governments would have no right to appeal their decisions on the merits.[26] The TPP sets no cap on the amount of taxpayer money that tribunals could order a government to pay.[27] Given such unpredictable costs, the mere threat of an investor-state case can be, and has been, enough to dissuade governments from enacting important public interest measures.[28]

2. BROAD DEFINITIONS OF "INVESTMENT" AND "INVESTOR"

The definition of "investment" in the TPP goes far beyond real property and opens up governments to a wide range of cases not even related to actual investments. The final text's definition of investment is: "every asset that an investor owns or controls,

directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk."[29] That definition would empower foreign corporations to launch ISDS cases against U.S. climate policies even if they merely own a minority share in a company that, in turn, owned a U.S. fracking, oil drilling, or coal mining operation. For example, the TPP would empower an Australian subsidiary of HSBC, a multinational bank, to launch an ISDS case against U.S. policies affecting BHP Billiton's U.S. fossil fuel operations, despite the fact that the HSBC subsidiary only owns a 19 percent share in BHP Billiton.[30]

The TPP investment chapter would even allow foreign investors to launch ISDS cases against policies that affect "written agreements" with governments that give rights to the "exploration, extraction, refining, transportation, distribution or sale" of government-controlled natural resources. Unlike *any* previous U.S. trade agreement, the TPP explicitly states that this covers agreements for the extraction, processing, and transportation of federally owned "oil" and "natural gas."[31] Were a new U.S. climate policy, for example, to restrict a foreign-owned corporation's ability to extract oil or natural gas on public lands under an existing government lease, the firm could ask three lawyers on an ISDS tribunal to order compensation from U.S. taxpayers.[32]

The investment chapter's new rights and privileges for foreign investors would extend to investments *already existing* on the day the TPP would take effect.[33] This means that foreign investors could, for example, launch ISDS claims against policies affecting any existing pipelines, natural gas fracking operations, coal mines, or oil drilling projects in any of the 12 TPP countries. The chapter's similarly broad definition of an "investor" would even allow corporations to launch ISDS cases over failed attempts to make an investment. As long as a foreign fossil fuel firm had "taken concrete action or actions to make an investment," including "applying for permits or licenses," they would be permitted to challenge government policies in ISDS tribunals.[34]

3. "MINIMUM STANDARD OF TREATMENT": AN OBLIGATION TO NOT FRUSTRATE CORPORATE EXPECTATIONS

The TPP guarantees a "minimum standard of treatment" (MST) for foreign investments, which includes a right to "fair and equitable treatment" (FET).[35] These vague obligations for TPP governments largely replicate the language found in previous U.S. pacts and have been the basis of many alarming ISDS rulings, including an order for Ecuador to pay more than $1 billion to Occidental Petroleum, as described below.

Indeed, in three out of every four ISDS tribunal rulings under U.S. pacts in which the government lost, the foreign investor won on the basis of the broad MST/FET obligation.[36] A number of ISDS tribunals have interpreted this standard as a requirement for a government to ensure "the stability of the legal and business framework."[37] This means that a government could face ISDS cases for changing its policies to better protect the climate, the environment, or its citizens, if doing so frustrates the expectations that foreign firms held when they made their investments.

USTR claims to have inserted new "safeguards" in the TPP to narrow the extremely broad MST/FET obligation, such as a provision asserting that "the mere fact" that a government does something "inconsistent with an investor's expectations" is not enough to qualify as an MST/FET violation.[38] This provision, however, would still allow an ISDS tribunal to use frustration of an investor's expectations as *one* reason to rule against a government policy. It would also still allow the tribunal to use the firm's frustrated expectations as the *only* reason for ruling against the government, if the firm could show that its expectations were based on a statement from a government official (e.g., that an official did not foresee future restrictions on fracking).[39] In response to the new provision, longtime ISDS lawyer Todd Weiler stated, "I can't recall any tribunal that, if you put this provision in that agreement, that the result would be different either way."[40]

Even if the new provision were meaningful, an ISDS tribunal could simply ignore it, given that the TPP fails to limit the broad discretion of ISDS lawyers,

and still rule against a government on the mere basis that a new policy frustrated a foreign investor's unsubstantiated expectations. Indeed, ISDS tribunals have ignored the last attempt by the U.S. government to narrow the MST/FET standard, opting instead to use a broader interpretation of MST/FET to order government compensation to foreign firms.[41]

4. "INDIRECT EXPROPRIATION": A RIGHT TO COMPENSATION FOR POLICIES THAT REDUCE AN INVESTMENT'S VALUE

Virtually replicating past free trade agreements, the TPP explicitly obligates governments to compensate foreign investors for "indirect" expropriation.[42] Past ISDS tribunals have interpreted this broad obligation as allowing foreign corporations to demand compensation for government policies or actions that have the effect of merely reducing the value of a foreign investment.[43] By contrast, in most domestic legal systems, governments typically are not required to provide compensation unless they actually seize the property of an individual or firm.[44] And the U.S. Supreme Court has consistently ruled that a mere reduction in the value of private property does not require the U.S. government to provide compensation.[45]

The TPP's inclusion of this expansive foreign investor right could allow a foreign corporation, like BHP Billiton, for example, to challenge a new environmental regulation, such as additional permit requirements, as a TPP-prohibited "indirect expropriation" if it diminished the value of its fracking operations. In fact, an annex in the TPP makes explicit that "non-discriminatory regulatory actions...designed to protect public welfare objectives, such as public health, safety, and the environment" can constitute "indirect expropriations" "in rare circumstances."[46] While USTR touts this provision as a "safeguard," it would be up to an unaccountable ISDS tribunal to decide which environmental or other public interest policies fall into the "rare circumstances" loophole.

CORPORATE TRIBUNAL CASES AGAINST CLIMATE AND ENVIRONMENTAL PROTECTIONS

These are not hypothetical dangers. ISDS cases against environmental, health, and other public interest policies are increasing in frequency, while the scope of policies being challenged is widening. These are just a few ISDS cases that exemplify how investment rules can limit a government's ability to mitigate climate disruption, protect the environment, and ensure the safety of its people:

ENVIRONMENTAL IMPACT ASSESSMENT FOR MINING IN NOVA SCOTIA

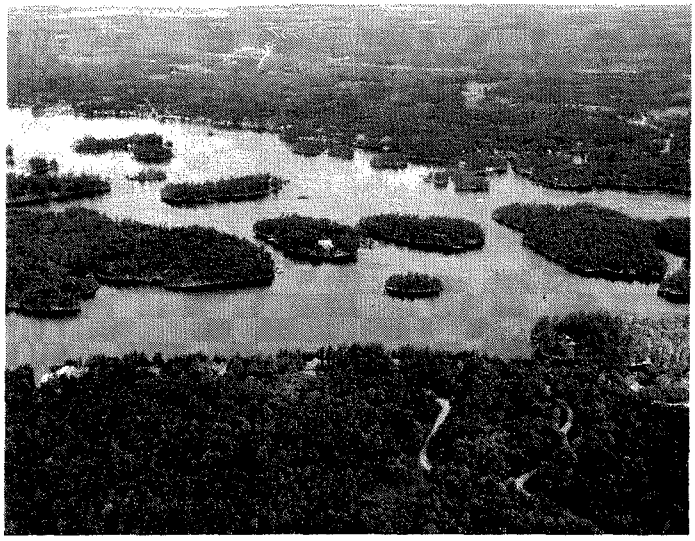
In 2007, the government of Nova Scotia in Canada rejected a proposal by Bilcon of Delaware, a U.S. mining company, to use invasive "blasting" methods to extract rock near the Bay of Fundy and ship it to the United States.[47] The government acted in response to an environmental impact assessment, which found that the project could harm endangered species, including the North Atlantic right whale and Inner Bay of Fundy salmon.[48] The assessment also highlighted concerns by commercial fishers, indigenous communities, and local residents about threats to the local landscape, diverse wildlife, and community, leading the Novia Scotia and Canadian governments to agree that the mining project threatened "core values that reflect [the local community's] sense of place, their desire for self-reliance, and the need to respect and sustain their surrounding environment."[49]

In response to the government's rejection of the project, Bilcon launched an ISDS case against Canada under NAFTA, arguing that its right to a "minimum standard of treatment" (among others) had been violated.[50] In 2015, two of the three lawyers on the ISDS tribunal ruled against Canada, arguing that the environmental impact assessment frustrated Bilcon's expectations, and thus violated Bilcon's right to a "minimum standard of treatment," because it took into consideration the local community's values, including their concerns about the environment.[51] The dissenting tribunalist warned that the decision

would be seen as "a remarkable step backwards in environmental protection," and predicted that "a chill will be imposed on environmental review panels."[52] Bilcon is demanding at least $300 million in compensation from Canadian taxpayers.[53]

FRACKING IN QUEBEC

In September 2013, Lone Pine Resources, a U.S. oil and gas firm, launched an ISDS case against Canada under NAFTA in response to a moratorium enacted by Quebec on shale gas exploration and development, including fracking, under the St. Lawrence River.[54] A Quebec government review has concluded that fracking in the area could pollute the air and water and have "major impacts" on local communities.[55] In launching its ISDS case, Lone Pine claimed the Quebec government acted "with no cognizable public purpose," and violated the firm's "valuable right to mine for oil and gas under the St. Lawrence River."[56] Lone Pine argued that Quebec's fracking moratorium violated NAFTA's guarantee of a "minimum standard of treatment" for foreign investors because it "violated Lone Pine's legitimate expectation of a stable business and legal environment."[57] Lone Pine also called the fracking moratorium a NAFTA-prohibited "indirect expropriation."[58] The firm is demanding $119 million from Canadian taxpayers as compensation, in addition to asking Canada to cover Lone Pine's legal fees.[59]



COAL-FIRED POWER PLANT STANDARDS AND NUCLEAR ENERGY IN GERMANY

In 2007, the government of Hamburg, Germany, granted Swedish energy firm Vattenfall a permit to begin construction of a new coal-fired power plant.[60] In an attempt to allay strong concerns from policymakers and the public that the plant would contribute to climate disruption and could pollute the adjacent Elbe River,[61] the government of Hamburg required Vattenfall to comply with environmental requirements to protect the river[62] Instead of meeting those requirements, however, Vattenfall launched a $1.5-billion ISDS case against Germany und er the Energy Charter Treaty,[63] claiming that the environmental rules constituted an expropriation of its investment and a violation of its right to "fair and equitable treatment."[64] To avoid a potentially costly case, the German government reached a settlement with Vattenfall in 2010 that required Hamburg to abandon its environmental conditions for the coal-fired plant (even ones Vattenfall had already agreed to) and allow the plant to be built.[65] Hamburg complied, and Vattenfall's coal plant there began operating in 2014.[66]

Two years after successfully using ISDS to roll back German restrictions on its coal-fired power plant, Vattenfall decided to launch an ISDS case against German restrictions on nuclear power. Following Japan's Fukushima Daiichi nuclear disaster of 2011, and in the midst of significant public pressure, the German Parliament decided to phase out nuclear power and shift toward cleaner renewable energy sources.[67] In response, Vattenfall, which had investments in German nuclear energy, launched an ISDS case against Germany under the Energy Charter Treaty.[68] Vattenfall is now seeking more than $5 billion from German taxpayers for losses that it may sustain during the nuclear phase-out.[69]

OIL EXPLORATION IN ECUADOR

In 1999, Occidental Petroleum Corporation signed a 20-year contract with Ecuador for oil exploration and production rights in the Amazon rainforest.[70] In accordance with Ecuador's laws on oil production, the agreement explicitly prohibited Occidental from selling its oil production rights without government

approval.[71] This legal requirement provided the government the opportunity to evaluate any companies seeking to produce oil within Ecuador's national boundaries. The country had good reason to exercise caution: For nearly three decades, Texaco, which Chevron later acquired in 2001, dumped billions of gallons of toxic water into Ecuador's Amazon region while drilling for oil.[72] Just one year after signing its contract, Occidental violated it (and Ecuadorian law) when the corporation sold 40 percent of its production rights to Alberta Energy Company without formally informing, or seeking authorization from, the Ecuadorian government.[73] In response, Ecuador terminated Occidental's contract and investment, which prompted Occidental to launch an ISDS case against Ecuador under the U.S.-Ecuador Bilateral Investment Treaty.

Although the ISDS tribunal agreed that Occidental broke the law and that Ecuador was within its legal rights to terminate the contract and investment,[74] the tribunal used a broad interpretation of Occidental's right to "fair and equitable treatment" to rule against Ecuador.[75] The tribunalists ordered Ecuador to pay more than $2 billion to Occidental[76]—the largest ISDS penalty at the time, and equivalent to what the Ecuadorian government spends each year on healthcare for half of its population.[77] A later, partial annulment of the decision left the ruling largely intact and left Ecuador with a penalty of more than $1 billion.[78]

LOCKING IN NATURAL GAS EXPORTS AND FRACKING

As scientists and experts have warned, in order to solve the climate crisis we must keep the majority of fossil fuels in the ground.[79] Yet, the TPP would provide a lifeline to the natural gas industry, encouraging increased production of U.S. natural gas for export markets where the industry can earn more than three times what they can earn by selling natural gas in the U.S.[80]

Before authorizing the export of natural gas to most countries in the world, the U.S. Department of Energy (DOE) is required under U.S. law to conduct a careful

PHOTO: ECOFLIGHT

and public analysis to determine whether natural gas exports are in the public interest.[81] But the 1992 amendment to the Natural Gas Act states that DOE must forego this analysis and approve applications "without modification or delay" to export natural gas to any countries with which the United States has a free trade agreement requiring "national treatment for trade in natural gas."[82] Because the TPP includes this requirement,[83] the DOE would be bound under U.S. law to automatically approve *all* exports of U.S. liquefied natural gas (LNG) to all countries in the agreement[84]—including Japan, the world's largest LNG importer.[85] The TPP, therefore, could lock in U.S. natural gas production and LNG exports despite the threats to clean air and water, healthy communities, and a stable climate.

Automatic exports of U.S. LNG to TPP countries would be particularly dangerous. TPP member Japan imported more than 88 million metric tons of LNG in 2014, which amounted to more than 40 percent of global LNG imports. No existing U.S. free trade agreement (FTA) partner comes close to that level of import demand. South Korea is the closest, and its 2014 LNG imports were less than 42 percent of Japan's level.[86] And, since the TPP is a "docking" agreement that additional countries could join in the future, it could create an expanding web of countries with automatic access to natural gas from the United States.[87]

By locking in large-scale LNG exports, the TPP would threaten our environment and climate by:

- **Facilitating Increased Fracking:** The U.S. Energy Information Administration (EIA) estimates that a significant rise in LNG exports above current projections, which the TPP would facilitate, would spur up to a 10 percent increase in U.S. natural gas production.[88] The EIA further predicts that about three-quarters of the increased production would come from shale gas. This would spell a rise in fracking, the dominant extraction method for shale gas.[89] An intrusive procedure, fracking involves pumping millions of gallons of water, sand, and chemicals underground to create pressure, which forces out natural gas. According to a 2015 review of academic studies on the effects of fracking, 69 percent of recent studies have found potential or actual water contamination, 88 percent have found indication of air pollution, and 84 percent have found potential or actual health risks.[90] The U.S. Geological Survey also reports that underground wastewater disposal associated with fracking "has been linked to induced earthquakes."[91]
- **Exacerbating Climate Disruption:** Recent studies find that natural gas has significant climate disrupting impacts, due in part to leaks of methane (a potent greenhouse gas), in the extraction, processing, and domestic transport of natural gas.[92] And LNG has even greater life-cycle greenhouse gas emissions than natural gas, due to the energy needed to cool, liquefy, store, ship, and re-gasify the gas.[93] In fact, DOE estimates that liquefaction, overseas shipping, and re-gasification contribute 21 percent of the life-cycle greenhouse gas emissions of LNG exported from the United States to Asia.[94] DOE's analysis indicates that LNG exports from the United States to Asian TPP countries (e.g., Japan) likely represent higher life-cycle greenhouse gas emissions than LNG shipments from closer LNG-exporting nations (e.g., Australia).[95] By locking in U.S. LNG exports to Japan, the TPP would thus facilitate Japan's use of a more climate-disruptive fossil fuel. A reliable supply of LNG exports from the United States would likely also displace renewable energy production in Japan, spurring further climate disruption. More broadly, since the TPP is a docking agreement for other countries to join, opening our natural gas reserves to unlimited exports to all current and future TPP countries would increase the world's dependence on a fossil fuel with significant climate effects.
- **Locking in Fossil Fuel Infrastructure:** LNG export requires a large fossil fuel infrastructure, including a network of natural gas wells, terminals, liquefaction plants, pipelines, and compressors that all require careful environmental review. For example, whether exporters are expanding old pipelines or building new ones, these construction projects can cut across private property and public land, further fragmenting landscapes and increasing pollution. There are also environmental effects associated with the building of natural gas export terminals, which may require the dredging of sensitive estuaries to make room for massive LNG tankers. Expanding facilities and ship traffic also takes a toll on coastal communities and the environment. Moreover, the construction of new fossil fuel infrastructure to enable LNG exports would lock in the production of climate-disrupting fossil fuels for years to come—years during which we ought to be dramatically reducing fossil fuel production.[96]
- **Potentially Shifting the Domestic Gas Market Toward Coal:** The EIA projects that by raising demand for U.S. natural gas, increased LNG exports would cause U.S. natural gas prices to increase. In the near term, the EIA projects that more expensive natural gas would spur increased use of coal in power generation (with coal rising more than nuclear or renewables).[97] The extent to which this projection would pan out would depend somewhat upon how U.S. states choose to implement the Clean Power Plan. In states with policies that more aggressively seek to phase out coal production (as opposed to focusing more on energy efficiency, for example), such efforts would likely nullify upward pressure on coal use from LNG exports.[98] In states more permissive toward coal, LNG exports could spur a shift, in the short term, toward coal-fired power, causing increased greenhouse gas emissions.

HOW THE TPP WOULD INCREASE GREENHOUSE GAS EMISSIONS

In addition to locking in large-scale exports of greenhouse gas-intensive LNG to TPP countries, including Japan, the TPP would likely increase climate-disrupting emissions by:

- **Shifting Manufacturing to Countries With Carbon-Intensive Production:** The TPP, by eliminating tariffs, would put manufacturing firms in relatively high-wage nations, like the United States and Canada, into direct competition with manufacturing firms in low-wage countries, like Vietnam and Malaysia.[99] The resulting shift in manufacturing to low-wage countries would not only cost U.S. manufacturing jobs, but would also spur higher greenhouse gas emissions. Production in Vietnam is more than four times as carbon-intensive as U.S. production, and production in Malaysia is more than twice as high (due to lower energy efficiency and/or a higher concentration of dirty fossil fuels in energy production).[100]
- **Increasing Shipping:** A TPP-spurred shift in manufacturing from countries like the United States and Canada to countries on the other side of the Pacific Ocean would also increase shipping-related greenhouse gas emissions. The International Maritime Organization (IMO) estimates that international shipping already accounts for 2.1 percent of global greenhouse gas emissions. IMO projects that carbon emissions from shipping will increase between 50 percent and 250 percent by 2050, depending largely on the extent to which demand for traded goods rises.[101] Increased demand for traded goods is a stated objective of the TPP.[102]
- **Escalating Tropical Deforestation Via Cash Crop Expansion:** The TPP would encourage increased production of cash crops, like oil palm, that have played a leading role in destroying carbon-capturing tropical forests. Recent studies have found the expansion of oil palm plantations to be the primary cause of the widespread destruction of carbon-rich peat swamp forests in TPP member Malaysia.[103] Scientists estimate that each hectare of peat swamp cleared for oil palm releases up to 723 metric tons of carbon into the atmosphere.[104] Malaysia is already the world's second-largest exporter of palm oil (the primary product of oil palm).[105] Seven TPP countries currently impose tariffs on palm oil, ranging from 3 to 25 percent, including major palm oil importers like Mexico.[106] The TPP would eliminate or reduce all of these tariffs, encouraging greater oil palm production, and thus increasing climate-disrupting deforestation, in palm oil-exporting TPP countries like Malaysia.[107]
- **Expanding Production and Consumption:** Even the World Trade Organization (WTO) concludes that trade liberalization would likely increase greenhouse gas emissions due to increased production and consumption. A 2009 review by the WTO and United Nations Environment Programme of studies measuring the impact of trade liberalization on greenhouse gas emissions concluded, "Most of the econometric studies suggest that more open trade would be likely to increase CO_2 emissions," due largely to an increase in production and consumption.[108]
- **Increasing Exports of Coal:** While most TPP countries have already eliminated tariffs on the importation of coal and coal products, the TPP would eliminate the few coal tariffs that remain, making the carbon-intensive fuel and energy source more affordable in select TPP countries.[109] For example, Japan would eliminate its 3.2 percent tariff on coke and semi-coke of coal from the United States[110]—a carbon-intensive product for which Japan is the world's second-largest importer and the United States is the world's sixth-largest exporter.[111]

Despite these likely effects of increasing LNG exports, the TPP would strip the ability of the United States to even *examine* whether greater natural gas exports are in the interest of our communities and climate.

NEW LIMITS ON CLIMATE AND ENVIRONMENTAL REGULATIONS

Various other TPP chapters would impose additional limits on the ability of governments to tackle climate disruption and other environmental imperatives. The TPP includes a chapter on Technical Barriers to Trade (TBT), for example, that could limit the ability of governments to establish new energy-saving or environmentally-friendly labels, technical regulations, and standards. The TPP's TBT chapter builds on the WTO TBT agreement, and includes commitments to ensure that technical regulations do not create "unnecessary obstacles to international trade" and are not "more trade-restrictive than necessary."[112] Such expansive requirements have led to a recent string of anti-environment and anti-consumer TBT cases. In 2015, for example, the WTO ruled against the U.S. "dolphin-safe" tuna label—a voluntary label that applies to U.S. and foreign tuna producers, which has contributed to a dramatic reduction in dolphin deaths—on the basis that the label constitutes a "technical barrier to trade."[113] The WTO also recently ruled that a ban on candy-flavored cigarettes and popular country-of-origin meat labels violate the broad TBT rules.[114] The TPP's expansion of those rules would likely leave even less room for climate and environmental labels and standards.

In another example of new limits that the TPP would impose on governments, the chapter on government procurement would limit the ability of governments to mandate "green purchasing" in government contracts or for government purposes. Requirements for recycled content in paper and other goods, or for energy to come from renewable sources, for example, could be challenged under the TPP for having the unintended "effect of creating an unnecessary obstacle to trade."[115]

Green jobs programs could also be challenged as violating TPP rules concerning trade in goods if they included provisions to incentivize local job creation. Indeed, the TPP virtually replicates rules that the WTO used in 2013 to rule against Ontario's successful clean energy program, which reduced emissions while creating thousands of local jobs.[116] Rather than reform decades-old rules to make space for such popular initiatives to combat climate disruption, the TPP would further constrain green policies.

THE ENVIRONMENT CHAPTER

One of the 30 TPP chapters focuses on the environment, and USTR often claims the pact would benefit the environment based exclusively on this chapter. And yet, despite the fact that the TPP would likely increase climate-disrupting emissions by enabling corporate challenges to climate protections while increasing carbon-intensive production, fossil fuel exports, shipping, and deforestation, the TPP environment chapter fails to even mention the words "climate change."[117] The environment chapter also excludes core environmental commitments that have been included in all U.S. trade agreements since 2007, including those negotiated by the George W. Bush administration.

Instead, the chapter narrowly focuses on a set of conservation rules that are likely to be too weak to curb environmental abuses in TPP countries. The provisions are also unlikely to be enforced, since violations of environmental terms in existing U.S. trade deals have been repeatedly ignored. Moreover, the environment chapter fails to protect climate and environmental policies from the myriad threats that other parts of the TPP pose.

A STEP BACKWARD FROM PAST TRADE DEALS

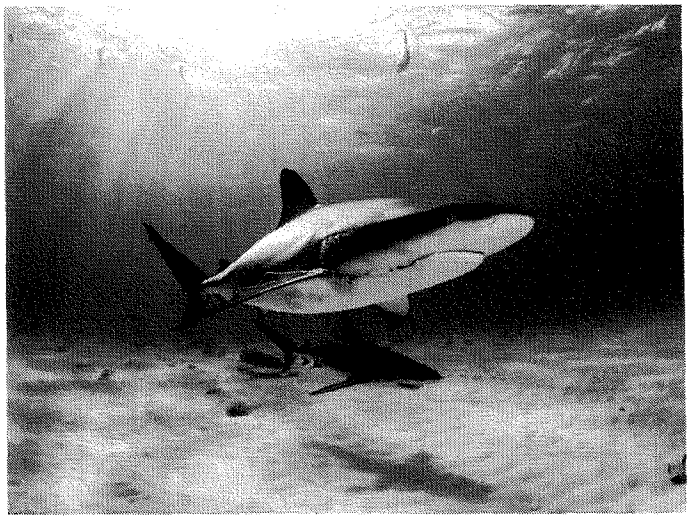
In some respects, the TPP environment chapter actually takes a step *back* from environment chapters of previous trade pacts. For example, pursuant to a bipartisan agreement between then-President George W. Bush and congressional Democrats,[118] all U.S. FTAs since 2007 have required each of our FTA partners to "adopt, maintain, and implement

laws, regulations, and all other measures to fulfill its obligations under" a set of seven multilateral environmental agreements (MEAs).[119] With proper enforcement, this obligation should deter countries from violating their critical commitments in environmental treaties in order to boost trade or investment. 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).[120] This regression violates the minimum degree of environmental protection required under the Bipartisan Congressional Trade Priorities and Accountability Act of 2015, also known as fast track.[121]

WEAK CONSERVATION RULES

While the range of conservation issues mentioned in the TPP may be wide, the TPP countries' obligations are generally shallow, as detailed in the Sierra Club's textual analysis.[122] Vague obligations combined with weak enforcement may allow countries to continue with business-as-usual practices that threaten our environment. For example:

- **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,"[123] while stronger measures like sanctions are merely listed as options.[124] Moreover, the TPP states that "each Party retains the right to exercise administrative, investigatory and enforcement discretion in its implementation" of the commitment to combat illegal trade in flora and fauna, providing TPP countries a giant escape hatch to avoid fulfilling this already weak obligation.[125]
- **Illegal, Unreported, and Unregulated (IUU) Fishing:** Rather than *obligating* countries to abide by trade-related provisions of regional fisheries management organizations (RFMOs), which 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.[126]



- **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.[127] Meanwhile, the TPP would actually encourage increased shark finning by eliminating the significant shark fin tariffs that major shark fin importers, such as Vietnam and Malaysia, currently impose on major shark fin exporters, such as Mexico and Peru.[128]

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. In fact, 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 aimed at stopping the large, illegal timber trade between Peru and the

United States. The pact not only required Peru "to combat trade associated with illegal logging," but also included eight pages of specific reforms that Peru had to take to fulfill this requirement.[129] The obligations were far more detailed than any found in the TPP environment chapter, and were subject to the same enforcement mechanism.[120]

But after more than six years of the U.S. – Peru trade deal, widespread illegal logging remains unchecked in Peru's Amazon rainforest. A 2014 study in *Scientific Reports* found that about 70 percent of Peru's supervised logging concessions are being used for illegal logging.[131] In an investigation conducted that same year, Peru's own authorities found that 78 percent of wood slated for export was harvested illegally.[132]

For years, U.S. environmental groups have called on USTR to use the rules in the trade deal to counter Peru's extensive illegal logging.[133] Yet to date, Peru has faced no formal challenges, let alone penalties, under the trade pact,[134] despite ample evidence that Peru has violated the pact's rules by illegally cutting Amazonian trees and exporting them for sale to unwitting U.S. consumers.[135] Given that the Peru deal's stronger environmental obligations have failed to halt illegal logging in Peru, it is hard to imagine that the TPP's weaker provisions would be more successful in combatting conservation challenges.

FAILURE TO PROTECT CLIMATE POLICIES

Nothing in the TPP, including the environment chapter, offers adequate protection from the myriad TPP threats that would constrain the ability of countries to combat climate disruption. There is no protection from rules that would allow foreign investors to challenge climate and clean energy policies in unaccountable trade tribunals. There are no meaningful safeguards for green jobs programs that could run afoul of the TPP's procurement rules. There is no flexibility offered to governments who wish to restrict the exports of climate-disrupting fossil fuels. There are no sufficient safeguards for energy-saving labels that could be construed under the TPP as "technical barriers to trade," or for border adjustment mechanisms that could conflict with TPP rules regarding imports. Therefore, the TPP could not only spur increased climate-disrupting emissions, but also inhibit domestic efforts to curb such emissions.

CONCLUSION

The TPP poses a panoply of threats to our climate and environment. The weak conservation provisions of the TPP environment chapter do not change the fact that, under the TPP, governments would *lose* autonomy to enact policies to address the climate crisis, while corporations would *gain* new powers to challenge climate and environmental policies. As the world moves toward a clean energy future, we cannot afford to let the TPP keep us in the fossil fuel-dominated past. The Sierra Club believes that a new model of trade that protects communities and the environment is urgently needed—one that overturns the polluter-friendly model of the TPP.

ENDNOTES

1. See Article 30.4 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Final-Provisions.pdf. "TPP Full Text," Office of the U.S. Trade Representative, accessed November 10, 2015, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.

2. "The Trans-Pacific Partnership: Preserving the Environment," Office of the U.S. Trade Representative, October 2015, https://ustr.gov/sites/default/files/TPP-Preserving-the-Environment-Fact-Sheet.pdf.

3. "TPP Full Text," Office of the U.S. Trade Representative, accessed November 10, 2015, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text.

4. Philip Bump, "We Made President Obama's Big TPP Trade Deal Searchable," *The Washington Post*, November 5, 2015, https://www.washingtonpost.com/news/the-fix/wp/2015/11/05/we-made-president-obamas-big-tpp-trade-deal-searchable/.

5. Peter Robinson, "TPP: A 21st Century Trade Agreement," United States Council for International Business, September 14, 2015, http://www.uscib.org/tpp-a-21st-century-trade-agreement/.

6. Article 9.6 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

7. Lori Wallach, "'Fair and Equitable Treatment' and Investors' Reasonable Expectations: Rulings in U.S. FTAs & BITs Demonstrate FET Definition Must be Narrowed," Public Citizen, September 5, 2012, http://www.citizen.org/documents/MST-Memo.pdf.

8. These cases include: *Dow AgroSciences LLC v. Canada* (http://www.italaw.com/cases/3407), *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (http://www.italaw.com/cases/1225), *Chevron Corporation and Texaco Petroleum Corporation v. Ecuador* (http://www.italaw.com/cases/257), and *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Ecuador* (http://www.italaw.com/cases/767).

9. "Recent Trends in IIAs and ISDS," United Nations Conference on Trade and Development, February 2015, at 5, http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf.

10. For summaries of these and other ISDS cases affecting environmental protections, see "Trading Away Our Climate? How Investment Rules Threaten the Environment and Climate Protection," The Sierra Club, 2014, https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/Investor-State-Climate-FINAL.pdf. See also: "Case Studies: Investor-State Attacks on Public Interest Policies," Public Citizen, 2015, http://www.citizen.org/documents/egregious-investor-state-attacks-case-studies.pdf.

11. "Recent Trends in IIAs and ISDS," United Nations Conference on Trade and Development, February 2015, at 5, http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf.

12. The figure counts only the U.S. subsidiaries of foreign corporations based in TPP countries that do not currently have an ISDS-enforced agreement with the United States: Australia, Brunei, Japan, Malaysia, New Zealand, and Vietnam. Data on foreign-owned firms doing business in the United States from "Foreign Firms Operating in the United States," Uniworld, extracted September 21, 2015, https://www.uniworldbp.com/search.php.

13. "Resourcing Global Growth: Annual Report 2015," BHP Billiton, 2015, at 36 and 44, http://www.bhpbilliton.com/~/media/bhp/documents/investors/annual-reports/2015/bhpbillitonannualreport2015.pdf?la=en.

14. Data on foreign-owned firms doing business in the United States from Uniworld, "Foreign Firms Operating in the United States," extracted September 21, 2015, https://www.uniworldbp.com/search.php.

15. "The Trans-Pacific Partnership: Upgrading and Improving Investor-State Dispute Settlement," Office of the U.S. Trade Representative, October 2015, https://ustr.gov/sites/default/files/TPP-Upgrading-and-Improving-Investor-State-Dispute-Settlement-Fact-Sheet.pdf.

16. Preamble of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Preamble.pdf.

17. In the words of a recent pro-ISDS law review article, in TPP-like investment agreements "the power to regulate operates within the limits of rights conferred upon the investor." Rudolf Dolzer, "Fair and Equitable Treatment: Today's Contours," *Santa Clara Journal of International Law*, 12: 1, January 17, 2014, at 21, http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1147&context=scujil.

18. See, for example, Varun Sivaram, "TPP: A Small Step in the Right Direction on Climate," Council on Foreign Relations, November 6, 2015, http://blogs.cfr.org/levi/2015/11/06/tpp-a-small-step-in-the-right-direction-on-climate/.

19. Article 9.15 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

20. S.D. *Myers, Inc. v. Government of Canada*, UNCITRAL, Separate Opinion by Dr. Bryan Schwartz (on the Partial Award), November 12, 2000, at para. 117, http://italaw.com/sites/default/files/case-documents/ita0748.pdf.

21. Andreas Kulick, *Global Public Interest in International Investment Law*, (Cambridge: Cambridge University Press, 2012), at 70-71.

22. See Chapter 9, Section B of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

23. For a summary of such dual roles and the conflict of interest it creates, see Pia Eberhardt and Cecilia Olivet, "Profiting from Injustice," Corporate Europe Observatory and Transnational Institute, November 2012, https://www.tni.org/files/download/profitingfrominjustice.pdf.

24. "The Trans-Pacific Partnership: Upgrading and Improving Investor-State Dispute Settlement," Office of the U.S. Trade Representative, October 2015, https://ustr.gov/sites/default/files/TPP-Upgrading-and-Improving-Investor-State-Dispute-Settlement-Fact-Sheet.pdf.

25. Article 9.21.6 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

26. Tribunal decisions could only be "annulled" on narrow grounds such as "corruption" by a tribunal member or "departure from a fundamental rule of procedure." International Centre for Settlement of Investment Disputes, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, at Article 52, https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf. The TPP text addresses the possibility of an actual appellate mechanism for ISDS decisions by stating that "in the event" that one is created "under other institutional arrangements," the Parties merely commit to "consider" whether it could be used to appeal ISDS decisions. Article 9.22.11 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

27. See Article 9.28 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

28. See "Setting the Record Straight: Debunking Ten Common Defenses of Controversial Investor-State Corporate Privileges," Public Citizen, 2015, at 8-9, http://www.citizen.org/documents/ustr-isds-response.pdf.

29. Article 9.1 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

30. HSBC's subsidiary in Australia is HSBC Australia Nominees Pty Limited. "Resourcing Global Growth: Annual Report 2015," BHP Billiton, 2015, at 309, http://www.bhpbilliton.com/~/media/bhp/documents/investors/annual-reports/2015/bhpbillitonannualreport2015.pdf?la=en. This example spotlights the fact that Article 9.14 of the TPP would allow a firm (e.g., HSBC's subsidiary in Australia) to bring an ISDS case against another TPP government (e.g., the United States) even if it is owned or controlled by a parent firm in a non-TPP country (e.g., United Kingdom-based HSBC), so long as it has "substantial business activities" in the TPP country from which it launches the case (e.g., Australia). Article 9.14 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

31. Article 9.1 of the TPP final text, under the definition of "investment agreement," https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

32. An oil and gas lease with the U.S. Bureau of Land Management, for example, would seem to meet the conditions of an "investment agreement," as it "creates an exchange of rights and obligations, binding on both parties," it "grants rights" to an investor, and the investor relies on it "in establishing or acquiring a covered investment." For a description of the rights and obligations associated with such leases, see "Qs & As about Oil and Gas Leasing," Bureau of Land Management, U.S. Department of the Interior, accessed November 10, 2015, http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/questions_and_answers.html. Such leases could also potentially fall under the TPP's definition of "investment," which explicitly mentions "leases" as a covered item. Article 9.1 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

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38. Article 9.6.4 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

39. Luke Eric Peterson, "A First Glance at the Investment Chapter of the TPP Agreement: A Familiar US-Style Structure with a Few Novel Twists," *Investment Arbitration Reporter*, November 5, 2015, http://www.iareporter.com/articles/a-first-glance-at-the-investment-chapter-of-the-tpp-agreement-a-familar-us-style-structure-with-a-few-novel-twists/. In addition, the TPP's "most-favored-nation treatment" provision could allow a foreign investor to try to use an older MST/FET definition from an entirely different agreement to circumvent the added provision in the TPP. Foreign investors have used the "most-favored-nation treatment" provision of ISDS-enforced agreements to import substantive foreign investor rights found in other agreements to which the government in the dispute is a Party. See: "Most-Favoured Nation Treatment," United Nations Conference on Trade and Development, 2010, at 59-60, http://unctad.org/en/Docs/diaeia20101_en.pdf. The TPP text makes clear that investors cannot use the "most-favored-nation treatment" provision to access procedural rights in existing agreements, but leaves open the possibility for them to access substantive rights in those deals. See Article 9.5.3 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

40. "TPP Investment Language Aims To Tighten Standard For MST Breach," *Inside U.S. Trade*, November 13, 2015, http://insidetrade.com/inside-us-trade/tpp-investment-language-aims-tighten-standard-mst-breach.

41. For example, the U.S. government and other Parties to the Central America Free Trade Agreement (CAFTA) inserted an annex into that agreement that was intended to narrow the MST obligation by requiring that it align with the "minimum standard of treatment" consistently practiced by governments. But in two of the first ISDS case rulings under CAFTA, tribunals simply ignored the annex, imported a broad interpretation of MST from yet another ISDS tribunal, and used that interpretation to order Guatemala to pay millions of dollars to foreign firms. "Setting the Record Straight: Debunking Ten Common Defenses of Controversial Investor-State Corporate Privileges," Public Citizen, 2015, at 4, http://www.citizen.org/documents/ustr-isds-response.pdf.

42. See Article 9.7 and Annex 9-B in the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

43. The tribunal in *Metalclad Corporation v. Mexico*, for example, concluded, "expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour [sic] of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole *or in significant part*, of the use or reasonably-to-be-expected economic benefit of property, even if not necessarily to the obvious benefit of the host State" (emphasis added). *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB (AF)/97/1, Award, August 30, 2000, at para. 103.

44. "...[T]he distinction between police-power regulation of property and eminent-domain expropriation of property is fundamental to all [constitutional] property clauses, because only the latter is compensated as a rule. Normally, the will be no provision for compensation for deprivations or losses caused by police-power regulation of property." A.J. Van der Walt, Constitutional Property Clauses: A Comparative Analysis (Kluwer Law International, 1999), at 17. United States law is an exception to this general rule, but compensation for claims of "regulatory takings" under the Fifth Amendment of the U.S. Constitution is still only available in specific instances. Supreme Court rulings indicate that these include when a government measure results in "permanent physical invasion" of a property, causes a complete and permanent destruction of a property's value, constitutes a land-use exaction "so onerous that, outside the exactions

context, they would be deemed per se physical takings," or is otherwise "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-540, 547-548 (2005).

45. "[O]ur cases have long held that mere diminution in value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California.*, 508 U.S. 602, 645 (1993).

46. Annex 9-B in the TPP final text, at 3(b), https://ustr.gov/sites/default/files/TPP-Final-Text-Investment.pdf.

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48. "Environmental Assessment of the White Point Quarry and Marine Terminal Project," Joint Review Panel, October 2007, at 57, 102-103, http://www.novascotia.ca/nse/ea/whitespointquarry/WhitesPointQuarryFinalReport.pdf.

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51. *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, at 124-179, http://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf.

52. *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Dissenting Opinion of Professor Donald McRae, March 10, 2015, at para. 51, http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/clayton-13.pdf.

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112. Article 8.4.1 of the TPP text incorporates Article 2.2 of the WTO TBT agreement, which includes these requirements. See TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Technical-Barriers-to-Trade.pdf, and WTO text, https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm#articleII.

113. In April 2015, a WTO panel ruled that the U.S. "dolphin-safe" label still did not comply with TBT rules after the U.S. government altered the labeling policy in response to an earlier loss in the same case. After the United States appealed that ruling, the WTO Appellate Body again ruled against the U.S. dolphin-saving label in November 2015. There is no remaining possibility for appeal. "United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products," World Trade Organization, accessed November 25, 2015, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm.

114. "United States — Measures Affecting the Production and Sale of Clove Cigarettes," World Trade Organization, accessed November 11, 2015, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm. "United States — Certain Country of Origin Labelling (COOL) Requirements," World Trade Organization, accessed November 11, 2015, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm.

115. Article 15.12.1 of the TPP final text. Such requirements could also be challenged as contradicting the text's preference for "functional" rather than "design" specifications. Article 15.12.2 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Government-Procurement.pdf.

116. Article 2.3.1 of the TPP final text incorporates Article III of the WTO's General Agreement on Tariffs and Trade (GATT), https://ustr.gov/sites/default/files/TPP-Final-Text-National-Treatment-and-Market-Access.pdf. In 2013, the WTO Appellate Body ruled against the domestic content provisions in Ontario's feed-in tariff program (which incentivized local production of solar panels and wind turbines) on the basis that they violated the national treatment rules of GATT Article III:4. "Canada — Certain Measures Affecting the Renewable Energy Generation Sector," World Trade Organization, accessed November 10, 2015, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds412_e.htm.

117. See Chapter 20 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf.

118. This is known as the "May 10, 2007" deal. See "Peru and Panama FTP Changes," May 10, 2007, Bilaterals.org, http://www.bilaterals.org/IMG/pdf/05_14_07.pdf.

119. See, for example, Article 18.2 of the U.S. – Peru Free Trade Agreement, https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file953_9541.pdf. A footnote on the provision clarifies, "To establish a violation of Article 18.2 a Party must demonstrate that the other Party has failed to adopt, maintain, or implement laws, regulations, or other measures to fulfill an obligation under a covered

agreement in a manner affecting trade or investment between the Parties."

120. Article 20.17.2 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf.

121. 19 U.S.C. § 4201(b)(10)(A), http://uscode.house.gov/view.xhtml?path=/prelim@title19/chapter27&edition=prelim.

122. "TPP Text Analysis: Environment Chapter Fails to Protect the Environment," The Sierra Club, November 5, 2015, https://www.sierraclub.org/sites/www.sierraclub.org/files/uploads-wysiwig/tpp-analysis-updated.pdf.

123. Article 20.17.3 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf.

124. Article 20.17.5 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf.

125. Article 20.17.6 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf.

126. Article 20.16.14e of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf.

127. Article 20.16.4 of the TPP final text, https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf.

128. Vietnam is the world's 5th largest importer of shark fins by value. Malaysia is the world's 8th largest importer of shark fins by volume. Vietnam currently has a 20 percent tariff on shark fin imports, while Malaysia has a 7 percent tariff. Mexico and Peru are the 4th and 5th largest exporters of shark fins in the world by value. Mexico ranks among the top 10 countries in the world for the number of sharks killed each year, and Peru's exports of shark fins to Asia have grown significantly in recent years. Neither Vietnam nor Malaysia has existing free trade agreements with Mexico or Peru that would reduce or eliminate tariffs on shark fin imports from these countries in the absence of the TPP. For tariff schedules, see Annex 2-D of the TPP final text, https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text. For trade data, see: United Nations, UN Comtrade Database, accessed November 9, 2015, http://comtrade.un.org/data/. For data on shark kills per year, see: "State of the Global Market for Shark Products," Food and Agricultural Organization of the United Nations, 2015, at 17, http://www.fao.org/3/a-i4795e.pdf. For information on Peru's increasing shark fin exports to Asia, see: "Rise in Shark Fin Exports from Peru Leads to Thousands of Dolphin Killings," *Agence France-Presse*, October 18, 2013, http://www.rawstory.com/2013/10/rise-in-shark-fin-exports-from-peru-leads-to-thousands-of-dolphin-killings/.

129. U.S. – Peru Trade Promotion Agreement, 2007, Annex 18.3.4, https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file953_9541.pdf.

130. U.S. – Peru Trade Promotion Agreement, 2007, Article 18.12, https://ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file953_9541.pdf.

131. Matt Finer, et al., "Logging Concessions Enable Illegal Logging Crisis in the Peruvian Amazon," *Scientific Reports (Nature)*, 4: 4719, April 17, 2014, http://www.nature.com/articles/srep04719.

132. Bob Abeshouse and Luis Del Valle, "Peru's Rotten Wood," *Al Jazeera*, August 12, 2015, http://www.aljazeera.com/programmes/peopleandpower/2015/08/peru-rotten-wood-150812105020949.html.

133. "US Government Requested to Use Free Trade Agreement to Take Action on Illegal Timber Exports: Peru," Environmental Investigation Agency, April 19, 2012, http://eia-global.org/news-media/us-government-requested-to-use-free-trade-agreement-to-take-action-on-illeg.

134. "Implementation and Enforcement Failures in the US-Peru Free Trade Agreement (FTA) Allows Illegal Logging Crisis to Continue," Environmental Investigation Agency, June 2015, http://eia-global.org/images/uploads/Implementation_and_enforcement__FINAL.pdf.

135. Bob Abeshouse and Luis Del Valle, "Peru's Rotten Wood," *Al Jazeera*, August 12, 2015, http://www.aljazeera.com/programmes/peopleandpower/2015/08/peru-rotten-wood-150812105020949.html.

INSTITUTE FOR AGRICULTURE AND TRADE POLICY
COMMENTARY

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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..

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

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]

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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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the TRANS-PACIFIC PARTNERSHIP

The Trans-Pacific Partnership (TPP) levels the playing field for American workers and American businesses, leading to more Made-in-America exports and more higher-paying American jobs here at home. By cutting over 18,000 taxes 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.

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Upgrading & Improving Investor-State Dispute Settlement

U.S. businesses and investors operating abroad often face a heightened risk of bias and discrimination. Investor-state dispute settlement (ISDS) is a mechanism that provides neutral international arbitration to ensure that Americans doing business abroad receive the same kinds of protections—such as protection from discrimination and expropriation without compensation—that are available to companies and investors doing business in the United States under U.S. law. This mechanism allows for an impartial, law-based approach to resolve conflicts and promotes development, rule of law, and good governance around the world. TPP also serves to modernize and reform ISDS by including clearer language and stronger safeguards that raise standards above virtually all of the other 3,000 plus investment agreements in force today.

THE BASIC FACTS ON ISDS

- **TPP specifically protects the right of governments to regulate in the public interest.** We would never negotiate away our right to do so, and we don't ask other countries to do so either. This is true for public health and safety, the financial sector, the environment, and any other area where governments seek to regulate.

- ISDS ensures that American businesses and investors do not face discrimination, nationalization, or abuse when doing business abroad. Through TPP, we can put in place **higher standards and stronger safeguards** for ISDS.
- ISDS is found in more than **3,000 existing agreements** around the world, covering **180 countries**. The U.S. has taken part in **51 of these agreements with ISDS** over the last 30 years.
- **The United States has never lost an ISDS case**. We have had only **13 cases brought to conclusion against us**, and the United States has **prevailed in every case**. And in part because we have continued to **raise standards through each agreement**, in recent years we have seen a drop in ISDS claims, despite increased levels of cross-border investment. Only one new case has been brought against the United States in the last five years.
- More than **half of companies that initiate ISDS cases are small- and medium-sized businesses or individual investors**, so the millions of American workers they employ stand to potentially benefit from strong ISDS protections.

HOW TPP UPGRADES AND IMPROVES ISDS

TPP includes new ISDS safeguards that close loopholes and raise standards higher than any past agreements. **Some of these new safeguards in TPP include:**

- **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.
- **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).
- **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.
- **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.
- **Arbitrator ethics**. TPP countries will provide detailed additional guidance on arbitrator ethics and issues of arbitrator independence and impartiality.

- **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.
- **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.

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:**

- **Transparency**. TPP requires ISDS panels to "conduct hearings open to the public" and to make public all notices of arbitration, pleadings, submissions, and awards.
- **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."
- **Remedies**. A government can only be required to pay monetary damages. ISDS does not and cannot require countries to change any law or regulation.
- **Challenge of awards**. All ISDS awards are subject to subsequent review either by domestic courts or international review panels.
- **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.
- **Attorney's fees for frivolous claims**. A panel may award attorney's fees and costs in cases of frivolous claims.
- **Expert reports**. A panel can consult independent experts to help resolve a dispute.
- **Binding interpretations**. TPP countries can agree on authoritative interpretations of ISDS provisions that "shall be binding on a tribunal."
- **Consolidation**. A panel can consolidate different claims that "arise out of the same events or circumstances." This protects against harassment through duplicative litigation.

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*

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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.

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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.

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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

[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.*

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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.

http://www.iatp.org/blog/201511/tpp-fine-print-biotech-seed-companies-win-again

TPP Fine Print: Biotech Seed Companies Win Again

Posted November 16, 2015 by Ben Lilliston

After six years of secret negotiations, the dozen countries that make up the Trans Pacific Partnership (TPP) have finally made the text public. The full implications of the broad-reaching, 30 chapter, 5000-plus page deal will be analyzed intensely in the coming months leading up to a U.S. Congressional up or down vote. Big concerns about the deal's impact on public health, workers, the environment and the legal rights of corporations are already being raised. A close look at the Intellectual Property Rights (IPR) chapter shows how just a few lines in TPP can turn into a big win for an industry—in this case, the biotech seed industry.

The IPR chapter, a draft version was posted by Wikileaks last month, has already received considerable criticism because of its lengthy patent protection for drugs, which could lead to high costs of essential medicines. But the chapter also requires patent protection important to another sector—the seed biotech industry. Companies like Monsanto and Syngenta depend on strong patenting regimes to control the market for genetically engineered crops. The IPR chapter largely reflects the wish list that BIO, the biotech industry's powerful trade group, outlined when TPP negotiations began in 2009.

The IP chapter requires all 12 TPP countries to join a number of global intellectual property treaties. One of those treaties is the International Convention for the Protection of New Varieties of Plants 1991 (UPOV 91). That agreement updated the 1978 treaty in several important ways that emphasize the rights of seed companies over farmers' rights, according to an analysis by Public Citizen and Third World Network (TWN). UPOV91 requires IP protection to be provided for all plant varieties; it requires protection for 20 to 25 years; and it stops farmers and breeders from exchanging protected seeds, a common practice of farmers in many countries around the world.

Of the TPP countries, Brunei, Malaysia, Mexico and New Zealand are not yet members of the UPOV 91. Chile is also not yet a member, though it is already required to become a member under a previous Free Trade Agreement with the U.S. Under the TPP, these countries could face major changes to laws and rules that protect farmers' rights when it comes to plant breeding and seed saving. The TPP IPR chapter also requires any additional countries that join the TPP to become members of UPOV 91. Countries currently considering joining the TPP include South Korea, Indonesia, the Philippines and Taiwan—none of which are members of UPOV 91.

In order to join the UPOV91, countries have to apply to the UPOV91 Office of the Union, which then reviews the country's laws on plant variety protection and declares which laws need to be changed, or added, in order to come into compliance and join the convention. Malaysia has

already gone through this process, and in order to join the treaty, they will have to change their laws in order to: lengthen the patent time protection for seed companies, prohibit farmers from exchanging seed they have saved and remove anti-biopiracy provisions which protect plants from patents.

Changes in plant patent laws could become very controversial in Mexico. Farm groups in Mexico, considered the birthplace of corn, are leading a campaign called "Sin Maíz, No Hay Paíz" (Without corn, there is no country) that advocates for a ban on GMO corn. They have been successful, and the ban is current facing a legal challenge. Farm organizations argue that the country's biodiversity and genetic resources are at risk from contamination of GMO corn. Monsanto hopes to double its sales in Mexico over the next five years if the ban is struck down.

Strong opposition may also arise in New Zealand, which currently has not approved any GMO crops for commercialization, requires any imported GMO foods to be labeled, and uses its GMO-free status as an export marketing tool. Brunei is just developing its regulatory framework for GMO crops.

The TPP also requires countries and any future country participants to join the Patent Cooperation Treaty (PCT) and the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, which would make it easier to apply for a patent, according to the Public Citizen/Third World Network analysis. Malaysia, New Zealand and Vietnam have not joined the Budapest Treaty.

The argument for patent protection is that it spurs innovation, but that assertion is questionable in the case of plants. A 2011 study looking at vegetable varieties over the last century found a "clear demonstration that massive amounts of innovation occur without the stimulus of patent or PVP law." In the U.S., where strong plant patent protection exists and GMOs for commodity crops are widely used, research published this year by Kansas State University found that U.S. cropping systems are becoming markedly less diverse and the "homogenization of agricultural production systems" could have "far-reaching consequences" for the food system.

Maintaining genetic diversity in crop and animal production is seen as a critical tool for adapting to climate change, according to a report published earlier this year by the FAO. The report concluded:

It is likely that climate change will necessitate more international exchanges of genetic resources as countries seek to obtain well-adapted crops, livestock, trees and aquatic organisms. The prospect of greater interdependence in the use of genetic resources in the future underscores the importance of international cooperation in their management today and of ensuring that mechanisms are in place to allow fair and equitable—and ecologically appropriate—transfer of these resources internationally.

The international battle over the patenting of plants by biotech companies versus the rights of farmers is not a new one. The biotech industry has won a favorable patent regime through free trade agreements, and through the World Trade Organization's TRIPS (Trade Related Aspects of Intellectual Property Rights) Agreement. Farmers have fought to protect their rights on seeds

through the International Treaty on Plant Genetic Resources, which grants farmers the right to save and share seed. The conflict between these international regimes continues.

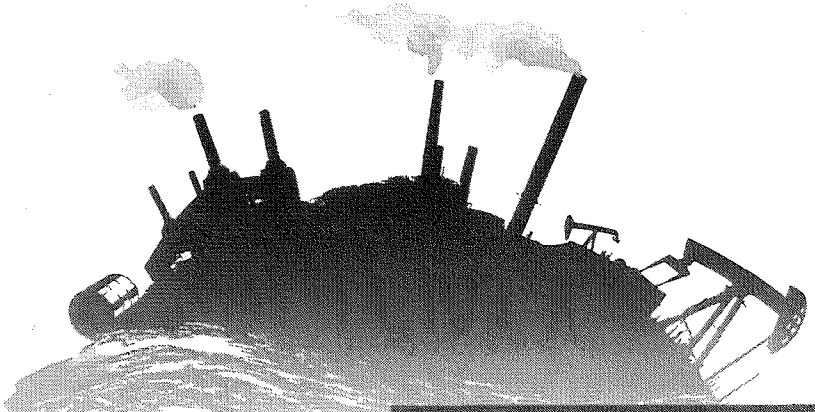
This past summer, the Alliance for Food Sovereignty in Africa (AFSA) strongly opposed an effort by some African governments to comply with UPOV 91 through stronger patent protection. According to AFSA, the initiative's "underlying imperatives are to increase corporate seed imports, reduce breeding activity at the national level, and facilitate the monopoly by foreign companies of local seed systems and the disruption of traditional farming systems." AFSA's concerns were consistent with a recent paper by Australian researchers looking at the impact of intellectual property law on food security in Least Developed Countries. The paper concluded that the one-size-fits-all approach to plant patents found in trade rules like TRIPS do not work in countries reliant on traditional agriculture.

The UN Special Rapporteur on the Right to Food has been particularly critical of trade agreements that require the implementation of UPOV 91, urging instead that countries undertake a Human Rights Assessment (including the Right to Food) prior to signing any trade agreements. In 2012, the FAO's Committee on Food Security's High Level Panel of Experts called for countries to adopt the International Treaty on Plant Genetic Resources for Food and Agriculture and urgently implement provisions on farmers' rights to conserve and curate genetic resources in order to adapt to climate change.

The U.S. government's requirement that countries join UPOV 91 as part of free trade agreements is starting to see resistance. Last year, Guatemala repealed plant variety legislation, known as the Monsanto law. That law had been passed in order for Guatemala to join UPOV 91 as required under the Central American Free Trade Agreement (CAFTA). The law had sparked massive protests from farmers and indigenous movements.

The TPP IPR chapter represents yet another in a long list of actions by the U.S. government to advocate on behalf of biotech seed companies—including a WTO challenge to European GMO regulations and using State Department attachés to pressure governments to accept GMOs. The industry's influence within the office of the U.S. Trade Representative (USTR) is considerable. USTR's Assistant Agriculture Specialist is a former VP at BIO, the industry's lobbying group. BIO also sits on the USTR's Advisory Committee on Intellectual Property and has had access to the TPP negotiations and text over the last six years.

The TPP's IPR chapter provides a glimpse into what this new mega free trade deal is all about. The chapter's requirement that countries grant patent protection for multinational biotech seed companies has little to do with trade and nothing to do with respecting farmers' innovations, their livelihoods or countries' food security. It is about asserting, in a very raw way, corporate power over sovereign nations and the farmers who live there.



POLLUTERS' PARADISE

DECEMBER 2015

How investor rights in EU trade deals sabotage the fight for energy transition

Avoiding catastrophic climate change is the defining challenge of our time. If we are to have a chance of preventing extremely dangerous levels of global warming, much of the world's fossil fuels – oil, coal and gas – must be left in the ground, unexploited. Societies need to move to an energy system based on renewable sources like sun, wind and water.

This colossal change will require strong action from public authorities. But their ability to introduce the right laws and regulations is severely constrained by a little-known but very powerful legal system. This international investment regime has ensnared many countries in its legal nets in the last decades.

Thousands of trade and investment agreements signed between countries allow multinational companies to sue governments if changes in policy – even in rules to protect the environment or fight climate change – are deemed to reduce their profits. By the end of 2014, there were 608 of these investor lawsuits known to be taking place within international tribunals. The costs of these suits weigh heavily on governments, in the form of hefty legal bills and weakened social and environmental regulations.

A growing number of investor-state lawsuits target government initiatives in the energy sector, ranging from the phase out of nuclear power to moratoria on environmentally-risky shale gas development ('fracking'). As law firms make money each time that an investor sues a state, this encourages more and more corporate lawsuits: for example, over legislation in the renewables sector.

Despite the evident risk to energy transition, even more trade and investment deals are in the pipeline that would empower corporations to challenge strong government action on climate change. Amongst them is the Transatlantic Trade and Investment Partnership (TTIP), currently under negotiation between the EU and the US, and the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada, for which ratification could start in 2016.

Yet while big polluters are lobbying heavily for these deals, a growing movement is turning against the corporate power grab. Indeed, there is now more public scrutiny and debate about trade and investment agreements than there has been in years.

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Association Internationale de Techniciens, Experts et Chercheurs
Corporate Europe Observatory
Power Shift
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Box 1: ENERGY POLICIES UNDER ATTACK IN INVESTOR-STATE DISPUTES

Corporations against environmental restrictions on coal – Vattenfall vs. Germany I: In 2009, Swedish energy multinational Vattenfall sued the German government, seeking €1.4 billion in compensation for environmental restrictions imposed on one of its coal-fired power plants. The case, which was based on the Energy Charter Treaty, a multilateral agreement about investments in the energy sector, was settled after Germany agreed to water down the environmental standards.[1]

Corporations against phasing out nuclear energy – Vattenfall vs. Germany II: In 2012, Vattenfall launched a second lawsuit via the Energy Charter Treaty, seeking €4.7 billion for lost profits related to two of its nuclear power plants. The legal action came after Germany decided to phase out nuclear energy, following the Fukushima nuclear disaster. The German government has already spent over €3.2 million to defend the case, and expects a total of €9 million in legal costs.[2]

Corporations against fracking moratoria – Lone Pine vs. Canada: In 2011, the government of the Canadian province of Quebec responded to concerns over water pollution by implementing a moratorium on the use of hydraulic fracturing ('fracking') for oil and gas exploration. In 2012, the Calgary-based Lone Pine Resources energy company filed an investor-state lawsuit based on the North American Free Trade Agreement (NAFTA), challenging the moratorium. Lone Pine, which filed the case via an incorporation in the US tax haven Delaware, is seeking US$109.8 million plus interest in damages.[3]

Corporations against 'buy local' rules – Mesa Power vs. Canada: In 2011, Texas-based energy company Mesa Power filed a NAFTA claim against Canada for a total of CAD$775 million. The case concerns the Province of Ontario's Green Energy and Green Economy Act. Amongst other objections, Mesa Power is challenging 'buy local' requirements obliging wind and solar firms to source parts of their materials from local suppliers in exchange for access to certain support schemes.[4] These rules helped to maximise the economic and social benefits of green investments in the region, which initially helped gather broad political support for the Act.

Corporations against research requirements – Mobil Investments and Murphy Oil vs. Canada: In 2007, Mobil Investments (a subsidiary of the world's richest energy company, US oil giant ExxonMobil) and Murphy Oil Corporation sued Canada under NAFTA, challenging a 2004 requirement adopted by the Province of Newfoundland and Labrador that off-shore oil firms must invest a portion of revenues in local research and development. NAFTA (implemented in 1994) included a 'reservation' for such requirements. But the arbitration tribunal ruled against Canada, arguing that the research rules were illegal under NAFTA and that the reservation only protected rules that were in place in 1994. Canada was ordered to pay CAD$17.3 million plus interest in compensation.[5]

Corporations against oil taxes – Perenco vs. Ecuador: In 2008, Anglo-French company Perenco sued Ecuador based on its bilateral investment treaty with France. The case is one of several concerning the country's tax on windfall profits in the oil sector. While the tribunal has already ruled against Ecuador (the compensation sum is still to be determined), it has also indicated that it holds Perenco liable for breaching Ecuadorian environmental law. Ecuador had claimed that Perenco's oil fields had created an "environmental catastrophe" in the Amazon.[6]

More and more investment disputes are being filed (see Box 2 on page 4), and many of them are initiated by fossil fuel and energy companies. As Lexpert, an online news portal about the business of law, recently noted: "If a single industrial sector might be called the cradle of international ...arbitration, it would be the energy business. Especially oil and gas."[7] In short, the energy sector is driving the growth in international arbitration.

> "Energy companies are particularly keen to turn to arbitration."
>
> *Tom Sikora, counsel with ExxonMobil*[8]

In November 2015, nearly half of all cases pending at the World Bank's International Centre for Settlement of Investment Disputes (ICSID), where most investor-state disputes are tried, related to oil, mining, gas, electric power and other energy.[9] Challenges relating to the generation and supply of energy have surged in recent years: around 30 per cent of the new cases filed at ICSID in the last two years were energy-related – compared to between 5 and 13 per cent in the previous years.[10] Looking at the full history of all known investor-state lawsuits globally, the Energy Charter Treaty – a multilateral treaty signed after the Cold War to integrate the Soviet and Eastern European energy sectors into Western markets – has become the most frequently invoked legal basis for the corporate claims.[11]

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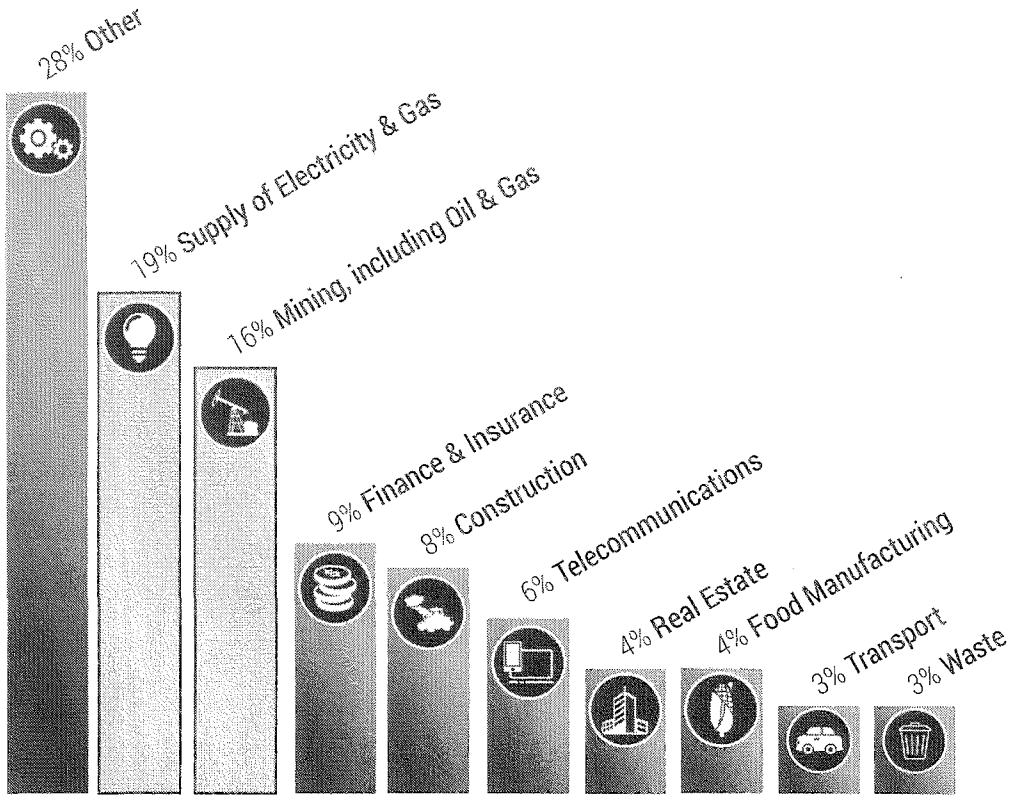
35 PER CENT OF ALL INVESTOR-STATE CLAIMS RELATE TO OIL, MINING, GAS AND ELECTRICITY

Source: UN Conference on Trade and Development (UNCTAD)[12]



"As the anti-fossil fuel forces gain strength, extractive companies are beginning to fight back using a familiar tool: the investor protection provisions in free trade agreements."

Naomi Klein, journalist and author[13]

Fossil fuel and energy companies have used these lawsuits to challenge environmental restrictions on coal-fired power plants, government decisions to phase out nuclear energy, and fracking moratoria (see Box 1). Polluters have also used the threat of costly investor lawsuits in attempts to pressure governments to accept controversial energy projects such as the Keystone XL oil pipeline from Alberta, Canada to the US state of Nebraska.[14] Now these same companies are enthused about the prospect of far-reaching rights for foreign investors in upcoming trade agreements, such as the EU-US free trade deal TTIP and the EU-Canada CETA.

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Box 2: WHAT YOU NEED TO KNOW ABOUT INVESTOR-STATE DISPUTE SETTLEMENT (ISDS)[15]

- States have signed more than **3,200** international investment treaties.
- These treaties give **sweeping powers** to foreign investors, including the ability to file lawsuits directly against states in international tribunals in the case of alleged violations of the treaties' provisions. These international lawsuits usually circumvent local courts.
- Investor-state cases have mushroomed in the last two decades from a total of three known treaty cases in 1997 to a record high of over **50** new claims filed per year in 2012 and 2013.
- Globally, **608** investor-state disputes were counted at the end of 2014, but due to the opacity of the system the actual figure could be much higher.
- Cases are usually decided by a tribunal of three private lawyers, the **arbitrators**, who have a financial stake in the system and a number of conflicts of interest.[16]
- Investors have triumphed in **60 per cent** of investor-state cases where there has been an actual decision on the merits of the case, whereas states have won only **40 per cent** of the time.
- Award figures may reach up to 10 digits. The highest known damages to date, **US$50 billion**, were ordered against Russia, to the former majority owners of oil and gas company Yukos.
- To date, the main financial beneficiaries have been large companies and rich individuals, with **64 per cent** of the money from known awards of **over US$10 million** having gone to companies with over **US$10 billion** in annual revenue. Another **29 per cent** of these awards have gone to companies with between **US$1-10 billion** in annual revenue, or to individuals with over **US$100 million** in net wealth.[17]

POLLUTERS LOBBYING FOR CORPORATE RIGHTS

US-based oil and gas multinational Chevron, for example, is lobbying for "a world-class investment chapter" in TTIP. The company has had several meetings behind closed doors with the EU's TTIP negotiators.[18] Chevron focused its entire response to the US government's TTIP consultation on investment protection, in its opinion "one of our most important issues globally".[19] Chevron is currently suing Ecuador to avoid having to pay US$9.5 billion to clean up oil drilling related contamination in the Amazonian rainforest, as ordered by Ecuadorian courts. The case has been lambasted as an "egregious misuse" of investment arbitration as a way to evade justice.[20]

> **"A strong investment protection regime within the TTIP would allow us and other US businesses to better mitigate the risks associated with large-scale, capital-intensive, and long-term projects overseas."**
> *Chevron to US negotiators*[21]

> **"Investment access and protection rules must be included in the TTIP, especially Investor-to-State Dispute Settlement (ISDS)."**
> *American Petroleum Institute to EU negotiators*[22]

In its contribution to the European Commission's consultation on investor rights in TTIP, Chevron has attacked proposals to reform the system so as to preserve countries' right to regulate,[24] and has even proposed to expand the corporate privileges granted in TTIP.[23] Several other corporate lobby groups in which big oil and energy play an important role have put forward similar positions, amongst them the International Association of Oil and Gas Producers ("working on behalf of the world's oil & gas exploration and production companies"), the European employers' federation BusinessEurope (providing special services to companies such as Areva, EDF, Enel, ExxonMobil, General Electric, Lukoil, Repsol, Shell, Statoil, and Total), the Transatlantic Business Council (representing over 70 Europe and US-based multinationals including BP, Chevron, ExxonMobil, and Statoil), and the European Roundtable of Industrialists (bringing together 50 bosses of EU-headquartered multinationals such as Shell, Repsol, Eni, Engie, Total, and E.ON).[25]

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MAKING ACTION AGAINST CLIMATE CHANGE ILLEGAL

If big business has its way, it will become close to impossible for governments to take the necessary measures to prevent catastrophic global warming. Such measures would massively bite into the profits of fossil fuel and energy companies, potentially violating the investor privileges in treaties such as the proposed TTIP and CETA, and putting governments on the hook for billions.

Take the existing oil, gas and coal reserves. Climate scientists agree that a large share of these resources needs to stay in the ground if we do not want to wreck the planet. They estimate that if we are to stay below a total global temperature increase of two degrees, humankind can only emit 565 more gigatons of CO2 into the atmosphere. However the amount of carbon that is already in the reserves of the major oil, gas and coal companies is much higher than that, totalling 2,795 gigatons. This means that the fossil fuel industry has five times as much oil, coal and gas assets in its books as climate scientists think is safe to burn.[26] Preventing the exploitation of these assets – for example through hefty taxes, by forcing plants to close down, or by adopting other rules about the extraction, sale or trade of dirty fuels – would profoundly eat into corporate profits. And this in turn would potentially make governments liable for breaching several provisions in trade and investment agreements (see Box 3 on page 6).

> "Current trade and investment rules provide legal grounds for foreign corporations to fight virtually any attempt by governments to restrict the exploitation of fossil fuels."
> *Naomi Klein, journalist and author*[27]

Or take the example of renewable energy. Getting us off fossil fuels and onto the green energy path will require a range of aggressive steps – from price guarantees to straight subsidies – in order to give green energy a fair shot at competing. But these types of regulatory measures could be penalised, as they violate the standard provisions in international investment treaties (see Box 3). As one of the world's busiest law firms in investor-state lawsuits, K&L Gates, writes: "With respect to ... changes in the renewable energy sector, international investment treaties could be of assistance ... in one of the following two ways. They could be used either as a tool of pressure against further governmental action in the green energy sector, or, alternatively, they could be considered as an exit strategy, which allows an investor to recoup a part or the totality of its loss associated with the frustrated project."[28]

LEGAL SHARKS CIRCLING ENERGY TRANSITION

Several international law firms are already alerting multinational corporations to the investment arbitration regime as a potential route to defend their profits in the energy sector. For the lawyers, this is a great opportunity to trawl for business. Due to the explosion in the number of international investment disputes against states over the past two decades, investment arbitration has become a money-making machine in its own right. Legal costs for investor-state disputes average over US$8 million per suit, and can exceed US$30 million in some cases. The tabs racked up by elite law firms can be US$1,000 per hour, per lawyer – with whole teams handling cases. The arbitrators, the lawyers who sit on the tribunals that ultimately decide the cases, also earn handsome fees: at the most frequently used tribunal for investor-state claims, the ICSID, arbitrators earn US$3,000 per day.[29]

> "Should you let a group of foolish lawyers interfere with saving the planet?"
> *Nobel Prize-winning economist Joseph Stiglitz*[30]

DISSUADING GOVERNMENTS FROM CLIMATE ACTION

In the context of energy crises and transitions, arbitration lawyers have also encouraged their clients to use the threat of a costly lawsuit as a way to scare governments into submission. Law firm Steptoe & Johnson, for example, praised investment protection "as a highly important tool" for energy producers and their lobby groups "in advocating against legislative changes to renewable energy regulations".[31] These changes could be anything, from renewable energy targets to subsidies.

Global law firm Dentons' 'practical tip' for investors affected by energy subsidy cuts reads like this: "In considering whether to bring a claim ... investors should bear in mind that around 30 to 40 per cent of investment disputes typically settle before a final award is issued. Commencing a claim can create leverage to help the investor reach a satisfactory result."[32]

> "Chevron argues that the mere existence of ISDS is important as it acts as a deterrent."
> *EU Commission official about a meeting with Chevron on ISDS in TTIP, 29 April 2014*[33]

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One can easily imagine how companies, seeing their extractive dreams threatened by democratic opposition or tough anti-pollution regulations, could file, or threaten to file, costly investor lawsuits to dissuade governments from strong action to combat climate change. French multinational Total and US-based oil and gas company Schuepbach, for example, have already challenged the introduction of a ban on fracking in the French courts.[34] The inclusion of investor-state dispute settlement in more trade deals such as TTIP would give corporations an extra tool – and in some cases a second chance – to challenge public interest policies.

"It may well be possible to use investment treaty protections as a tool to assist lobbying efforts to prevent wrongful regulatory change."

Law firm Steptoe & Johnson on "Foreign Investors' Options to Deal with Regulatory Changes in the Renewable Energy Sector"[35]

Box 3: A HIT LIST OF MEASURES IN THE ENERGY SECTOR FOR INVESTMENT ARBITRATION LAWYERS

Renewable energy targets: In a briefing about "foreign investors' options to deal with regulatory changes in the renewable energy sector", US-based law firm Steptoe & Johnson has explained to producers of dirty energy that they "may well have strong arguments" for making the case that the introduction of binding production targets for renewable energy violated their "legitimate expectations that the proportion of energy from non-renewable sources would not be decreased". According to Steptoe, green energy targets could result in a breach of the 'fair and equitable treatment' standard in investment treaties, potentially paving the way for multibillion-euro compensation awards.[36]

Subsidy cuts: Dozens of global law firms have alerted their multinational clients to "international investment treaties as a possible shield against government cutbacks in subsidies for the green energy sector",[37] specifically mentioning curtailed incentive schemes in the renewables sector in Spain, the Czech Republic, Italy, Romania, Greece, and Bulgaria (see Box 4).[38] The arguments put forward by the lawyers – that the policy changes violate the 'fair and equitable treatment' standard and amount to indirect expropriation in that their effect is to deprive the investment of its economic substance – could easily apply to cutbacks in state support for fossil fuels such as coal.

Rejection of dirty energy projects: When indications mounted in 2015 that US President Obama would reject the controversial Canada-US Keystone XL pipeline due to environmental concerns, the arbitration industry started to bang the war drums. "With veto, it's time for the NAFTA option," wrote investment lawyer Todd Weiler. He encouraged project developer TransCanada to sue the US for discrimination (because the US had previously approved pipeline projects that were similar to Keystone) and for the violation of NAFTA's fair and equitable treatment standard ("which includes a prohibition against exercising legitimate regulatory authority for an improper purpose" such as pleasing "the Democratic Party's most generous campaign donors"). Weiler suggested that TransCanada's lawyers should quickly "pose awkward discovery questions" and demand documents from the US, as "refusal to fully comply with such demands can be construed as an admission of the facts in the claimant's case."[39]

Fossil fuel taxes: Investment lawyers regularly alert companies to international arbitration as a potential forum to challenge taxes on fossil fuels. As a lawyer of US-based law firm King & Spalding explains: "The economics of an independent power project or of an oil and gas project can be severely impacted if a host State changes the tax regime applicable to the project after an investor has committed its capital." While some agreements explicitly exclude tax matters from their scope, according to the lawyer, contracts with "specific stabilization commitments" can fill the gap and protect investors from "adverse changes" in tax regimes.[40] One can easily see how such arguments could be used to squash hefty taxes intended to prevent the exploitation of more fossil fuels.

Exits from dirty energy: When Swedish energy firm Vattenfall sued Germany over its phase out of nuclear power (see Box 1 on page 2), law firm Baker & McKenzie outlined "the possible routes that may be taken in the English courts if the UK government were to take a similar course of action."[41]

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Box 4: COMBATING CLIMATE CHANGE THROUGH INVESTMENT ARBITRATION?

Several EU states are currently being sued over rolled-back incentives for renewable energy production which proved too costly in times of economic crises. Spain is the defendant in more than 20 known claims, the Czech Republic in seven, Italy in three and Bulgaria in two. Investment lawyers have referred to these and other cases to point out that investor-state claims could be an effective tool to force states to take the necessary steps to combat climate change.[42]

Renewable energy cooperatives and environmental organisations have indeed condemned the Spanish and other governments for curbing subsidies to an industry that is seen as a real alternative to dirty energy and the climate crisis. Ordinary citizens who had invested in the sector were also massively affected by the cuts in support schemes. However, the general population has no recourse to investor-state arbitration, while powerful international investors have the resources and legal avenues to sue.

It is also important to note that several of the lawsuits in the renewables sector were launched by speculative funds trying to make windfall profits. Even though they invested when the countries were already in full-blown crisis mode and were busy cutting the support schemes, the funds are now claiming that their expectations of profits were undermined by the change in government policy.[43] This speculative use of investment protection is fostered by specialised companies such as European Solar Holdings, which advertises itself as a "vehicle for yield-seeking investors into renewable energy assets in the EU" with the "strongest possible investment protection currently available".[44] But state support should go to local and national renewable energy initiatives, and not to international investment funds seeking to ensure big profits and risk-free business protected by investment agreements.

Also, private equity investors and investment fund managers are interested in businesses that yield high returns, and not in ethical investment. It just happened that this business was renewable energy in countries like Spain. Ian Simm, Chief Executive of Impax Asset Management, one of the funds suing Spain, puts it clearly: "We don't have an ethical mandate per se. ... We're trying to make money for investors in this area [energy, water, food and waste]. We are often attractive for ethical investors, because what we do fits their objectives, but we also manage funds for investors who would say they are agnostic on ethical investing, at best! They're attracted by exposure to a high growth area. ... They ought to be able to make good, if not better, returns in the long term from this area than from anything else."[45]

As a result, other analysts have highlighted the risks that investment arbitration poses to countries' ability to combat climate change. Gus van Harten, an investment law expert teaching at the Osgoode Hall Law School in Toronto, Canada, has argued that "faced with risks of uncapped financial liability due to ISDS claims, states may be deterred from implementing measures to fulfil their climate change responsibilities". He has developed an exemption clause intended to protect a future climate agreement from the adverse affects of investor-state dispute settlement.[46] In October 2015, the European Parliament adopted a resolution including this 'carve-out'.[47]

> "Faced with risks of uncapped financial liability due to ISDS claims, states may be deterred from implementing measures to fulfil their climate change responsibilities."
>
> *Gus van Harten, Professor at Osgoode Hall Law School*

GROWING PUBLIC OUTCRY

As corporate lawyers and dirty energy producers lick their lips in anticipation of more rights for foreign investors in trade deals such as TTIP and CETA, a growing movement around the world is becoming attuned to the democratic threat represented by these treaties. Indeed, there is now more public scrutiny and debate about trade and investment agreements than there has been in years.

More than 3.2 million people across the EU have signed a petition against TTIP and CETA "because they include several critical issues such as investor-state dispute settlement ... that pose a threat to democracy and the rule of law".[48] When the European Commission organised a public consultation on the issue in 2014, the vast majority of the 150,000 contributions protested against the proposed excessive rights for foreign investors in TTIP. It was not only trade unions, consumer and health groups, environmentalists, and digital rights activists that spoke out, but businesses and governments as well.[49]

The US National Conference of State Legislatures, which represents the legislative bodies in all 50 states, has also announced that it "will not support any [trade agreement] that provides for investor-state dispute resolution" because it interferes with their "capacity and responsibility as state legislature to enact and enforce fair, nondiscriminatory rules that protect the public health, safety and welfare, assure worker health and safety, and protect the environment".[50]

> **"Why create these rigged, pseudo-courts at all? What's so wrong with the US judicial system? Nothing, actually."**
> *Elizabeth Warren, Democratic Senator from the United States*[51]

Some governments, too, have realised the injustices of investment arbitration and are trying to get rid of the system. South Africa, Indonesia, Bolivia, Ecuador and Venezuela have terminated several bilateral investment treaties. South Africa has developed an investment bill that does away with some of the fundamental and most dangerous clauses in international investment law. India's new draft model investment treaty does the same.[52] In Europe, Italy has withdrawn from the Energy Charter Treaty (ECT), notably after having been hit by ECT-based claims in the renewables sector.[53]

A GLOBAL CORPORATE BILL OF RIGHTS

Still, many of our governments are determined to hand out even more dangerous legal weapons to corporations in the form of new and expanded trade deals. The CETA deal between the EU and Canada, for which ratification could start in 2016, empowers foreign investors to bypass local courts and sue states directly in international tribunals when democratic decisions impact their expected profits.[54] The Trans-Pacific Partnership (TPP), which was recently concluded by the US and 11 other countries from the Pacific Rim, does the same.[55] The US government and the European Commission seem determined to enshrine similarly excessive investor rights in the proposed TTIP.

DESPITE THE REFORM TALK, ISDS IS AS ALIVE AND DANGEROUS AS EVER

In the face of fierce opposition to the investor rights provisions in agreements such as CETA and TTIP, the European Commission and some EU member states have come up with a number of proposals for 'reforming' the system. But these proposals do not reduce the risk that exclusive corporate rights pose to democracy, public budgets and public policy, including in the energy sector. Here are four reasons why:

1. ***The EU's proposals contain the same substantive investor rights that corporations have been referring to when challenging measures to protect the public interest in previous cases.*** Nothing in the EU's proposals would stop investors from attacking policies such as fracking moratoria, phase-outs of dirty energy, or measures to rapidly move away from fossil fuels.

Box 5: WHAT DIFFERENCE DO CETA AND TTIP MAKE?

While existing trade and investment treaties already severely limit the policy space that governments have to fight climate change, the inclusion of investor-state dispute settlement (ISDS) in CETA and TTIP would massively expand the investment arbitration system – and multiply liability and financial risks for governments on both sides of the Atlantic.

- So far, only **9** EU member states, all of them Eastern European, have a bilateral investment treaty with the US;[56] only **8** have one with Canada.[57] These treaties cover a mere one percent of US and Canadian investment in the EU. The investor rights included in CETA and TTIP would bring that coverage to 100 per cent.
- Of the **51,495** US-owned subsidiaries currently operating in the EU, more than **47,000** would be newly empowered to launch ISDS attacks on European policies and government actions.[58]
- With CETA, **four out of five** US firms operating in the EU – that is a total of **41,811** – could become eligible for an ISDS case against the EU and its members if investments are structured accordingly.[59]
- EU, US and Canadian companies are already the most frequent users of investment arbitration. They are responsible for launching **over 80 per cent** of all known investor-state disputes globally.[60]
- A number of mega treaties currently under negotiation (including TTIP) are together estimated to expand ISDS coverage to **over 80 per cent** of the world's investment flows – from a mere **15-20 per cent** coverage today despite thousands of existing treaties.[61]

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2. ***Nothing in CETA or in the EU's TTIP proposal would stop governments from 'voluntarily' repealing measures when a lawsuit has been filed or threatened by a deep-pocketed company.*** Examples of such 'regulatory chill' include the watering down of environmental restrictions for a coal-fired power plant when Germany settled the first Vattenfall claim (see Box 1 on page 2), as well as New Zealand's announcement that it will delay its 'plain tobacco packaging' legislation until tobacco giant Philip Morris' claim against Australia's anti-smoking rules has been resolved.[62]

3. ***The people deciding future CETA and TTIP lawsuits will have strong incentives to interpret the law in favour of the investor,*** as the arbitrators (re-labelled 'judges' in the Commission's latest proposal for TTIP) are paid per case, usually earning US$3,000 a day. In a one-sided system in which only investors can sue, this is a strong incentive for pro-investor rulings that pave the way for additional future claims – and more appointments, money and power for the arbitrators.

4. ***Neither CETA nor the Commission's TTIP proposal contain meaningful measures to reduce the risks of investor-state disputes for public budgets.*** Future damages awards could amount to serious raids on public budgets (see Box 2 on page 4). Tribunals could arguably even demand compensation for expected future profits.

Overall, the EU's 'reforms' of the investment arbitration regime do not reduce the risks for public interest legislation, taxpayers and democracy. They are purely an attempt to salvage an increasingly-contested legal regime, concocted to enrich a small elite, by making it more acceptable with reforms around the edges.[63]

> "If the trade rules don't permit all kinds of important measures to deal with climate change – and they don't – then the trade rules obviously have to be rewritten. Because there is no way in the world that we can have a sustainable economy and maintain international trade rules as they are. There's no way at all."
>
> *Steven Shrybman, lawyer*[64]

HOW TRADE TRUMPS THE PLANET

Extreme investor rights are not the only elements in international trade deals with the potential to sabotage energy transitions. The aggressive protection for patents in the intellectual property sections of these agreements impede the free transfer of green technologies. Public procurement provisions can stand in the way of 'buy local' renewables programmes, which are often needed to convince local politicians to support green energy. Energy chapters like the one foreseen in TTIP can prevent restrictions on oil, coal and gas exports, locking in yet more fossil fuel dependency. And TTIP's proposed regulatory cooperation chapter could give corporations extensive new rights that could kill any prospective energy transition measures at birth – from strict energy efficiency standards to financial rules on dirty energy.[65]

In fact, the green energy programmes needed to lower global emissions have increasingly been challenged under the World Trade Organisation (WTO). The US for example has attacked China's wind subsidy programme as well as India's Solar Mission. India has in turn taken aim at green energy programmes in the US, and China has objected to various renewable energy programmes in the EU. And Japan and the EU have challenged the Green Energy and Green Economy Act in the Canadian province of Ontario, which has also been targeted in an investor-state dispute (see Box 1 on page 2).

> "This doesn't change anything because the standards on the basis of which judgements are rendered remain the same."
>
> *Nigel Blackaby, lawyer with Freshfields on the EU's proposal for an investment court in TTIP*[66]

NO MORE SPECIAL RIGHTS FOR POLLUTERS

It is high time that governments, parliaments, and the public grasp the political and financial risks of the existing trade and investment regime. In a time when all attention should be focused on averting a global climate catastrophe, there is simply no space for agreements that would send emissions soaring and make many solutions to climate change illegal. Existing treaties that allow private companies to sue governments over laws that impinge on their profits – from tough antipollution regulations to the bold steps needed to move to green energy – should be abolished, and plans for supplemental corporate bills of rights in proposed treaties such as TTIP and CETA should be axed.

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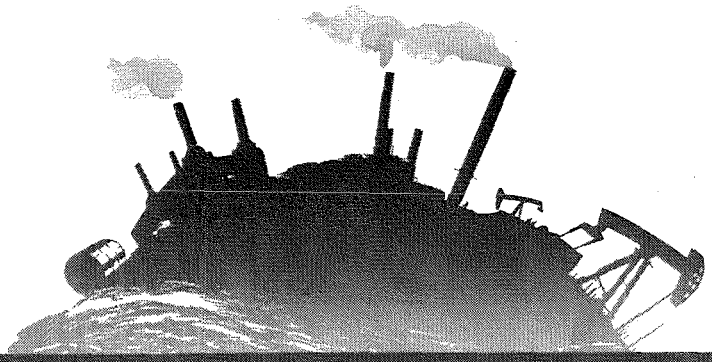

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Hidden in the Omnibus: To Comply With World Trade Organization, Congress Kills Country-of-Origin Meat Labels That 90 Percent of Americans Support

For Immediate Release
Friday, December 18, 2015

WASHINGTON - Congress' elimination of country-of-origin meat labels (COOL) for pork and beef that consumers rely on to make informed choices about their food is a glaring example of how trade agreements can undermine U.S. public interest policies, Public Citizen said today.

A week after the World Trade Organization (WTO) approved $1 billion in annual trade sanctions against the United States unless and until the policy was terminated, a provision to kill the popular consumer labels for beef and pork was tucked into the omnibus package passed today. Three weeks ago, the WTO also issued a final ruling against U.S. dolphin-safe tuna labels, ordering the elimination of the popular environmental policy.

Claims that trade pacts cannot harm U.S. consumer and environmental policies are a mainstay of the administration's effort to build support for the Trans-Pacific Partnership (TPP), which faces opposition from an unprecedentedly diverse coalition of organizations and members of Congress.

In his May 2015 speech at Nike headquarters, President Barack Obama said that critics' warning 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 elimination under orders by the WTO of consumer labels we all rely on in the grocery store 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.

"The omnibus included a dangerous rider that will gut our nation's mandatory Country of Origin Labeling laws. This is wrong. We cannot let trade agreements change our rigorous standards - something that will only become more commonplace under the proposed Trans-Pacific Partnership," said U.S. Rep. Rosa DeLauro (D-Conn.), a leading congressional advocate for consumer protection and food safety.

Implementation of the TPP would dramatically increase the prospect of U.S. public interest policies being undermined. The TPP includes constraints on food safety that extend beyond the

WTO. The pact would roll back the environmental standards included even in George W. Bush's trade pacts and would empower individual foreign corporations directly to launch attacks on public interest policies using the TPP's controversial investor-state dispute settlement regime.

"These WTO rulings should unite lovers of Flipper and haters of mystery meat with the majority of Americans whose jobs and wages would be undermined by the TPP to ensure Congress does not approve the pact," Wallach said.

Today's congressional action is not a first. 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 merits ruling against COOL in May, Obama's Agriculture Secretary Tom Vilsack also contradicted Obama's claim that trade pacts cannot undermine domestic consumer policies, 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 90 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 and then authorization to impose more than $1 billion in trade sanctions annually against the United States until it weakened or ended COOL.

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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Public Citizen is a national, nonprofit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch and the courts.

http://www.theage.com.au/comment/the-dismissal-of-a-case-against-plain-cigarette-packaging-is-good-news-for-taxpayers-20151218-glrb53.html

The dismissal of a case against plain cigarette packaging is good news for taxpayers

December 20, 2015

Kyla Tienhaara

Australia has prevailed in an international legal dispute brought by tobacco giant Philip Morris. This is good news for the government and for taxpayers, who now won't have to pay a penny to the company in compensation. The government and its legal team should be congratulated for their success and for standing up for health policy in the face of multiple legal challenges.

However, ultimately the decision is more a victory for common sense than a vindication of the government's plain packaging policy. And for several reasons, it provides cold comfort to anyone concerned about investor-state dispute settlement.

For those not familiar with the case, the basics facts are as follows. In 2010, the Labor federal government announced a new policy requiring that all tobacco products be sold in dull brown packages with large health warnings and no logos or other branding except for the name of the product in a plain and simple font. The Tobacco Plain Packaging Act was passed into law in December 2011.

Several tobacco companies accused the government of "expropriating" their intellectual property and launched a case in the High Court. The High Court ruled against the companies in 2012. Five countries (allegedly at the behest of tobacco companies) also launched trade disputes against Australia in the World Trade Organisation. Ukraine has suspended its lawsuit but the others have yet to be resolved.

As if that weren't enough, Philip Morris also initiated separate international arbitration proceedings in June 2011 through ISDS. How it did this is crucial to understanding yesterday's news.

Philip Morris is ostensibly an American company. However, there is no ISDS clause in the Australia-US free trade agreement and the Trans Pacific Partnership was not yet signed when the plain packaging legislation was introduced. The TPP text was only released in November 2015 and has yet to be ratified or come into force. In any case, despite fierce lobbying, the TPP specifically excludes ISDS cases related to the regulation of tobacco products.

With no clear path to arbitration, Philip Morris took the extraordinary measure of restructuring its investment through an Asian subsidiary, based in Hong Kong, in order to take advantage of a bilateral investment treaty signed with Australia in 1993.

While much of what happened in the ISDS case remains under the wraps of a confidentiality order, it appears that Australia was able to convince the tribunal that Philip Morris should not be permitted to plead the merits of its case because it engaged in "treaty shopping". In other words, it was an American investor when plain packaging was introduced and only adopted a "flag of convenience" in order to access arbitration.

Treaty shopping is a serious problem in international arbitration, and tribunals have come to different conclusions about whether or not to permit it. As such, any decision that rejects a company's efforts to shift nationality in this way is to be welcomed.

However, the dismissal of the case on procedural grounds means that we will never get a ruling on the substance of Philip Morris' claims. As such, the award contributes nothing to the bigger debate about the conflict between investment protection and public policy.

Indeed, the company's own press release says as much. Philip Morris International senior vice president and general counsel Marc Firestone has stated that there is "nothing" in the ISDS award "that addresses, let alone validates, plain packaging in Australia or anywhere else".

What this means is that any country that is contemplating plain packaging – France has just joined the list of countries pursuing the policy – still has cause for concern. This is especially the case because tobacco companies don't show any sign of giving up their legal campaign.

In this regard, poor countries are in the worst position because they can't afford even a preliminary defence in an ISDS case. It has been reported that Australia has spent $50 million defending plain packaging in arbitration. Uruguay has been mired in its own dispute with Philip Morris for even longer than Australia and has to rely on funding from a foundation set up by former New York mayor Michael Bloomberg because it can't afford to pay its legal fees.

The high cost of ISDS makes the threat of arbitration a potent tool for the tobacco companies. Political satirist John Oliver revealed earlier this year that several countries including the tiny nation of Togo have been intimidated by the legal threats of tobacco giants. The potential for "regulatory chill" isn't diminished by Australia's victory on Friday.

There are also other reasons why any celebration of this decision should be muted. First, it took more than four years for the tribunal to decide what should have been a fairly straightforward jurisdictional issue. This says a great deal about the claims that arbitration is a more efficient system than domestic courts.

Second, we don't yet know if Australia will be able to recoup its costs – there is no hard and fast "loser pays" rule in ISDS.

I do not highlight these issues because I wish to diminish the hard won success of the government's legal team or dampen the joy that health advocates will undoubtedly feel at being given this "early Christmas present". Rather, I only wish to caution that we should be wary of anyone who suggests that the decision demonstrates that ISDS isn't problematic.

Australia dodged a bullet on this one. That doesn't mean we are bullet-proof.

Dr Kyla Tienhaara is a research fellow at the Regulatory Institutions Network (RegNet), College of Asia and the Pacific, Australian National University.

TPP is a giftwrapped wealth-transfer to China

http://boingboing.net/2015/12/27/tpp-is-a-giftwrapped-wealth-tr.html

5:46 am Sun Dec 27, 2015

Writing in the *Globe and Mail*, University of Toronto Munk Chair of Innovation Studies Dan Breznitz explains how the TPP -- negotiated in secret without any oversight or accountability -- will enrich a few multinationals at the expense of US and Canadian growth, making the whole trade zone less competitive and more ripe to be overtaken by Chinese firms.

In sealing the broken patent and copyright system, the insane trade secrecy regime, and Investor-State Dispute Resolution systems beneath a lacquer of unbudgeable trade obligations, the US government has hung weights around the necks of new entrepreneurs and businesses.

Interestingly, this critique comes from a "Hayekian," right-wing proponent of free market capitalism, who says that by going far beyond trade, this "trade agreement" will cripple the economies of all who sign it.

Finally, the TPP continues to enshrine the very questionable usage of investor-state dispute-settlement mechanisms – special courts in which foreign investors can sue countries, states and local authorities but cannot be sued back. This elevates one economic actor (investors) to a status above all others in an economic transaction, and induces strategic behaviour by investors that aims to influence regulatory decisions, instead of letting consumers make their choices known through the market. There is no economic rationale for these mechanisms, only a very questionable (and extremely inefficient, in cost terms) political gamble that some time in the future, they might put China at a disadvantage. It's time that we put these mechanisms in their proper place – the trash bin of history.

All this extra cost, risk and uncertainty will have chilling effects that will stifle market experimentation. This leads to yet another problematic "benefit" of the TPP: Decreasing the Hayekian (as in Friedrich Hayek) efficiency of the market. That is, the ability of the markets to act as the best-learning and constantly improving system mankind has ever developed.

Inside U.S. Trade today:

The Year Ahead: TTIP In Push For 2016 Deal, Regulatory Agenda May End Up Being Pared Back

December 29, 2015

As the end of 2015 approaches, U.S. and EU trade officials are entering a new year without the "outline" of the Transatlantic Trade and Investment Partnership (TTIP) that political leaders had expressed hope for last summer. But what is becoming clear to both sides is that if a deal is to come together under the Obama administration, it will fall far short of the sweeping U.S.-EU regulatory alignment project that it was initially framed to be.

The plan of action for 2016, as laid out in private conversations by U.S. officials, is not focused on the regulatory cooperation side of the agenda. Instead, it envisions an exchange of modest government procurement market access offers by February. By summer of the new year, the aim is to be in the "middle game" of the negotiations, during which both sides envision having all the text of the deal essentially agreed and further advancement on sensitive areas. Exactly what this advancement would entail is not clear, although the EU has indicated it wants at least some inkling that the U.S. will agree to grant new protections to geographical indications (GIs) in this timeframe. U.S. and EU sources contend the main body of the text could come together rather quickly, and will likely be an amalgam of pieces borrowed from the Trans-Pacific Partnership (TPP) on issues like state-owned enterprises, along with portions on issues like sanitary and phytosanitary (SPS) measures that deal more specifically with U.S.-EU challenges.

Under this plan, the notoriously elastic "end game" would begin in the fall. This will be the final stage where deals are cut on on sensitive agricultural tariff lines, longstanding trade barriers rooted in SPS measures, and other sticking points, sources said. This ambitious scenario foresees the conclusion of the TTIP negotiations during the lame-duck session of Congress, or even just before Obama leaves office in 2017. But what this kind of rush to wrap up would necessarily mean, sources on both sides of the Atlantic say, is that some components of TTIP's regulatory agenda must be left for later — becoming items in a future work program to be taken up by regulators, or else left by the wayside entirely. Whether the EU, which is seen as more wedded to the sectoral regulatory aspect of the talks, is willing to go along with this will depend on both sides' ability to tee up a package that sufficiently addresses other key priorities like procurement so that a scaled-down deal could still be defended as economically meaningful. Already, the U.S. has tamped down expectations for its first procurement offer in February.

Overshadowing all of this is TPP, Obama's legacy trade policy priority. Until the administration can secure Congressional approval of the Pacific deal, observers say it is

unlikely to expend the focus or political capital on issues needed to close a deal with Europe, such as procurement and GIs.
But political leaders on both sides have also framed the TTIP initiative in a broader geopolitical context, with Russia encroaching on Ukraine and the Syrian refugee crisis introducing new challenges to the EU. Advocates for TTIP acknowledge the possibility that substance may be sacrificed if President Obama urges leaders in major members states like Germany, the UK and France to pressure the European Commission to conclude.
At this point, it's doubtful Congress will approve TPP before the November presidential election. That leaves almost no time to conclude a TTIP agreement before Obama's term expires. Bernd Lange, the chair of the European Parliament's International Trade Committee, has said he doubts that TTIP can be concluded in 2016 and that it may be delayed indefinitely if TPP does not pass in 2016 (Inside U.S. Trade , Dec. 18, 2015).

The elections themselves may have an impact, too, said Daniel Hamilton, executive director of the Center for Transatlantic Relations at Johns Hopkins School of Advanced International Studies. If a Republican candidate wins the election — depending on who in the crowded field it is — the EU might hit the brakes knowing that the new administration will surely demand to put its own stamp on the deal.

Progress in the TTIP's so-called "sectoral" regulatory talks — those dealing with the weedy differences in how each side regulates cars, chemicals, pharmaceuticals and other industrial sectors — has been slow. While there are some hints of progress on cars, sources say, regulators particularly on the U.S. side have not gotten the political direction to identify and pursue specific outcomes. As a result, many agree that any sectoral regulatory outcomes will be small if a TTIP deal is wrapped up in 2016. This might suit the U.S. just as well, according to Hamilton. The Obama administration is so keen to say that it achieved a trade deal with the EU "that they're willing to go for 'TTIP light,'" he said in an interview.

From the start, it has been clear that the EU has been more enamored of the "sectoral" aspect of TTIP, claiming this is where the real economic efficiencies and savings for businesses are to be reaped. The EU auto industry, for one, sees this component as essential in order to balance the inevitable tariff cuts. The U.S. tariff on passenger vehicles is 2.5 percent, while the EU tariff is 10 percent. The U.S., while not the rejecting the sectoral approach, has focused intensively on what it calls "regulatory coherence" — the notice-and-comment style procedures followed by U.S. regulatory agencies that U.S. Trade Representative Michael Froman has said the European Commission should mimic.
The U.S. is perceived as needing to secure some outcomes on this objective in order to credibly claim that it has made progress toward greater regulatory alignment with Europe. The European Commission has shown willingness to make its legislative and regulatory procedure more transparent in ways that would partially satisfy U.S. demands, under its own "Better Regulation Agenda" (Inside U.S. Trade , July 10, 2015).

Whether the U.S. is willing to settle for that remains to be seen, although even some of the biggest U.S. business champions on this front privately concede the U.S. is unlikely to

convince the the EU to subject its process of drafting new laws to notice-and-comment style procedures.
Another critical fight that will have to be settled — and has made very little progress, sources close to the talks say— surrounds the issue of what is an "international standard." This battle has played out in the negotiating group on Technical Barriers to Trade (TBT), as well as between private standards groups. At its most basic level, this is a simple question of whether the EU is willing to endorse in its laws and regulations the standards that private-sector industry leaders in the U.S. draw up. In reality, this involves challenging the interests of EU and European national standards-setting bodies that would be loathe to see their role diminished. Froman has made this exceedingly technical fight a priority, highlighting it as a big part of his first major policy speech on TTIP in Europe in October 2013, following the launch of negotiations in July of that year (Inside U.S. Trade, Oct. 4, 2013).

The standards issue is one "which is really down in the weeds, but is also really quite critical," Hamilton said. "They haven't unlocked the door on this yet, but that doesn't mean they can't." The degree to which the EU will make concessions on those sensitive points depends, of course, on what it gets in return. Formally, the EU has rejected the notion of a "TTIP light" agreement. But what exactly TTIP light means is open to interpretation. It may ultimately be that a package that includes new procurement market access, protection for commercially significant GIs, and a few modest sectoral regulatory outcomes is enough for Brussels. Regulators have begun to nibble at the edges of some of these issues. The U.S. Food & Drug Administration (FDA) has been actively assessing whether it can rely more on EU regulators in inspecting the manufacturing practices of EU pharmaceutical firms by observing EU audits; the EU has done the same for the U.S. (Inside U.S. Trade , May 1, 2015).

But FDA by the 2015 was only expected to cover a fraction of the 28 EU members states through these visits. Earlier this year, an FDA official said the agency had not decided whether it could begin to rely on the inspections of certain member states it has reviewed and slowly phase in others. That approach has proved problematic before, over EU claims it would give some companies in those member states an unfair advantage.
In the automobile sector, the main objective of the U.S. and EU industry — to have regulators on both sides recognize each other's standards as effectively equivalent in protecting passengers in a crash — took a big hit this year when a joint project conducted by independent U.S. and EU research institutions concluded data do not support that claim (Inside U.S. Trade, Aug. 14, 2015).

The UK-based consulting firm Transport Research Laboratory (TRL), one of the institutions that participated in that study, has conducted another study on crashworthiness with a different methodology that is still in the process of being reviewed. One industry source said that the U.S. National Highway Traffic Safety Administration (NHTSA) had received a copy of the report but had been silent on it; a TRL spokeswoman on Dec. 22 declined to comment on the conclusions of the study.

The industry source, however, said NHTSA had given signals it was more seriously evaluating the results of a separate study conducted by TRL that aimed to evaluate the effectiveness of a subset of U.S. and EU car safety regulations dealing with visibility and lighting. That study found key differences between these sets of standards in some areas, but also found that interior mirrors provide an equivalent level of safety in the EU and U.S., for instance.

Outside of the TTIP context but related to it, the U.S., EU and Japan have put forward a proposal at the multilateral Working Party 29 body in Geneva that aim to foster smoother implementation of so-called Global Technical Regulations (GTRs) for autos. These are intended to be a way for auto-producing nations to harmonize certain standards, but the system has not delivered on this promise; the U.S. has often ended up altering GTRs prior to adopting them because its regulatory system requires it to take into account input from stakeholders.

A trilateral "white paper" on how to address this issue and others was discussed at the Working Party 29 meeting in November and is expected to see further discussion at a session in March, the industry source said. The U.S. and EU car industries are also hoping to complete by the next TTIP round, slated for the week of February 22, a study showing the potential economic benefits of granting mutual recognition of certain safety standards.

TPP Faces Uncertain Future, With No Signing Date, Objections In Congress

Inside US Trade
Posted: December 30, 2015

The fate of the Trans-Pacific Partnership (TPP) remains up in the air as the new year begins, with no signing date confirmed, Republican members of the U.S. Congress calling for changes or clarifications to certain provisions, and Australia making clear it will not agree to reopen the controversial language on biologic drugs.

All of these factors raise serious doubts about whether Congress can approve the TPP agreement in 2016 as President Obama has said is his goal. On top of that, Senate Majority Leader Mitch McConnell (R-KY) has directly called on the president not submit TPP to Congress before the November 2016 election, although he has held open the possibility it could come up during the lame-duck session of Congress after the election.

The Obama administration has already started to engage with Senate Finance Committee Chairman Orrin Hatch (R-UT) and House Ways & Means Committee Republicans about their objections to TPP, which have mainly focused on the provisions on biologics, financial services and tobacco.

But it remains unclear whether and how the administration will address these objections, and how it would overcome opposition from other TPP countries toward making changes or clarifications to the deal.

One observer said the U.S. would likely have to offer additional concessions to compensate TPP countries for any potential changes, as the U.S. did when it renegotiated the U.S.-Korea free trade agreement.

There is no roadmap yet for how or when Republican objections will be addressed, but congressional staff expect one to emerge in the coming weeks. The U.S. Chamber of Commerce and the National Association of Manufacturers have both held off on coming out with a formal position on TPP in order to see whether and how their members' objections to the trade deal are addressed by the administration.

Some Republican congressional staff have urged the administration not to rush forward with signing the TPP until it is clear how their objections will be addressed.

These staff were dismayed to learn in November that TPP countries were leaning toward signing the deal in New Zealand on Feb. 4, which would be immediately after the 90 day congressional review period expires. Similarly, one TPP government source suggested that the signing might be delayed until the administration can address the objections of members of Congress.

But moving forward with the signing would require the completion of the legal scrub, which is still ongoing. TPP countries were unable to complete the legal scrub at a meeting in an early December in New Zealand as they had hoped, sources said. Efforts are focused on the

painstaking task of checking parties' tariff schedules and lists of non-conforming measures in services and investment.

Some sources have said Japan in particular has taken a hard line by insisting on certain wording during the legal scrub process. One source with experience in legal scrubbing said it is typically hard to wrap up the process until there is a firm date for signing, as one side can always make an argument that further checking and correction is needed.

On biologics, Ways & Means Republicans have asked U.S. Trade Representative Michael Froman whether it would be possible to further define the "other measures" that TPP countries are supposed to provide in addition to five years of market exclusivity in order to deliver a comparable outcome to eight years of protection. This could be done through a side letter or an implementation plan, they have suggested.

But Australian Trade Minister Andrew Robb in a Dec. 19 interview rejected the idea of changing the biologics provisions. He defended the biologics outcome as balanced and argued that Australia's current system provides an equivalent level of protection to eight years.

Robb is one of the few TPP ministers who has publicly responded to the Republican demands for changes on the biologics provisions, although Chile and Peru are likely to take a similar stance. The Obama administration has made clear to some TPP officials that commenting on controversial issues like biologics at this time would only complicate its discussions with congressional Republicans about advancing TPP.

On financial services, U.S. banks and insurances companies along with their supporters in Congress have objected to two provisions in the TPP.

The first is the fact that language in 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.

Resolving the latter issue would require securing more concessions from Malaysia, where the prospects of ratification of TPP are so uncertain that the Malaysian trade minister explicitly held open the possibility in a side letter with the United States that his country may never become a party to the deal.

By contrast, the major hurdle to resolving the server localization issue is the U.S. government rather than objections by other TPP partners.

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

Proponents of banning localization requirements in the financial services sector are seeking to change that provision in TPP as well as to secure such a ban in the Trade in Services Agreement (TISA) and the Transatlantic Trade and Investment Partnership (TTIP) deal with the European Union.

But some advocates of quick congressional action on TPP have suggested that financial services companies should settle for the issue being addressed in TISA and TTIP.

The tobacco issue revolves around language in the TPP agreement that allows governments to block investor-state challenges of their anti-tobacco measures. This language is opposed by tobacco companies, their allies in cross-sectoral business associations and lawmakers from tobacco-producing states.

Thus far, all three major U.S. business associations that have come out with a formal position on TPP have implicitly flagged the tobacco issue as a problem. They are the National Foreign Trade Council, the Emergency Committee for American Trade and the U.S. Council for International Business.

All of these groups have endorsed TPP but noted that the objections flagged by members of Congress will have to be addressed before the deal can be approved.

Similarly, 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 from Republican members.

New GDAE Working Paper

Global Development And Environment Institute
at Tufts University

GDAE

Trading Down:
Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement

Jeronim Capaldo and Alex Izurieta
with Jomo Kwame Sundaram

GDAE Working Paper 16-01
January 2016

The Trans-Pacific Partnership (TPP) now awaiting ratification in the U.S. Congress may result in job losses and rising inequality, weakening rather than strengthening economic growth in the United States, according to a new GDAE Working Paper by GDAE Research Fellow Jeronim Capaldo, Alex Izurieta, and Jomo Kwame Sundaram. The authors also project employment losses and negligible benefits for growth in other participating countries.

These findings contrast with widely cited projections of TPP's effects which suggest GDP gains for all countries after ten years, varying from less than half a percentage point in the United States to 13 percent in Vietnam. However, those projections are based on unrealistic assumptions such as full employment and constant income distribution. Here, the authors employ a more realistic model that incorporates effects on employment and income distribution.

The authors highlight the following effects of TPP:

- TPP would generate *net losses of GDP in the United States and Japan*. For the United States, GDP is projected to be 0.54 percent lower than it would be without TPP, 10 years after the treaty enters into force. Japan's GDP is projected to decrease 0.12 percent.
- *Economic gains would be negligible for other participating countries* – less than one percent over ten years for developed countries and less than three percent for developing countries. These projections corroborate previous findings that any TPP gains would be small for many countries.
- *TPP would lead to employment losses in all countries*, with a total of 771,000 lost jobs. The United States would be the hardest hit, with a loss of

448,000 jobs. Developing economies participating in the agreement would also suffer employment losses, as higher competitive pressures force them to curtail labor incomes and increase production for export.

- *TPP would lead to higher inequality*, as measured by changes in the labor share of national income. Competitive pressures on labor income, combined with employment losses, can be expected to push labor shares lower, redistributing income from labor to capital in all countries. In the United States, this would exacerbate a multi-decade downward trend.
- *TPP would lead to losses in GDP and employment in non-TPP countries*. In large part, the loss in GDP (3.77 percent) and employment (879,000) among non-TPP developed countries would be driven by losses in Europe, while developing country losses in GDP (5.24%) and employment (4.45 million) reflect projected losses in China and India.

These results come from the innovative, and more realistic, United Nations Global Policy Model (GPM), which GDAE operates in collaboration with UNCTAD, the UN body specialized in international trade and finance. A previous Working Paper employed the GPM to project the effects of the Trans-Atlantic Trade and Investment Partnership, raising concerns about the proposed agreement's effects on employment and inequality. The TPP results contrast with mainstream models because those generally use versions of Computable General Equilibrium models (CGE) that exclude by assumption effects on employment.

This study contributes a much-needed economic assessment to the coming debates on TPP.

Empty Promises and Missed Opportunities: An Assessment of the Environmental Chapter of the Trans-Pacific Partnership

Professor Chris Wold*
January 4, 2016

About the Author

Professor Chris Wold has taught International Environmental Law, Trade and the Environment, and other courses since 1994 at Lewis & Clark Law School, home of the country's top-ranked environmental law program. He also directs the International Environmental Law Project, a legal clinic that provides students with practical experience in international environmental law, particularly with respect to climate change, international biodiversity conservation, and issues at the nexus of trade and environmental law. He has been the legal advisor to the Convention on Migratory Species in 2014 and the United Kingdom for the 2001 meeting of the International Whaling Commission. He has also worked with the Ministries of Environment in Bulgaria and Ukraine to review their environmental laws for consistency with their international obligations. In Mauritius, he developed legislation to protect environmentally sensitive areas.

He was appointed to the National Advisory Committee to provide the Environmental Protection Agency with advice on environmental cooperation among the three North American governments. He continues to provide legal and technical advice to small island developing states in the climate change negotiations and to numerous nongovernmental organizations on issues concerning the World Trade Organization, regional free trade agreements, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Convention on Biological Diversity, and the Convention on Migratory Species, among other treaties and international institutions. He is the author of the law school textbook, *Trade and the Environment: Law and Policy* (2d. ed. 2011) and numerous articles exploring the relationship between trade and the environment.

I. Introduction

At the adoption of the Trans-Pacific Partnership (TPP)[1] the Office of the United States Trade Representative (USTR) championed the agreement as "the most robust enforceable environment commitments of any trade agreement in history."[2] The USTR hailed the Environment Chapter as an "historic opportunity to advance conservation and environmental protection across the Asia-Pacific"[3] and claimed that the TPP "establish[es] pioneering new commitments," including commitments to prohibit harmful fisheries subsidies and to take

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[1] Trans-Pacific Partnership, signed October 4, 2015, *available at* https://ustr.gov/tpp/.
[2] USTR, The Trans-Pacific Partnership, Preserving the Environment, 1 (undated) *available at* https://ustr.gov/sites/default/files/TPP-Preserving-the-Environment-Fact-Sheet.pdf.
[3] *Id.* at 2.

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"enhanced actions" to combat wildlife trafficking.[4] Environmental groups have challenged those statements, describing the TPP's Environment Chapter as "toothless,"[5] "largely unenforceable,"[6] and "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."[7]

A good faith interpretation of the TPP's Environment Chapter based on the ordinary meaning of the words and provisions used in the chapter,[8] indicates that the TPP's environmental provisions are, indeed, weak and unlikely to address the problems of illegal wildlife trade, overfishing, and other environmental concerns described, but not meaningfully addressed, in the TPP. Moreover, the history of previous regional free trade agreements, in which similar issues have been addressed and not enforced, further suggests that the Environment Chapter may be full of empty promises. With weak and largely unenforceable provisions, the TPP also represents a missed opportunity to address some of the region's significant environmental problems.

This article assesses five of the main substantive issues of the TPP's Environment Chapter on which environmental groups have commented: the provisions relating to multilateral environmental agreements; illegal, unreported, and unregulated fishing; illegal trade in wildlife; protection of marine animals such as sharks and whales; and climate change. It also analyzes the provisions for enforcement because the USTR has frequently noted the enforceable nature of the substantive provisions.

II. Multilateral Environmental Agreements

The provisions relating to environmental law generally and multilateral environmental agreements (MEAs) specifically are weak in several respects. Generally, the "Parties recognize the need to enhance the mutual supportiveness between trade and environmental law and policies."[9] This provision merely restates public discourse concerning trade and environment issues from the previous 20 years. Indeed, the *Rio Declaration on Environment and Development* from 1992 already calls for States to "cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all

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[4] USTR, Environment (Nov. 5, 2015), *available at* https://medium.com/the-trans-pacific-partnership/environment-a7f25cd180cb#.olc9466pz.

[5] Sierra Club, TPP Text is "Concrete Evidence" of Toxic Deal, at 1 (Nov. 5, 2015), *available at* http://content.sierraclub.org/press-releases/2015/11/sierra-club-tpp-text-concrete-evidence-toxic-deal; Rodrigo Estrada Patiño, Greenpeace Response to the Trans-Pacific Partnership Text (undated), *available at* http://www.greenpeace.org/usa/news/greenpeace-response-to-the-trans-pacific-partnership-text/.

[6] Friends of the Earth, Press Release, (Nov. 5, 2015), *avialable at* http://www.foe.org/news/news-releases/2015-11-trans-pacific-partnership-text-exposes-threat-to-environment.

[7] Defenders of Wildlife, Press Release, Trans-Pacific Partnership Falls Short for Wildlife (Nov. 5, 2015), *available at* https://www.defenders.org/press-release/trans-pacific-partnership-falls-short-wildlife.

[8] The Vienna Convention on the Law of Treaties (Vienna Convention) provides the fundamental rules of treaty interpretation. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27. 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). The most fundamental of all rules of treaty interpretation is the principle that a treaty must be "interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of its object and purpose." *Id.* at art. 31(1).

[9] TPP, *supra* note 1, at art. 20.4(2).

countries, to better address the problems of environmental degradation."[10] *Agenda 21*, also adopted in 1992, states that governments "should continue to strive ... to promote and support policies, domestic and international, that make economic growth and environmental protection mutually supportive."[11]

More specifically, the TPP Parties "affirm" their commitment to implement their MEA obligations.[12] In other provisions, the Parties state that they "shall" take measures to implement measures with respect to specific MEAs; the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[13] the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol),[14] and MARPOL.[15] MEAs, however, already include legally binding international commitments that Parties to those MEAs must adopt and implement.[16] Thus, affirming a commitment to implement those obligations or even obligating Parties to implement those MEAs adds nothing to the quality or nature of those obligations.

Provisions that require TPP Parties to adopt and implement their MEA obligations could be meaningful if supported by meaningful dispute settlement when the relevant MEA does not have its own compliance mechanism or that compliance mechanism is weak. As described in Section VI, however, while the TPP includes dispute settlement provisions, these are highly unlikely to be used; they have never been used in any of the other regional free trade agreements to which the United States is a Party.

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[10] Rio Declaration on Environment and Development, UN DOC A/CONF.151/5/Rev. 1, Principle 12, June 13, 1992, *available at* http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163.

[11] U.N. GAOR, 46th Sess., Agenda Item 21, UN Doc A/Conf.151/26, Chapter 2, para. 9(d) (1992).

[12] TPP, *supra* note 1, at art. 20.4(1).

[13] *Id.* at art. 20.17(2) (stating that "each Party shall adopt, maintain and implement laws, regulations and any other measures to fulfill its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora."). For the provisions of CITES, see Convention on International Trade in Endangered Species of Flora and Fauna, Mar. 3, 1973, 27 U.S.T. 1087; 993 U.N.T.S. 243 (entered into force on July 1, 1975) [hereinafter CITES], *available at* www.cites.org.

[14] TPP, *supra* note 1, at art. 20.5(1) (stating that "each Party shall take measures to control the production and consumption of, and trade in, [ozone depleting] substances" covered by the Montreal Protocol on Substances that Deplete the Ozone Layer. For the provisions of the Montreal Protocol, see Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3, S. TREATY DOC. NO. 10, 100th Cong. 1st Sess. (1987), (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol], *available at* http://ozone.unep.org/en/treaties-and-decisions.

[15] TPP, *supra* note 1, at art. 20.6(1) (stating that "each Party shall take measures to prevent the pollution of the marine environment from ships" as regulated by the agreements collectively referred to as MARPOL). Notably, the TPP omits a commitment to "adopt, maintain, and implement" laws and regulations to reference to four MEAs referenced in prior free trade agreements: the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention), the Convention on the Conservation of Antarctic Living Marine Resources, the International Convention for the Regulation of Whaling, and the Convention for the Establishment of an Inter-American Tropical Tuna Commission. *See, e.g.* Trade Promotion Agreement, U.S.-Peru, art. 18.2, Annex 18.2, Apr. 12, 2006, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/peru/asset_upload_file953_9541.pdf [hereinafter U.S.–Peru FTA]. Presumably these MEAs have been omitted because one or more Parties have not become a Party to the MEA. For example, Brunei Darussalam and Singapore are not Parties to the Ramsar Convention. Ramsar, Country Profiles, *available at* http://www.ramsar.org/country-profiles.

[16] *See, e.g.*, Frederic Kirgis, *Treaties as Binding International Obligation*, ASIL INSIGHTS (May 14, 1997) (explaining why "[t]reaties, including the United Nations Charter, are binding instruments under international law, subject to limited grounds much like those in domestic contract law for invalidating or terminating them."), *available at* https://www.asil.org/insights/volume/2/issue/4/treaties-binding-international-obligation.

In addition, the TPP's standards for bringing a claim for not implementing MEA obligations are weaker than those found in CITES, the Montreal Protocol, and perhaps in MARPOL. For example, to establish a violation of a TPP Party's obligation to "adopt, maintain, and implement" laws relating to CITES,[17] the challenging Party "must demonstrate" that the failure to adopt, maintain, or implement such laws "affect[s] trade or investment between the Parties."[18] Moreover, the TPP limits the dispute settlement procedure to violations of the obligations of CITES, leaving out the failure to comply with resolutions and other recommendations directed to the Parties.[19]

In contrast, the CITES Parties have developed mechanisms for imposing trade sanctions on Parties for failure to implement the provisions of the treaty itself,[20] but also failure to adequate national implementing legislation,[21] failure to comply with recommendations of the Standing Committee,[22] or for other reasons;[23] resort to the compliance procedures does not require a demonstration of an impact on trade or investment. In March 2015, for example, the CITES Standing Committee recommended that the Parties suspend trade in CITES-listed species with the Lao People's Democratic Republic because it had failed to develop a national ivory action plan.[24] Significantly, the Standing Committee took this action even though the requirement to develop such an action plan is not found in the text of CITES itself; it was based on a recommendation of the Standing Committee.[25] No demonstration of a trade impact was required. Clearly, the TPP's provisions to enforce CITES are considerably weaker than those of CITES itself.

Similarly, the TPP requires the Parties to take measures, consistent with the Montreal Protocol, to control the production and consumption of ozone depleting substances (ODSs).[26] A footnote then provides that a TPP Party will be in compliance with this requirement if

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[17] TPP, *supra* note 1, at art. 20.17(2)

[18] *Id.* at art. 20.17(2), fn. 23.

[19] Footnote 23 stipulates that a violation must relate to a failure to adopt, maintain or implement laws or other measures to fulfill an *obligation* of CITES. Article 20.17(3)(a) then provides that TPP Parties "shall endeavor to implement, as appropriate, CITES resolutions."

[20] CITES, *supra* note 13, at art. XIII (establishing a compliance procedure when "the provisions of the present Convention are not being effectively implemented" by a Party).

[21] CITES, *National Laws for Implementation of the Convention*, Resolution Conf. 8.4 (Rev. CoP15) ("Instruct[ing] the Standing Committee to determine which Parties have not adopted appropriate measures for effective implementation of the Convention and to consider appropriate compliance measures, which may include recommendations to suspend trade, in accordance with Resolution Conf. 14.3.").

[22] CITES, *Review of Significant Trade in Specimens of Appendix-II Species*, Resolution Conf. 12.8 (Rev. CoP13) (stating that, "when the Secretariat, having consulted with the Chairman of the Animals or Plants Committee, is not satisfied that a range State has implemented the recommendations made by the Animals or Plants Committee in accordance with paragraph n) or o), it should recommend to the Standing Committee appropriate action, which may include, as a last resort, a suspension of trade in the affected species with that State. On the basis of the report of the Secretariat, the Standing Committee shall decide on appropriate action and make recommendations to the State concerned, or to all Parties.").

[23] *See generally*, CITES, *CITES Compliance Procedures*, Resolution Conf. 14.3 (establishing procedures for assessing compliance with the Convention and for recommending trade sanctions for non-compliance).

[24] CITES, Notification to the Parties No. 2015/013, *Recommendation to Suspend Trade* (Mar. 19, 2015).

[25] CITES Standing Committee, *Elephants*, SC65 Com. 7, at 1 (2014).

[26] TPP, *supra* note 1, at art. 20.5(1).

"maintains" its current implementing measures listed in an Annex.[27] The use of "maintain" is concerning because it suggests that the TPP Parties do not actually need to implement those measures. In contrast, the TPP text relating to CITES requires Parties to "adopt, maintain, and implement" laws relating to CITES.[28] Treaty interpreters are directed to assume that drafters intended differences in meaning when different terms are used.[29] Since "implement" is used with respect to CITES but not with respect to the Montreal Protocol, one must assume that the drafters did not intend to make failure to implement the obligations of the Montreal Protocol subject to dispute settlement under the TPP.

A second footnote further weakens dispute settlement with respect to the Montreal Protocol. That footnote provides that a violation of this obligation only occurs when a Party has not "maintain[ed]" its measures identified in Annex; in addition, another Party "must demonstrate" that the other Party has failed to take measures to control the production and consumption of, and trade in, ODSs "in a manner that is likely to result in adverse effects on human health and the environment, in a manner affecting trade or investment between the Parties."[30] In other words, to violate the TPP's requirement to implement the Montreal Protocol, a Party must not simply be in violation of its obligations under the Montreal Protocol; the violation must *likely* affect human health and the environment *and* affect trade or investment among the Parties. In contrast, Parties to the Montreal Protocol may become the subject of a non-compliance proceeding under the Montreal Protocol simply for failing to comply with one of its obligations,[31] including obligations relating to reporting of data[32] that may not have any impact on human health and the environment and are certainly not going to have any impact on trade and investment. Thus, a violation of the TPP relating to the Montreal Protocol will occur long after a party is subject to the Montreal Protocol's non-compliance procedure.

The TPP Parties also agreed to take measures to prevent pollution from ships consistent with MARPOL.[33] As with the TPP's provisions relating to the Montreal Protocol, a Party is

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[27] *Id.* at art. 20.5(1), fn. 4, Annex 20–A.
[28] *Id.* at art. 20.17(2).
[29] See, *e.g.*, Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (*adopted* May 20, 1996) (using the "ordinary language" rule of interpretation to overturn previous rulings that interpreted the phrase "relating to" as equivalent to "necessary"); Appellate Body Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, ¶ 528, WT/DS320/AB/R (*adopted* Nov. 14, 2008) (concluding that "based on" and "conform to" have distinct meanings).
[30] TPP, *supra* note 1, at art. 20.5(1), fn. 5.
[31] Montreal Protocol, Non-compliance Procedure of the Montreal Protocol, Decision IV/5, as amended by Decision X/10, available at http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/1555. The full text can be found at Montreal Protocol, Non-compliance Procedure (1998), *available at* http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/2117.
[32] At its most recent meeting, the Parties requested the Implementation Committee to review the failure to provide data on consumption and production of ODSs from Democratic Republic of Congo, Dominica, Somalia and Yemen. Decision XXVII/9: Data and information provided by the parties in accordance with Article 7 of the Montreal Protocol, *in* Advance, unedited compilation of the decisions adopted by the Twenty-Seventh Meeting of the Parties to the Montreal Protocol, 9 (Nov. 10, 2015), *available at* http://ozone.unep.org/en/focus.
[33] TPP, *supra* note 1, at art. 20.6(1). Footnote 6 clarifies that

> this provision pertains to pollution regulated by *the International Convention for the Prevention of Pollution from Ships*, done at London, 2 November 1973, as modified by the *Protocol of 1978*

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considered in compliance with this provision if it "maintains" its current implementing measures identified in an Annex.[34] Consequently, the TPP Parties appear to have exempted failures to implement those measures from the TPP's dispute settlement provisions.[35] Also like the provisions relating to the Montreal Protocol, the TPP sets a high bar for alleging a violation of the duty to "maintain[]" measures to control and prevent vessel pollution. To establish a violation of this obligation, a Party "must demonstrate that the other Party has failed to take measures to prevent the pollution of the marine environment from ships in a manner affecting trade or investment between the Parties."[36] But MARPOL already requires a number of compliance strategies, such as the International Air Pollution Prevention Certificate[37] and the International Oil Pollution Prevention (IOPP) Certificate.[38] Moreover, several TPP Parties already have rigorous provisions for ensuring compliance with MARPOL, including the United States.[39] The threshold for investigating and bringing an action are significantly lower than the TPP's standards. For example, the United States may inspect and take enforcement action against ships to determine compliance with Annex VI of MARPOL, which addresses air pollution from ocean-going ships,[40] as well as Annexes I and IV.[41] The provisions of U.S. law do not require a showing of harm to trade or investment.

Moreover, unlike prior bilateral and regional trade agreements the TPP does not carve out an exception for environmental measures adopted pursuant to MEAs. For example, the U.S.–Peru Free Trade Agreement,[42] the U.S.–Colombia Free Trade Agreement,[43] and others[44]

> *relating to the International Convention for the Prevention of Pollution from Ships*, done at London, 17 February 1978, and the *Protocol of 1997 to Amend the International Convention for the Prevention of Pollution from Ships, 1973 as Modified by the Protocol of 1978 relating thereto*, done at London, 26 September 1997 (MARPOL), including any future amendments thereto, as applicable to it.

[34] *Id.* at art. 20.6(1), fn. 7, Annex 20–B.
[35] *See supra* notes 28–29 and accompanying text.
[36] TPP, *supra* note 1, at art. 20.6(1), fn. 8.
[37] Ships larger than 400 gross tons must obtain an International Air Pollution Prevention Certificate (IAPP Certificate), which verifies compliance with vessel air pollution standards. *See* Det Norske Veritas, MARPOL 73/78 ANNEX VI: REGULATIONS FOR THE PREVENTION OF AIR POLLUTION FROM SHIPS 4 (2009).
[38] MARPOL, Annex I- Regulations for the Prevention of Pollution by Oil, Regulation 7, *available at* http://www.marpoltraining.com/MMSKOREAN/MARPOL/Annex_I/r7.htm.
[39] Act to Prevent Pollution from Ships, 33 U.S.C. §§ 1901–1912. Section 1907(f) authorizes the U.S. Coast Guard to inspect ships to determine compliance with Annex VI of MARPOL.
[40] *Id.* (proving that "[t]he Secretary may inspect a ship to which this chapter applies as provided under section 1902(a)(5) of this title, to verify whether the ship is in compliance with Annex VI to the Convention and this chapter.").
[41] *Id.* at §1907(c).
[42] The U.S.–Peru Free Trade Agreement provides as follows:

> In the event of any inconsistency between a Party's obligations under this Agreement and a covered agreement, the Party shall seek to balance its obligations under both agreements, but this shall not preclude the Party from taking a particular measure to comply with its obligations under the covered agreement, provided that the primary purpose of the measure is not to impose a disguised restriction on trade

U.S.–Peru FTA, *supra* note 15, at art. 18.13(4).
[43] Trade Promotion Agreement, U.S.–Colom., arts. 18.13(4), Nov. 22, 2006, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/colombia/asset_upload_file644_10192.pdf [hereinafter U.S.–Colombia FTA].

specifically provide that in the event of an inconsistency between a Party's implementation of its trade obligations and its obligations under seven specified MEAs,[45] the Party is not precluded from complying with its MEA obligation provided the intent is not to impose a disguised restriction on trade.[46] Without a similar provision in the TPP, a TPP Party has greater leeway to challenge another TPP Party for trade restrictions adopted to implement the provisions of an MEA. Such an outcome is inconsistent with the TPP's call to "enhance the mutual supportiveness between trade and environmental law and policies."[47]

The TPP's MEA provisions would have been stronger, and worthy of being called historic, if they had done two things. First, they could have included a binding commitment to implement resolutions adopted by the Parties. Resolutions are the "soft law" of conventions and are considered non-binding. Nonetheless, Parties frequently adopt key definitions, develop new implementation mechanisms, or establish terms of reference for subsidiary bodies necessary for the effective implementation of an MEA. For example, the CITES Parties have defined the phrase "personal and household effects" to harmonize implementation of an important exception to the rules for trade in protected species.[48] They have also developed rules for issuing permits for trade in specimens taken on the high seas.[49] The Montreal Protocol Parties have established criteria and a procedure for requesting and considering requests to use an ozone depleting substance for an "essential use."[50] By harmonizing the rules relating to these and other issues, the Parties create a predictable and accountable regime for trade—the very predictability that the TPP seeks to achieve.[51] Parties are expected to implement these resolutions. Rather than bind the TPP Parties to implement these and other important resolutions, the TPP directs the Parties to "*endeavor to implement, as appropriate*, CITES resolutions that aim to protect and conserve

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[44] See, *e.g.*, Trade Promotion Agreement, U.S.-Pan., arts. 17.13(4), June 28, 2007, *available at* http://www.ustr.gov/sites/default/files/uploads/agreements/fta/panama/asset_upload_file314_10400.pdf [hereinafter U.S.–Panama FTA].

[45] The specified MEAs, described as "covered agreements," are the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, the Convention on Wetlands of International Importance Especially as Waterfowl Habitat, the Convention on the Conservation of Antarctic Marine Living Resources, the International Convention for the Regulation of Whaling, and the Convention for the Establishment of an Inter-American Tropical Tuna Commission. U.S.–Peru FTA, *supra* note 31, at Annex 18.2.

[46] U.S.–Peru, *supra* note 15, at art. 18.13(4).

[47] *Id.* at art. 20.4(2).

[48] CITES, *Control of Trade in Personal and Household Effects*, Resolution Conf. 13.7 (Rev. CoP16), available at https://cites.org/eng/res/13/13-07R16.php.

[49] CITES, *Introduction from the Sea*, Resolution Conf. 14.6 (Rev. CoP16), *available at* https://cites.org/eng/res/14/14-06R16.php.

[50] Montreal Protocol, *Essential Uses*, Decision IV/25, *available at* http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/1166.

[51] The TPP's preamble states that one goal of the TPP is to "establish a predictable legal and commercial framework for trade and investment through mutually advantageous rules. TPP, *supra* note 1, at preamble, para. 7. Similarly, the Understanding on Dispute Settlement of the World Trade Organization, for example, provides that "[t]he dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. . . . [I]t serves to preserve the rights and obligations of Members under the covered agreements." Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 3.2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, 354 (1999), 1869 U.N.T.S. 401.

species whose survival is threatened by international trade."[52] As weak as this commitment is, it is stronger than for other MEAs; the TPP is silent with respect to implementing decisions of the Montreal Protocol or other MEAs.

Second, the TPP could have engaged in a review of the adequacy of implementing legislation and then used the results of these analyses to focus capacity-building efforts and, as a last resort, sanction a non-complying Party that does not improve its inadequate legislation. The CITES national legislation project provides an excellent example of how to direct capacity-building support to specific Parties to improve implementation of an MEA and help conserve public resources.[53] When a Party's legislation has been found inadequate, the Secretariat provides legislative drafting assistance or other capacity-building support. In this way, Parties are able to receive exactly the kind of support they need.

III. IUU Fishing

As noted in the introduction, USTR has praised the TPP's "pioneering commitments" to combat illegal fishing and prohibit some of the most harmful fisheries subsidies, such as those given to fishermen engaged in illegal, unreported, and unregulated (IUU) fishing.[54] Like the provisions relating to MEAs, however, these provisions are weak; they are also inadequate to meet the challenges of IUU fishing.

For example, the TPP prohibits fisheries subsidies to any fishing vessel listed by the flag State or an RFMO for engaging in IUU fishing.[55] Many RFMOs, however, already implicitly require the elimination of such subsidies or impose stricter requirements vis-à-vis IUU vessels. The Western and Central Pacific Fisheries Commission, the Inter-American Tropical Tuna Commission, and the Indian Ocean Tropical Tuna Commission, three RFMOs managing and conserving tuna and other fish stocks,[56] require their members to "take all the necessary measures to eliminate IUU fishing activities, including, if necessary, the withdrawal of the registration or the fishing licenses of these vessels."[57] They must also, among other things, refuse to allow such vessels to fly their flags, prohibit these vessels from engaging in commercial transactions, and prohibit these vessels from importing, landing, and transshipping of species.[58]

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[52] TPP, *supra* note 1, at art. 20.17(3)(c) (emphasis added).
[53] *See* Resolution Conf. 8.4 (Rev. CoP15), *supra* note 21.
[54] The Trans-Pacific Partnership, *supra* note 2, at 2; USTR, Environment, *supra* note 4.
[55] TPP, *supra* note 1, at art. 20.16(5)(b).
[56] Australia, Canada, Japan, Mexico, New Zealand, United States, and Vietnam are members or cooperating non-members of the WCPFC. *See* WCPFC, About WCPFC, at https://www.wcpfc.int/about-wcpfc. Canada, Japan, Mexico, Peru, and the United States are members of the IATTC. *See* IATTC, Inter-American Tropical Tuna Commission, at http://www.iattc.org/HomeENG.htm. Australia and Malaysia are members of the IOTC. *See*
[57] WCPFC, Conservation and Management Measure to Establish a List of Vessels Presumed to Have Carried Out Illegal, Unreported, and Unregulated Fishing Activities in the WCPO, Conservation and Management Measure 2010-06 ¶ 21(b) (2010); Inter-American Tropical Tuna Commission, Amendment to Resolution C-05-07 on Establishing a List of Vessels Presumed to have Carried Out Illegal, Unreported and Unregulated Activities in the Eastern Pacific Ocean, Resolution C-15-01, ¶ 15 (2015); Indian Ocean Tropical Tuna Commission, Resolution 11/03 on Establishing a List of Vessels Presumed to have Carried Out Illegal, Unreported and Unregulated Fishing in the IOTC Area of Competence, ¶ 15 (2011).
[58] WCPFC, CMM 2010-06, *supra* note 16, at ¶ 22; IATTC Resolution C-15-01, *supra* note 16, at ¶ 16; IOTC Resolution 11/03, *supra* note 44, at ¶ 16.

While these provisions do not expressly call for the removal of subsidies, it is highly unlikely that a member of an RFMO would provide subsidies to a vessel it does not flag (unless the subsidy is carried in the below-market cost of fuel or is otherwise generally available to all fishing vessels, in which case the subsidy may not be covered by the TPP because it would not be considered "specific" within the meaning of the WTO's Subsidies and Countervailing Measures Agreement).[59]

These RFMO measures also show how members of relevant RFMOs already cooperate with respect to IUU fishing. Thus, the TPP's call for TPP Parties to "endeavor" to improve cooperation to address IUU fishing[60] has, in many respects, already been accomplished, particularly since the TPP does not direct the TPP Parties to cooperate through the TPP's Environment Committee to address IUU fishing. As a consequence, the TPP Parties will endeavour to improve cooperation through competent international organizations,[61] such as the WCPFC, IATTC, and IOTC.

Other activities relating to IUU fishing simply do not go far enough and will be difficult, if not impossible, to enforce. To combat IUU fishing and deter trade in products from species harvested from IUU fishing, for example, the TPP Parties must "strive" to act consistently with the rules of RFMOs of which it is not a member.[62] They must also "endeavor" not to undermine catch or trade documentation schemes operated by RFMOs, as well as intergovernmental organizations whose scope includes the management of shared fisheries resources.[63] At a time when some countries such as Palau and Indonesia are burning or sinking vessels of TPP Parties such as Vietnam and Malaysia for engaging in IUU fishing,[64] obligations to "strive" for and "endeavor" to undertake certain activities are inadequate to meet the challenges of IUU fishing. In addition, obligations qualified by words such as "strive" and "endeavour" are likely impossible to enforce. The plain language of such words only requires the Parties to exert some

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[59] The WTO's Agreement on Subsidies and Countervailing Measures limits its applicability by distinguishing subsidies of general applicability from those that are "specific." Subsidies that are generally available to the public, such as public education and fire protection, are not subject to trade discipline and cannot be countervailed. Specific" subsidies, however, are covered. To be "specific," the subsidy must be conferred on an identifiable enterprise or group of enterprises. More concretely, Article 2.1(c) of the SCM Agreement provides that a subsidy may be specific if "there are reasons to believe that the subsidy may in fact be specific." *De facto* specificity may be found where: 1) the actual recipients are limited in number; 2) an enterprise or industry is a predominant user of the subsidy; 3) certain enterprises receive a disproportionately large amount of the subsidy; and 4) the manner in which the granting authority exercises discretion to grant a subsidy indicates that an enterprise or industry is "favored over others." Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, 231 (1999), 1869 U.N.T.S. 14

[60] TPP, *supra* note 1, at art. 20.16(13).

[61] *Id.* The TPP Parties have a duty to cooperate with each other concerning IUU fishing but only to "identify needs and to build capacity to support implementation" of efforts to combat IUU fishing. *Id.* at art. 20.16(14).

[62] *Id.* at art. 20.16(14)(d).

[63] *Id.* at art. 20.16(14)(e).

[64] Associated Press, *Moving to Preserve Fisheries, Palau Burns Vietnamese Boats Caught Fishing Illegally*, (June 11, 2015) (noting that Palau burned four Vietnamese fishing vessels fishing illegally in Palau's waters and that Indonesia blew up and sank 41 foreign fishing vessels from China, Malaysia, the Philippines, Thailand and Vietnam), *available at* http://www.foxnews.com/world/2015/06/11/moving-to-preserve-fisheries-palau-burns-vietnamese-boats-caught-fishing/.

energy.[65] In legal terms, obligations qualified by such terms only require a Party to "act diligently in order to achieve the object of the obligation."[66]

The only unqualified obligation relating to IUU fishing is the obligation to implement port State measures.[67] Even here, however, the obligation is inadequately framed. Unlike other TPP provisions that frame obligations in terms of specified MEAs, the requirement to implement port State measures does not do so, even though a relevant MEA exists—the FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (Port State Measures Agreement). The FAO adopted the Port State Measures Agreement in 2009.[68] Although it has yet to enter into force, FAO has produced a number of guides to support implementation of port State measures.[69] Nonetheless, the TPP does not reference the Port State Measures Agreement or any of these implementation documents with respect to the duty to implement port State measures.[70] As such, the reference to "port State measures" is not tied to any specific legal or technical document, and the Parties have no specific commitments to implement specific port State measures.

IV. Conservation and Trade in Wildlife

The USTR has also hailed the provisions relating to wildlife trade as "pioneering"[71] and "enforceable."[72] Here, too, USTR overstates the TPP's provisions, which fall short of what is necessary to meet the challenges of illegal wildlife trade.

In the TPP, the Parties acknowledge that poaching and illegal trade in wildlife undermine efforts to conserve and manage those resources.[73] To that end, they commit to taking "appropriate measures" to protect and conserve wildlife it has identified as "at risk" within its

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[65] "Endeavour" means "to attempt by exertion of effort." Merriam-Webster Dictionary Online, at http://www.merriam-webster.com/dictionary/endeavor. "Strive" means "to devote serious effort or energy." *Id.* at http://www.merriam-webster.com/dictionary/strive.

[66] RENÉ LEFEBER, TRANSBOUNDARY ENVIRONMENTAL INTERFERENCE AND THE ORIGIN OF STATE LIABILITY 71 (1996).

[67] TPP, *supra* note 1, at art. 20.16(14)(c).

[68] FAO Conference Resolution 12/2009 approving the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. For more on the Port State Measures Agreement, see FAO, Port State Measures Agreement, *available at* http://www.fao.org/fishery/psm/agreement/en.

[69] *See, e.g.*, *Implementation of Port State Measures Volume 1: Technical Guide to Port Inspection of Fishing* Vessels (FAO, 2013), *available at* http://www.fao.org/3/13a91774-6816-5262-92e1-654e2b8b9740/i3508e.pdf; Steve Dunn et al., *Implementation of Port State Measures Volume 3: Port Inspections–Guide to Activities and Tasks* (FAO, 2013), *available at* http://www.fao.org/3/3b45c6e9-52e1-50ed-8b7e-bf184108c9e3/i3510e.pdf.

[70] The TPP does reference the Port State Measures Agreement in Article 20.16(13), in which the "Parties recognize the importance of concerted international action to address IUU fishing as reflected in regional and international instruments." Regional and international instruments include the Port State Measures Agreement. TPP, *supra* note 1, at 20.16(13), fn. 20.

[71] The Trans-Pacific Partnership, *supra* note 2, at 2.

[72] USTR, Environment, *supra* note 4.

[73] TPP, *supra* note 1, at art. 20.17(1).

territory.[74] Because each TPP Party already has domestic wildlife legislation—either as CITES implementing legislation[75] or other legislation[76]—it is not clear what this adds.

Similarly, each Party commits to "maintain or strengthen government capacity and institutional frameworks to promote sustainable forest management" and wildlife conservation.[77] By definition, an obligation to "maintain" does not require improvements, and some TPP Parties clearly need to improve their capacity to manage forests sustainably and conserve wildlife. Vietnam, for example has been at the center of the illegal rhino horn trade. In fact, TRAFFIC, a non-governmental organization that assesses wildlife trade,[78] has stated that Vietnam is believed to be driving the "rapacious illegal trade in rhino horn"[79] with Vietnamese nationals at the center of the illegal trade.

Peru continues to struggle to stop the flow of illegally harvested timber from indigenous lands and national parks, and yet the TPP and Peru itself have turned a blind eye to these problems. Prior to the U.S.–Peru FTA, the World Bank estimated that 80% of Peruvian timber exports stem from illegal logging.[80] As a consequence, the U.S.–Peru FTA specifically requires Peru to take certain steps to control the illegal harvesting and illegal trade in timber.[81] For example, the U.S.–Peru FTA requires Peru to increase the number and effectiveness of personnel dedicated to enforcement of laws relating to harvest of and trade in timber products,[82] conduct comprehensive inventories of tree species listed by CITES,[83] establish an export quota for bigleaf mahogany,[84] and conduct period audits of timber producers,[85] among many other things.

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[74] *Id.* at art. 20.17(4)(a).

[75] See, *e.g.*, CITES Standing Committee, *National Laws*, SC65 Doc. 22, at Annex, p. 1, 6 (stating that Australia, Brunei, Canada, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, Vietnam, and the United States have legislation that adequately implements CITES ("Category 1"), with Chile having legislation that partially implements CITES ("Category 2")).

[76] *See, e.g.*, Environment Protection and Biodiversity Conservation Act 1999 (Australia), *available at* https://www.environment.gov.au/epbc; Wild Animals and Birds Act (Singapore), Cap. 351, 2000 Rev. Ed. Sing., available at http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3Af0719c63-6c52-4222-b991-3804d749ea36%20%20Status%3Ainforce%20Depth%3A0;rec=0; Wildlife Act 1953 (New Zealand), available at http://www.legislation.govt.nz/act/public/1953/0031/latest/DLM276814.html; Wildlife Conservation Act of 2010 (Malaysia), Act 716, available at http://www.gunungganang.com.my/pdf/Malaysian-Legislation/National/Wildlife%20Conservation%20Act%202010.pdf; Endangered Species Act (United States), 16 U.S.C. §§1531–1544; Law 20.380, Protección de los Animales (Chile), available at https://www.globalanimallaw.org/database/national/chile/.

[77] TPP, *supra* note 1, at art. 20.17(4)(b).

[78] TRAFFIC, http://www.traffic.org/overview.

[79] TOM MILLIKEN & JO SHAW, THE SOUTH AFRICA–VIET NAM RHINO HORN TRADE NEXUS: A DEADLY COMBINATION OF INSTITUTIONALIZED LAPSES, CORRUPT WILDLIFE INDUSTRY PROFESSIONALS AND ASIAN CRIME SYNDICATES 14 (TRAFFIC, 2012), *available at* http://static1.1.sqspcdn.com/static/f/157301/19987722/1345739024283/traffic_species_mammals66.pdf?token=YpfXekwfyCSD8VGrTQBez2jQMZw%3D.

[80] MARILYNE PEREIRA GONCALVES ET AL., JUSTICE FOR FORESTS: IMPROVING CRIMINAL JUSTICE EFFORTS TO COMBAT ILLEGAL LOGGING, 3, fn. 10 (World Bank, 2012) (citing estimates from 2006), *available at* http://elibrary.worldbank.org/doi/abs/10.1596/978-0-8213-8978-2.

[81] U.S.–Peru FTA, *supra* note 15, at Annex 18.3.4.

[82] *Id.* at Annex 18.3.4, ¶ 3(a).

[83] *Id.* at Annex 18.3.4, ¶ 3(d).

[84] *Id.* at Annex 18.3.4, ¶ 3(f).

[85] *Id.* at Annex 18.3.4, ¶ 6(a).

Nonetheless, the situation appears much the same; Peru's governmental agency to help oversee the timber industry, OSINFOR,[86] found in 2014 that 78% of the wood inspected at 115 concessions was illegally harvested but nonetheless transported with documents.[87] Remarkably, Peru brought no prosecutions against anyone, imposed no significant penalties, and returned the confiscated timber to the companies that illegally harvested and transported the timber.[88] These provisions of the U.S.–Peru FTA are significantly more precise and better targeted towards specific problems than anything found in the TPP. Yet, because the United States has not sought to enforce these provisions, many of them have gone unimplemented.[89]

Notably, the TPP's bilateral understanding between Peru and the United States does not address concerns relating to illegal harvest and illegal trade in timber from Peru. Instead, the two Parties "recognize" 1) that Peru's Forest and Wildlife Law requires proof of legal origin for wild fauna and flora, and failure to provide such proof is subject to penalties in accordance with that law and 2) that Peru has established procedures and legal requirements for wild fauna and flora produced and exported from Peru.[90]

The Parties also "commit … to combat the illegal take of, and illegal trade in, wild fauna and flora."[91] Rather than identify specific cooperative efforts the Parties will take to fulfill this obligation, the TPP directs the Parties to exchange information and experiences, undertake, as appropriate, joint conservation activities, and endeavor to implement, as appropriate, CITES resolutions.[92] These are not the type of provisions likely to change enforcement and prosecution of wildlife crimes.

The most interesting, but perhaps also the most ambiguous, provision relating to wildlife conservation is the duty of each Party to take measures "to combat, and cooperate to prevent," the trade in wildlife that was taken or traded in violation of "that Party's law or another applicable law."[93] A footnote explains that the phrase "another applicable law" means "a law of the jurisdiction where the take or trade occurred."[94] Presumably this phrase means "the law of another State" and cannot be interpreted as subnational law.[95] If so, then this provision has the

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[86] Organismo de Supervisión de los Recursos Forestales y de Fauna Silvestre, at http://www.osinfor.gob.pe/osinfor/.
[87] Bob Abeshouse & Luis Del Valle, *Peru's Rotten Wood*, AL JAZEERA (Aug. 12, 2015), *available at* http://www.aljazeera.com/programmes/peopleandpower/2015/08/peru-rotten-wood-150812105020949.html.
[88] *Id.*
[89] Environmental Investigation Agency, *Implementation and Enforcement Failures in the US--Peru Free Trade Agreement (FTA) Allows Illegal Logging Crisis to Continue* (June 2015), *available at* http://eia-global.org/images/uploads/Implementation_and_Enforcement_Failures_in_the_US-Peru_Free_Trade_Agreement_(FTA)_Allows_Illegal_Logging_Crisis_to_Continue.pdf.
[90] Bilateral Understanding between the U.S. and Peru on Conservation and Trade, *available at* https://ustr.gov/sites/default/files/TPP-Final-Text-US-PE-Understanding-regarding-Conservation-and-Trade.pdf. The provision appears more likely to assist U.S. officials seize illegal shipments of timber from Peru under the U.S. Lacey Act, 16 U.S.C. §§ 3371–3378.
[91] TPP, *supra* note 1, at art. 20.17(3).
[92] *Id.* at art. 20.17(3)(a)–(c).
[93] *Id.* at art. 20.17(5).
[94] *Id.* at art. 20.17(5), fn. 26.
[95] The TPP defines "Party" to mean "any State or separate customs territory for which this Agreement is in force." *Id.* at art. art. 1.3. Typically a reference to "State" or "party" includes subnational levels of government. Moreover,

potential to helpfully combat illegal wildlife trade by allowing a TPP Party to prosecute under its own laws violations of another State's laws. The United States has had great success with the Lacey Act,[96] which makes it unlawful to import, export, sell, acquire, or purchase fish, wildlife, or plants taken possessed or sold in violation of State or foreign law.[97]

As written, however, the provision depends on the individual implementation by the TPP Parties. This is because the measures for combatting such trade "include sanctions, penalties, *or* other effective measures." It is rather inexplicable why such measures do not "include sanctions, penalties, *and* other effective measures." As a consequence, TPP members could opt to return the illegally traded specimens to the country of origin, sell the confiscated specimens, or take other measures that do not sanction or penalize such trade.

Moreover, the TPP establishes broad discretion in the ways that Parties implement the duty to combat and prevent illegal wildlife trade. The TPP recognizes that each Party "retains the right to exercise administrative, investigatory and enforcement discretion" in its implementation of this obligation.[98] They also retain "the right to make decisions regarding the allocation of administrative, investigatory and enforcement resources."[99] While agencies and law enforcement personnel traditionally have broad discretion to choose which cases to investigate and prosecute, Parties to other free trade agreements have used similar language to excuse broad failures to enforce environmental law. For example, the United States has never enforced the Migratory Bird Treaty Act, which prohibits the taking of migratory birds,[100] against loggers. When submitters challenged that failure under the North American Agreement on Environmental Cooperation,[101] NAFTA's "side agreement," the United States claimed that it used its enforcement discretion to investigate and enforce activities involving pollution or energy production facilities.[102] It also stated that it had *bona fide* reasons for allocating enforcement resources to investigating other matters, but then referred to a range of initiatives completely unrelated to enforcement, such as monitoring the population status of migratory birds, public outreach, and implementing a permit program for hunting.[103] Yet, the Agreement's secretariat concluded that the United States had failed to describe why its enforcement choices were reasonable; for example, the United States did not provide information on the number of birds killed through intentional activities such as hunting versus incidental activities such as logging.[104] In addition, the secretariat found the U.S. response lacking because it did not, for example, describe why monitoring a hunting program might be easier than monitoring a logging

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other parts of the TPP specifically refer to "the central, regional or local governments or authorities of that Party," indicating that where Party is used, it refers to all levels of government. *See,* e.g., *id.* at art. 9.2(2).

[96] 16 U.S.C. §§ 3371–3378.

[97] *Id.* at § 3372(a)(2).

[98] TPP, *supra* note 1, at art. 20.17(6).

[99] *Id.*

[100] 16 U.S.C. §§ 703-712, § 703.

[101] North American Agreement on Environmental Cooperation, art. 14.1, U.S.-Can.-Mex., Sept. 14, 1993, *available at* http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567 [hereinafter NAAEC].

[102] Response of the United States, Migratory Birds, A14/SEM/99-002/05/RSP, 14 (Nov. 19, 1999) (SEM 99-002), *available at* http://www.cec.org/Page.asp?PageID=2001&ContentID=2370&SiteNodeID=548&BL_ExpandID=502.

[103] *Id.* at 15–21.

[104] Article 15(1) Notification to Council that Development of a Factual Record is Warranted, Migratory Birds, A14/SEM/99-002/05/ADV, 19 (Dec. 15, 2000) (SEM 99-002), *available at* http://www.cec.org/Page.asp?PageID=2001&ContentID=2370&SiteNodeID=548&BL_ExpandID=502.

operation, as claimed.[105] Overall, the United States failed to "provide a careful identification of the reasons why it chose to follow one course rather than another."[106] The TPP, however, does not have any secretariat to assess the claims of a Party to determine whether it provided the careful identification of the reasons for choosing one enforcement strategy over another.[107] Without that independent arbiter, claims of enforcement discretion will go unchallenged.

A stronger provision would have prohibited the trade in illegally taken or previously illegally traded plants and animals, except for *bona fide* scientific, enforcement purposes, or related, non-commercial purposes. Otherwise, illegally obtained and illegally traded specimens will enter the market, feed demand, and continue the decline of species. The example of illegal timber from Peru highlights this; by returning the illegally-taken specimens to the very companies involved in the illegal trade, it is very likely that those companies will profit from the return of the timber rather than be deterred by prosecutions and stiff penalties.

V. Protection of Marine Animals

The provisions relating to the protection of marine animals, including fish, are long on aspiration but short on obligation. While the Parties "acknowledge" that "the fate of marine capture fisheries is an urgent concern"[108] and that inadequate fisheries management contributes to the problem, the Parties are only required to "seek" to operate their fisheries management systems to prevent overfishing and overcapacity.[109]

The provisions also single out sharks, marine turtles, seabirds, and marine mammals.[110] That attention is well deserved, particularly the attention given to sharks, because populations of many shark species are declining due to shark-finning for shark fin soup. In fact, roughly 100 million sharks are killed each year, with the shark fin trade a primary reason.[111] An analysis of the conservation status of 1,041 shark, ray, and closely related species by the International Union of the Conservation of Nature (IUCN) shows that 25% are threatened with extinction and only 23% are of "least concern."[112] Because sharks grow slowly and have low reproductive rates, they are "highly susceptible to extinction, and it is difficult for many shark species to replenish their populations as quickly as they are being diminished. Many species of sharks are currently in danger due to shark finning."[113] Even as trade in shark fins has declined "slightly" since the early 2000s, trade in shark meat has increased 42%.[114]

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[105] *Id.*
[106] *Id.* at 18.
[107] *See infra* Section VII.A (describing the TPP's citizen submission process).
[108] TPP, *supra* note 1, at art. 20.16(1).
[109] *Id.* at art. 20.16(3).
[110] *Id.* at art. 20.16(4).
[111] Caty Fairclough, Shark Finning: Sharks Turned Prey, Smithsonian Institute, Museum of Natural History, *available at* http://ocean.si.edu/ocean-news/shark-finning-sharks-turned-prey.
[112] IUCN, A Quarter of Sharks and Rays Threatened with Extinction (Jan. 21, 2014), *available at* http://www.iucn.org/?14311/A-quarter-sharks-and-rays-threatened-with-extinction.
[113] Fairclough, *supra* note 111.
[114] FELIX DENT & SHELLEY CLARKE, STATE OF THE GLOBAL MARKET FOR SHARK PRODUCTS 3 (FAO Fisheries and Aquaculture Technical Paper No. 590, 2015), *available at* http://www.fao.org/3/a-i4795e.pdf.

To combat this trade and the practice of shark finning, 25 states and countries now have laws that ban the possession, sale, and trade of shark fins.[115] TPP Parties Japan, Malaysia, Singapore, and Vietnam are not among those that have banned shark finning or banned possession, sale, or trade in shark fins. Rather, those States in addition to other TPP Parties are among the main exporters, importers, and consumers of shark fins and other shark products. For example, Mexico and Malaysia are among the ten States responsible for more than 25% of global shark catches between 2002 and 2011.[116] Meanwhile, Singapore was the fourth largest exporter of shark fins between 2000 and 2009; it reported imports and exports of approximately 20,000 tonnes of meat and 10,000 tonnes of fins.[117] Peru and Chile are also significant exporters of various shark products.[118] Singapore, Malaysia, and Vietnam are among the six nations consuming the "vast majority" of shark fins.[119] Nonetheless, the TPP does not ask Parties to take any specific measures to conserve sharks, although Parties should, "as appropriate," collect data or impose catch limits, mitigation measures, or ban finning.[120]

More positively, the TPP prohibits fisheries subsidies that "negatively affect fish stocks that are in an overfished condition."[121] Even this provision, however, is limited in its effectiveness because the subsidies must "negatively affect fish stocks" that are already "overfished." With 28.8% of fish stocks fished at a biologically unsustainable level, the provision will have some impact,[122] but it does not apply to the 61.3% of fish stocks that that are fully fished with "no room for further expansion in catch."[123] Subsidies, however, frequently cause overfishing and overcapacity.[124] In 2006, a global study of the period from 1995-2005 estimated fisheries subsidies at $30–34 billion.[125] In 2010, the United Nations Environment Program valued fisheries subsidies at $27 billion, with "only around $8 billion . . . classed as 'good' with the rest classed as 'bad' and 'ugly' as they contribute to over-exploitation of

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[115] S. WHITCRAFT ET AL., EVIDENCE OF DECLINES IN SHARK FIN DEMAND: CHINA, 14–16, Tbl. 3 (WildAid, 2014), *available at* http://wildaid.org/sites/default/files/resources/SharkReport_Evidence%20of%20Declines%20in%20Shark%20Fin%20Demand_China.pdf.

[116] VICTORIA MUNDY-TAYLOR & VICKI CROOK, INTO THE DEEP: IMPLEMENTING CITES MEASURES FOR COMMERCIALLY-VALUABLE SHARKS AND MANTA RAYS 3 (TRAFFIC, 2013), *available at* http://static1.1.sqspcdn.com/static/f/157301/23202911/1375133237910/traffic_pub_fisheries15.pdf?token=kW21ajdN%2FrWycJaflegAVvoIsWY%3D. India and Indonesia are responsible for 20% of the global catch, while Argentina, Mexico, Malaysia, Pakistan, Brazil, Thailand, Nigeria, Iran, Sri Lanka, and Yemen are responsible for 20%. *Id.*

[117] *Id.* at 5.

[118] *Id.* at 5.

[119] DENT & CLARKE, *supra* note 114, at 3.

[120] TPP, *supra* note 1, at art. 20.16(4)(a).

[121] *Id.* at art. 20.16(5)(a).

[122] FAO, THE STATE OF WORLD FISHERIES AND AQUACULTURE 7 (2014).

[123] *Id.*

[124] *See, e.g.*, Peter Manning, *World Inventory of Fisheries: Subsidies in Fisheries: Issues Fact Sheets*, *in* FAO FISHERIES AND AQUACULTURE DEPARTMENT (updated May 27, 2005) (stating that "it is accepted that these subsidies speed up the development of overcapacity and consequently threaten the continued well being of wild fish stocks, in the absence of effective fisheries management."), *available at* http://www.fao.org/fishery/topic/13333/en.

[125] CATCHING MORE BAIT: A BOTTOM-UP RE-ESTIMATION OF GLOBAL FISHERIES SUBSIDIES, Fisheries Centre Research Reports, Vol.14 No. 6, 2 (eds. Ussif Rashid Sumaila & Daniel Pauly, 2d vers. 2007), available at http://www.fisheries.ubc.ca/node/3786.

stocks."[126] By not eliminating fisheries subsidies that contribute to overexploitation and overcapacity, the TPP has missed an extraordinary opportunity. As a consequence, the TPP's provision on fisheries subsidies must be viewed as inadequate to meet the challenges of fisheries management, particularly since Parties have three years to bring non-existing, non-complying subsidies into conformity with this prohibition.[127]

The United States also states that the TPP provides "specific protections for ecologically critical and iconic marine species, such as whales,"[128] but the Environment Chapter includes no concrete obligations relating to whales and other marine mammals. The one provision relating to conservation of marine mammals vaguely directs Parties to adopt measures, which "should include, as appropriate . . . conservation and relevant management measures, prohibitions, and other measures in accordance with relevant international agreements, to which the Party is a party."[129] As Japan has indicated that it will defy[130] an order of the International Court of Justice to prohibit the issuance of permits to conduct whaling in the Southern Ocean,[131] the statement of the United States is both wrong and another missed opportunity to improve conservation outcomes.

VI. Climate Change

The TPP contains some odd language that presumably refers to climate change while avoiding any mention of climate change or even carbon dioxide. In the TPP, the Parties

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[126] UNEP, Press Release, Turning the Tide on Falling Fish Stocks—UNEP-Led Green Economy Charts Sustainable Investment Path, 2 (May 17, 2010). The estimates of fisheries subsidies vary largely due to differing definitions of "subsidy." As the FAO notes,

> there is no universally accepted definition of exactly what government actions (or inaction) are to be considered as subsidies. The term subsidies can be broadly applied to a wide range of government interventions, or to the absence of correcting interventions, that reduce costs and/or increase revenues of producing and marketing of fish and fish products in the short-, medium- or long-terms. "Government interventions" include financial transfers or the provision of goods or services at a cost below market prices. "The absence of correcting interventions" includes failure by government to impose measures that correct for external costs (externalities) associated with fishing.

Manning, *supra* note 121. They also vary due to the "difficulties in measuring the magnitude and effects of fisheries subsidies given the lack of available data, information and empirical studies on its use and effects." *Id.*

[127] TPP, *supra* note 1, at art. 20.16(6). Vietnam has five years to bring its subsidies into conformity. *Id.* at art. 20.16(6), fn. 18. The Parties must make "best efforts" to refrain from introducing new, or existing or enhancing existing, subsidies that contribute to overfishing or overcapacity. *Id.* at art. 20.16(7). The have an ongoing duty to review subsidies that contribute to overfishing and overcapacity "with a view to achieving the objective of eliminating" them. *Id.* at art. 20.16(8).

[128] USTR, Environment, *supra* note 4.

[129] TPP, *supra* note 1, at art. 20.16(4)(b).

[130] *Japan Plans Unilateral Restart to Antarctic Whaling in 2015, Says Official*, THE GUARDIAN (June 20, 2015), *available at* http://www.theguardian.com/environment/2015/jun/20/japan-plans-unilateral-restart-to-antarctic-whaling-in-2015-says-official.

[131] Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening), 2014 I.C.J. Rep. __, ¶ 245 (Mar. 31, 2014).

acknowledge that a "transition to a low emissions economy requires collective action,"[132] but it does not identify the kind of emissions economy that requires collective action. A subsequent provision asks the Parties to cooperate to address areas of joint or common interest that "may include" energy efficiency, clean and renewable energy sources, and other issues[133] that indicate the Parties are, in fact discussing climate change. In light of the ongoing negotiations to reach agreement on a new climate change regime in Paris at the end of 2015, the Parties may have been understandably hesitant to include mitigation and adaptation commitments in the TPP. Nonetheless, they could have used the TPP to create more specific cooperative frameworks for addressing the transition to a low *greenhouse gas* emissions economy. They could have agreed to a timetable for reducing and eliminating fossil fuel subsidies.

Neither of these ideas would have affected the Parties negotiating positions in Paris. A concrete, binding strategy for eliminating fossil fuel subsidies would have been consistent with the pledges made by members of the G–20 and the Asia–Pacific Economic Cooperation (APEC) forum, which includes all TPP Parties.[134] Both the G–20 and APEC have called for eliminating fossil fuel subsidies.[135] And for good reason: the International Energy Agency (IEA) estimated fossil fuel consumption subsidies at $548 billion in 2013.[136] Fossil fuel production subsidies are estimated to be *at least* $100 billion.[137]

Fossil fuel subsidies increase consumption of fossil-fuel, increase emissions of carbon dioxide, and thus undermine global efforts to mitigate climate change. Assessing the removal of fossil fuel subsidies in just 8 non-OECD countries, the IEA predicted that global energy consumption would drop 3.5%, global carbon dioxide emissions would decline 4.6%, and GDP would increase by an average of 0.73% in the eight countries.[138] Focusing solely on coal

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[132] TPP, *supra* note 1, art. 20.15(1).

[133] *Id.* at art. 20.15(2).

[134] APEC comprises the following member economies: Australia, Brunei Darussalam, Canada, Chile, People's Republic of China, Hong Kong (China), Chinese Taipei, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Singapore, Thailand, United States, and Vietnam. *See Member Economies*, APEC, http://www.apec.org/About-Us/About-APEC/Member-Economies.aspx.

[135] The G–20 agreed to "rationalize and phase out over the medium term inefficient fossil fuel subsidies that encourage wasteful consumption." 3rd G-20 Summit Meeting, Pittsburgh, U.S., Sept. 24–25, 2009, *The Pittsburgh Summit Declaration*, ¶ 24, *available at* http://www.g20.org/images/stories/docs/eng/pittsburgh.pdf. APEC did the same. 17th APEC Economic Leaders' Meeting, Sing., Nov. 14–15, 2009, *Singapore Declaration- Sustaining Growth, Connecting The Region*, APEC Doc. No. 2009/AELM/DEC (stating "We also commit to rationalise and phase out over the medium term fossil fuel subsidies that encourage wasteful consumption, while recognising the importance of providing those in need with essential energy services."); *see also* 9th APEC Energy Ministers Meeting, Fukui, Japan, June 18–20, 2010, *Fukui Declaration on Low Carbon Paths to Energy Security: Cooperative Energy Solutions for a Sustainable APEC*, ¶ 11, APEC Doc. No. 2010/EMM9/002 (June 19, 2010) ("We remain committed to the 2009 Leaders' Declaration to rationalize and phase out over the medium term fossil fuel subsidies that encourage wasteful consumption, while recognizing the importance of providing those in need with essential energy services.").

[136] International Energy Agency, World Energy Outlook, Energy Subsidies, *available at* http://www.worldenergyoutlook.org/resources/energysubsidies/.

[137] *See* Global Subsidies Initiative-U.N. Environment Programme Conference, Oct. 14–15, 2010, Geneva, Switz., *GSI-UNEP Conference Report, Increasing the Momentum of Fossil Fuel Subsidy Reform: Development and Opportunities*, at 14-15, *available at* www.globalsubsidies.org/files/assets/ffs_conference.pdf.

[138] INTERNATIONAL ENERGY AGENCY, WORLD ENERGY OUTLOOK 1999, LOOKING AT ENERGY SUBSIDIES: GETTING THE PRICES RIGHT 10, 64 tbl. 6 (1999). The eight countries studied were China, India, Indonesia, Iran, Kazakhstan, Russia, South Africa, and Venezuela.

subsidies, others concluded that removing all coal subsidies would reduce global carbon dioxide emissions by 8% from the business-as-usual baseline.[139] Fossil fuel subsidies also aggravate local pollution problems by increasing emissions of sulphur dioxide (SO_2), nitrogen oxides (NO_X), and particulate matter, pollutants that cause respiratory and other human health problems.[140] With so many climate gains to be made, the failure to reduce fossil fuel subsidies as part of the TPP is another missed opportunity.

VII. Enforcement

Regional free trade agreements involving the United States beginning with NAFTA have typically included two types of enforcement mechanisms for environmental matters: citizen submissions and State-to-State dispute settlement provisions.[141] The TPP is no different, except that its enforcement mechanisms are likely to be even more ineffectual than those of prior agreements.

A. The Citizen Submission Process

The citizen submission processes of NAFTA, incorporated into the NAAEC,[142] U.S.–CAFTA,[143] and others[144] allow citizens to allege that a Party "is failing to effectively enforce its environmental law." The NAAEC Parties, acting through the agreement's Commission for Environmental Cooperation, have shown little interest in implementing that process effectively. For example, the United States has never attempted to enforce the provisions of the Migratory Bird Treaty Act (MBTA), despite the CEC's Secretariat finding that the allegations of the submitters were consistent with a failure to enforce the MBTA.[145] Moreover, the Parties have narrowed the scope of factual records[146] from that requested by submitters[147] and beyond that

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[139] Kym Anderson & Warwick J. McKibbin, *Reducing Coal Subsidies and Trade Barriers: Their Contribution to Greenhouse Gas Abatement*, 5 ENVT. & DEVELOPMENT ECON. 457, 477 (2000).

[140] 4th G-20 Summit Meeting, Toronto, Can., June 26–27, 2010, *Analysis of the Scope of Energy Subsidies and Suggestions for the G–20 Initiative*, at 25 (June 16, 2010), *available at* http://www.iea.org/weo/docs/G20_Subsidy_Joint_Report.pdf.

[141] The TPP also includes provisions for investor-state dispute settlement. TPP, *supra* note 1, at Chapter 9, *available at* https://medium.com/the-trans-pacific-partnership/investment-c76dbd892f3a#.vewtvh5ns.

[142] NAAEC, *supra* note 101, at art. 14.1.

[143] Dominican Republic–Central America–United States Free Trade Agreement, art. 17.7, Aug. 5, 2004, *available at* http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text [hereinafter DR–CAFTA].

[144] U.S.–Peru, *supra* note 15, at art. 18.8; U.S.–Panama, *supra* note 44, at art. 17.8; U.S.–Colombia, *supra* note 43, at art. 18.8.

[145] Final Factual Record, Migratory Birds, 63 (CEC Apr. 24, 2003) (SEM-99-002), *available at* http://www.cec.org/Page.asp?PageID=2001&ContentID=2370&SiteNodeID=250&BL_ExpandID=.

[146] The Council has narrowed the factual record of other submissions. *See* Final Factual Record at 23, BC Logging, (CEC Aug. 11, 2003) (SEM-00-04), *available at* http://www.cec.org/files/pdf/sem/00-4-FFR_en.pdf (excluding information regarding Canada's enforcement of the *Fisheries Act* against logging operations). S*ee also* Final Factual Record at 18-19, (CEC Aug. 12, 2003) (SEM-98-004), *available at* http://www.cec.org/files/pdf/sem/98-4-FFR_en.pdf (excluding information regarding the lack of enforcement of the *Fisheries Act* in regards to mining operations in British Columbia); Final Factual Record at 17-18, (CEC Aug. 11, 2003) (SEM-97-006), *available at* http://www.cec.org/files/pdf/sem/97-6-FFR_en.pdf (excluding prosecutions as a tool for enforcement of the Fisheries Act and the basis for Canada's assertion that voluntary compliance of the Fisheries Act represents legitimate use of discretion of enforcement powers).

recommended by the CEC's Secretariat.[148] More recently, the Parties rejected a request to prepare a factual record under questionable circumstances.[149]

Much has been written about the ineffectiveness of the NAAEC's submission process[150] and yet the TPP submission process is weaker. The process begins on a positive note by allowing written submissions "regarding [a Party's] implementation of this Chapter."[151] The range of claims is thus broader than found in the NAAEC, U.S.–CAFTA, and other free trade agreements,[152] which limit submissions to those alleging a failure to enforce environmental law effectively. However, unlike the NAAEC and U.S.–CAFTA, submissions do not go to an independent commission. Instead, they will first go to the Party whose implementation of the Environment Chapter is being challenged.[153] The lack of an independent third party to assess the allegations and a Party's response is an obvious hindrance to effective implementation of the submission process. Moreover, in establishing the process, the Party may require that a submitter "explain how, and to what extent, the issue raised affects trade or investment between the Parties."[154] If a Party avails itself of that provision, the submission process will be difficult to invoke because assessing whether a particular policy has specific impacts on trade or investment is challenging. In fact, due to the challenges of linking a policy or measure to trade impacts, WTO dispute settlement panels have refused to impose such a duty on WTO Members as a condition of showing a violation of the General Agreement on Tariffs and Trade.[155]

For those submissions asserting a Party's failure to enforce environmental law effectively, another Party must request that the TPP's Committee on Environment discuss the

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[147] *See e.g.*, Alliance for the Wild Rockies, et al., Submission to the Commission on Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environmental Cooperation, Migratory Birds, A14/SEM-99-002/01/SUB (Nov. 17, 1999) (SEM 99-002).

[148] *See e.g.*, Migratory Birds, Article 15(1) Notification, *supra* note 104, at 27.

[149] Article 15(1) Notification to Council that Development of a Factual Record is Warranted, BC Salmon Farms, A14/SEM/12-001/62/ADV (May 12, 2014) (stating that the Secretariat believes the preparation of a factual record is warranted); Council Resolution 14–09, Instruction to the Secretariat of the Commission for Environmental Cooperation with regard to submission SEM-12-001 (*British Columbia (BC) Salmon Farms*) asserting that Canada is failing to effectively enforce the *Fisheries Act* (Dec. 9, 2014) (rejecting the Secretariat's recommendation to prepare a factual record); Statement of the United States of America Explaining its Position and the Reasons for its Vote Regarding Submission SEM-12-001 (*British Columbia (BC) Salmon Farms*) (Dec. 9, 2014) (explaining that the United States disagrees with the reasons for rejecting the Secretariat's recommendation to prepare a factual record.). All documents relating to this submission can be found at http://www.cec.org/Page.asp?PageID=2001&ContentID=25165&SiteNodeID=1088&BL_ExpandID=.

[150] *See e.g.*, John H. Knox & David L. Markell, *Evaluating Citizen Petition Procedures: Lessons from an Analysis of the NAFTA Environmental Commission*; 47 TEXAS INT'L L. J. 505 (2012), *available at* http://www.tilj.org/content/journal/47/num3/Knox-Markell505.pdf; Chris Wold et al., *The Inadequacy of the Citizen Submission Process of Articles 14 & 15 of the North American Agreement on Environmental Cooperation*, 26 LOY. L.A. INT'L & COMP. L. REV. 415 (2004), *available at* http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1572&context=ilr.

[151] TPP, *supra* note 1, at art. 20.9(1).

[152] NAAEC, *supra* note 101, at art. 14; DR–CAFTA *supra* note 143, at art. 17.7; U.S.–Peru, *supra* note 15, at art. 18.8; U.S.–Panama, *supra* note 44, at art. 17.8; U.S.–Colombia, *supra* note 43, at art. 18.8.

[153] *Id.* at art. 20.9(1).

[154] *Id.* at art. 20.9(4).

[155] *See, e.g.*, United States-Sections 301–310 of the Trade Act of 1974, Panel Report, WT/DS/152/R, ¶¶ 7.83–7.85 (adopted Jan. 27, 2000).

submission and any written response.[156] In other words, submitters have no authority to bring even these types of submissions to an independent third party. The process, unlike the NAAEC and U.S.–CAFTA, is entirely in the hands of the Parties and does not even result in the preparation of a factual record, as under the NAAEC,[157] DR–CAFTA,[158] and other free trade agreements.[159] For those watching the transformation of the citizen submission process over time, this weakening of the process is not surprising; it is, in fact, totally expected. Nonetheless, it is a missed opportunity to shine a light on the enforcement practices of Parties that struggle to enforce their environmental laws.

B. State-to-State Dispute Settlement

The TPP's provisions for State-to-State dispute settlement compound the problem of vague and weak obligations by establishing a multi-step process that makes resort to actual dispute settlement highly unlikely. First, a Party may request consultations with any other Party on "any matter arising under this Chapter."[160] If the consulting Parties are unable to reach a "mutually satisfactory resolution,"[161] one of the Parties may then move to the second step: requesting the Environment Committee to help resolve the matter.[162] If the consulting Parties have failed to resolve the matter through the Environment Committee, then a consulting Party may move to step three: Ministerial consultations.[163] Finally we reach step 4: Barring resolution through Ministerial consultations, a consulting Party may seek dispute settlement.[164] Given this multi-step process, it is difficult to conceive a dispute actually reaching dispute settlement. This conclusion is supported by the fact that no dispute under an environment chapter of any free trade agreement involving the United States has ever reached binding dispute settlement. This includes more than 20 years of the NAAEC, which includes a much less intensive process for binding dispute settlement than the TPP[165] As indicated by the *Migratory Birds* submission and the failure of Peru to implement the obligations relating to timber harvesting and trade, opportunities to use these mechanisms exist. Governments simply choose not to use them regardless of whether they are included in a "side agreement," as with the NAAEC, or the trade agreement's core dispute settlement provisions, as with the U.S.–Peru Free Trade Agreement[166] and others.[167]

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[156] TPP, *supra* note 1, at art. 20.9(4).
[157] NAAEC, *supra* note 139, at art. 15.
[158] DR–CAFTA, *supra* note 143, at art. 17.8.
[159] U.S.–Peru, *supra* note 15, at art. 18.9; U.S.–Panama, *supra* note 44, at art. 17.9; U.S.–Colombia, *supra* note 43, at 18.9.
[160] TPP, *supra* note 1, at art. 20.20(2).
[161] *Id.* at art. 20.20(5).
[162] *Id.* at art. 20.21.
[163] *Id.* at art. 20.22.
[164] *Id.* at art. 20.23.
[165] NAAEC, *supra* note 101, at arts. 22–36.
[166] U.S.–Peru FTA, *supra* note 15, at art. 18.12(6).
[167] DR–CAFTA, *supra* note 143, at art. 17.10(6); U.S.–Panama, *supra* note 44, at art. 17.11(6); U.S.–Colombia, *supra* note 43, at 18.12(6).

VIII. Conclusion

Despite the statements of USTR, the TPP's Environment Chapter is neither pioneering nor an historic opportunity to advance conservation and environmental protection across the Asia-Pacific region. It is, in fact, a document filled with vague and empty promises. It includes obligations that are highly qualified with phrases such as "strive", "endeavour," or "promote." Parties may implement other obligations "as appropriate." It diminishes a potentially vital citizen submission process and it makes State-to-State dispute settlement so cumbersome and the obstacles to bringing a claim so high in some circumstances as to be illusory.

As a consequence, the TPP's Environment Chapter is a missed opportunity to tackle some of the region's most serious environmental issues through concrete domestic legal obligations and international cooperative action. Significantly, many of these environmental issues have trade as a central component, making them ideal for addressing as part of a trade agreement. Trade in shark fins and other shark products is decimating shark populations all over the world, with several TPP Parties at the center of that trade. Plants and animals illegally taken are frequently illegally trade. The failure of the Environment Chapter to benefit these efforts seems quite clear.

Levin To Lay Out Demands For ITC's TPP Report During Three-Day Hearing

Inside US Trade
Posted: January 07, 2016

House Ways & Means Committee Ranking Member Sander Levin (D-MI) on Thursday (Jan. 7) said he will testify at the U.S. International Trade Commission's upcoming hearing on the economic effects of the Trans-Pacific Partnership (TPP) and request that the ITC incorporate a number of factors into its economic analysis of the trade deal.

Although Levin -- speaking to reporters after a House Ways & Means minority forum on currency manipulation and TPP -- did not detail what his request would specifically consist of, he did lay out a list of demands for the report in testimony submitted to the Nov. 17, 2015 ITC hearing on the economic impact of past U.S. FTAs.

Those demands include an analysis of how TPP will affect wages and income inequality; an examination of whether the ITC's economic model should assume full employment; an analysis of who will experience gains or losses as a result of TPP; an economic evaluation of TPP's non-tariff provisions; consideration of elements left out of TPP, such as enforceable currency disciplines; and an evaluation of the impact increased imports may have on the U.S. economy.

The ITC hearing was originally slated to last only one day, but has been extended to take place over three days due to the number of requests to testify received by the trade agency, according to an ITC spokeswoman.

Michael Wessel, a congressionally appointed commissioner on the U.S.-China Economic and Security Review Commission, told reporters on a press call Jan. 6 that, in his view, it would be problematic for the ITC to deliver its report ahead of the anticipated date of May 18 because of the broad interest in the report as well as its complexity.

"If you look at the interest in next week's hearing where the ITC has expanded the hearing to three days because of the interest it would, I think, concern me and many others if they short-circuited the process when not only is there so much interest in testifying," Wessel said.

U.S. Trade Representative Michael Froman in February of last year urged members of the ITC to accelerate their economic impact assessment of the TPP -- long before the deal was concluded (*Inside U.S. Trade*, Feb. 13, 2015).

The timing of the ITC's report on TPP's potential economic effects is a variable in determining when Congress will likely take a vote on the trade pact. FTA implementing bills are typically only considered once the ITC has issued its assessment, although this is not a legal requirement.

The ITC is anticipated to release its report on May 18 and Congress is scheduled to go on summer recess on July 15, which leaves a short window for approving TPP before the November elections. Once the administration submits an FTA implementing bill to Congress there is a

maximum of 90 legislative days -- which can stretch to five months -- during which the bill must be voted on under the Trade Promotion Authority procedures.

Levin, when asked Thursday if a vote on TPP was likely to only occur in the lame duck due to the timing of the report said, "anything is possible."

The public hearing will start Jan. 13 at the ITC building and end Jan. 15. The ITC has published pre-hearing briefs and statements from about 45 businesses, business groups, advocacy organizations, unions, and academics. An ITC spokeswoman could not provide numbers on how many requests to testify the trade agency had received or how many entities are slated to testify at the three-day hearing.

http://www.sierraclub.org/compass/2016/01/corporation-behind-keystone-xl-just-laid-bare-tpp-s-threats-our-climate

January 7, 2016

The Corporation Behind Keystone XL Just Laid Bare the TPP's Threats to Our Climate

By Ben Beachy

TransCanada, the notorious fossil fuel corporation behind the ill-fated Keystone XL tar sands pipeline, just made abundantly clear the threats that the controversial Trans-Pacific Partnership (TPP) trade deal would pose to our communities, our climate, and our clean air and water, if approved.

Just two months after the Obama administration rejected TransCanada's bid to build the dangerous Keystone XL tar sands pipeline – a landmark victory for the movement to keep fossil fuels in the ground – the Canadian corporation announced it will retaliate by using a TPP-like trade deal.

Specifically, TransCanada plans to ask a private tribunal of three lawyers to order the U.S. government to hand more than $15 billion of our tax dollars to the corporation as "compensation" for the Keystone XL decision that spared us the threat of increased climate disruption and spills of dirty tar sands oil.

How can TransCanada make such an audacious demand? By using a provision called "investor-state dispute settlement" in the North American Free Trade Agreement (NAFTA), which gives foreign corporations, including fossil fuel firms, expansive rights to challenge U.S. environmental protections in unaccountable trade tribunals.

The TPP, a U.S. trade deal with 11 Pacific Rim countries that could come before Congress this year, would expand these corporate rights more than any past U.S. trade deal by extending them to more than 9,000 additional foreign-owned firms. In one fell swoop, the TPP would roughly double the number of foreign corporations that could follow TransCanada's example and challenge U.S. climate and environmental safeguards in private tribunals. The corporations that would gain this power include Australian and Japanese fossil fuel firms that are currently drilling for oil in the Gulf of Mexico and fracking for natural gas on U.S. public lands.

To be clear, TransCanada's NAFTA case will not reverse the Keystone XL decision – Keystone is dead, thanks to years of organizing by a diverse and dogged movement. However, the case could put taxpayers on the hook for the Keystone XL rejection. Even more, it offers a clarion warning that the TPP, by multiplying our exposure to costly cases from the likes of TransCanada, could undermine our most important environmental achievements and imperil climate leadership from future administrations. By helping to defeat the TPP, the movement that defeated Keystone XL can help safeguard future environmental victories.

Like NAFTA, the TPP would give foreign corporations like TransCanada the power to demand compensation for environmental policies that do not conform to their "expectations." In other words, when the government takes an unexpected step to protect our air, our water, our economy, or the health of our families from dangerous projects like Keystone XL, corporations can ask a tribunal to order the government to pay. Indeed, TransCanada argues that it "had every reason to expect that its application [for the pipeline] would be granted." The corporation states that its expectation was thwarted, and thus its special trade pact rights were violated, because the decision was made to "appease those who held a view on the environmental impact of the Keystone XL Pipeline."

While a judge in a U.S. court might toss out such a desperate argument, TransCanada is not taking its case to a court, but to a trade tribunal not accountable to any domestic legal system. Instead of a judge, three private lawyers will issue a binding ruling that cannot be appealed. Neither NAFTA nor the TPP has meaningful rules requiring these lawyers to be impartial. Indeed, under existing trade and investment deals, many such tribunal lawyers actually rotate between acting as tribunal "judges" and representing corporations in cases against governments.

Like NAFTA, the TPP would empower tribunal lawyers to order a government to pay a corporation for the profits it hypothetically would have earned in the absence of the government decision being challenged. Indeed, TransCanada's notice indicates that it is demanding more than $15 billion from the U.S. government to cover not only its pipeline preparation costs, but also its "expected revenues" from the canceled project. The $15 billion sum is one of the largest compensation demands that the United States has ever faced under a trade deal.

However, TransCanada's case is not, unfortunately, an anomaly. It is part of a rising trend of fossil fuel corporations using trade and investment deals to attack environmental victories in private tribunals. For example, after Quebec enacted a moratorium on fracking under the St. Lawrence River (akin to New York's fracking ban), a U.S. oil and gas company named Lone Pine Resources asked a NAFTA tribunal to order compensation from Canadian taxpayers. A Swedish energy firm named Vattenfall has similarly responded to Germany's decision to phase out nuclear energy, demanding $5 billion from Germany in a private tribunal. Chevron, meanwhile, is using another tribunal to try to evade a landmark court ruling requiring the oil giant to pay for the mass contamination of Ecuador's Amazon rainforest.

Amid this surge in trade tribunal attacks on environmental achievements, it's absurd that the TPP would go beyond any existing U.S. trade pact in exposing our safeguards to more greedy corporate challenges.

To protect our communities and the climate, we cannot allow TransCanada's $15 billion demand to inhibit our efforts to keep dirty fossil fuels in the ground. Nor can we allow the TPP to further undermine those efforts.

Inside US Trade

Final TPP Auto ROO Package Differs From Expected Outcome In Two Ways

Posted: January 07, 2016

The final automotive rules of origin in the Trans-Pacific Partnership (TPP) as detailed in the text released this past November differ in two key ways from how TPP officials and other sources described the rules immediately after the talks concluded -- both of which effectively allow for the use of more content from non-TPP countries.

The first difference is that the regional value content (RVC) threshold for some key auto parts made in North America is 35 percent, as calculated under the so-called net cost method. By contrast, officials and some auto industry sources had previously signaled that all of the most sensitive parts for North American manufacturers would require either 40 or 45 percent TPP content. Under the TPP, auto parts must meet either 35, 40 or 45 percent RVC threshold under the net cost method to qualify for tariff benefits, depending on the part. Finished vehicles must meet an RVC of 45 percent under net cost.

The second previously undisclosed aspect of the TPP's rules of origin is that a special methodology for calculating the RVC applies not only to finished automobiles, but to auto parts as well. Informed sources said this alternative methodology had initially been described to them as only applying to finished vehicles.

Critics of these developments fear that they will effectively weaken the rules of origin and allow more content from countries outside the TPP region like China, and argue this could have a negative impact on automobile-related jobs in the region. But they also concede that the full impact of the alternative methodology is difficult to project.

Japan had originally sought lower RVC thresholds than the U.S. was willing to accept, but ultimately backed the alternative methodology as a compromise. It argued this methodology would ease the paperwork burden of applying for tariff benefits for parts that are typically produced near automobile production plants anyway for logistical reasons -- rather then opening the door to sourcing these parts from outside the TPP region. Some sources familiar with the auto industry said they were skeptical of this reasoning, however. Examples of key auto parts made in North America that ended up with a 35 percent RVC are certain auto bodies, mufflers, radiators and engine parts.

Flavio Volpe, president of the Canadian Automotive Parts Manufacturers Association (APMA), said in an interview with *Inside U.S. Trade* that this outcome came as a surprise to his group. Volpe said some of the auto parts that have an RVC of 35 percent under TPP are made by a large number of Canadian companies, and that this contradicts earlier assurances he had received from the Canadian government that such parts with the highest concentration of Canadian producers would get the 40 or 45 percent RVC.

For instance, there are 26 Canadian companies currently producing auto bodies for motor vehicles other than passenger cars that are classified under tariff heading 8707.90, and 18 Canadian firms producing certain engine parts classified under 8409.91, according to APMA. Both of these auto parts ended up with an RVC of 35 percent.

Similarly, U.S. steel industry representatives serving on the Industry Trade Advisory Committee for their sector (ITAC-12) complained in their report on the TPP deal released on Dec. 5 that many steel-intensive auto parts require an RVC of 35 percent or 40 percent rather than the 45 percent. For instance, body stampings require 40 percent regional content to qualify as originating, while mufflers and radiators ended up with the lowest 35 percent, the report noted.

The alternative methodology for calculating the regional content value of autos and auto parts is laid out in Appendix 1 to Annex 3-D of the TPP's chapter on rules of origin. This alternative methodology -- described by some sources during the negotiations as the "flexibility mechanism" -- effectively makes it easier to meet the designated RVCs for vehicles and auto parts by providing a shortcut for counting some constituent materials as originating. Specifically, if certain materials have undergone one or more production processes listed in Table B of the appendix, they can be counted toward the originating value of the vehicle or auto part into which they are incorporated. This makes it easier to meet the RVC for that vehicle or auto part than the normal method, which would require such materials to meet their own product-specific relevant rule of origin specified in the TPP agreement.

The 11 processes listed in Table B are complex assembly, complex welding, die or other casting, extrusion, forging, heat treating including glass or metal tempering, laminating, machining, metal forming, moulding, and stamping including pressing.

But there are important differences in the way this flexibility mechanism functions for finished vehicles and auto parts. For vehicles, there is a finite list of seven products that can qualify as originating using the flexibility mechanism, listed in Table A of the appendix. These are tempered safety glass; laminated safety glass; auto bodies for passenger cars; auto bodies for other vehicles; bumpers; body stampings and door assemblies; and certain drive axles. This finite list places a limit on the extent to which vehicle producers can take advantage of the flexibility mechanism to qualify materials as originating.

The ability of companies to use the flexibility mechanism for auto parts is limited in a different way. First, it can only be used to help qualify materials going into 14 specific auto parts, including engines, bumpers, seat belts, brakes, steering wheels and airbags, which are listed in Table C of the appendix.

Second, the appendix states that the materials for which the flexibility mechanism is used can only account for a specified percentage of the total value of the listed auto part. For example, the regional value content requirement for bumpers is 45 percent under the net cost method. Materials that go into that bumper can be qualified using the flexibility mechanism, but such materials can only account for 10 percent of the total value of the bumper. The remaining 35 percent of the value of the bumper needed to meet the RVC must use the standard methodology for qualifying materials as originating.

Ten out of the 14 auto parts in Table C require an RVC of 45 percent, and for all of these parts the limit on the value of materials that can qualify using the flexibility mechanism is 10 percent. The four remaining auto parts require an RVC of 40 percent, and on these the flexibility mechanism can only be used to qualify materials making up 5 percent of the value.
After TPP was concluded, sources had described a similar cap on the use of the flexibility mechanism for vehicles, but that was not borne out by the text released on Nov. 5 (*Inside U.S. Trade*, Oct. 9).

The ITAC-12 report said it was unclear to what extent this flexibility mechanism would allow more content from outside the TPP region to be included into qualifying goods. Apart from this mechanism, the TPP already provides two options for many auto parts to qualify as originating -- either meeting the RVC or undergoing a change in tariff classification.
"It is not known how this alternative system system differs from existing rules regarding a tariff classification change following a substantial transformation, and how it might ultimately result in more non-TPP content becoming deemed as originating in a TPP country," the report said.
ITAC-12 recommended that, in order to provide more clarity, the production processes listed in Table B of the appendix be defined in the Statement of Administrative Action that will accompany the TPP implementing bill.

Overall, ITAC-12 said it was "very concerned" that the TPP auto rules of origin are "likely to lead to greater use of non-U.S. and non-TPP steel in vehicles and automotive goods, which is a negative result for both U.S. steel companies and U.S. manufacturing in general."
That assessment was more critical than that of ITAC-2 covering automotive and capital goods, which was internally divided over whether to support the auto rules of origin (*Inside U.S. Trade*, Dec. 25, 2015). Neither ITAC-12 nor ITAC-2 took a firm position on whether to support or oppose the TPP overall.

Critics of the flexibility mechanism argue that it further weakens the TPP RVC thresholds, which are already lower than those included in the North American Free Trade Agreement, thereby opening the door for more content from non-TPP countries to be included in originating vehicles and auto parts.

They provided two counterarguments to Japan's assertion that the materials in Table A are typically sourced from close to the vehicle assembly plant and therefore are not likely to be imported from outside the TPP region anyway. The first is that Japan had claimed the flexibility mechanism was necessary in order to allow it to maintain its current supply chain, which includes non-TPP countries like Thailand and China. If that is true, then the flexibility mechanism must somehow allow the continued utilization by Japanese companies of non-TPP inputs, they reasoned. Second, these critics argue that some of the products in Table A -- such as bumpers -- are indeed traded internationally, and that others may become more feasible to trade in the future because of advancements in materials and shipping technology. One source noted that the only way for auto manufacturers to meet new higher emissions standards required by the U.S. and European Union is to incorporate lighter materials, which could make these materials more tradeable.

Despite these worries, Volpe said some Japanese companies have expressed an interest in investing in auto parts production in Canada in part to diversify their supply chain away from

China. He said this was counterintuitive since the TPP's rules allow Japanese automakers to continue sourcing from non-TPP countries. "In spite of all this academic discussion of what the end result would be, I've been surprised to hear about the interest of Japanese capital coming into the Canadian manufacturing landscape," he said. "That would be counterintuitive … and it would be an unexpected benefit." -- *Matthew Schewel*

Washington Trade Daily

January 26, 2016

Political Timing Cramping TTIP

Given the volatile political environment in the country, unless a TransAtlantic Trade and Investment Agreement is at least signed by the end of the year, completing the pact will have to wait another four years, commented a senior US trade official Friday (WTD, 1/28/16).

The official – who spoke to an informal meeting on TTIP at the Swedish Embassy – indicated that negotiations have sped up since the last formal negotiating round last October in order to get to the end-game.

But European Union Ambassador David O'Sullivan, at the same forum, said there are a lot of tough issues to be resolved yet – such as agricultural tariffs, audio visual trade, open government procurement, Geographical Indications and services market access. He expressed hope that a final accord could be signed by the end of the year.

Deputy US Trade Representative – and US ambassador to the World Trade Organization – Michael Punke is in Brussels to take stock of the status of the negotiations and possibly address some of the toughest issues in advance of the next round of talks in Brussels starting February 22.

By the time of the October round in Miami, both sides had at least tabled initial offers. Inter-sessional talks since then have been frequent and comprehensive, the US official said. Negotiators were instructed to get enough on the table over the next few months to see an end point.

But should the TTIP negotiations fall through, the biggest losers will be the small- and medium-sized businesses on both sides, according to the US official. Existing nontariff barriers – including varying product standards and certification procedures – can be addressed without much bother by big companies, but they often are crippling for smaller firms, he pointed out.

Window Glass, Underwear and Mushrooms

Some tariffs on important products also are high on both sides, the official commented. He cited 8-percent tariffs on window glass, 18 percent levels on certain sports underwear, similar levels on imports of plywood from the United States – and an astonishingly 193 percent in the EU on imports of canned mushrooms.

Last October both sides agreed to eliminate tariffs on 97 percent on traded goods – but getting them all to zero will not be easy, the official commented.

Failure to reach agreement on time would be particularly disappointing because the small business chapter in TTIP is nearly complete – and could be considered an early harvest aspect of the grander trade and investment pact.

Also on hand for the discussion was Sweden's Minister for Enterprise and Innovation Mikael Damberg, who emphasized the negotiations must be as transparent as possible to put to rest growing anxiety by the European public. Without public involvement in the negotiations it will be difficult to thwart opinions that the US-EU accord will lead to a "race to the bottom" when it comes to consumer protection and safety.

Mr. Damberg also said the final TTIP must be a "living" agreement, which is reviewed and updated regularly.

1 of 6

Peterson Institute Study Shows TPP Will Lead to $357 Billion Increase in Annual Imports

https://medium.com/@DeanBaker13/peterson-institute-study-shows-ttp-will-lead-to-357-billion-increase-in-annual-imports-ac6b432cff23#.om1f2vff4

January 26, 2016

A new study published by the Peterson Institute projects that the TPP will lead to an increase of $357 billion in annual imports when its effects are fully felt in 2030. This increase in imports will be equal to 1.4 percent of projected GDP in that year.

You probably didn't see this projection in the write-ups of the analysis in the Washington Post, NYT, or elsewhere. That is likely because the study's authors chose not to highlight it. Instead, in their abstract they told readers that they projected the TPP would increase exports by $357 billion. If you were curious about what happened to imports you had to go to page 7 to find:

"The model assumes that the TPP will affect neither total employment nor the national savings (or equivalently trade balances) of countries."

In other words, by design the model assumes that trade balance for the United States is not changed as a result of the TPP. This means that whatever changes we see in exports, according to the model, will be matched by an equal change in imports. Unfortunately the implied projection for imports is never mentioned in the study, so some reporters may have missed this implication of the model.

There are several other important issues that may have been missed. First, the model is quite explicitly a full employment model. This means that, by assumption, the model rules out the possibility of the TPP leading to a larger trade deficit that reduces output and increases unemployment.

In prior decades most economists were comfortable with this sort of full employment assumption since it was widely believed that economies quickly bounced back from recessions or periods of less than full employment. In this view, if a trade agreement led to a larger trade deficit it would soon be offset by lower interest rates, which would provide a boost to investment and consumption.

Alternatively, a trade deficit would lead to a lower value of the dollar. A lower valued dollar would make our exports cheaper to people in other countries, leading them to buy more of them. At the same time, it would make imports more expensive for people in the United States, leading us to buy fewer imports. The net effect would be to lower the size of the trade deficit, bringing us back towards full employment.

Unfortunately, in the wake of the 2008 crash, fewer economists now believe that the economy has a natural tendency back to full employment. Many of the world's most prominent economists (e.g. Larry Summers, Paul Krugman, Olivier Blanchard) now accept the idea of "secular

stagnation." This means that economies really can suffer from long periods of inadequate demand.

From the perspective of secular stagnation, if the TPP does lead to a larger trade deficit, then there is no automatic mechanism that will offset the lost demand and jobs. In this respect it is important to note that the TPP does nothing to address issues of currency management. This would mean that if one or more of the countries in the TPP began running larger trade surpluses with the United States, and then bought up large amounts of dollars to prevent an adjustment of their currency, there is nothing the United States could do within the terms of the agreement.

Unfortunately, the Peterson Institute's model tells us nothing about whether the TPP is likely to lead to a growing trade deficit for the United States. It has ruled this possibility out by assumption.

There are some other items that are worth noting about the models assumptions. It assumes that 75 percent of the non-tariff barriers that are eliminated through the TPP will be protectionist in nature rather than welfare enhancing consumer, safety, or environmental regulation. That may prove to be to be correct, but it is very big assumption. This means that we will not see many cases where the investor-state dispute settlement (ISDS) mechanism is used to overturn (or more correctly impose penalties) for laws that allow consumers to purchase products they consider safe, such as country of origin labeling for meat. It means that the ISDS will not be used to overturn state or local bans on fracking, even if the purpose is to ensure safe drinking water. And, it means that the TPP will not make it more difficult to impose rules that prevent predatory lending by large financial institutions that happen to be based in other countries.

It is important to note that the bulk of the gains rest on this assumption about the nature of the non-tariff barriers that are overturned. Less than 12 percent of the projected gains are attributable to the reduction in tariff barriers in the TPP (page 15).

It is also worth noting that the study does not appear to factor in the losses associated with higher prices for the items that will be subject to stronger and longer patent and copyright protection. Stronger intellectual property protections were quite explicitly one of the main goals of the deal and were one of the last major issues to be resolved. As a result of the TPP, the countries that are party to the agreement will be paying more for prescription drugs and other protected products. The effect of longer and stronger IP rules is the same as a tariff, except we are talking about raising the price of protected items by many times above their free market price. This is equivalent to a tariff of several thousand percent on the protected items.

It does not appear as though the study has taken account of the losses associated with these implicit tariffs. There may be some offset if greater protection is associated with more innovation, but it would be a heroic assumption to assume this is automatically the case. Furthermore, even if innovation did offset the losses, it would not be done instantly, since there is a long lead time between when research is undertaken and when there is a product brought to market, especially with prescription drugs.

It is also worth noting, in the context of the balanced trade assumption of the Peterson Institute model, if the United States gets more money for its drugs patents and video game copyrights, then it gets less for its manufactured or agricultural goods. The greater income for drugs companies, the software industry, and other gainers from stronger IP protection imply less income for other exporters or import competing industries.

Finally, it is important to put the projected gain of 0.5 percent of GDP as of 2030 in some context. The Post article told readers:

"If those projections [from the Peterson Institute study] are correct, that additional growth would help a domestic economy that has struggled to regain the growth rates of previous decades in the wake of the Great Recession."

The study's projection of a cumulative gain to GDP of 0.5 percent by 2030 implies an increase in the annual growth rate of 0.036 percentage points. This means that if the economy was projected to grow by 2.2 percent a year in a baseline scenario, it will instead grow at a 2.236 percent rate with the TPP, assuming the Peterson Institute projections prove correct.

The projections imply that, as a result of the TPP, the country will be as rich on January 1, 2030 as it would otherwise be on April 1, 2030. Of course, other things equal, this would clearly be a positive story, but as noted above, there are reasons for believing that other things may not be equal and that these projections may not prove correct.

Economists Sharply Split Over Trade Deal Effects

By JACKIE CALMES

FEB. 1, 2016

http://www.nytimes.com/2016/02/02/business/international/economists-sharply-split-over-trade-deal-effects.html?_r=0

WASHINGTON — Lawmakers and presidential candidates are having their say about the 12-nation Pacific Rim trade accord that is President Obama's top economic priority in his final year in office. But lately the liveliest debate over the deal is among blue-ribbon economists.

On Monday, it was the critics' turn: Economists from Tufts University unveiled their study concluding that the pact, called the Trans-Pacific Partnership, would cause some job losses and exacerbate income inequality in each of the dozen participating nations, but especially in the largest — the United States.

Supporting the authors at the National Press Club was Jared Bernstein, who was the top economic adviser to Vice President Joseph R. Biden Jr. during Mr. Obama's first term.

The Trans-Pacific Partnership Trade Deal ExplainedMAY 11, 2015 Trans-Pacific Partnership Text Released, Waving Green Flag for DebateNOV. 5, 2015 Trans-Pacific Trade Pact Would Lift U.S. Incomes, but Not Jobs Overall, Study SaysJAN. 25, 2016 Obama Pushes New Pacific Trade Pact Ahead of Asia TripNOV. 13, 2015 The conclusions of the Tufts economists contradict recent positive findings from the Peterson Institute for International Economics and the World Bank about the trade pact, which would be the largest regional accord in history and would bind nations including Canada, Chile, Australia and Japan.

Each side in the economists' debate has criticized the economic model that the other used to reach its results, while opponents and supporters of the trade accord have quickly seized upon whichever analysis buttressed their own views.

Michael B. Froman, Mr. Obama's trade representative, plans to join other trade ministers in Auckland, New Zealand, on Thursday for the formal signing of the trade deal, which they finished in October after years of negotiations.

The future of the deal, however, depends on the approval of a sharply divided Congress. The administration is believed to lack enough support for passage, though votes are not expected until after the November election. Some other nations are delaying their own ratification processes pending American action.

Election-year pressures are not helping the president's cause, as leading candidates in both parties are opposing the trade agreement.

Donald J. Trump, the leading Republican candidate, told the conservative website Breitbart News over the weekend that as president he would stop what he called "Hillary's Obamatrade."

Hillary Clinton, the leading Democratic contender, has criticized the final agreement after praising it while it was being negotiated. She continues to be assailed by her main rival for the nomination, Senator Bernie Sanders of Vermont, for her early support.

Against this backdrop, the economists from prestigious universities and research institutions have been providing their takes and debating their differences just as intensely, though with more scholarly reserve.

The analysis from the Global Development and Environment Institute at Tufts was titled "Trading Down: Unemployment, Inequality and Other Risks of the Trans-Pacific Partnership Agreement," and was written by the economists Jeronim Capaldo and Alex Izurieta, with Jomo Kwame Sundaram, a former United Nations economic development official.

The authors wrote that they used "a more realistic model" for their analysis, and that previous reports that projected economic benefits from the trade accord were "based on unrealistic assumptions such as full employment" and unchanging income distribution.

The Tufts report projected that incomes in the United States would decline by a half-percentage point compared with the change expected without the Trans-Pacific Partnership. The Peterson Institute's report, by economists from Brandeis and Johns Hopkins universities, projected that incomes would rise by half a percentage point.

The Tufts paper also projected that the overall economies of the United States and Japan would contract slightly. Employment in the United States would decline by 448,000 jobs; total job losses in the dozen nations would be 771,000 — a small share of the nations' total work forces, yet hardly a selling point for leaders seeking to ratify the trade agreement.

The Obama administration has acknowledged that some jobs would be lost, especially in manufacturing and in industries that employ workers with lower skills, but it has said that those losses would be offset by new jobs created in export-reliant industries that pay more on average. The Peterson Institute report offered evidence for that argument, while concluding that there would be no net change in overall employment in the United States.

The other parties to the pact are Mexico, New Zealand, Peru, Malaysia, Vietnam, Singapore and Brunei.

"Economic gains would be negligible for other participating countries — less than one percent over 10 years for developed countries, and less than three percent for developing countries," the Tufts report said.

It also had bad news for countries, including China, that are not parties to the Trans-Pacific Partnership, whose participants account for nearly 40 percent of the world economy.

"We project negative effects on growth and employment in non-T.P.P. countries," the report said. "This increases the risk of global instability and a race to the bottom, in which labor incomes will be under increasing pressure."

The authors' explicit criticism of models and data used by other economists provoked swift counter-criticism. Robert Z. Lawrence, a professor of international trade and investment at the Kennedy School of Government at Harvard, and a senior fellow of the Peterson Institute, wrote a blog piece on Monday expounding on why the institute's analysis was "superior on all counts" and better suited to specifically gauging the impact of megatrade agreements.

Portman to oppose trade deal as opposition back home builds

By Paul Kane and Kelsey Snell

February 4, 2016

https://www.washingtonpost.com/news/powerpost/wp/2016/02/04/portman-to-vote-no-on-trade-deal/

Sen. Rob Portman, a former U.S trade ambassador, announced Thursday that he opposes a sweeping 12-nation Pacific Rim trade agreement, dealing a setback to a deal that is seen as a key part of President Obama's economic legacy.

The Ohio Republican is facing a difficult re-election campaign against Ted Strickland, an anti-trade former Democratic governor, in a state that has seen a steep decline in manufacturing as a result of companies moving operations overseas. The announcement is a significant but not fatal blow to the Trans Pacific Partnership (TPP) agreement, which is protected by fast-track rules that ensure it cannot be filibustered in the Senate.

"I cannot support the TPP in its current form because it doesn't provide that level playing field," Portman said in a statement. "I will continue to urge the Obama administration to support American workers and address these issues before any vote on the TPP agreement."

Portman, who served as the top U.S. trade official under President George W. Bush, was seen as a potential ally for the Obama administration. Last year he voted for legislation to grant Obama fast-track trade negotiating authority. That bill, considered a bellwether of support for the trade agreement itself, passed on a 62 to 37 vote in May.

Strickland used Portman's announcement as an opportunity to knock his past support for trade deals.

"The difference between Senator Portman and myself when it comes to trade is clear: he voted for 8 trade deals and I opposed them," he said in a statement. "He voted to make permanent most favored nation status for China, and I opposed it."

The TPP agreement was signed Wednesday in a ceremony in New Zealand but has not yet been transmitted to Congress for official consideration. Support for the agreement has waned in recent months and Senate Majority Leader Mitch McConnell (R-Ky.) said Tuesday that he does not expect to consider the deal before the November election.

[*U.S., 11 nations formally sign largest regional trade deal in history*]

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"It's pretty obvious to anybody who will state the obvious that with both the Democratic candidates for president opposed to the deal and a number of the presidential candidates of our party opposed to the deal, it's my advice that we not pursue that, certainly before the election," McConnell said.

Portman left open the possibility that he could change his position and support the deal if changes are made to better protect U.S. workers. He announced last year that he was skeptical of the deal for failing to prevent countries like Vietnam and Japan from artificially devaluing or otherwise manipulating the value of their currency. He drew criticism from his Republican colleagues for supporting a currency amendment to the fast-track bill.

The statement also listed concerns with the complex rules of origin that are used to determine how countries can source parts for major exports like automobiles. Many U.S. companies worry that the TPP makes it too easy for countries like Japan to undercut U.S. automakers by buying cheap parts from China to build inexpensive cars destined for U.S. dealerships.

The fight over rules of origin has plagued the deal throughout negotiations as have concerns that it doesn't do enough to protect U.S drug innovations. U.S. pharmaceutical companies wanted data and research on complex biologic drugs to be protected for 12 years, a measure Portman and other Republicans supported. The final deal cut the protections to five years.

[*In a setback for Obama, negotiators fail to wrap up Pacific trade pact*]

The Obama administration has hailed the TPP as the most extensive trade expansion in a generation. Supporters of the agreement originally hoped the bipartisan vote on the fast track bill was a signal that the trade deal would have an easy path in Congress despite election year politics.

Hopes fizzled in December when McConnell announced in an interview with The Washington Post that he thought it would be a mistake for Obama to try to pass the deal in an election year. Nearly every presidential candidate in both parties oppose the deal as do many House Democrats.

[*McConnell warns that trade deal can't pass Congress before 2016 elections*]

Fast-track legislation lays out a strict timeline that requires Congress to vote on the legislation within 90 days of the signed agreement being transmitted for their consideration. Transmission could take time and there is a chance that Obama could work with Congress to slow-walk the process long enough for deal to come up after the November election.

McConnell and House Speaker Paul D. Ryan (R-Wisc.) are both in favor of expanding U.S. trade and Ryan is credited with carefully persuading House Republicans to back fast track while he was chairman of the House Ways and Means Committee.

"The speaker's a free trader. I'm a free trader, and obviously, the president is as well," McConnell said earlier this week. "There are a number of flaws here. We're gonna keep on talking about it and see if there's a way forward."

http://www.ft.com/intl/cms/s/0/eb52ea88-cb46-11e5-be0b-b7ece4e953a0.html

February 4, 2016 5:31 pm

As Pacific trade deal is signed pharma holds key to US ratification

Shawn Donnan in Gaithersburg

US President Barack Obama's plan to get a vast Pacific Rim trade deal through Congress this year is taking flak from the presidential campaign trail, where disdain for the pact appears to be one of the rare unifying themes for almost everyone from Donald Trump to Hillary Clinton.

But a more immediate obstacle to the Trans-Pacific Partnership signed by the US, Japan and 10 other countries on Thursday lives in Jan Kemper's laboratory an hour's drive from the White House. It can be found in the finicky Chinese hamster ovary cells in the glucose-rich sludge at the bottom of bioreactor BRX-099 — part of a biological assembly line for a new generation of drugs to fight everything from asthma to cancer.

"Cells get very cranky when they don't get enough sugar," says Ms Kempner, a researcher. "Just like people."

The cells are part of biotech company Medimmune's research and development programme for medicines known as biologics — complex molecules built out of biological material rather than chemicals, like most traditional drugs.
They represent the cutting edge of treatment for all manner of diseases and a future that the pharmaceuticals industry is betting on. Biologics now make up half the pipeline of medicines being developed by parent AstraZeneca, which bought Maryland-based Medimmune in 2007.

What makes them a threat to Mr Obama's efforts to get the TPP, which covers
40 per cent of the global economy, through a Republican-controlled Congress is that key GOP leaders such as Utah Senator Orrin Hatch, chairman of the Senate Finance Committee, do not like the intellectual property protections his administration negotiated for biologics in the TPP. They have vowed to block ratification until something changes.

US law calls for 12 years of exclusivity for biologics, something Washington sought to have replicated in the TPP. But, backed by campaign groups such as Médecins Sans Frontières who argue that such long periods help inflate drug prices by preventing generic competitors, Australia, Peru and other countries pushed for a five-year period. Under a fudge reached at the end ofmarathon negotiations in Atlanta in October, the deal eventually called for a period of either five or eight years depending on circumstances.

The compromise drew the ire of the pharmaceuticals industry, which has been lobbying heavily since for

a change. It managed to have a caveat added to endorsements of the TPP from major business groups in recent weeks, who have urged the administration to resolve "outstanding issues" with Congress.

Trade is a good thing. But trade has got to be fair. And the TPP is anything but fair

Bahija Jallal, Medimmune's top executive, says it takes an average of 10 years to bring a biologic to the market, and without intellectual property protections the incentives to pour millions into research are not there.

"Someone didn't just wake up and say 12 years," she says. "There is solid research behind that."

Administration officials insist they will not renegotiate the TPP, which took five years of discussions to get done. But they have begun talks with members of Congress that are set to intensify in the coming weeks.

"I'm confident at the end of the day because of the strong benefits to the US economy . . . that members of Congress will see the benefits for their constituents, and we'll have the necessary bipartisan support to be approved," Mike Froman, the US trade representative, told reporters at the TPP signing ceremony in New Zealand on Thursday.

Transpacific ambivalence

In TPP deal, what's good is very good and what's bad is very bad

The goal, officials say, is to find another compromise with Congress in the coming weeks that would allow the TPP to be presented for ratification as soon as May or June, a plan already complicated by the fact that Mitch McConnell, the Republican leader who controls the Senate, does not think the trade deal should be voted on until after November's presidential elections.

Possible solutions suggested by administration officials range from a promise that future trade deals would include a longer exclusivity period to a simple promise not to pursue any change in the 12-year period now in US law.

Any pledges the Obama administration makes now are complicated by the fact that the president has less than a year left in office and both Democrats and Republicans running to succeed him are sceptical of the TPP.

"Trade is a good thing. But trade has got to be fair. And the TPP is anything but fair," says Bernie Sanders, the Vermont Senator challenging Mrs Clinton from the left for the Democratic Party's presidential nomination. Among the reasons for his opposition: "Skyrocketing drug prices".

US business groups insist a deal will be done and that the TPP is more likely than not to be ratified

before Mr Obama leaves office in January 2017. "I'm very confident that they are going to work this out," says John Engler, who heads the Business Roundtable.

But for Mr Obama, his economic legacy, the TPP and the Chinese hamster cells in Medimmune's bioreactors there are still significant hurdles to get over in the months ahead.

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http://thehill.com/policy/finance/trade/268693-obama-trade-deal-taking-a-hit-in-presidential-race

Obama trade deal taking a hit in presidential race

By Vicki Needham - 02/09/16 06:00 AM EST

Lawmakers say harsh criticism leveled against President Obama's Pacific Rim trade agreement from presidential candidates in both parties is further complicating its passage.

The stinging rhetoric against the 12-nation Trans-Pacific Partnership (TPP) comes on top of other challenges and could stifle what is already expected to be a difficult process.

"We knew once we got into the primary season both for members running in their primaries and the presidential primaries that it was going to make it difficult politically," said Rep. Charles Boustany Jr. (R-La.), a member of the House Ways and Means Committee who backs the deal.

"So we have that and we have the problems we're trying to resolve in the finalized agreement so it's all going to delay things," he added.

Rep. Gerry Connolly (Va.), one of the two dozen or so House Democrats backing the deal, also said the rhetoric from the 2016 field is complicating progress on the TPP.

"If we had people out there campaigning in favor of it, it would provide some protective cover here, give us a little safe place to go now and then," Connolly told The Hill.

"Beating the drums in opposition out there in any way, shape or form certainly doesn't help the climate here," he said.

The United States and 11 partner nations signed the TPP in Auckland, New Zealand, last week, but it is unclear if the deal will be considered by Congress this year.

Senate Majority Leader Mitch McConnell (R-Ky.) and Senate Finance Committee Chairman Orrin Hatch (R-Utah) say the sweeping agreement probably won't come up for consideration until after the November elections, and could even get pushed into 2017.

Hatch argued the TPP's legislative process will be lengthy regardless of the opposition rippling through the electoral landscape.

"It's always been hard, there's nothing easy about that [passing trade deals]," Hatch told The Hill.

"So we'll just have to when we can do it. It's always going to be hard because the vast majority of Democrats are against this even though it's their president."

Democrats are under pressure to oppose the deal because of opposition from unions and other liberal groups.

A number of business constituencies, including pharmaceutical companies, also have deep reservations about the deal. That has left Republicans lukewarm at best toward the agreement.

The fiery backlash against the president's trade agenda coming from the 2016 field only makes a congressional fight less attractive. Opponents are arguing that the controversial trade deal would lower U.S. jobs and wages, a message that is resonating with some voters.

Republican presidential hopeful Donald Trump has vowed to kill the TPP, calling it a "terrible one-sided deal," while Ted Cruz, the winner of the Iowa caucuses, has recently ramped up his anti-trade rhetoric. Marco Rubio, who has railed against the president's economic policies, has yet to take a position on the TPP, although he did back fast-track authority last summer.

On the Democratic side, Bernie Sanders has pledged to dismantle Obama's trade agenda if elected.

"As your president, not only will I make sure that the TPP does not get implemented, I will not send any trade deal to Congress that will make it easier for corporations to outsource American jobs overseas," he said last week during an event in New Hampshire.

Hillary Clinton also opposes the TPP, even though she supported it as Obama's secretary of State.

Rep. Dave Reichert (R-Wash.), chairman of the House Ways and Means Committee Trade Subcommittee, chalked up most of the critical trade talk to election-year political posturing.

He said he's convinced that the next president can be persuaded to back a robust trade agenda.

"I'm hopeful that whoever is elected that when they come into office, we can sit down with the Ways and Means Committee, the [trade] ambassador and the new president and I'm sure we'll be able to convince them the importance of trade and how important it is to the economy and how it does grow jobs," he told The Hill.

In the meantime, however, lawmakers wanting to move the TPP this year will have to endure criticism from the campaign trail.

Sen. Rob Portman (R-Ohio), a former U.S. Trade Representative who faces a tough reelection campaign, said Thursday that he "cannot support the TPP in its current form because it doesn't provide that level playing field."

Portman's opposition is perhaps the best symbol yet of the difficulty faced by trade supporters. That a former U.S. trade representative is opposing the deal speaks volumes to the perceived dangers of tackling the issue this year.

Kevin Madden, a former adviser to Republican presidential campaigns, is urging pro-TPP candidates to get out front and tout the economic and national security benefits of the deal in an effort to better navigate any potential congressional complications.

"In this environment right now we're combating the anti-trade talk with the facts," he said.

US TRADE Daily News

White House Predicts TTIP Will Not Conclude Under Obama Administration

February 09, 2016

White House Press Secretary Josh Earnest on Monday (Feb. 8) said that although the Transatlantic Trade and Investment Partnership (TTIP) is a priority for the Obama administration, he does not envision the deal wrapping up while President Obama is in office.

"I do not believe that we're going to reach a TTIP agreement before the president leaves office, but he's certainly interested in moving those negotiations forward and in a direction where we can be confident that the economy of the United States will be enhanced through the completion of an agreement hopefully under the leadership of the next U.S. Ppesident," Earnest said at the daily press briefing.

This is the first time an administration official has publicly said that concluding the TTIP before Obama leaves office is unlikely, although officials have acknowledged that it would be difficult to do so.

The Office of the U.S. Trade Representative, meanwhile, has stressed that the two side should push to reach a deal before Obama leaves. A USTR spokesman deferred a question on Earnest's comment to the White House.

The briefing came the same day that Obama met with Italian President Sergio Mattarella at the White House and signaled that the administration was still keen on concluding TTIP in 2016.

"And from the work we're doing together in Afghanistan ... to the opportunities that present themselves in finalizing a trade agreement through the TTIP process, we agreed that joint and common action between the United States and Italy not only serves the interest of both our countries, but the broader transatlantic relationship that has underwritten so much peace and prosperity over the last several decades," Obama said.

The meeting between Obama and Mattarella comes just two weeks ahead of the next TTIP negotiating round, slated for Feb. 22-26 in Brussels. But while U.S. trade officials have been publicly stressing the

message that the talks must wrap up under Obama or else risk drifting for years, the U.S. has showed reluctance to make key concessions on issues like government procurement that the EU has said it needs to conclude a deal.

Mattarella, in his remarks after the meeting, said that TTIP could be used to prevent future economic and financial crises. Speaking through interpreter, he made the case that this would be good for developing countries as well, as they would also be impacted by any economic downturn in the U.S. or EU.

"We also talked about our transatlantic economic and trade partnership, and this of course is a very important approach because it can help us to avoid in the future additional, new economic and financial crises, because they would, of course, jeopardize the prosperity that has been achieved in the developing world and perhaps ward off or prevent any prosperity from being achieved in developing nations," he said.

Prior to the meeting, a White House notice said the two presidents would discuss "the importance of concluding the Transatlantic Trade and Investment Partnership."

Mattarella, as the president, is the Italian head of state. The head of government is Prime Minister Matteo Renzi.

POLITICO

Levin on TPP: 'I cannot support it' in current form

By Doug Palmer

02/18/2016 10:05 AM EDT

The top Democrat on the House Ways and Means Committee said today that he can't support the Trans-Pacific Partnership in its current form, another sign of the difficulty the White House is having building support for the pact.

The 12-nation agreement, as negotiated, "is short of acceptable, and I cannot support it," Rep. Sander Levin said at a breakfast hosted by The Christian Science Monitor. "There are four key areas - worker rights, currency manipulation, the rules of origin and investment - where the results are wholly inadequate."

Levin, a veteran of many trade battles during his decades in Congress, has supported some trade deals in the past and opposed others. However, last year he voted against giving President Barack Obama trade promotion authority to complete the TPP and other trade deals.

The White House is pushing for a vote on TPP this year but continues to face resistance from top Republicans. Levin said he hoped his opposition would prompt the administration to address his concerns to build more support on the Democratic side of the aisle for pact.

http://insidetrade.com/daily-news/ryan-raises-possibility-tpp-will-never-pass-congress-details-objections

Ryan Raises Possibility TPP Will Never Pass Congress; Details Objections

February 19, 2016

House Speaker Paul Ryan (R-WI) over the weekend held open the possibility that Congress will never pass the Trans-Pacific Partnership (TPP) by saying he does not know if and when there will be enough votes to pass it. He also publicly spelled out his problems with the agreement for the first time, citing provisions on cross-border data flows, dairy and biologic drugs.

In a Feb. 14 interview on Fox News, Ryan reiterated his previous statements that there are currently not enough votes to pass TPP in Congress. "And I don't see where these votes are right now and I'm just being honest with people about that, and I don't know if and when that's going to change," he said.

He said the votes are not there at the moment because the administration negotiated an agreement with "flaws" in it. "They're going to have to figure those out and work those out if they want to get the votes to pass in Congress, which I don't see the votes there right now," he said.

Ryan stressed that he would not bring up TPP if the votes are not there because he is not the "dictator of the House" or the "micromanager of the House."

When pressed on what exactly needs to be changed in TPP, Ryan said: "I think there are things that need to be addressed. I won't go into all the details, but cross-border data flows, dairy, there are biologics, intellectual property rights protection."

Cross-border data flows likely refers to the exclusion of the financial sector from a general ban in TPP on government requirements that data be stored on local servers.

U.S. financial services companies and their congressional allies have been pressing the administration to change that provision in TPP and future trade agreement. Treasury Secretary Jack Lew last week said his department is talking with financial services firms and independent U.S. financial regulators to work through the industry's objections to that exclusion.

http://www.politico.eu/article/5-things-to-watch-on-ttip-eu-us-trade-european-commission/

5 things to watch on TTIP

Whether the EU and the US can reach a deal before the end of the Obama administration hinges on their resolution.

By

Hans von der Burchard

2/25/16, 5:30 AM CET

Updated 2/25/16, 5:55 AM CET

Negotiations for an ambitious EU-U.S. trade deal had a bumpy start this week, with Greenpeace activists blocking the entrance. This was just a blip for the 12th round of negotiations on the Transatlantic Trade and Investment Partnership (TTIP) this week in Brussels. It's crunch time for European Commissioner for Trade Cecilia Malmström: She hopes to reach a compromise by the end of 2016, before President Barack Obama's term ends in January 2017, and U.S. officials say they share the same goal.

Here are five potential sticking points:

1. Regulatory cooperation

Backers say harmonizing regulatory standards would allow manufacturers of products from chemicals to cars to minimize compliance costs.

"This is one of the main objectives of TTIP," Malmström said Monday.

Critics, however, are concerned that such an alignment "bears the risk of introducing U.S. regulatory standards that could lower our level of consumer protection," said Johannes Kleis from the European Consumer Organization BEUC.

Malmström, for her part, said, "no EU trade agreement will ever lower the level of protection of consumers or food safety or of the environment."

To keep this promise, her negotiators need to convince the U.S. to accept a more "precautionary" approach to assess the risk of pesticides, hormones or other potentially harmful substances in food or chemical products.

While EU legislation requires producers to prove that all substances in their products are safe before they get market approval, the U.S. does not have such a legal obligation. Critics say the U.S. applies exactly the opposite principle — products get approved unless it is proven that their ingredients can do harm.

2. Investor-state arbitration

One of the most controversial clauses would allow foreign investors to sue governments over regulations if they allegedly harm their investments. This has been a part of over 3,000 international agreements since the 1950s, with almost half of them including EU member countries.

The European Commission took this investor-state dispute settlement, or ISDS, off the negotiating table in January 2014 amid growing opposition in Europe. Then, the European Parliament demanded last July that ISDS be replaced "with a new system for resolving disputes between investors and states" — otherwise, it would reject the whole deal when it is time for ratification.

In a bid to appease critics, Malmström revamped the investor court system in September, turning it into a permanent dispute settlement court with 15 independent judges, an appellate mechanism of six judges, and more transparent procedures.

This week, negotiators will for the first time exchange their views on the new proposal, but there are signs that the U.S. is not very enthusiastic.

For Malmström, this is an essential point: If she can't convince the U.S. to accept her court idea, the whole plan risks falling apart and drawing even more criticism of TTIP. Some say it isn't worth killing the deal, and call for the arbitration system to be carved out completely.

3. Buy (not just) American

"This is another potential deal breaker," said Bernd Lange, chair of the Parliament's international trade committee and a member of the Socialist & Democrats party.

At issue is the opening of the world's two largest public contract markets to each other's companies.

The EU, which says it is already very much open to U.S. firms, is pressuring Washington to lower restrictions, most notably the Buy American Act. The law requires the U.S. government to, in most cases, prefer American products or offers whenever they buy equipment or award a contract.

"This is one of the major benefits we could get out of TTIP," said Markus Beyrer, director-general of Business Europe, a major business lobby. "We need a comprehensive agreement giving both sides new market opportunities."

Although the issue is not on the table this week, both sides will exchange offers next Monday and discuss them during follow-up talks in Washington in two weeks. It will be a tough negotiation.

"We have never expected that the Buy American Act would be abolished, especially not in an election year," Malmström told POLITICO last Thursday. "But there are ways to make waivers and exceptions, and this is what we hope we can achieve."

Another problem: Even if the U.S. federal government were to open its procurement market, this would not include contracts issued by the 50 U.S. states.

Expanding the commitments to the state level "is something where we are very much insisting [on]," a Commission source said.

The American Chamber of Commerce to the EU is backing the Commission's demand.

"Ideally, the state level should be included at the negotiation table to open up the whole U.S. public procurement market," said Hendrik Bourgeois from the business lobby. "However, enlarging the negotiations to all U.S. states will be a very difficult step to undertake."

4. Financial services

Defining common standards for banks, traders and rating agencies is another priority of the EU.

"It would be good if the EU and the U.S. could set joint standards, to raise the bar globally," said Marietje Schaake, an MEP from the Alliance of Liberals and Democrats. "International cooperation and oversight are crucial to avoid a future financial crisis."

At the last TTIP round in October, the U.S. had been reluctant to approach financial services, arguing TTIP would not be the right format. Ahead of this round, U.S. officials declined to comment.

The only point on which both sides seem to agree so far is a "prudential carve-out" provision, which would allow governments to protect their financial systems during times of crisis.

5. Protecting (European) food names

These so-called geographical indications – for example, Parma ham or Roquefort cheese – are a top issue for the EU. It maintains U.S. companies should be forbidden to sell imitations of such food under the same name. But so far Washington has shown little interest to give in.

"I'm afraid we are still not there," the Commission source said. "We will still need to have a lot of discussions with the United States."

If the two sides can't agree on this point, it would further jeopardize the ratification of a finalized TTIP deal: The Greek government has already threatened to veto a different EU trade deal with Canada as long as it does not protect its Feta cheese from foreign imitations.

With these five major points unsolved, and differences remaining in some others as well, the goal of concluding negotiations in 2016 seems ambitious — unless both sides manage to drastically speed up the negotiations.

"By the end of this round, or shortly thereafter, we anticipate having specific agreement language under discussion in nearly all areas," said Trevor Kincaid, a spokesperson for the U.S. Trade Representative.

The Commission said it wants to have compromises in place by the end of July, with only some minor questions remaining open.

"We are still very far away from an agreement," Lange said. "In the most sensitive areas, nothing has happened. The EU has presented its proposals, it's now the U.S.'s turn to come forward so that we can make a deal."

http://www.theguardian.com/business/2016/feb/26/ttip-eu-and-us-vow-to-speed-up-talks-on-trade-deal

TTIP: EU and US vow to speed up talks on trade deal

Negotiators confirm they hope to reach agreement on Transatlantic Trade and Investment Partnership by end of year

Senior European and US officials have vowed to accelerate talks on a controversial trade deal that critics say would weaken environmental and consumer standards, while giving too much power to companies to sue governments.

Negotiators from the EU and the United States confirmed they were hoping to secure agreement on the Transatlantic Trade and Investment Partnership by the end of the year. TTIP, which the EU trade commissioner once described as "the most contested acronym in Europe", is a sweeping plan to harmonise regulatory standards, cut tariffs on thousands of items and help companies do more transatlantic business.

Talks began in July 2013, but rapidly became bogged down amid widespread public protest, with disputes breaking out over issues ranging from the French film industry to feta cheese.

Now the two sides are racing to strike a deal before Barack Obama leaves presidential office in January 2017.

On Friday, the EU's chief negotiator, Ignacio Garcia Bercero, said it was time to pick up the pace. "We are ready to seek to conclude negotiations in 2016 provided that the substance is right." He told journalists that the latest round of negotiations – the 12th – were being extended into next week to intensify talks on sensitive areas.

His US counterpart, Dan Mullaney, said: "We still have a lot of work to do but if we can sustain our current intensified engagement we can finish negotiations this year."

The two sides will hold two further rounds of talks in the coming months, with the aim of getting a draft deal by July, leaving the most contentious areas to be resolved in the second half of the year.

The drive to strike a deal was underlined by the relaunch of talks this week on one of the most contentious aspects of TTIP, a special court for settling disputes between governments and investors.

The European commission wants to establish an exclusive trade court to replace the Investor-State-Dispute Settlement, a system for resolving trade disputes that has existed since the 1960s.

This system is written into thousands of investment contracts, including 1,400 involving EU countries, but has aroused growing concern.

Critics say ISDS tribunals give private companies too much power to sue governments for lost profits.

Tobacco company Philip Morris used ISDS in an attempt to overturn Australia's plain-packaging laws. Although the challenge failed, the Australian government spent an estimated A$50m (£26m) of taxpayers' money defending the 2011 law.

More recently, TransCanada announced it was suing the US government for $15bn, after the Obama administration rejected on environmental grounds the Keystone XL pipeline, which was designed to pump oil from the tar sands of Canada.

Earlier this week, one of the UK's leading QCs warned that TTIP would make it easier for private companies providing services to the NHS to sue the government through the special trade court.

Garcia Bercero confirmed the special court was discussed this week, having been frozen out of the negotiations in March 2014.

In response to widespread criticism, his boss, the EU trade commissioner Cecilia Malmström, last year proposed a new kind of special court for resolving disputes – the investment court system. Under the revised proposals, an international court of 15 judges and six appeal judges would be created with judges appointed by the US and the EU, rather than disputing parties, as under the current system.

The commission says this is more transparent and efficient, but critics argue it is no better than the system it replaces. In a recent report, a coalition of NGOs, including Corporate Europe Observatory and War on Want, described the new court as a "zombie ISDS", back from the dead.

Although they concede it does contain procedural improvements, such as the appointment of judges, they argue the court still allows companies too much leeway to sue governments.

"Some of the reforms are nice – more transparency is always good – but it is not really a complete reform," said Ska Keller, a German Green MEP who sits on the European parliament's trade committee. "It is setting up a parallel justice system for companies. Companies of course should be able to go to court, but a normal court, as anyone else."

Business groups are also unhappy with the commission's proposals. "We feel it would be very difficult for companies to launch a complaint," said Luisa Santos, director of international relations for pan-European lobby group Business Europe. She is concerned that many governments would use "the umbrella of public interest" to shelter state-owned companies from competitors.

The commission argues it has struck the right balance. "Investors have a way of ensuring their rights are properly protected," said Garcia Bercero, "but in no way can this create any interference with the right of public authorities to regulate."

http://myinforms.com/en-af/a/26693134-malmstrom-seeks-ttip-deal-this-year-but-says-it-must-deliver-on-eu-priorities/

Daily News

Malmstrom Seeks TTIP Deal This Year, But Says It Must Deliver On EU Priorities

March 10, 2016

European Union Trade Commissioner Cecilia Malmstrom on Wednesday (March 9) emphasized that efforts to conclude a Transatlantic Trade and Investment Partnership (TTIP) this year cannot be successful without securing some of the key EU priorities, such as more access to the U.S. government procurement market, **more protection for food names known as geographical indications (GIs)**, and an innovative regulatory cooperation chapter.

She also said that any future trade agreement must include investor protections reflecting the EU proposal for an investment court that ensures additional transparency, an appeal mechanism and a government right to regulate more than the investor-state dispute settlement mechanism.

This is what the EU obtained in its trade deals with Canada and Vietnam, and what it is pursuing in all future trade agreements.

"It is in our interest to complete [a TTIP deal this year], but not at any price," Malmstrom said at a press briefing immediately after her arrival in Washington, DC. "We do not want TTIP light." She said she has to come as close as possible to meeting her mandate from member states demanding a strong deal.

Malmstrom spoke before her March 10 meeting with U.S. Trade Representative Michael Froman that will be focused on regulatory cooperation. The two will discuss both sectoral cooperation as well as horizontal issues like good regulatory practices, she said.

She acknowledged that progress on the priorities she identified has been at best slow in the TTIP negotiations. She said the two sides are still in the phase of discussing and analyzing offers on government procurement, and that no negotiations have taken place on the controversial EU investor protection proposal. She also signaled the same was true for EU demands on **GIs, an issue "very important" to member states**.

But she said the two sides made progress on potential goals for regulatory cooperation in specific sectors, particularly autos and pharmaceuticals, during the last negotiating round in Brussels in late February. In those two areas, she cited the possibility to "harmonize" respective standards on seat belt anchors and a recognition of each other's inspections on good manufacturing practices (GMP) for pharmaceutical manufacturers.

One informed source said that the Food and Drug Administration (FDA) continues to insist that any cooperation has to be conducted on its own terms and not as part of TTIP.
That is consistent with the message of a senior FDA official who said last May the agency is actively assessing whether it can rely more on EU regulators in inspecting the manufacturing

practices of EU pharmaceutical firms. But he made clear that the timeline and ultimate result of these efforts will not be influenced by the broader TTIP talks, and would be strictly a "regulator-to-regulator" dialogue.

Malmstrom noted that for a TTIP agreement to be concluded this year, the "end-game" phase of the negotiations have to begin by the summer. She said this can be done, but that the two sides have to work "really hard" and that is why they are maintaining very close political contact regarding the negotiations.

Malmstrom said that work on regulatory cooperation in other sectors has not reached "the same level of concreteness" as autos and pharmaceuticals. Other sources familiar with the negotiations said that in the other sectors, the work on objectives remains exploratory, identifying possible options. The seven other sectors are medical devices, chemicals, cosmetics, information and communications equipment, engineering, textiles and pesticides.

Malmstrom cited the possibility of agreeing on the same apparel labeling that provides care and handling instructions, and traceability of medical devices.
According to Malmstrom, these options are "basically agreed" but the details must still be worked out in various agencies. These are the things the EU side will discuss with Froman, she said.

She insisted that these issues are not "politically controversial," and expressed the hope that the two sides "could finalize these chapters during the next negotiating round" to be held in mid-April in New York City.

On investment protection, she said the EU "presented" its proposal to the U.S. during the February round in Brussels. The two sides went through all the elements of the proposal and the U.S. asked questions. "But it was not a clear negotiation," she said.

Malmstrom made clear that she did not expect the negotiations to go smoothly and that the two sides will have to "sit down at the political level" to consider this issue.
Informed sources said earlier this week that the EU considers the U.S. government procurement offer insufficient to advance the negotiations toward the end game, and that it must be improved in order for the EU to consider concessions on its most sensitive agriculture tariffs. In addition, the EU has linked its tariff offer to progress on GIs and expanding a bilateral wine agreement in TTIP.

Asked whether the EU is dissatisfied with the U.S. offer because it does not lift the Buy American restrictions, Malmstrom only said that the EU has been very clear it is not seeking an elimination of such restrictions but "possible exceptions and waivers." She also signaled that there may be a second round of offers on government procurement, by noting that in many areas there have been revised offers following the initial ones.

She said that the two sides will hold two more negotiating round before the summer in April and July, and hold intersessionals. She said the political oversight will continue with a March

18meeting focused on market access, and a meeting in April when President Obama visits Germany accompanied by Froman and Commerce Secretary Penny Pritzker.

She also said that she and Froman will meet "probably" in May, though no date has been set, as well as towards the end of June. They will also both participate in the OECD meetings in early June, and may also meet at the G20 in Shanghai.

http://myinforms.com/en/a/27272596-mexico-seeks-to-retaliate-on-4723-million-in-trade-with-us-in-tuna-dispute/

Short Takes

Mexico Seeks To Retaliate On $472.3 Million In Trade With U.S. In Tuna Dispute

March 15, 2016

Updated: Mexico has announced it will ask the World Trade Organization for the right to hike tariffs on $472.3 million annually in trade with the United States over the latter's failure to comply with multiple Appellate Body and panel rulings faulting its dolphin-safe labeling requirements for tuna.

In a communication circulated to WTO members on March 11, Mexico said it would make its request at the next meeting of the Dispute Settlement Body (DSB), which is slated for March 23. A spokesman for the Office of the U.S. Trade Representative said the U.S. intends to object to the retaliation amount requested by Mexico, thereby referring the matter to an arbitrator to determine the appropriate amount.

"We would note that Mexico's request for authorization to affect $472.3 million in U.S. exports annually appears to be substantially inflated," the spokesman said in a March 15 emailed statement.

Mexico said it is seeking to suspend the application to the United States of tariff concessions and other related obligations in the goods sector under the General Agreement on Tariffs and Trade (GATT) in the amount of $472.3 million, but did not say the specific products on which it plans to raise tariffs.

"Mexico will implement the suspension of tariff concessions and other related obligations by imposing additional tariffs on a list of U.S. products to be established by Mexico in due course," it said in the communication.
Mexico emphasized that the amount is equivalent on an annual basis to the level of nullification or impairment of its benefits due to the U.S. failure to bring its tuna-labeling requirements into line with the earlier WTO rulings.
It also said it had applied the general principle set out in Article 22.3(a) of the Dispute Settlement Understanding (DSU) in determining what concessions and obligations to suspend. Article 22.3(a) states that the complaining party should first seek to suspend concessions in the same sector as that in which the violation occurred.

In its Nov. 20, 2016 ruling, the Appellate Body found that the U.S. tuna labeling rule as amended in 2013 still violates Article 2.1 of the Agreement on Technical Barriers to Trade (TBT), as well as Articles I:1 and III:4 of the GATT. Article 2.1 of the TBT Agreement requires members' technical regulations to accord treatment "no less favorable" to the products of other WTO members as to their own products or products of third countries. Article I:1 of the GATT requires countries to grant most-favored nation treatment to all parties, while Article III:4 requires countries to provide national treatment.

The Appellate Body found the 2013 U.S. dolphin-safe labeling rule violated TBT Article 2.1 by setting more stringent requirements for tuna caught in the Eastern Tropical Pacific ocean, where the bulk of the Mexican fishing fleet operates, to garner the label compared with tuna caught in other fisheries. It applied a similar logic in finding the GATT violations.

http://mobile.nytimes.com/2016/03/16/business/economy/on-trade-angry-voters-have-a-point.html?_r=0

On Trade, Angry Voters Have a Point

March 15, 2016

Eduardo Porter

ECONOMIC SCENE

Were the experts wrong about the benefits of trade for the American economy?

The nation's working class had another opportunity to demonstrate its political clout Tuesday, as primary voters went to the polls in Illinois and Ohio, Rust Belt states that have suffered intensely from the loss of good manufacturing jobs. Last week, the insurrection handed Michigan's Democratic primary to Bernie Sanders while continuing to buoy the insurgent Republican candidacy of Donald Trump.

Voters' anger and frustration, driven in part by relentless globalization and technological change, may not propel either candidate to the presidency. But it is already having a big impact on America's future, shaking a once-solid consensus that freer trade is, necessarily, a good thing.

"The economic populism of the presidential campaign has forced the recognition that expanded trade is a double-edged sword," wrote Jared Bernstein, former economic adviser to Vice President Joseph R. Biden Jr.

What seems most striking is that the angry working class — dismissed so often as myopic, unable to understand the economic trade-offs presented by trade — appears to have understood what the experts are only belatedly finding to be true: The benefits from trade to the American economy may not always justify its costs.

In a recent study, three economists — David Autor at the Massachusetts Institute of Technology, David Dorn at the University of Zurich and Gordon Hanson at the University of California, San Diego — raised a profound challenge to all of us brought up to believe that economies quickly recover from trade shocks. In theory, a developed industrial country like the United States adjusts to import competition by moving workers into more advanced industries that can successfully compete in global markets.

They examined the experience of American workers after China erupted onto world markets some two decades ago. The presumed adjustment, they concluded, never happened. Or at least hasn't happened yet. Wages remain low and unemployment high in the most affected local job markets. Nationally, there is no sign of offsetting job gains elsewhere in the economy. What's more, they found that sagging wages in local labor markets exposed to Chinese competition reduced earnings by $213 per adult per year.

In another study they wrote with Daron Acemoglu and Brendan Price from M.I.T., they estimated that rising Chinese imports from 1999 to 2011 cost up to 2.4 million American jobs.

"These results should cause us to rethink the short- and medium-run gains from trade," they argued. "Having failed to anticipate how significant the dislocations from trade might be, it is incumbent on the literature to more convincingly estimate the gains from trade, such that the case for free trade is not based on the sway of theory alone, but on a foundation of evidence that illuminates who gains, who loses, by how much, and under what conditions."

Global trade offers undeniable benefits. It helped pull hundreds of millions of Chinese out of poverty in a matter of a few decades, an unparalleled feat. It ensured Apple could benefit from China's ample supply of cheap labor. Consumers around the world gained better-priced, better-made goods.

Still, though trade may be good for the country over all — after netting out winners and losers — the case for globalization based on the fact that it helps expand the economic pie by 3 percent becomes much weaker when it also changes the distribution of the slices by 50 percent, Mr. Autor argued. And that is especially true when the American political system has shown no interest in compensating those on the losing side.

The impact of China's great leap into the market economy — which drew hundreds of millions of impoverished peasants into the manufacturing sector, mostly making goods for export to the United States and other wealthy nations — is waning. China's wages are rising fast. Its exports and economy are slowing.

Trade with other parts of the world has not been as disruptive. For all the criticism of Nafta, most economists assess its impact on American workers as modest. Trade flows with Mexico were smaller and more balanced than those with China. American manufacturing employment remained fairly stable in the years after Nafta came into force in 1994, plummeting only after China entered the World Trade Organization in 2001 and gained consistent access to markets in the United States.

The Chinese export onslaught, however, left a scar on the American working class that has not healed. That disproportionate impact suggests Washington officialdom might do well to reassess its approach to future trade liberalization. Most important, it points to reconsidering how policy makers deal with trade's distributional consequences.

It doesn't mean walling off the United States from the rest of the world, but it does mean learning from the experience of other advanced nations that had a much healthier response to China's rise.

Germany, for example, not only received a surge of Chinese imports, but also experienced an onslaught of imports from Eastern European countries after the collapse of the Soviet bloc. But it managed to maintain a more balanced trade because German manufacturers increased their exports to all these countries too, offsetting the job losses from import competition.

Mr. Autor suggests that Americans' low savings rate was a big part of the story, coupled with foreigners' appetite for accumulating dollar assets, which helped keep American interest rates low and the dollar strong, in that way fueling a persistent trade deficit.

But other factors were at work. Robert Gordon of Northwestern University suggested to me that Germany's highly skilled workers were harder to replace with cheaper Chinese labor, limiting though not totally eliminating outsourcing. Germany's stronger labor unions also put up more of a fight.

Washington played its part, too. In their new book "Concrete Economics" (Harvard Business Review Press), Stephen S. Cohen and J. Bradford DeLong of the University of California, Berkeley suggest that ultimately, it was the fault of American policy choices.

The United States might have leaned against China's export-led strategy, they argue, perhaps by insisting more forcefully that Beijing let its currency rise as its trade surplus swelled. It might have tried to foster the cutting-edge industries of the future, as government had done so many times before, encouraging the shift from textiles to jumbo jets and from toys to semiconductors.

What Washington did, instead, was hitch the nation's future to housing and finance. But Wall Street, instead of spreading prosperity, delivered the worst recession the world had seen since the 1930s. Even at best, they write, the transformation of banking and finance has "produced nothing (or exceedingly little) of value."

So where should policy makers go from here?

There are no easy answers. Tearing up existing trade agreements and retreating behind high tariff barriers — as Mr. Trump, and perhaps Mr. Sanders, would have it — would be immensely unproductive. It would throw a wrench into the works of a wobbly world economy. And reneging on international treaties would vastly complicate the international coordination needed to combat climate change.

But in any future trade liberalization — including the Obama administration's pending Trans-Pacific Partnership deal, if it is to go forward at all — policy makers must be much more careful about managing the costs. Mr. Autor suggests any further deals to increase trade should be gradual, to give much more time for exposed companies and their workers to retool and shift into other jobs and sectors.

Perhaps most important, the new evidence from trade suggests American policy makers cannot continue to impose all the pain on the nation's blue-collar workers if they are not going to provide a stronger safety net.

That might have been justified if the distributional costs of trade were indeed small and short-lived. But now that we know they are big and persistent, it looks unconscionable.

Assuming Away Unemployment and Trade Deficits from the TPP

By Timothy A. Wise and Jomo Kwame Sundaram

GDAE Globalization Commentary
March 20, 2016

In an old joke, a shipwrecked economist is asked for his counsel on how the stranded group can be rescued. "Assume we have a boat," he begins.

Robert Lawrence and Tyler Moran, writing for the Peterson Institute for International Economics, seem to have missed the joke in their recent repeat of the same flawed assumptions of their colleagues' hugely optimistic assessment of the Trans-Pacific Partnership (TPP) Agreement which prompted our own paper, "Trading Down: Unemployment, Inequality, and Other Risks of the Trans-Pacific Partnership."

Claiming to address contrarian findings that the TPP may well cause job losses and increase income inequality, Lawrence and Moran assume away the causes – downward pressure on wages and employment due to the consequent "race to the bottom" – which have made free trade agreements so controversial.

Assume we create jobs

To recap, in January, the Peterson Institute published new TPP estimates, updates by Peter Petri and Michael Plummer of an earlier 2012 paper. The update reiterated their claim of significant income gains from the agreement, 0.5% for the United States after fifteen years, with minimal job displacement, and with new jobs in growing industries absorbing displaced workers in declining activities.

In "Trading Down", we pointed out that the study was flawed because it assumed full employment and unchanged national trade and fiscal balances, among other things. We applied the United Nations macroeconomic Global Policy Model to their estimated trade impacts from the TPP dropping the full employment assumption.

Even without adjusting for the assumption of fixed trade balances, we found that if one does not assume away job losses, there will be some permanent job loss, there will be downward pressure on wages, and economic growth will be slowed by the consequent decline in aggregate demand.[1]

Congressman Sander Levin (D-MI) highlighted the problems with the kind of modeling the Peterson Institute offered, calling on the International Trade Commission, in its

TPP assessment for the U.S. government due in May, to stop using models that assumed away the problems. As *Inside U.S. Trade* reported, the new paper is the Institute's attempt to respond to that criticism:
"Levin in February at a U.S. International Trade Commission (ITC) hearing on the economic impact of TPP argued that its analysis must include an examination of how TPP will affect wages and income inequality; a review of whether the ITC's economic model should assume full employment; and an analysis of who will experience gains or losses as a result of TPP and other factors. Lawrence said that his and Moran's paper aimed to answer Levin's demands for a more holistic analysis of TPP."

Holistic analysis? Or filled with holes?
It does nothing of the sort, offering a misleading analysis instead. Consider:

- The new study is based on the earlier Petri-Plummer model, claiming to take those results to estimate the "adjustment costs" for workers displaced by the agreement. But the same assumption, that the TPP causes no long-term job loss, underlies the analysis. So *permanent job loss is excluded by assumption*, with all displacement assumed to be temporary.
- Nor do the new findings allow for trade deficits. The authors assume that TPP does not cause long-term trade surpluses or deficits, in fact, that trade itself is not a major determinant of current account balances. This, of course, flies in the face of large and persistent U.S. trade deficits, including with partners such as Korea, with whom the U.S. has seen its bilateral trade deficit nearly double since the Korea-U.S. Trade Agreement took effect four years ago. Again, the Peterson modeling assumes away the possibility of trade deficits and associated job losses.[2]
- With no trade-deficit-related job losses, Lawrence and Moran only estimate "adjustment costs" for the remaining few displaced workers awaiting new jobs assumed for them, offering three scenarios, each smaller than the previous.
- The first mischaracterizes our paper, suggesting that we assume that no displaced workers get new jobs. We simply do not assume that they are fully absorbed into growing industries. They estimate 1.69 million U.S. workers could be displaced over ten years.
- The second drastically reduces that total to 278,000, by invoking the full-employment assumption that rising demand will generate new jobs and limit job loss. They acknowledge, however, that the displaced workers are nearly all in manufacturing.
- The third reduces this to 238,000 workers who voluntarily leave manufacturing jobs, so the TPP can't be blamed for that.
- They then apply a formula to estimate the temporary adjustment costs (essentially lost wages) from those "displaced". They compare these to Petri and Plummer's reported TPP gains for the United States of $131 billion. The

resulting cost-benefit calculation does not report the costs, just the ratios, for the three scenarios. The authors report that for their "most realistic" scenario (#3), with the least displaced jobs, the benefits are 18 times the costs over the 10-year "adjustment period" (2017-26).

- Then, remarkably, when they add in the "post-adjustment years" 2027-2030, the ratio skyrockets to 115:1. Why? Presumably because with the full-employment assumption all displaced workers are, by then, happily employed in their new post-TPP jobs.
- Finally, Lawrence and Moran claim that the TPP will be mildly progressive for U.S. income distribution. Basically, they argue that the assumed income gains will be very much the same for each quintile of U.S. income distribution, with the bottom quintile seeing a percentage increase 0.007 of a percentage point higher than the top quintile. Technically, that is mildly progressive.
- But it certainly does not look that way when one looks as the absolute gains. The bottom 40% sees just $8 billion in income gains, while the top quintile would get $48 billion. That is more in absolute terms than the bottom 80% combined.
- The authors also make the unfounded assumption that U.S. wages will increase at the same rate as productivity, though that has not happened for decades. This misleadingly raises most workers' incomes in their analysis.

Full-employment models? Abandon ship!

It is not surprising that Lawrence and Moran find that the benefits of the TPP far exceed the adjustment costs. They employed the same study with the same flawed assumptions of full employment and fixed trade balances. With such assumptions, wage and employment losses are written off as temporary adjustment costs on the path back to full employment. These are significantly understated if the TPP results in large and persistent trade deficits, an outcome they assume away.

The resulting cost-benefit calculations are misleading. First, the costs are minimized as outlined above. Second, the benefits are overstated, taking Petri and Plummer's estimates at face value, with all their flawed growth-boosting assumptions (surge in foreign investment, most growth gains from non-trade measures).

Finally, the gains are simply asserted to be large, when even the recent Petri-Plummer estimates of gains are incredibly small, just 0.5% of GDP for the United States in 2030, i.e. a paltry 0.029% per year on average over 15 years. How small is that? *For the bottom 40% of the U.S. income distribution, the gains amount to just $62 per person, in 15 years.*

Those concerned that TPP modeling needs to take better account of the real implications of such agreements should not be satisfied with the Peterson Institute's

latest offering. It does little more than reiterate flawed assumptions, which understate costs and overstate benefits, besides misrepresenting them as serious cost-benefit analysis.

Before the U.S. Congress approves the TPP, the public deserves the kind of robust economic analysis that Rep. Levin has called for, that does not assume away employment losses or trade deficits and offers realistic estimates of the TPP's impacts on wages, employment, and inequality.

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[1] For the United States, we estimated that in 2025 the TPP would generate a 0.5% slowing in economic growth, 448,000 job losses, and rising inequality, as measured by a 1.31% decline in labor's share of national income.

[2] It is worth quoting the paper's own acknowledgment of these assumptions (from p. 3): "For analyzing the long-run impact of the TPP, it is reasonable for Petri and Plummer to assume that the agreement is unlikely to permanently affect the level of employment or the trade balance[...] Assuming normal employment levels is justified not because changes in imports and exports have no impact on employment in the short run-obviously import growth can cause job loss and exports can generate job growth-but rather because the size of the annual impact of the TPP will be smaller than the many other shocks that will occur every year[...] Moreover, over a longer period macroeconomic policies and wage and price adjustments are likely to restore the economy to the same employment level as the baseline."

http://www.bloomberg.com/politics/articles/2016-03-22/trade-backers-pin-pacific-pact-hopes-on-lame-duck-u-s-congress

Trade Backers Pin Pacific-Pact Hopes on Lame-Duck U.S. Congress

March 22, 2016 05:00AM ET | Bloomberg Government

(Bloomberg) -- Election-year protectionism has trade supporters and some lawmakers eyeing the lame-duck session of Congress late this year as the last chance for the U.S. to approve the Trans-Pacific Partnership before a new administration waters down or scuttles a deal.

Opposition to trade has emerged as a rare area of bipartisan agreement in the 2016 election campaign, with leading candidates opposing or criticizing a pact that would boost trade among nations making up 40 percent of the global economy. A tough battle for congressional seats in states where economic concerns loom large makes supporting deals such as TPP a political liability.

In such a hostile environment, where anti-trade rhetoric resonates among voters in key manufacturing regions, congressional leaders point to the legislative session just after the Nov. 8 election as the earliest a deal could be considered.

"I think we'll probably get it through, but it's shaky," Senate Finance Committee Chairman Orrin Hatch, a Utah Republican, said in an interview. "It will probably have to be after the elections. I think we have a better chance to passing it after, but we'll see" what Senate Majority Leader Mitch McConnell wants to do, he said.

McConnell, a Republican from Kentucky, has indicated plans not to pursue it "certainly before the election," leaving the door open to a vote in the lame-duck session, according to trade analysts. A spokesman for McConnell said the senator has nothing to add to his previous comments on TPP, and has not announced a schedule for consideration yet.

GOP leaders' support is critical to the deal's passage. President Barack Obama is counting on them to mobilize the same coalition of lawmakers that helped give the president fast-track authority in June to conclude the 12-nation deal. This time around, Republicans are less committal, having raised opposition to some of the provisions in the newly signed deal.

Presidential Campaign

Presidential politics complicates the picture. Hillary Clinton, the front-runner on the Democratic side, said she no longer supports it. Donald Trump, who leads the race to be the Republican nominee, has slammed the agreement and called for 45 percent tariffs on Chinese imports.

Thomas Donohue, chief executive officer of the U.S. Chamber of Commerce, said in an interview Friday on Bloomberg Television that such tariffs would backfire politically and ultimately hurt "the citizens that go to Wal-Mart and Target."

The hyperbole against trade has helped fire up crowds and rack up primary victories, but it's heightening anxiety among multinational companies dependent on exports and global supply chains. So they're mounting a push on Capitol Hill to get it done as soon as possible.

Expeditious Passage

Business groups are "going to put a lot of pressure on McConnell to make sure this doesn't fall through, and they have influence," said Julian Zelizer, a presidential historian at Princeton University.

After the 12 nations signed the trade deal in early February, five major American business groups joined the leadership of the U.S. Coalition for TPP -- whose members include Apple Inc., Microsoft Corp. and Wal-Mart Stores Inc. -- to push for passage.

"Our intention is certainly to push as far and fast as we can on the agreement now and work with Congress and administration to get a vote as soon as we possibly can to make sure we get this turned into law in 2016," Doug Oberhelman, CEO of Caterpillar Inc., who serves as chairman of the Washington-based Business Roundtable, one of the co-leaders of the coalition, said on a conference call March 15.

Obama said on Feb. 22 that the administration plans to present the TPP formally to Congress "at some point this year and my hope is that we can get votes."

Senate Elections

Republicans have their own calculation to make as their try to retain control of both chambers in Congress. While the GOP has a firm hold on the majority in the House, it's defending 24 seats in the Senate this year. Democrats need a net gain of five seats to win outright control of the Senate.

"They don't want to do anything that might jeopardize their majority in the Senate in the upcoming elections," said Joshua Meltzer, a senior fellow at the Brookings Institution in Washington and a former Australian trade negotiator. Republicans need to work out what a TPP vote would be for them, and "that's the key political issue which will sort of determine ultimately whether they do move forward with this or not," he said.

Lawmakers fearing a voter backlash may be more apt to stay quiet on the issue through Election Day and take controversial votes during the lame-duck session, which can last as long as a month after the election and before a new Congress convenes in January, according to Bloomberg Intelligence.

Lame Duck

But history shows mixed results. Congressional Research Service records show that only three trade-related bills have been voted on in a lame duck.

The Trade Act of 1974 created fast-track authority for the president to negotiate trade agreements that Congress can approve and disapprove without amendments.

The Uruguay Round of 1994, which led to the creation of the World Trade Organization, was approved by a Democratic Congress in the 1994 lame duck session, after Republicans won control of both the House and Senate in the November elections.

During the 2006 lame-duck session, a Republican House defeated a measure backed by President George W. Bush to normalize trade relations with Vietnam. The bill was cleared a month later, however, and allowed Vietnam to join the WTO in 2007.

For a TPP vote in the lame duck, "a lot of work would have to be done between now and then," Meltzer said. "But trade has been done in the lame duck -- it's definitely doable."

INSIDE US TRADE

Administration Faces April 3 Deadline For Submission Of TPP Legal Changes

March 29, 2016

The Obama administration is facing an April 3deadline to submit to Congress a description of the changes that will be required to U.S. law in order to implement the Trans-Pacific Partnership agreement, which is one of several outstanding procedural steps required under the 2015 fast track law that are listed below.

This list of changes would lay the groundwork for the administration and Congress to work together in drafting an implementing bill for trade agreements subject to fast track.

Specifically, the requirement laid out in Section 106(a)(1)(c) is that "within 60 days after entering into the agreement, the President submits to Congress a description of those changes to existing laws that the President considers would be required in order to bring the United States into compliance with the agreement." The TPP was signed on Feb. 3 U.S. time.

The fast-track law does not explicitly require this document to be made public, as it does for some other documents it requires for free trade agreements. But a congressional source said he expects the document to be made public.

The Office of the U.S. Trade Representative did not respond by press time to a question on whether it planned to publish the description of legal changes required under TPP.

One issue that is sure to be addressed in the document is the Obama administration's plan to restructure the main U.S. customs user fee -- the merchandise processing fee (MPF) -- in order to comply with the TPP's obligation that it not be applied on an ad valorem basis. This change must be made through legislation, and is expected to be addressed as part of the TPP implementing bill.

The April 3 submission and other procedural steps would prepare the groundwork for a potential lame-duck vote on TPP, which at this point is not certain for a number of reasons, including the outcome of the presidential and congressional elections.

Apart from the steps required under fast track, the administration is also working politically to appease the congressional critics who have flagged various problems with TPP, including a market exclusivity period for biologics that they view as too short.

International Trade Commission Report: The only other outstanding requirement under fast track for which there is a set date is for the ITC to conclude its economic assessment of the TPP agreement within 105 days of signature. This would be May 18, and the ITC has said it expects to deliver the report on that date.

After that, the timing depends on when the administration formally submits the draft TPP implementing bill to Congress. The administration has indicated it will work with Congress to determine the most appropriate time for congressional consideration of TPP, which at this point seems to be after the November election.

30-Day Deadline: Thirty days prior to formal submission of the draft TPP implementing bill, the president must submit to Congress a copy of the final legal text of the agreement; a draft statement of administrative action (SAA) proposed to implement the agreement; and a plan for implementing and enforcing the agreement.

At the same time, he must also submit to the House Ways & Means and Senate Finance committees three reports that spell out how the deal will impact U.S. employment, labor rights in the U.S. and FTA partners, and the environment. USTR has said these reports will promptly be made available to the public "to the maximum extent possible."

Mock Markups: Historically, prior to formal submission of the draft implementing bill, Ways & Means and Finance have held so-called "mock markups" where they consider a preliminary version of the draft implementing bill. During these sessions, members can consider amendments to the preliminary version of the implementing bill, although any amendments approved are not directly binding on the administration.

The mock markup process is not required under the 2015 fast-track legislation, although both the Finance and Ways & Means reports accompanying the bill indicate their preference for having them on future FTA implementing bills. The reports do not explicitly lay out a timetable for when the mock markups would take place, although the Ways & Means report implies that it intends to hold its mock markup after the president submits the final legal text and draft SAA but before he formally submits the draft implementing bill.

It does so by saying that the 30-day advance submission of the final legal text and draft SAA "is intended to provide the Committee with the information necessary to conduct its mock-mark-up. It also allows Congress as a whole to review the materials with adequate time before the implementing bill is transmitted for consideration pursuant

to this bill."

Formal Submission: After the mock markups take place, the president during a day in which both chambers are in session must formally submit the draft TPP implementing bill with three additional documents. These include another copy of the final legal text of the agreement, as well as the final SAA.

The fourth document is known in the law as "supporting information" and consists of two elements. The first is an "explanation as to how the implementing bill and proposed administrative action will change or affect existing law."

The second element is a statement that itself consists of two parts. The first part asserts "that the agreement makes progress in achieving the applicable purposes, policies, priorities, and objectives" of the fast-track law.

The second part sets forth the reasons of the president regarding how and to what extent the agreement makes progress in achieving the applicable purposes, policies, and objectives of the fast-track law; whether and how the agreement changes provisions of an agreement previously negotiated; how the agreement serves the interests of United States commerce; and how the implementing bill meets the fast-track standards, including that it only contain such provisions that are "strictly necessary or appropriate" to implement a trade agreement.

TPP Consideration: Once the implementing bill is introduced, Congress has up to 90 legislative days to consider it. Specifically, the Ways & Means Committee must act by the 45th legislative day or the bill is automatically discharged. A full House vote on passage must happen by the end of the 15th legislative day after that.

Senate Finance has until the later of the 45th day of session after the Senate bill is introduced or the 15th day of session after the Senate receives the House bill. After the bill is discharged from Finance, a full Senate vote must take place by the end of the 15th legislative day after the bill is discharged.

Based on the House legislative calendar circulated by House Majority Leader Kevin McCarthy (R-CA), the Obama administration has already missed the date by which it would need to submit a TPP implementing bill in order to guarantee a vote by the end of the lame-duck session of Congress. That would Feb. 26, which is 90 legislative days before Dec. 16, the last day Congress is scheduled to be in session in 2016.

Similarly, May 18 is the day which the Obama administration would need to submit the TPP implementing bill if it wanted to lock in a House vote on the legislation, as that is 60 legislative days prior to the end of the session.

But a vote is still possible during the lame duck because the fast-track bill only sets out the maximum number of days for consideration; an implementing bill could move much faster if the congressional leadership makes it a priority.

McCarthy's calendar states that the post-election schedule is subject to change, and some sources have held open the possible that there may not even be a lame-duck session at all.